

**WILL UNDER MUSLIM LAW AND INDIAN SUCCESSION ACT: A**

**CRITICAL ANALYSIS**

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**ABSTRACT**

In present society every one treated equally before law but many laws in India are based on religion and with their traditions which was followed by the people from many years. The concept of will which come effect after the death of the testator because of this there are laws which governs the will. The concept of will is governed by “Indian succession act” to all religion but Muslim community has governed their laws from traditions and it was quite different from Indian laws where the Muslim can only make a will of one third estate of testator. Modes of will in both laws and there are different modes for the revocation of will in both laws and Many of people do not aware of laws on will.

This paper discusses about the definitions of will and who can make a will and modes of executing a will and it differ in both laws and also each laws contains limitations and restrictions on the testamentary rights. This paper also explained about historical background of the concept of will under Islamic Law and Indian succession Act and it also focused on the concept of will of pre Islamic period which having many differences after establishment of Islamic and also focuses on the application of Will is different in both Sunni and Shia laws under Islamic Law and also focuses on the testamentary provisions under Indian Succession Act. This paper also critically examined the age of majority for making will and consent of heir under Muslim Law and also other concepts under Indian Succession Act, 1925.

Key words: Will, Muslim law, Indian Succession Act, Revocation, Shia Law, Sunni Law

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**INTRODUCTION**

In present society, the demand on Ancestral property is widely increasing and the disputes over partition of property in family also rapidly increasing. Ancestral Property, it can be immovable or movable property was divided only when the previous owner was died.<sup>1</sup> Every person has right to make a will to estate the property and this issues governed by succession Laws in many countries. Basically, “succession is branch of law which deal with the devolution of a person’s property to others on the death of owner.”<sup>2</sup> There are two form of Succession such as intestate succession and testamentary succession. The testamentary succession which deals with will given by testator before his death and the intestate succession deals with an owner who does not make any will before his death.

According to Black’s law dictionary, Will means “the legal expression or declaration of a person’s mind or wishes as to the disposition of his property, to be performed or take effect after his death.”<sup>3</sup> Will also know as testament and inherits does not have an absolute right on property until death of the testator (owner of the property). The Latin word for will is “voluntas” which was used in the text of Roman law to express the intention or desire of testator with respect to his property which he wish to give after his death and in this case, will is relevant only for the natural death.<sup>4</sup> In India, the succession laws are not uniform and it was influenced by personal laws which owed their adherence to custom and religious.<sup>5</sup> In ancient time, the concept of wills was not same as of now and since 1826, the concept of testamentary is recognised under Hindu law.<sup>6</sup> In Last decades, the concept of giving a gift by writing a will as part of the general law of Hindus was valid and affirmed by the courts.<sup>7</sup>

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<sup>1</sup> Shaveta Dua, *11 facts about ancestral property you must know*, TIMES OF INDIA, (Nov 17,2017, 12:05 Pm ) <https://timesofindia.indiatimes.com/business/india-business/11-facts-about-ancestral-property-you-must-know/articleshow/61684720.cms>

<sup>2</sup> 2 B.M. GANDHI, FAMILY LAW, 31 (EBC 2013).

<sup>3</sup> HENRY CAMPBELL BLACK, BLACK’S LAW DICTIONARY, 1772 (4<sup>th</sup> ed.Rev.1968)

<sup>4</sup> CHATURVEDI & PITHISARIA, HALSBURY’S LAWS OF INDIA: WILLS AND SUCCESSION, (LexisNexis, 2nd ed. 2013).

<sup>5</sup> 2 KUSUM & POONAM PRADHAN SAXENA, FAMILY LAW, 1 (LexisNexis 2019).

<sup>6</sup> Alami v. Komu, (1889) ILR 12 Mad 126.

<sup>7</sup> CHATURVEDI & PITHISARIA, *Supra* note 4, at 13.

As per Muslim personal law, will is testamentary document which also known as Wasiyat and no Muslim man allowed to make will of his whole property.<sup>8</sup> As per Quran, making a will is lawful and it does not provide any restriction on testamentary succession of one third property and Indian Muslims are governed by “Muslim Personal Law (Shariat) Application Act”.<sup>9</sup> If a person who is Muslim married as per other rituals or as per special marriage act he will be governed by the Indian succession act itself.<sup>10</sup> In India, the government proposed an Indian succession act 1925 which deals with testamentary and Intestate Successions. This act is pre-existing before independence and this act is not applicable to the Muslim community. There are some Amendments have been made on this act in 1939 and 1962.<sup>11</sup> The concept of will is differently governed in both Muslim Law and Indian Succession Act.

In India, the concept of will is varies in both Muslim law and Indian succession act it very important to know about the concept of will and testamentary because many people are aware of the laws and many disputed occurred because of this. This study is focused on the modes of will and executing will in both laws and the similarity and differences of will and the people who are facing problem due the provisions of both laws and this study also discuss about important will provisions of a both laws.

## **HISTORICAL PERSPECTIVE OF WILL UNDER MUSLIM LAW AND INDIAN SUCCESSION ACT**

### **MUSLIM LAW:**

The concept of will was existed before the Islamic period, also known as pre Islamic period. In that Period, every person was free to express and make a will of his complete property to any person by ignoring his family and if he wants, he could give to any of one his heir and without any restriction.<sup>12</sup>In Islamic period, it was totally changed and many restrictions were placed on these testamentary dispositions.<sup>13</sup> As per Hedaya, “will are declared to be lawful in the Quran and the tradition.”<sup>14</sup> And it is one of leading authority of will. According to Bukhan, “the tradition demands

<sup>8</sup> B.M. GANDHI, *Supra* note 2, at 33.

<sup>9</sup> Anand Kumar Tripathi, *The Concept of Will under Muslim Law : A Study*, 4 IJLLJS 70 (2017) <http://ijlljs.in/wp-content/uploads/2017/08/Will.pdf>

<sup>10</sup> *Id.* at 72.

<sup>11</sup> LAW COMMISSION OF INDIA, *The Indian Succession Act, 1925*, (Law Com no.110, 1985) Para 1.2

<sup>12</sup> SYED KHALID RASHID, *MUSLIM LAW*, 212 (EBC, 6<sup>th</sup> ed. 2020).

<sup>13</sup> *Id.* at 213.

<sup>14</sup> PARAS DIWAN, *MUSLIM LAW IN MODERN INDIA* 13 ALL.L.A (2018).

that a Muslim man who has properties should not sleep even for two nights without writing a will.”<sup>15</sup> Every Muslim has testamentary powers to disposing his property however his powers were limited that only one third of his property can be disposed of.<sup>16</sup> The will of Muslim is governed by Muslim law that is shariat laws and in India still now that tradition was followed by Muslim community. The concept of will under Muslim Law is different in both sunnis and shias.

## **INDIAN SUCCESSION ACT:**

Indian Succession Act, 1925 has integrated with several central acts which passed between 1841 and 1903 and this act specifically dealing with a substantive law of testamentary succession is followed by all community except Muslims and intestate succession is not followed by Hindus as well as Muslims.<sup>17</sup> Firstly, the concept of will is developed in the Roman law that is the testator has power to transfer his whole inheritance property and later it was developed in other countries such as Germany.<sup>18</sup> The present Act was superseded “the Indian Succession Act, 1865, the Hindu wills Act, 1870, the probate and administration Act, 1881, the Succession Certificate Act, 1889 and other relevant Acts.”<sup>19</sup> English law system allowed to make a will of whole property and it is applicable to all people except who governed by Muslim Law and in some other cases it will not applicable to Hindus community.

## **THE CONCEPT OF WILL UNDER MUSLIM LAW**

### **DEFINITION OF WILL**

Will is defined by many jurists such as Durrul Mukhtar stated that “Will is an assignment of property to take effect after one’s death”<sup>20</sup> In Muslim Law, Will also called as Wasiyyat and it is means a owner of the property should say to other person that after his death, particular property should be deliver particular person. A will is a legal declaration to transfer the property by a person who as property after his death and the person who make a will is called as musi, testator or legator and to whom the will is made is called as musiliah, testarix and legatee.<sup>21</sup> As per Ameer Ali1 “a will from the Mussalman point of view is a divine institution since its exercise is regulated by the Quran and at

<sup>15</sup> M.S.Rama Rao, *Mohammedan law* , 28 (2017).

<sup>16</sup> PARAS DIWAN, *Supra* note 14 at 254.

<sup>17</sup> LAW COMMISSION OF INDIA, *The Indian Succession Act, 1925*, REP No.110 (Feb 1985). Para 1.3.

<sup>18</sup> *Id.* at para 2.6

<sup>19</sup> George Claus Rankin. *Background to Indian Law* 54 (1946).

<sup>20</sup> SYED KHALID RASHID, *Supra* note 12 at 212.

<sup>21</sup> Jung, Al-Haj Mahomed Ullah ibd S, *A Digest of Anglo Muslim law* , (Dec 6 , 2019).

<https://indianculture.gov.in/digest-anglo-muslim-law>

the same time the Prophet declared that the power should not be exercised to the injury of the lawful heirs.”<sup>22</sup> In Islamic law, the will is restricted by one third of property and these limitations are not laid by Quran and based on hadith tradition.

## LIMITATION OF ONE THIRD ON WILL (WASIYYAT)

Tradition of hadith is followed by Islamic Law where the prophet provided the explanation of a particular situation where a Muslim man who does not have heirs other than a daughter however it was followed by Shia and Sunnis schools and prophet has declared that the power should not be exercised to unlawful heir and restricted testator from bequeathing more than one third of his property.<sup>23</sup> Wasiyyat means not only will but also Moral exhortation it means that for distribution of property, every Muslim must make certain arrangements. There are general exception rule that testamentary deposition must not be exceed one third of the property for the benefit of heirs. These are the exceptions, When there is no heirs for the testator in such situation, the allowable one-third limit is extended to him, the government will be the beneficiary, and the property will be taken by “doctrine of escheat”, notwithstanding the fact that the primary object of extending the bequeathable permissibility to the degree of one-third is to protect the heirs' interests, not the government's and When the heirs themselves agree to a bequest of more than one-third of the estate. Since the primary goal of the restriction is to protect

the heirs' interests, the excess bequest will be validated if the heirs whose shares are likely to be harmed by the excess bequest offer their consent and that should be voluntarily given.<sup>24</sup>

## CAPACITY OF MAKING WILL AND FORMALITIES FOR EXECUTING THE WILL

Under Muslim law, the will can be made in oral or written form there is no specific form to make a will and that will is only executed after death of testator. In case of *Aulia bibi v. Alauddin*,<sup>25</sup> stated that if the will is made in written form then it does not require any signed and attestation and main concept is only testator intention should be clear. If the person who is suffering from diseases and he is unable to talk then the other person addresses on behalf testator and his must give clear nod with his head to whose his will is going make.<sup>26</sup> There are some conditions should be fulfilled for a valid will that are every Muslim person (testator) should be sound mind and should attain the age of

<sup>22</sup> Anand Kumar Tripathi, *supra* note 9 at 72.

<sup>23</sup> SYED KHALID RASHID, *supra* note 12 at 213.

<sup>24</sup> KUSUM & POONAM PRADHAN SAXENA, *Supra* note 5 at 9.

<sup>25</sup> *Aulia bibi v. Alauddin*, (1906) 28 All 715.

<sup>26</sup> *Mazar Husen v. Bodha Bibi*, (1898) 21 All 91.

majority, in Muslim law the puberty is considered as the age of majority that is 15 years but the purposes of will “the Indian Majority Act” recognised age of 18 years as majority.<sup>27</sup> A person who is unsound mind makes a will that invalid under Muslim Law though that insanity is cured and testator should aware of all legal consequences of making a will.<sup>28</sup> “The executor or al-wasi of the will is the manager of the estate appointed by the testator. The executor has to carry out the wishes of the testator according to Islamic law and to watch the interests of the children and of the estate. The authority of the executor should be specified.”<sup>29</sup>

## SUBJECT MATTER OF WILL

The testator has the legal capacity to make a valid will for the property he owns and may transfer. Property must exist at the time of his death; otherwise, a bequest of anything that does not exist but will be created in the future is null and void. There are some subject matters of will for valid will. In condition bequest, the property which is made with certain conditions and deviates the completeness of the bequest. “Similar to the law relating to gifts, the grant with respect to the corpus of a property must be an absolute grant and therefore no life estate can be created in the or of the corpus, or the thing or the subject-matter of the grant. If the bequest is subject to a condition that derogates from the absoluteness of the grant the condition would be void but the bequest would be valid.”<sup>30</sup> The bequest which has to take effect on not happening event that is contingent event that will is void and for future bequest it is valid for the certain limited period and alternative bequest also valid.<sup>31</sup>

## REVOCAION OF WILL

In Islamic law, the testator has power to cancel or change his intention of made will by expressly or impliedly. The will made by the testator can be revoked expressly and it can be either written or orally. The intention of revocation should be clear. If the testator made a will against a person and with same property testator made to another person then the pervious will is revoked. The will can be impliedly revoked by testator, if the testator made a will of cash to a person and after 2 months he purchases a car with that amount than will is impliedly revoked.<sup>32</sup>

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<sup>27</sup> Indian Majority Act, 1875, § 3, No. 9, Acts of Parliament, 1875 (India).

<sup>28</sup> MULLA, PRINCIPLES OF MAHOMEDAN LAW, (LexisNexis, 20<sup>th</sup> ed. 2020).

<sup>29</sup> Anand Kumar Tripathi, *supra* note 9 at 81..

<sup>30</sup> Ma Hmyin v. PL Chettyar, AIR 1935 Rang 318.

<sup>31</sup> KUSUM & POONAM PRADHAN SAXENA, *Supra* note 5 at 33.

<sup>32</sup> SYED KHALID RASHID, *supra* note 12 at 221.

## THE APPLICATION OF WILL IN SUNNI LAW AND SHIA LAW

The application of will in sunni law and shia law is slightly differ from each and basically it discuss about the validity of will and consent of heirs etc. the will can made only if legatee is existed on the earth at the time of making of the will that means a child who is in the mother womb can be considered as in existences, as per sunni law, if a child born within a six months of making of the will and as per shia law, if a child born within a ten months of making of the will is considered as valid will.<sup>33</sup> The will is valid when the bequest by one commits the suicide before or after making will under sunni law and it only valid when act of committing suicide is done after making a will under Shia law.<sup>34</sup> Under sunni law, the consent of legatee is presumed if legatee dies before consenting that will but under shia law, there won't be any presumption and consent heir must be taken. There is no requirement for a bequest in favour of a strange up to one third property this is same in both laws. It is mandatory in sunni law that for bequest in favour of an heir, consent of another heir and in shia law that it is not mandatory for one third property to take consent of other heir. Time of consent is very essential thing for will it differ in both laws that is in shia law consent of testator after or before death is sufficient for the will but in sunni law only after death of testator is considered and sufficient.<sup>35</sup>

## THE CONCEPT OF WILL UNDER INDIAN SUCCESSION ACT, 1925

### MEANING OF WILL AND CAPACITY OF MAKING WILL

A will or testamentary is a legal document where every person is make will and testator express the intention of disposing the property. According to section 2(h) of Indian Succession Act, 1925 define the will it states that “the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death.”<sup>36</sup> The provisions of Indian Succession Act, 1925 are governed by will made by Hindus, Sikhs, Buddhist or Jain. For making a will, testator must be sound mind and he should not be minor and in case a person who is dumb or deaf or blind must be able to know what they do by it and incase a person is generally insane and he make will when he is of sound mind that will can be considered and if a person who is intoxicated and in such a state of

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<sup>33</sup> Lucy Carroll, *Application of the Islamic Law of Succession: Was the Propositus a Sunnī or a Shī'ī?* ISLAMIC LAW AND SOCIETY 2 (1995).

<sup>34</sup> MULLA, *Supra* note 28 at 117.

<sup>35</sup> SYED KHALID RASHID, *supra* note 12 at 223.

<sup>36</sup> Indian Succession Act, 1925 § 2 (h) , No. 39, Acts of Parliament, 1925 (India).

mind that he does not know what he is doing at that time he cannot make a will.<sup>37</sup> In India, A Will or testament made by a testator should be in written form and it can be made by anyone who is above 21 years of age.

## KINDS OF A WILL

The testator has power to make will for the benefit of his heirs and it will take effect after death of testator. There are various types of wills that are Privileged wills was defined under “section 65 of Indian succession Act, 1925”, it states that a will made by a certain person such as soldier, navy, mariner, airman who are willing to disposing their property to their heirs and these person must be attain the age of 18 years for making a will.<sup>38</sup> This Will can be either written or oral form and there are certain modes of making will and executing it that are will may be written wholly by testator need not to signed or attested, will be written wholly or in part by other Person and signed by testator or need not to be attested.<sup>39</sup> The testator may revoke a privileged Will by an unprivileged Will or by any situation expressing an intention to revoke it.

According to section 63 of Indian succession Act, states about the execution of unprivileged wills that is “Every testator, not being a Soldier employed in an expedition or engaged in actual warfare, or a mariner at sea, shall execute his will according to the following rules (a) The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction. (b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will. (c) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.”<sup>40</sup> In case of *Hazara Bradri v. Lokesh dutta multani*<sup>41</sup> the court held that the made will cannot be disbelieved that will is made by testator has used different pen than the witness used

<sup>37</sup> Indian Succession Act, 1925, § 59, No. 39, Acts of Parliament, 1925 (India).

<sup>38</sup> Dhawesh Pahuja, *Will under Indian Law*, (Mar 14 2016). <https://www.legalindia.com/will-under-indian-law/> (last visited on Jan 3, 2022).

<sup>39</sup> Indian Succession Act, 1925, § 66, No. 39, Acts of Parliament, 1925 (India).

<sup>40</sup> *Id.*

<sup>41</sup> *Hazara Bradri v. Lokesh dutta multani*, (2005) SC 4362.



different pen. In case of *Benga Behera v. Braja kishore Nanda*<sup>42</sup> the court held that in some suspicious situation itself may be held to be sufficient to arrive a conclusion that the will of executors has not been proved.

## **REVOCAION OR ALTERATION OF WILL**

A will made by the testator is revoked or altered at any time when he is competent to dispose of property there are two types of revocation of will under Indian succession Act there are voluntary revocation and involuntary revocation. Voluntary revocation means a testator who wants to revoke his will which made by testator at specific time and date and by himself he can revoke by differ modes such as by destroying, burning or striking out the signature of the written will.<sup>43</sup> Involuntary revocation means a will is revoked by testator's marriage and it was stated under section 69 of Indian Succession Act, 1925 and it does not apply to Hindu community.<sup>44</sup> Testator's marriage does not make will invalid.<sup>45</sup>

## **CRITICAL ANALYSIS OF WILLS UNDER MUSLIM LAW AND INDIAN SUCCESSION ACT**

The concept of will is having similarity and difference in both Muslim Law and Indian Succession Act. the meaning will and view of the concept is partly same but the Muslim man cannot make a will beyond one third of estate to heir or anyone but in the Indian succession Act, a person can make a will freely to anyone.

## **FLAWS OF MUSLIM LAW IN VIEW OF WILL**

For making a will the Muslim who is making a will should be major, as per Muslim law puberty is majority that is fifteen years but for only this concept the Indian Muslims follows Indian majority act that is above 18 years can make a will and as per India law the above 21 years of age is eligible for making a will it shows inequality between the laws follows in India. As per tradition of Muslim Law about one third estate which is not mentioned in the Quran is only followed by the Muslim community which was effected many of Muslim persons due to inequalities shares to heirs and

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<sup>42</sup> *Benga Behera v. Braja kishore Nanda*, AIR 2007 SC 1975.

<sup>43</sup> B.M. GANDHI, *Supra* note 2, at 56.

<sup>44</sup> Indian Succession Act, 1925, § 69, No. 39, Acts of Parliament, 1925 (India).

<sup>45</sup> *Id.* § 57.

Muslim testator cannot make a will of whole property to heirs which shows the biasness among the religion in India.

## **CRITICISM OF WILL IN INDIAN SUCCESSION ACT**

In present society, there are more than 2 crore (approx.) property dispute cases pending before all Indian courts and that disputes are taking a lot time to solve cases and many of them are related to the concept of testamentary succession and intestate succession.<sup>46</sup> As per section 59 of Indian succession act the meaning of state of mind in this section was not clearly mentioned which is effecting for property by will. The testamentary succession is equal beneficiaries to the all religions except Muslim law under Indian succession act. it is showing inequalities in India through making a will or unequal distribution of property without testators knowledge. There should be the uniform civil code for the equal law in India. The concept of will which come effect after the death of the testator for that there should be evidence for same but in the Muslim Law it does not focus on that evidence and but in the Indian succession Act for the written will it is necessary of signature of testator as a evidence.

## **CONCLUSION AND RECOMMENDATION**

The wills in Islamic Law and Indian Laws were governed in India and the concept of will in Muslim Law is limited to one third of estate and the testator must be capable of giving his consent and intention toward a will and it is same in the Indian Succession Act but there is no limit for making a will. There are differs modes to execute the will in both laws and in Muslim law there are two schools that is sunnis and shias where there are some different classification of will. Under Indian succession Act, there are two types of will that are privileged and unprivileged will and there are different modes for execution of will. Under both laws, the testator is having absolute rights to make a will or revoke it and these rights are protected the laws. There are some concepts under will should be bring changes under Islamic law and some provisions under Indian succession Act should be amended. In India, the purpose of equal opportunities and rights the Uniform civil code should be implemented which brings equality to make the will freely of whole property and the awareness about the provisions of Will should be increase and each testator must know his rights. The justice system in India should be speed up for issues of made will and property distribution.

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<sup>46</sup> Manan Seth, *six property disputes that show snail's pace of justice in India*, (Feb 11 2018).