CONSTITUTIONAL VALIDITY OF SECTION 21 OF THE HINDU SUCCESSION ACT, 1956

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I. INTRODUCTION

Section 21 of the Hindu Succession Act reads out as where two persons have died in circumstances rendering it uncertain whether either of them, and if so which, survived the other then, for all purposes affecting succession to property, it shall be presumed, until the contrary is proved, that the younger survived the elder.[1] There has never been any research on this topic before. So the primary method to test its constitutional validity is to view the section logically. There seems to be absolutely no logic as to why has there even been a classification on age (or maturity, depending on how *younger* is interpreted). A better way to interpret and presume who would survive whom, even if it is by a split second, would be to classify on the basis on fitness. In fact, even the English and the Scottish Law believe that the younger issue is deemed to be the fitter one. But we all know for a fact that this may not necessarily be the case. In fact, the authors would also go to the extent of saying that the preventable lifestyle disorders which primarily affect the new generation youth is on an all time high. On the other hand, the unpreventable diseases of the older generation are currently at an all time low due to medical advancements and increase in disposable income. Furthermore, a younger person is less likely to live a certain old age (say, 100 years) as compare to an older person.

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[1]Presumption in cases of simultaneous deaths.- Where two persons have died in circumstances rendering it uncertain whether either of them, and if so which, survived the other then, for all purposes affecting succession to property, it shall be presumed, until the contrary is proved, that the younger survived the elder.

II. COMPARING THE PRESUMPTION IN INDIAN, ENGLISH AND SCOTTISH LAW

England does not have a succession law, especially for Hindus, probably because they interpret secularism in such a way that the state should be equidistant from all religions. On the other hand, India's view of secularism is interpreted as equal respect in all religions and equal interest in all religions. The most relevant statutory presumption is Section 184 of the Law of Property Act, 1925.[2] This provision is very similar to Section 21 of the Hindu Succession Act, 1956.[3] Here two fallacies are observed.

Firstly, making a classification on devolution of property through succession by understanding age is absolutely arbitrary. Other aspects need to be considered like strength, agility, presence of mind and skill to deal with a particular situation. This has partly been illustrated in the House of Lords Case of *Hickman and Ors.* v *Peacey and Ors.*[4], where Viscount L.C., assenting with the majority had quoted,

> "*If A and B are swept off the deck of a ship by the same wave in a storm and both are drowned, there is usually no material which would justify the conclusion that they both died at exactly the same instant; there may sometimes be sufficient proof that A survived B, e.g., if B was not able to swim and was seen to sink at once whereas A was a fine swimmer who could be observed holding his own for a considerable time. In*

[2]Presumption of survivorship in regard to claims to property.
In all cases where, after the commencement of this Act, two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, such deaths shall (subject to any order of the court), for all purposes affecting the title to property, be presumed to have occurred in order of seniority, and accordingly the younger shall be deemed to have survived the elder.
[3]William Wing v. Richard Angrave, John Tulley, and Others, (1860) VIII House of Lords Cases (Clark's) 183.
[4](1945) A.C. 304.

> *such a case there would be no uncertainty as to who was the survivor, and there would be no justification for applying the section. If, however, the facts do not enable a conclusion to be reached as to which of them survived the other, while the circumstances do not justify the conclusion that they both died at the same moment, then the section operates to establish a conventional order of succession."*

The authors would humbly like to build on the logic put forth above. If it is known previously that A was a better swimmer than B was, then such evidence should be reasonable enough to believe that A would have survived B, even if it was for a split second. The reasons that such presumptions appear valid is because in personal laws relating to succession in India, determining who survived whom is very crucial. With respect to proving strength, agility, presence of mind or skill of the deceased, it shall be dealt with as a question of fact.

Secondly, case laws in India have established that the younger one survives the older one, irrespective of the absolute age of the deceased. This is also a fallacy. Children of a very young age would probably not be able to survive their elder siblings or their parents in cases of simultaneous deaths. Such intuitive knowledge was not appreciated by the Hon'ble Supreme Court. In *Jayanti Mansukhlal* v. *Mehta Channalal*[5] the mother and eight year old daughter died in a fire accident together. The daughter was presumed to have survived the mother. This seems completely arbitrary and hence, violative of Article 14 of the Constitution of India.

Even Section 31 of the Succession (Scotland) Act, 1964 appreciates the presumption.[6]

[5]A.I.R. 1968 Guj 212(India).

[6]Presumption of survivorship in respect of claims to property.

(1) Where two persons have died in circumstances indicating that they died simultaneously or rendering it uncertain which, if either, of them survived the other, then, for all purposes affecting title or succession to property or claims to legal rights or the prior rights of a surviving spouse or civil partner,

Probably one way to ascertain that why would the same law exist in different jurisdictions, despite being *prima facie* arbitrary is to understand the intention of the legislatures. From what the authors can understand, there is an interest in devolution of property from one generation to another so that the property does not remain in the hands of one person for a long period of time. But even by this understanding, the provisions appear unreasonable. If the law makers had such an intention, a presumption would have been made only to the extent of simultaneous deaths of members of a family of different generations (for example parents and children as against siblings or first cousins). Again, such classification is not made. On the other hand, there has been an omnibus presumption of survivorship of the younger issue irrespective of which generation of the family the deceased belongs to.

III. SECTION 21 WITH RESPECT TO ARTICLE 14 OF THE CONSTITUTION OF INDIA

It has already been observed with hypothetical examples in the previous chapter that the provision is arbitrary. Unfortunately, this is also supported with various case laws. Further, to the knowledge of the authors, no authority on Hindu law, property law or evidence law has opined on the unreasonableness of the section or the broader jurisprudence behind this doctrine. The courts lately have increased

(a) where the persons were husband and wife[or civil partners to each other], it shall be presumed that neither survived the other; and
(b) in any other case, it shall be presumed that the younger person survived the elder unless the next following subsection applies.
(2) If, in a case to which paragraph (b) of the foregoing subsection would (apart from this subsection) apply, the elder person has left a testamentary disposition containing a provision, however expressed, in favour of the younger if he survives the elder and, failing the younger, in favour of a third person, and the younger person has died intestate, then it shall be presumed for the purposes of that provision that the elder person survived the younger.

the ambit of Article 14 from having unreasonable classifications, to arbitrariness, unreasonableness and tackling violations of the principles of natural justice.[7]

Article 14 of the Constitution of India is the cornerstone of avoiding arbitrariness in law. In the words of Bhagawati, J,

> "*Rule of Law which permeates the entire fabric of the Indian Constitution excludes arbitrariness. Wherever we find arbitrariness or unreasonableness, there is denial of rule of law.*"[8]

Even though there is *strictu sensu* no fundamental right involved, the authorities who exercises their statutory power should exercise in conformity with article 14 bonafide and non arbitrary.[9]

Hence, the authors would like to humbly opine that the doctrine of the younger one surviving the elder one is violative of Article 14 of the Constitution of India.

As discussed in the previous chapter, a better classification would be to allow the fitter one surviving the one who is not as fit. Also asserted was that the younger issue need not necessarily be the fitter one. Both of these would be analysed in the upcoming chapters. This shall be done through studying evolution, medical records and economics.

IV. EVOLUTION - CHARLES DARWIN'S NATURAL SELECTION THEORY

"Veera Bhoggya Vasundhra - the strong one survives"[10]

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[7]Equality before law : The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth

[8]Bachan Singh v. State of Punjab, A.I.R. 1982 SC 1336(India).

[9]S.M. Rao v. Deputy Commissioner and Deputy Magistrate, Bangalore, A.I.R. 2004 NOC 235 (Kant)(India); 2004 A.I.R. Kant HCR 468(India).

[10]*Ishavashyopanishad*.

Probably the most famous theory ever propounded by an individual, Charles Darwin's words re now more relevant than ever. In short, his theory of *Survival of the Fittest* envisages that if

- Under changing conditions of life organic beings present individual differences in almost every part of their structure, (and this cannot be disputed);
- If there be, owing to their geometrical rate of increase, a severe struggle for life at some age, season or year, and this certainly cannot be disputed; then,
- Considering the infinite complexity of the relations of all organic beings to each other and to their conditions of life, causing an infinite diversity in structure, constitution, and habits, to be advantageous to them,
- It would be a most extraordinary fact if no variations had ever occurred useful to each being's own welfare, in the same manner as so many variations have occurred useful to man.

Also, if variations useful to any organic being ever do occur, assuredly individuals thus characterised will have the best chance of being preserved in the struggle for life; and from the strong principle of inheritance, these will tend to produce offspring similarly characterised. It leads to the improvement of each creature in relation to its organic and inorganic conditions of life; and consequently, in most cases, to what must be regarded as an advance in organisation. Nevertheless, low and simple forms will long endure if well fitted for their simple conditions of life.[11]

This simple prophesy had become so dynamic that the modern society runs on this doctrine. This theory having being accepted in mainstream society wholeheartedly, it may be appropriate to believe

[11]CHARLES DARWIN, THE ORIGIN OF SPECIES BY MEANS OF NATURAL SELECTION; OR THE PRESERVATION OF FAVOURED RACES IN THE STRUGGLE FOR LIFE (6th London Edition, project Gutenberg ebook no. 2009).

that the stronger one will only survive, no matter how the conditions change.

In fact, Darwin has also quoted,

> *"Let us take the case of a wolf, which preys on various animals, securing some by craft, some by strength, and some by fleetness; and let us suppose that the fleetest prey, a deer for instance, had from any change in the country increased in numbers, or that other prey had decreased in numbers, during that season of the year when the wolf was hardest pressed for food. Under such circumstances the swiftest and slimmest wolves have the best chance of surviving, and so be preserved or selected, provided always that they retained strength to master their prey at this or some other period of the year, when they were compelled to prey on other animals. I can see no more reason to doubt that this would be the result, than that man should be able to improve the fleetness of his greyhounds by careful and methodical selection, or by that kind of unconscious selection which follows from each man trying to keep the best dogs without any thought of modifying the breed."*

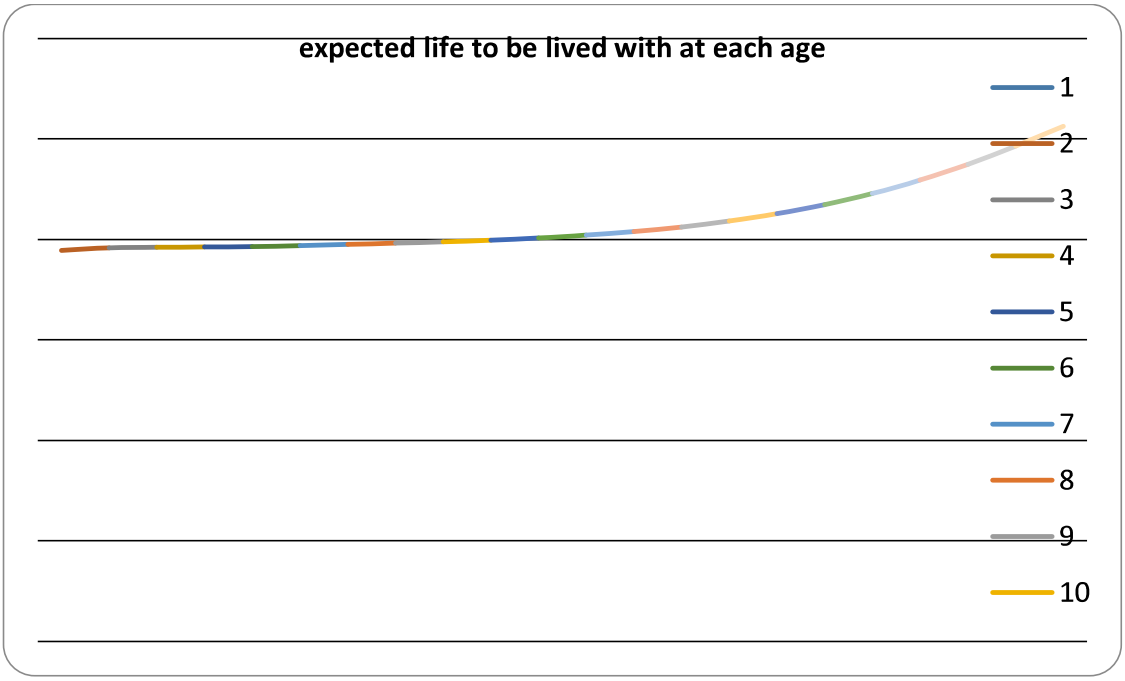
If the same logic is to be applied in knowing who survived, then the doctrine behind the provision fails the test of evolutionary biology. Hence, the alternative doctrine propounded by the authors appears more logical.

V. MEDICAL DATA WITH RESPECT TO ASCERTAINING FITNESS WITH RESPECT TO AGE

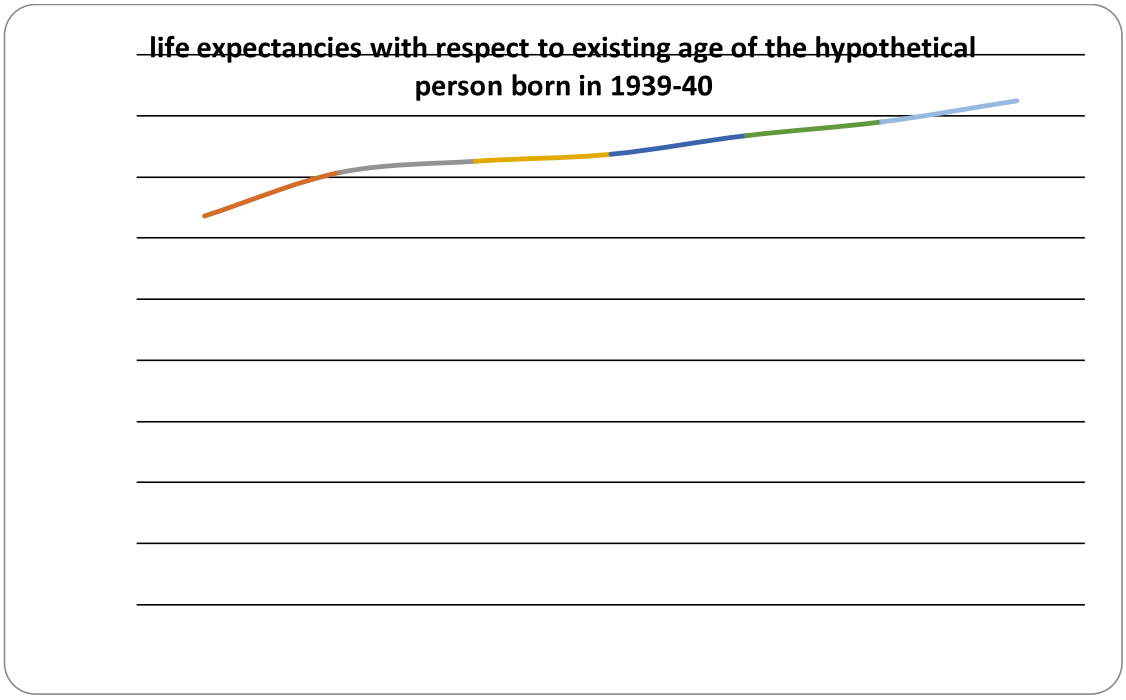
We have already seen that fitness is a very dynamic word. When it comes to a life and death situation, different dimensions of fitness crop up. Probably one reason that the doctrine of *younger one survives* derives logic from believing that the younger issue is the fitter one. The authors humbly believe that this presumption may have

been valid many years ago when the life expectancy of the elderly was much lower than what it is today. Another factor is that the preventable lifestyle disorders acquired by the younger generations are at an all time high. These would include HIV/AIDS, Type II Diabetes, lung cancer etc. which nowadays affect the youth at the peak of their lives. On the other hand, due to medical advancements, the duration of lives of the elder generation in increasing. Science has found cures for various previously unpreventable diseases. It has also at the same time, prolonged the inevitable death of other diseases. We have seen, for example, that deaths in the USA caused by HIV/AIDS affect the victims before they reach their old age.[12] At the same time, more people are today dying from HIV/AIDS than some of the other traditional age related diseases. Hence, at this rate, there will come a time, due to constantly differing values of the younger generation with respect to the older generation, which the younger generation will be less healthy than the older generation. Intuitively, this is well known. But when the life expectancy of each age group is compared (of the USA)[13], it is observed that an person of an older age is more likely to reach a particular milestone age as compared to one of younger age. For example, a person of 20 years of age is expected to live another 58.8 years, which will make him, live up to 78.8 years. On the other hand, a sixty-year-old person is expected to live another 22.5 years, which expects him to live up to 82.5 years.

[12]Mortality by underlying cause, ages 18+: US/State, 2001-2006 (Source: NVSS).
[13]Life Expectancy in the United States available at *aging.senate.gov/crs/aging1.pdf* visited on 31st March, 2010.



While this data may appear to be intrinsically in favour of the older generation, it is but true that to reach a particular age, an older person is more likely to reach it than a younger one. Even if the expected life of one person is considered with the advancing number of years, still the older self of the person is more likely to reach a particular age than the younger self of the person. The following chart is the example of a hypothetical person born in 1939-40 and his life expectancies thereafter with each subsequent time period.



Hence, if fitness is considered with respect to number of years that one can live, then the younger one cannot be the fitter one. Please note that the authors have not used predicted life expectancies in the future years with respect to different age groups because such data is unreliable.

VI. ECONOMICS OF PROVIDING VALUE TO THE LIFE WITH RESPECT TO AGE

We have already seen that an older person is more likely to live a certain age than a younger person. There is yet another concept in which the authors believe that the younger one need not necessarily be the fitter one. A younger person may not value his life as much as an older person. This also is known intuitively. For example, a younger person is more likely to have an unhealthy diet and lifestyle. On the other hand, an older person is more likely to take his medicines in time and follow the prescribed diet and lifestyle. While

this notion may not outrightly declare that a person of which age is fitter, it definitely gives us an idea as to who has more value to their life. If the younger person does not have as much value of life as an older person, then why should law give the younger person the benefit of doubt?

Please note that the authors are not here to establish that there should be an omnibus presumption of the elder one surviving the younger one. A fit person also most likely values his life well. This is probably why he is fit in the first place. The law should thus presume that that fitter one survived the one who is not fitter.

A conflict that can arise here is that one person who may not value his life as much as the other person can still be deemed fit. One important point to be noted here is that deciding the perceived value of the life of the two deceased is just one of the aspects to determine who is fitter. Determining the relative fitness of the deceased should be a question of fact. Even though such conflicts could arise, if preference is given to the one who valued his life more than his actual fitness, the presumption may still be reasonable when observed on humanitarian grounds. Yet, there should be some balance of value of life vis-a-vis relative fitness. This is somewhat related to the theory of karma, wherein the good deeds (valuing of life) at one point of time of the person's life has reaped the benefits in terms of devolution of property to their successors. Yet, such humanitarian believes should not come intrinsically in the way of defeating the initial purpose of the proposed doctrine of survivorship in cases of simultaneous deaths. To what extent the balance needs to be achieved should be a decision of the higher judiciary (High Courts and Supreme Court).

It is in analysing these conflicts of choices that the authors put forth that when a person does not value his life as much as his peer who has also deceased at the same time, then the law presuming survivorship to the one who happens to not value his life as much, is absolutely illogical.

VII. INTERPRETATION OF THE PROVISION SO AS TO MAKING IT CONSTITUTIONAL AND WORKABLE

Every provision has a presumption of constitutionality. The courts need to follow the maxim "*ut res magis valeat quam pereat*." It is an application of this principle that the courts while pronouncing upon the constitutionality of a statute start with the presumption in favour of the constitutionality and prefer a construction which keeps the statute within the competence of the legislature.[14] The above principle in its application as a rule of construction is that if on one construction a given statute will become *ultra vires*, the powers of the legislature whereas on another, which may be open, the statute remains effective and operative, the court will prefer the latter, on the ground that the legislature is presumed not to have intended as excess of its jurisdiction.[15] It is probably on these lines that the constitutional validity of the provision was never challenged.

One way to construe the provision to be constitutional is to interpret the word *younger*. *Young* or *youth* is defined both as:

1. These adjectives mean of, relating to, characteristic of, or being in an early period of growth or development. *Young* is the most general of the terms.[16]
2. *Youthful* suggests characteristics, such as enthusiasm, freshness, or energy, that are associated with youth.[17]

If *younger* is interpreted as the latter, then the provision can be construed as constitutional and workable. It is already discussed before that an infant or a baby would probably not survive its parents or siblings in cases of simultaneous deaths. Hence, if the meaning is

[14]Corportation of Calcutta v. Liberty Cinemas, A.I.R. 1965 SC 1107(India).
[15]JUSTICE G.P. SINGH, PRINCIPLES OF STATUTORY INTERPRETATION 532 (Wadhwa, Nagpur, 10th ed. 2006); see also Daniel Latif v. Union of India, (2001) 7 S.C.C. 740(India).
[16]The Free Dictionary, Young, http://www.thefreedictionary.com/young.
[17]*Id.*

construed as the former, then the provision will remain unconstitutional. On the other hand, if the word is interpreted as the latter definition, then characteristics like *enthusiasm*, *freshness* and *energy* may be construed to include fitness. Even after such a bold interpretation there is one major flaw in interpreting *youth* with fitness. There may arise a case where an elder person is more fit than the person of lesser age. Here a conflict of interpretation also arises, as to whether

- The elder and fitter person should be considered as *youth* or which appears contrary to the basic definition of *youth*, or
- Should the person of lesser age but not as fit be considered as youth, in which case the purpose of changing the doctrine would fail.

Such a conflict needs to be resolved by the higher judiciary and the authors feel incompetent to answer the question. Even though such interpretation is very vague and indirect, it is worth it. When the statute has some meaning even though it is obscure, or several meanings, even though there is very little to choose between them, the courts need to take the meaning of what the court needs to bear rather than reject it as a nullity.[18]

Even if the statute can be workable, it is the duty of the courts to make sure that the statute is interpreted in such a way. Unfortunately, as already analysed before, that has not been the case.[19] The Supreme Court has presumed the eight year old child to have survived her mother. This has totally destroyed the principle of "*ut res magis valeat quam pereat.*"

Hence, either the Hon'ble Supreme Court had interpreted the provision wrongly, or the provision was meant to be interpreted in such a way which the authors believe to be illogical.

[18]Tinsukhia Electric Supply Co. Ltd. v. State of Assam, (1989) 3 S.C.C. 709 (India).
[19]*Supra* note 5.

VIII. CONCLUSION

It is very rare that such situations of simultaneous deaths occur and it is impossible to ascertain who survived whom. Hence, the topic has not been discussed much in the legal fraternity. But it is still an important aspect of law which some common law countries have made a blanket presumption on survival of the younger one. Another reason this topic has hardly been discussed is because new scientific methods and better understanding of the law of evidence in general have made it easier to determine who survived whom. Thus the presumption is used to a lesser extent now. Yet another reason why there has not been much talk about this provision or doctrine is because nowadays family law disputes are more likely to be settled out of court as opposed to the traditional legal system. This has impaired the courts to have an opportunity to have another look at the law and give an opinion which is similar to the one humbly established in this paper. Further, Hindu law in general and the Hindu Succession Act is particular has seen heavy winds of change in the 2005 amendments. There is a dire need of another amendment to correct Section 21 and some other sections. If and when such an amendment happens, the march of Indian Law would even go further and set standards for change in English and Scottish law.

If and when the legislature adopts this amendment, it will be another endeavour towards justice and an opportunity for the public to pursue their happiness.