Gender Discrimination in the Law of Divorce and Succession among Christians

Thesis Submitted by

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DECLARATION

I do hereby declare that this work has been originally carried out by me under the guidance and supervision of Dr. K.N. Chandrasekharan Pillai, Professor and Head of the Department of Law, Cochin University of Science and Technology. This work has not been submitted either in part, or in whole, for any degree at any University.

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CERTIFICATE

This is to certify that this thesis entitled "GENDER DISCRIMINATION IN THE LAW OF DIVORCE AND SUCCESSION AMONG CHRISTIANS", submitted by Shri. C.A. Sebastian, for the Degree of Doctor of Philosophy is the record of bona fide research carried out under my guidance and supervision from 11th April, 1991 in the Department of Law, Cochin University of Science and Technology. This thesis, or any part thereof, has not been submitted elsewhere for any other degree.

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PREFACE

The laws applicable to Christians in India have been criticised as discriminatory for more than a century. Apparently, there was discrimination and confusion all around. The complex mass of law consisting of customary law shrouded in history, canon law entangled in obscure religious practices and statute law bereft of any scientific basis made the confusion confounded. Therefore, it was proposed to undertake a research into the matter in the context of history, constitution and the statutory framework so as to identify the areas of gender discriminatory aspects in the law of marriage, divorce and succession- the most vital areas of family law relating to Christians in India.

While proceeding with the programme, I got unflinching support, encouragement and valuable and constructive criticism from my Guide, Professor K.N. Chandrasekharan Pillai, but for whose paternal care and guidance, it would not have been possible for me to complete this task within the prescribed time limit.

In the matter of collection of materials, the co-operation extended to me by Mr. K.G. Rajamohan, Librarian of the Kerala High Court Library, the Staff of the Libraries of C.U.S.A.T, Department of Law, Government Law College,

Ernakulam and the Law Library, Government Secretariat, Trivandrum deserve special mention. Further, my fellow research students and my brother also took special interest in collecting research materials from other Indian States.

There was valuable assistance from my wife Mrs. Lali Cherian, who, inspite of her official duties, found out time to go through the type written script of the thesis. I would fail in my duty if I do not mention about the co-operation that I received from the teachers and the staff of the Department of Law, C.U.S.A.T; and also my typist Miss. Sini. P.S for neatly typing out the thesis.

With gratitude to one and all and especially to my Teacher, I submit this thesis on the firm belief that it would be of some use to the legal fraternity.

Cochin 682022

20th April, 1995 C.A. SEBASTIAN

CONTENTS

INTRODUCTION

A person who professes the Christian religion is a Christian.[1] Christians in India constitute a minority community forming about 2.43% of the population as per the census report of 1981.[2] In 1971, they constituted 2.60%. Their rate of growth is less as compared to that of other communities. Though they constitute a minority in India as a whole, in certain states like Nagaland, Meghalaya, and Mizoram, Christians constitute the majority.[3]

In Kerala, Christians were the second largest community with 21.05% in 1971, but by 1981, they have been relegated

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1. The term "Christian" is seen defined in various statutes and judicial decisions. See Chapter I, notes 124 to 127 and the accompanying text for details.
2. As per census report of India, 1981, the total number of Christians in India was 16,174,498. (Religion-wise break up of the data on population collected for the census report of 1991 is not yet published).
3. Christians constitute 80.21% in Nagaland, 83.81% in Mizoram and 52.61% in Meghalaya as per the census report of 1981.

to the third position with 20.56%[4] conceding the second place to Muslims with 21.25%. Sizable Christian presence is also there in Goa, Tamil Nadu, Pondicherry and Andhra Pradesh.[5] An analysis of the distribution of Christian population in India shows that Christianity is most wide spread in the Southern[6] and North-Eastern regions of the country.

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4. In Kerala, the Christian population was 5,233,865 as per the census report of 1981. (An analysis of the trend of growth of population in Kerala made by Shri. T.N. Jayachandran, a former Additional Chief Secretary of Kerala, shows that Muslims have out-numbered Christians and they have become the single largest constituent of the total population of Kerala by 1994. As per this projection of growth of population there are 59.20 lakhs of Christians in Kerala by 1994. See Kerala Kaumudi (Malayalam Daily) dated 23.11.94).

5. Christians in Goa constitute 29.28% (318,249), Tamil Nadu 5.78% (2,798,048), Pondicherry 8.25% (49,914) and Andhra Pradesh 2.67% (1,433,327).

6. The census figures of 1981 shows that Christianity has made it's impact felt in the South Indian States more than in the North Indian States. The percentage distribution of Christians in different states would show that Kerala accounts for 31.60% of the Christians in the country; Tamil Nadu 16.65%, Andhra Pradesh 12.82%, Karnataka 4.31%, Goa, Daman and Diu 1.92%, Pondicherry 0.29% and Maharashtra 5.04% of the total Christian population in India.

Though the percentage of Christian population in India is only 2.43, Christians are not a negligible constituent as their numerical strength is 1.61 crores. This is equivalent to the total population of Portugal and Switzerland, or Greece, New Zealand and Sweden; or Denmark, Finland and Switzerland, which are predominantly Christian countries. Yet it is a matter of regret that they have not been able to draw sufficient attention of the State to their problems in the field of family law.

Of course, certain attempts were made in the past for reforming the law of marriage and divorce of Christians.[7] But they did not culminate into statutory reforms. Nor did they attract the attention of the general public. It was at this time that the Supreme Court handed down its decision in Mary Roy's Case.[8] It was indeed a shot in the arm for the community which has been slow,

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7. See Chapter 6.

8. Mary Roy and others v. State of Kerala and others. (1986) 2 S.C.C 209=A.I.R 1986 S.C 1011=1986 K.L.T 508.

less vociferous and less tenacious in its demands for reform while at the same time straining its every nerve to prepare the ground for change through debates and discussions. In the post Mary Roy period the law relating to Christians came to be depicted as discriminatory to women and the media has been agog with it. Seminars and public debates have been going on at the instance of interest groups on issues relating to succession, marriage, divorce and other areas of family law relating to Christians in India. It has however been passion that prevailed over reason in such discussions. So much of heat and dust have been produced and the community and its leaders seem to be in utter confusion as to what is to be done in the matter. No attempt worth the name, has been made to analyse the issues involved in these matters in a dispassionate manner. And the result: the community is still left to be governed by laws enacted on the philosophy of a bygone century.

The Indian Divorce Act, 1869 of the Victorian vintage is thus even today applicable to the Christians

throughout India. Some of its provisions, admittedly, reflect discrimination against women. Though there are customary laws governing marriage and divorce among Christians in certain regions of India, they are ignored and the Divorce Act is imposed. The community suffers this imposition lying low. Though the need for change is felt and shared by all, so far no change has been effected.

The position is not different with reference to the law of succession. Inspite of customary laws governing the issues and the Indian Succession Act making provision for saving of such customary laws, the provisions of the Indian Succession Act- which often run counter to the customary laws- are made applicable to Christians. And some of its provisions are alleged to be discriminatory.

These pieces of legislation in relation to their application to the Christians have been crying for change. But the legislature has not been prompt in tailoring these laws to suit the needs of this minority community.[9]

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9. There is general criticism that the legislature has been shutting its eyes to the sad 'state of affairs' of personal laws of the minorities- See Tahir Mahmood, "The Indian Civil Code and Islamic Law". (1976), at 11.

Courts in India have been reluctant to go into the matter even when the constitutionality of the provisions of the personal law alleging discrimination was challenged.[10] In cases where the Court was constrained to intervene in the interest of justice it had to tread on slippery grounds focussing attention on irrelevant issues.[11] Even the latest attempt made by a Full Bench of the Kerala High Court in Mary Sonia Zachariah,[12] to give a liberal construction to Section 10 of the Indian Divorce Act, 1869, so as to eliminate discrimination against women, as regards the grounds of divorce, is only a feeble one. In fact this

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10. See Anil Kumar Mahsi v. Union of India. J.T 1994(4) S.C. 409=1994(2) K.L.T 399. Also see Joseph v. Union of India 1978 K.L.T (S.N) 116, and Mary Roy v. Union of India (1986) 2 S.C.C 209.

11. See George Sebastian v. Molly Joseph 1994(2) K.L.T 387 (F.B). And Mary Roy v. Union of India (1986) 2 S.C.C 209.

12. Mary Sonia Zachariah and another v. Union of India and others. O.P.No.5805 of 1988 and O.P.No.4319 of 1991 (F.B). The judgment of the Full Bench of the Kerala High Court was rendered on 24.2.1995 and it is yet to be reported. It will be discussed in detail in Chapter IV.

decision has disturbed the equilibrium in the working of the Act.

The Court's inquiry into the development of certain vital areas of Christian law smacks of lack of appreciation of historical evolution of law in the politico-socio-economic milieu. It appears, the confusion felt by the community gets confounded by the frequent formulation of legal rules having no basis in the culture built up by the community through centuries. The pitfalls attendant with judicial legislation in vital areas like marriage, divorce and succession, without having regard to the cultural matrix of the community make the area darker and darker.

The reticence manifested by the Indian legal system to respond positively to the need for reform in Christian law- the legislative inertia and the Courts' avoidance of discussion of issues involving allegations of discrimination in the cultural and constitutional context- and their inadequate adhoc formulation of rules calls for a deep study into the various aspects of

Christian law. Gender discrimination alleged to be writ large on the various provisions should be obliterated. The laws have to be toned up to be in tune with the times. This exercise naturally demands appreciation of issues in the light of the evolutionary history of Christianity in India. And therefore the history of advent of Christianity in India is examined in the next chapter to act as a groundwork for the analysis of various issues in the subsequent chapters.

CHAPTER-I

ADVENT OF CHRISTIANITY IN INDIA

Christianity is spread all over India. But it was first introduced in the southern parts-especially in the territories now forming the state of Kerala- and as 31.60% of the total Christian population of India is in Kerala, it is proposed to deal with the advent of Christianity in Kerala in detail and to provide a bird's eye view of its development in other states.

The advent of Christianity in Kerala dates back to the first century. According to wide spread tradition which is believed by most of its members, the church in India was originally established in the year 52 A.D., by the Apostle, St.Thomas, who landed at Malankara near Cranganore.[1] The veracity of this claim has been explored by many historians, both in India and abroad. According to L.K. Ananthakrishna Ayyar, all along the ages St.Thomas has been known as the Apostle of India, and the testimony of the Christian writers is worthy of consideration. In A.D.190, the Great Gnostic Panthaenus, a Professor of Theology in the school of Alexandria, set sail from Bernice in the Red Sea and landed in one of the

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1. C.A. Innes (Edited by F.B. Evans), Madras District Gazetteers Malabar. volume I (Superintendent, Govt. Press, Madras) 1951 (first published in 1908) at 195. It may be noted that in ancient times Cranganore was also known as Muziri and at present it is called Kodungalloor. It is a place near Cochin in Kerala.

Cochin Ports.[1] There he found a colony of Christians in possession of the Aramaic version of the Gospel of St.Mathew, in Hebrew, which St.Bartholomew was supposed to have carried thither; and this is the earliest mention of the community now known as the Syrian Christians.[2] One of the earliest and most notable witnesses is the Didascalia Apostolorum (Teaching of the Apostles), a book probably produced in Syria and dated about 250 A.D. It makes references to St.Thomas and his Indian connections.[3] It appears from the writings of other eminent writers that the Indian Christians were represented by Johannes, the Metropolitan of Persia and the Great India, at the first Ecumenical Council held at Nice in 325 A.D, which was held by the order of the Emperor.[4]

Ruffinus in 371 A.D. wrote that the bones of St.Thomas were brought from India to Edessa.[5] In remembrance of this, a feast called Duhrana is celebrated by the Romo-Syrians and Jacobites of Malabar on the 3rd of July of every year as a day of obligation.[6] Yet another source of information is the

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2. L.K. Ananthakrishna Ayyar, "Anthropology of the Syrian Christians". (1926) Cochin Govt. Press, Ernakulam at 6.

3. C.B. Firth, "An Introduction to Indian Church History". (1976) The Christian Literature Society, Madras, at 8.

4. Supra n.2 at 7.

5. Edessa is the modern Urfa in Turkey. A few historians are of the opinion that "India" mentioned here could be Indo-Minor (Eastern Syria).

6. Supra n.2 at 6-7.

hymns of St.Ephraem (a hymn-writer of Syria) who spent the last ten years of his life at Edessa, which was one of the chief centres of Christianity and which claimed to be the resting place of the bones of St.Thomas brought from India by a Syrian merchant. An annual festival of St.Thomas in commemoration of this event was celebrated there on July 3rd every year and it is still celebrated in the Syrian Churches.[7] Another well known Venetian traveller, Marco Polo, who visited South India in 1288 and 1292 mentions about the tomb of St.Thomas in South India.[8]

Some believe that Christianity has a Jewish origin in India. According to this view Christianity would have come to India from Alexandria where Christians used to congregate like others for trade. The spread of Christianity in India at the early period might thus be traced with some probability[9] with the trade relations between India and Alexandria. The presence of Jewish Colonies on the Malabar Coast at the time might give credence to the belief that they might have been the first converts to Christianity. Further, the existence of a Jewish Colony (the Jewish Colony of Cochin on the West Coast of India) would very likely have attracted the Apostle who was himself of the stock of Abraham. Judging from these historical facts and from the traditions, it is not unlikely that the

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7. Supra n.3 at 5.
8. Ibid at 4.
9. Supra n.2 at 8.

Apostle St.Thomas came to these parts to spread the Gospel among the Hindus of Kerala.[10] Jesus and his disciples including St.Thomas were Jews and continued to be Jews until the Christian faith and church got established. St.Thomas might have had followers among the Jews of Kodungallur.[11] The fact, however, that the Great Gnostic Pantaenus found a Hebrew copy of St.Mathew's Gospel here points to the probability of the first colony of Christians having been of Israelites, and not either Syrians or Persians.[12] Even the Portuguese authorities in spite of their ruthless attempt to westernise the local 'Hindu-Christians', respected the Kerala Christian claim of apostolic origin. Portuguese historians, de Barros and de Couto, who made critical enquiries into the tradition, were satisfied about its credibility.[13]

The Migrations

There are more authentic evidences of Indian Christians' connections with Christians of East Syria, Mesopotamia and Persia. The Syrian Church of Malabar has

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10. Supra n.2 at 11-13. Also see infra chapter V n.6.

11. Joseph Kolangadan, "The Historicity of Apostle St.Thomas". (1993) Trichur, at 6. Also see infra chapter V n.6.

12. William Logan, "Manual of the Malabar District". (1906) Madras at 203.

13. Supra n.11 at 49.

traditions of at least two considerable immigrations of influential people from those countries. It is believed that they settled down in India and did much to revive and strengthen the church here. The first of these immigrations is commonly ascribed to the year 345 A.D. and is said to have consisted of between three and four hundred families, men, women and children, including some clergy, under a leader called Thomas, who is variously known as Kanaye Thoma, Thomas of Cana, Thomas the Cananite, Thomas Cannaneo or Thomas of Jerusalem.[14] The second immigration is dated 823 A.D, when a number of Christians from Persia, including two bishops, came to Quilon in Travancore and settled there, having obtained from the local ruler grants of land and various other privileges. According to A. Mingana, they built a church and erected a town in the District of Kullam, to which Syrian Bishops and Metropolitans used to come by order of the Catholicos.[15] Contemporary evidence is available in the form of five copper plates recording various grants to the Christians. Three of these are at the Jacobite Seminary at Kottayam and the other two in the keeping of the Mar Thoma Church at Thiruvalla.[16]

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14. Supra n.3 at 28.

15. A. Mingana, "The Early Spread of Christianity in Asia and the Far East". (1925) Manchester University, at 45.

16. Supra n.3 at 31.

Indeed both these settlers and those at Cranganore seem to have absorbed the Christian communities they found on the spot, so that later generations reckoned themselves as descendants of the Syrian Colonists and came to be known as Syrian Christians. There may well have been other occasions when Syrians or Persians came and settled in India, for the Syrians were great traders.[17]

Thus, two views with regard to the origin of Christianity in India are prevalent among scholars. One is based on the tradition of St. Thomas. The other is based on the theory of Christianity having been introduced into India by the East Syrian traders who came to Malabar coast during the early centuries. Those who subscribe to the first view do not however deny the mission of the East Syrian merchants strengthening an already existing community.

While the tradition of Apostolic origin of Christianity in India cannot be fully tested by the criteria of modern historical research, one tends to agree with the declaration made by Jawaharlal Nehru in the Lok Sabha on 3rd December, 1955 that Christianity was as old in India as the religion itself and that, as a religion, it found its roots in India even before it went to countries like England, Portugal and Spain.[18] At any rate, it has been accepted by most historians

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17. Ibid. at 31-32.
18. Lal Dena, "Christian Missions and Colonialism". Vendrame Institute. (1988) Shillong, at 12.

including Vincent Smith that Malabar tradition of the visit of St.Thomas is as nearly as history.[19] The conclusion seems to be obvious that Christianity came to India in the first century A.D.

The Syrian Christians of the Malabar coast continued their links with Syria-Mesopotamia and accepted Bishops who were sent from Syria-Mesopotamia and their church remained an Eastern Church not owing allegiance to Rome and to the Pope. These Syrian Christians continued to maintain their customs and traditions as conversion to Christianity had not brought about any change in them except in the matter of faith. One historian says:-

> "They are Hindus by race and they speak Malayalam language which is spoken by their neighbours".[20]

In their physical appearance and many of their general characteristics, the Syrian Christians were very like the Nayars, but in some respects they differed from them.

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19. D. Babu Paul, "Veni, Videi, Vici- the story of an Apostolic visit". St. Joseph's Press Trivandrum, at 7. Also see Rev. Fr.Bernard, "A Brief Sketch of the History of the St.Thomas Christians". (1924) Trichinopoly, at 1-7. Here the author traces the death of St.Thomas to 3rd July 72 A.D. at 4.30. P.M. at Mylapore (near Madras).

20. G.T. Macrenzie Esquire, "History of Christianity in Travancore". Travancore State Manual. Vol.II, (1906) at 135.

According to another author there were several survivals of Hindu custom among the Syrian Christians, but with the spread of English education and increasing contact with European Christians they were gradually dying out.[21] The Syrian Christians, before the sixteenth century, appear to have belonged to the village organisation of the Hindus and retained most of their manners and customs.[22]

The Syrian Christians in former times were mostly merchants trading with foreign countries on a large scale. The rulers of the land conferred on them high privileges which were embodied in the two copper-plate charters, the date of the grant of one of which, according to Dr. Burnell's calculations, being 744 A.D. The second charter was granted in 824 A.D. These two charters throw a good deal of light on the social conditions of the Syrian Christians during the seventh and eighth centuries.[23] The Christians like the Jews were assimilated into the main

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21. C.Achyutha Menon, "The Cochin State Manual" (1911) Ernakulam, at 225-226.

22. Supra n.2 at 132.

23. See J.J. Morris, "Moonnu Thamrasasangalum Manmaranju Kidakkunna Chila Charithra Sathyangalum". (Malayalam) (1993) Kollam, at 101-103.

stream of Malayalis, and the position assigned to them and the Jews was that of practical equality with the Nairs of the Six hundred of the nad in respect of the two characteristic functions and privileges of protectors and superiors for a share of the produce of their land in compensation for their services. The duties of the Jewish and Syrian communities were also to protect the town of Palliyar or the church people in union with the six hundred of the nad; and the church people had to render to them and the king trustworthy accounts of the shares of the produce of the land. In sum, the Syrian Christians were recognised among the 'noble races of Malabar'.[24]

These Christians were directly under the King, and were not subject to local chiefs. They were given seats by the side of kings and their chief officers. Sitting on carpets, a privilege enjoyed by the ambassadors, was also conceded to them. The power exercised by them could be gauged from what has happend in Parur in the 16th century. According to L.K. Ananthakrishna Ayyar, in the 16th century when the Rajah of Parur wished to concede certain

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24. See supra n.2 at 51-54.

privileges to the Nayars in his dominion, the Syrian Christians resented and immediately declared war against him if he persisted. Conscious of his inability to enforce his will, in opposition to theirs, he was obliged to leave the matters on their ancient footing. The immunities and honours above mentioned enhanced the dignity of their bishop very considerably.[25]

Another author says that the Syrian Christians of Kerala form the perfect example of thorough assimilation of a culture into another. Christian in essentials, they are cent per cent Indian in their way of life. With a Christian ancestory as old as that of Antioch and Rome, they have ever been loyal to the Christian ideals and proud of the Christian heritage. No less loyal to and proud of their motherland, have they proved themselves down the centuries. And still the ancient Kerala culture, has been this community's heirloom.[26]

At the arrival of the Portuguese in India, the Christians appeared as a fairly prosperous trading and

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25. Ibid. at 55.

26. See supra n.11 at 47-48.

land owning community, reckoned by the Hindus as equivalent to one of their higher castes. Indeed they were influenced by some customs peculiar to Hindu culture such as untouchability.[27]

Prior to the establishment of Courts,[28] it is said, the Government of the Syrian Christians both in temporal and spiritual matters devolved on the Bishop in whose diocese they belonged.[29] The Bishop was the judge in all civil and ecclesiastical causes within his diocese. The local Princes and judges had no concern with them except in criminal matters.[30] As such the Syrian Christians had a well settled position in this country. But their interaction with the Portuguese changed them in many ways.

Vasco da Gama reached India and landed near Calicut in 1498 A.D.[31] Trading stations were established along the West Coast, and the Portuguese influence steadily

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27. See supra n.3 at 36.

28. "The establishment of courts for the first time in Travancore was in 1811 A.D." See Travancore State Manual Vol.III at 546. Also see S.A. Azariah, "A Judicial History of Travancore," (1932) Trivandrum, at 7.

29. See supra n.2 at 135.

30. E.M.Philip, "The Indian Church of St.Thomas". L.M.Press. (1950) Nagarcoil, at 421. Also see supra n.3 at 46.

31. "India-Medieval History". Publications Division, Ministry of I & B, Government of India, (1992) at 112.

grew. As they sought to establish a permanent position in Asia, to carry on their commercial activities without hindrance, they captured Goa and made it the centre of administration and the capital of all Portuguese settlements in Asia. Though they were friendly to the Syrian Christians at first, their attitude undervent a change later.[32] They worked vigorously to win the Syrian Christians to the Roman Catholic communion to which they belonged. Inspite of their efforts they could not win over the Syrian Christians. This led the Portuguese to an open conflict with the Syrian Bishops, in which the Portuguese adopted the most odious and tyrannical measures. Mar Joseph, the Bishop of the Syrian Christians, was arrested, brought to Goa and from there deported by sea to Portugal en route to Rome. Meanwhile the Syrians in Malabar had sent word to Mesopotamia for another bishop, for no one expected Mar Joseph to return. On representations made by the Syrian Christians, Mar Abraham, a genuine Nestorian from Mesopotamia, reached Malabar in

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32. See supra n.2 at 25.

disguise and began to function as their Bishop.[33] Thereafter, Mar Joseph returned to Malabar with the approval of the Pope. Though the Portuguese had no trust in Mar Joseph, they were compelled to support him in the struggle for power and position between Mar Abraham and Mar Joseph. The Portuguese then arrested Mar Abraham and shipped him off for Europe on a voyage that was to prove adventurous. While the ship was at Mozambique, he escaped from the ship and from there he managed to make his way to Mesopotamia.[34] There he was reconsecrated by the Chaldian Patriarch. He then went to Rome, and met Pope Pius IV, who consecrated him afresh as Archbishop of Angamali, the head quarters of the Syrian diocese (near Cranganore). Mar Abraham adopted this course of action apparently to get the support of the Pope against the Portuguese interference. He managed to reach Malabar and entered upon his office. According to Tisserant, Mar Joseph seemed to have been removed from office by this time.[35] Mar Abraham seems to have made a genuine attempt to fulfil the role assigned to him as Bishop of an Eastern Church acknowledging the Pope. But he was

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33. See supra n.13 at 77.

34. Ibid. at 77.

35. See Cardinal Eugene Tisserant, "Eastern Christianity in India" (1957) Calcutta, at 42.

entitled to retain the Syrians' customs. But the Portuguese had little sympathy; their aim was to bring the Malabar Syrians effectively under the padroado.[36] Mar Abraham attended the provincial Synod of Goa in 1585, and was obliged to assent to a series of Canons, some of which have been highly unwelcome to him.[37] On his return, he tried to assert his independence, but he died early in 1597. Upon his death, the (Portuguese) Arch Bishop of Goa, Alexis de Menezes, decided to take charge of the Syrian diocese. Though the Syrian Christians resisted, by employing all means that were mean he managed to bring the Syrians under his control using political influence, military force and money power.[38]

The Synod of Diamper, 1599 A.D

Menezes prevailed upon the Rajah of Cochin, a minor ruler in whose territory Angamali lay to conduct a synod. He issued a circular dated 14th May 1599 and ordered the Archdeacon and all Syrian Priests to attend a Synod at Diamper (Udayamperur). Each local church was ordered to send four lay delegates fully empowered to act on its

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36. See supra n.3 at 79.

37. Ibid. at 80.

38. Id. at 83.

behalf. The Synod began on 20th of June 1599 and continued for seven days upto 26th of June. It was in this Synod that the Syrian church accepted, under pressure, the rule of the Portuguese hierarchy and the doctrine and many of the customs of the Western Church.[39] It was thus by a calculated effort made by the Portuguese that the Indian Church came under the control of the Pope. The general result was that they found themselves not only subject to Pope, but cut off from their mother church to be conformed to the Roman Catholicism of Europe under the control of the Portuguese Bishops, and they were compelled to become part of the western church organisation.[40]

The Synod of Diamper affected the life of the Syrian Christians in more than one way as it passed various decrees concerning both spiritual and temporal matters. The Syrian Christians were following the Hindu Law in matters of succession, before the Synod. Under this system, the males alone were considered heirs. The females whether married or single were excluded, even when the parents had no sons to succeed. Thus according to this system, the parents'

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39. Ibid. at 92.

40. Id. at 92.

property passed over to the males in a very remote degree of consanguinity or even in the transverse line. As a result, the females perished miserably or were driven by indigence to prostitution. The Synod declared this mode of succession to be contrary to natural equity and wholly illicit and decreed that the property must be equally distributed among the sons and daughters. The Synod decreed that whoever refused to observe this law or to make restitution should be excommunicated beyond all hope of absolution, until he obeyed this decree and made restitution.[41] According to another decree, the married clergy were ordered to separate from their wives, or else give up their ministry.[42] By the orders of Alex-de-Menezes, the popular Nestorian books (kept in the Syrian Churches) were all destroyed.[43] Yet, it was not possible to get the Syrian Christians to observe the decrees of the Synod which pertained to their ancestral customs, especially in matters relating to succession. This is evident from the letters written by Francis Roz, the

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41. Julian Saldanha S.J, "Conversion and Indian Civil Law". (1981) Bangalore, at 108-109.

42. See supra n.3 at 95.

43. See supra n.2 at 27 and 29.

first Latin Bishop of Syrian Christians, to his religious superior in Aquavia.[44] The ultimate consequence of the Synod arose from the destruction of the ancient documents of the church of Syrian Christians which now makes it impossible to write a complete history of the Syrian Christians.[45]

While trying to take control over the Syrian Christians, the Portuguese, at the same time, embarked upon a vigorous attempt to convert as many local Hindus of the lower castes to Christianity as possible and their converts came to be known as the Latinites or the Catholics of the Latin rite. They also got some Syrian Christians into their fold. The new converts of the Latin rite as well as the Syrian Christians were then governed by the Jesuits who belonged to the Latin rite of the Portuguese.

The Coonen Cross Revolt of 1653 A.D

But the Jesuit supremacy became so intolerable to the Syrian Christians that they resolved to have a bishop of

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44. See Sebastian Champappilly, "Christian Law of Succession and Mary Roy's Case". (1994)4 S.C.C.(Jour) 9 at 11. Also see 1994(1) K.L.T (Jour) 12 at 15.

45. See supra n.35 page XIII of Introduction. Also see supra n.3 at 95.

their own from the East and applied to Babylon, Alexandria, Antioch and other headquarters, as if these ecclesiastics possessed the same creed. A man named Ahatalla, otherwise known as Mar Ignatius, was accordingly sent by the Patriarch of Antioch but was on the way intercepted by the Portuguese who secured him at Goa and shipped him off to Europe. According to another account he was either drowned in the Cochin harbour or burned at the Inquisition at Goa. This cruel deed provoked a large body of Syrian Christians to meet in solemn conclave at the (coonen) Cross at Mattancherry in Cochin, and with one voice renounced their allegience to the church of Rome. This incident took place on 3rd January, 1653 and it made an epoch in the history of the Syrian Church and led to a separation of the community into two parties, viz, the Pazhayakuru (the Romo-Syrians) who adhered to the church of Rome according to the Synod of Diamper, and the Puthenkuru,[46] (the Jacobite Syrians) who after the oath at the (Coonen) Cross, got Mar Gregory from Antioch and acknowledged the spiritual supremacy thereof.[47] Thereafter, the Jacobite Syrian Christians got split up into different groups in course of time.

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46. See A. Sreedhara Menon, "A Survey of Kerala History". (1991) Madras, at 195-196.

47. See supra n.2 at 27-28.

THE VARIOUS DENOMINATIONS OF CHRISTIANS IN SOUTH INDIA

1. THE SYRIAN CATHOLICS (Romo-Syrians)

(i) Syro-Malabar Rite

They are the Romo-Syrians (Pazhayakuru) who form 62.90% of the total number of Catholics in Kerala. They are under the sacred congregation for the Oriental Churches (Rome) and are divided into two provinces (Arch Dioceses), viz, Ernakulam and Changanacherry. The dioceses under the Arch diocese of Ernakulam are Ernakulam, Trichur, Irinjalakuda, Tellicherry, Kothamangalam, Mananthavady and Palghat. The dioceses under the Arch dioceses of Changanacherry are, Changanacherry, Kottayam, Palai and Kajirappally. The diocese of Kottayam has a special jurisdiction over all the southists (Syrian Knanaya Catholics) and thus it remains an exclusive group.[48]

With the creation of a new Major Archiepiscopate for the Syro-Malabar Church, it has attained the juridical status with it's Synod to legislate and decide upon it's legitimate prescriptions and customs. This follows from the

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48. A.K. Thomas, "The Christians of Kerala" (1993) Kottayam, at 62. Also see Jacob v.Superintendent of Police, 1992(2) K.L.T 238 para 2=A.I.R. 1993 Kerala 1.

Apostolic Constitution, Quae maiori, dated 16th December, 1992.[49] The Catholics of the Syro-Malabar Rite undertake missionary apostolate from 1962 onwards in Chanda, Ujjain, Satna, Sagar, Jagadalpur, Bijnor and Rajkot in North India. Their personal law is to be found in the "Code of Canons of the Eastern Churches" promulgated by the Pope in 1990 and in the Particular Laws framed thereunder. Of late this has been recognised as the Code of their personal law by the High Court of Kerala.[50]

ii) The Syro-Malankara Rite

They form 5.35% of the total number of Catholics in Kerala. They are a break-away group from the Jacobite Syrians (Puthenkuru) who thereafter accepted the Pope as the head of the church. This re-unification to the church of Rome took place in September, 1930. For the Syro-Malankara Church two ecclesiastical provinces were erected with Trivandrum as Metropolitan See and Tiruvalla as

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49. See The Preamble to the Synodal Statutes of the Syro-Malabar Major Archiepiscopal Church, 1993. (The Synodal News. vol.II, 1994).

50. Leelamma v. Dilip Kumar, A.I.R 1993 Kerala 57=1992(1) K.L.T 651=1992(1) K.L.J 648=I.L.R 1992 Kerala 798. But this decision has since been dissented from in George Sebastian v. Molly Joseph. 1994(2) K.L.T. 387 (FB). But the dissent is not on the question of the applicability of canon law. However, the operation of the Judgment of the Full Bench in 1994(2) K.L.T 387 has been stayed by the Supreme Court in S.L.P.No.19959 of 1994.

suffragan. The Metropolitan See of Trivandrum consists of Trivandrum, Kottarakara, Adoor, Pathanamthitta, Mavelikara, Kayamkulam and Chengannoor. The eparchy of Tiruvalla comprises Tiruvalla, Niranam, Kottayam, Muvattupuzha and Kunnamkulam. Those who are reunited to the Catholic Church from the southists, though belonging to the Syro-Malankara rite, are usually under the jurisdiction of the southist Chaldeo-Malabar Hierarchy of Kottayam to keep their identity.[51]

II. The Jacobite (Jacobite Syrian Christians)

The term "Jacobite" is derived from the name of a bishop, Jacob Baradai (542-577 A.D) of Mesopotamia (Persia) who was an adherant to the theory of Monophysistism. In 1665 a Jacobite bishop, Gregorius of Jerusalem, came to Kerala accepting the invitation from the local people for a validly ordained bishop. Those who received "new faith" from Mar Gregorius began to be known as "Puthenkuru". This community has a long history of internal split and re-unions. Bishop Vattasseril Mar Dionysius was ordained Bishop and appointed the Jacobite Bishop in 1908 by Patriarch Abdulla of Antioch. But the Patriarch Abdulla's claim of complete jurisdiction over the Jacobite church including rights over the property of the Jacobite Church was not accepted by Mar Dionysius and other lay leaders of the church. In 1911, the Patriarch dismissed bishop

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51. George Koilparambil, "Caste in the Catholic Community in Kerala". (1982) Ernakulam,at 66. Also see supra n.48.

Mar Dionysius and bishop Mar Kurillos was appointed in his place. Thus two parties emerged in the Jacobite church, the bishop's party and the patriarch's party. This was followed by a series of litigations between the parties.[52] In 1958, the Bishop's party got a favourable decision from the Supreme Court.[53] Immediately thereafter, the two parties united at Kottayam in 1958. But soon thereafter, the Patriarch's party realised that their interests were at stake and again there was a split in between the parties, followed by a spate of litigations and they are still continuing. The Patriarch's party is now known as the Jacobite Church and the Bishop's party is known as the Malankara Orthodox Church.

The Malankara Orthodox Church is also known as the Metran's Party, Or Katholiko's Party. Today they have adopted the name 'Orthodox Church', with the assumption that it is the church that has preserved the true Christian faith. The struggle between Patriarch wing and the Bishop's wing took a new dimension in 1974 and it still continues.[54] The dispute between the parties was adjudicated by the Hon'ble High Court of Kerala wherein Justice T. Chandrasekhara Menon held that the church in Malankara is not purely an episcopal church and

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52. The History of the litigation is sketched in M.M.B. Catholicos v. M.P. Athanasius, A.I.R 1954 S.C. 526. And also in Moran Mar Baselius Marthoma Mathews I v. Most. Rev. Paulose Mar Anthanasios and others, 1990(2) K.L.T (Supplement) at 1-94.

53. See M.M.B. Catholicos v. T. Paulo Avira, A.I.R 1959 S.C.31.

54. See supra n.51 at 50.

individual parish churches have independent status.[55] This was taken up in appeal before a Division Bench of the High Court of Kerala which held:-

> "Parish churches are not congregational or independent but are constitutant units of the Malankara Church; they have fair degree of autonomy subject to the supervisory powers vesting in the Managing Committee of the Malankara Association, Catholicos and the Malankara Metropolitan as the case may be. Administration of the day to day affairs of Parish churches vests in Parish assembly and elected committees of the parishes".[56]

The matter has now gone before the Hon'ble Supreme Court of India.[57] Though the matter has not been finally decided yet, the two parties have formed themselves

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55. Moran Mar Baselius Marthoma Mathews I. v. Most Rev. Paulose Mar Anthnasios, O.S.No.4 of 1979. (Also see 41 T.L.R 1; 45 T.L.R 116; 45 T.L.T 116; 13 T.L.R 101 for further details).

56. Moran Mar Baselius Marthoma Mathews I. v. Most Rev. Paulose Mar Anthanasious and others; 1990(2) K.L.T(Supplement)at 58. (A.S.No.331 of 1980 and Cross objections).

57. Civil Appeal No.4958 to 4960 of 1990 on the file of the Hon'ble Supreme Court is still pending.

into two different churches for all practical purposes viz,

(i) The Jacobite Church and,

(ii) The Malankara Orthodox Church.

III. THE MARTHOMITES

The origin of the Marthomites (the Marthoma Syrian Church) may be said to date from the ex-communication of Mar Mathew Athanasius in 1875. The Marthomites are 'Protestant' in doctrine, but of orientals or Jacobites in the externals. It adopted a largely democratic constitution for the church. They are mostly distributed in the districts of Quilon, Alleppey and Kottayam. They are a break-away group from the Jacobite Syrian Christians.[58]

IV. St.Thomas Evangelical Church of India

This church is an off-shoot from the Marthomites. There emerged two groups, Traditionalists and the Progressivists in the Mar Thoma Church. In the struggle for supremacy there were litigations and when the Progressivist group was defeated they decided to start a new church, and it was inagurated at Thiruvalla. This church is affiliated to the International Council of Christian Churches.[59]

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58. See supra n.51 at 52-53. For further details see 23 T.L.R; 171; 26 T.L.R 148; 18 T.L.R 222; 20 T.L.R 131 and 23 T.C.R 171. The famous Maramon Convention is conducted by the Marthomites.

59. See supra n.51 at 59.

V. Thozhiyoor Sabha (Anjoor Sabha)

This is a section separated from the Jacobite Church. They follow the same beliefs and practices of the Jacobite Church. They are also known as "Malabar Swatantra Suriani Sabha" (Malabar Independent Syrian Church). The Jacobites tried to capture the church and property of the Thozhiyoor Sabha, but could not succeed in their attempt since the court verdict was in favour of the Thozhiyoor Church.[60]

VI. The Nestorians

Nestorians are the followers of Nestorious who broke away from some of the traditional teachings of the Catholic Church.[61] There is dispute about the time of the beginning of Nestorian Church in Kerala. In 1907, there were Nestorians in Trichur under the Nestorian Patriarch, who sent a Nestorian bishop. At the initial stage all the Christians of Trichur except four families followed the Nestorian faith. But later many of them were reunited to the Catholic Church reducing the Nestorian Community smaller in size.[62]

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60. Fr. Inchakalodi, "Keralathile Kristhava Sabhakal". (1962) Tiruvalla, at 274-275.

61. Rev. Dr. N.A. Thomas, "Asiayile Marthoma Sabhakal". (Church History in Malayalam) (1982) Trivandrum, at 76-83.

62. See supra n.60 at 149-163.

VII. Church of South India (C.S.I)

The Church of South India was formed in 1947 out of the union of three Protestant Churches in South India, namely Anglican, London Mission and Weslien Methodist. The Anglicans had some followers from the Syrian Christians. The London Mission had followers most of whom were converts from the Nadar Community and the depressed classes. The community of C.S.I is divided into four districts for administration in Kerala; South Kerala, Madhya Kerala, East Kerala and North Kerala. Each district is under a bishop.[63]

VIII. The Latin Catholics

The Catholics of the Latin Rite are later converts to Christianity when compared to the Syrian Christians. It is said that they are the descendants of the converts of St.Francis Xavier, Fr.Miguel Vaz and other Portuguese Missionaries after the year 1500 A.D.[64] According to a report prepared by Msqr. Francis Xavier, Carmelite Vicar Apostolic of Malabar in 1832, the Latin Christians of Malabar were in three classes, firstly, those of mixed indigenous and European blood called Topass, Parenghi, Munnuttikkar; secondly,

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63. See "The Constitution of the Church of South India". Reprint (1982) Madras, at 105. There are 16 other dioceses for the C.S.I in the various South Indian States.

64. See supra n.2 at 253.

those of a caste called Mucua, including the caste of Anjuttikkar and the third group with Malabar blood who were not of Mucua lineage and their common name was Ezhunnuttikkar. Among them were persons originally from all castes from the highest Brahmin[65] to the lowest exterior castes.[66] Anthropologists have catagorised the Latin Catholics into the following divisions:-

a) Three Hundred, b) Five Hundred, c) Seven Hundred, d) Sixty-Four.

a) Three Hundred

The community of "Three Hundred" or "Munnuttikkar" are the Latins or 'Topasses' so named from the wearing of hats. The 'Topasses' are said to have sprung from the old Portuguese settlers and the low caste women of the soil.[67] In other words, the Topass Christians were the sons of Indian mothers and fathers from diverse European nations.[68]

b) The Five Hundred

The members of this community are known as 'Mukkuvans' or 'Kadakodies'. Their origin is attributed to

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65. See supra n.55 at 113.

66. Kathleen Gough, "Indian Nationalism and Ethnic Freedom". David Bidney (ed) Mouton & Co,. (the Hague) 1963, at 195.

67. See supra n.2 at 257.

68. See supra n.58 at 89 and 239.

the conversion of the multitude of fishermen who were baptised after the year 1532. The members of this community in the extreme south are known as Paraver or Chavalakkar. Subsequently they changed their caste name to Cochikkar and during the first half of the 19th century into Anjuttikkar.[69] They were under the protection of the Portuguese and the Dutch.

c) Seven Hundred

The "Seven Hundred" or Ezhunnuttikkar were also under the protection of the Portuguese and the Dutch. They were trained in the art of war and it is said that there were 700 soldiers under each commandant. It is also said that in the Portuguese or Dutch Fort of Cochin, there were seven hundred soldiers who were engaged as Watchmen. Dr.Day and Vischer affirm that the community known as the "Seven Hundred" is made up of the low caste converts from Izhuvans, Pulayans and Parayans.[70]

d) Sixty-Four

The Arawatnalkar (the community of the sixty-four) is said to have consisted originally of converted Brahmins and Nayars.[71]

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69. See supra n.2 at 255-256.
70. Ibid at 254-255.
71. Ibid. at 258.

The Five Hundred and the Seven Hundred now claim that their ancestors were Syrian Christians who after abandoning their rite of worship for some reason or other, joined the Portuguese missionaries and adopted their ritual. Each of these two communities asserts their superior social status over the other.[72] Agriculture and trade are the chief occupations of the vast majority of the community of the seven hundred. The community of Five Hundred live mostly by fishing. The Topasses at present follow various trades.[73] The aforesaid nicknames are now being disclaimed by the respective communities. The Latin Catholics are now found all over India spread in about eighty six Dioceses. They are mainly the converts from the local areas.

IX. The Brethren Church

The Church of Brethren was established in Kerala in 1895. Many conversions took place from among the Marthomites, and Kumbanadu near Thiruvalla was selected as the centre for their activites in Kerala.[74] The Brethren movement, which emphasised the study of the Bible and right living, originated in Germany in 1708. It came to Kerala from England. They were more interested in getting followers

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72. Id. at 253.

73. See Id. at 273-275.

74. See supra n.58 at 55.

from the existing churches than in converting non-Christians. It does not have bishops or priests but for practical purposes, it has elders who conduct ceremonies like baptism and marriage. It does not have church buildings, instead it has assembly halls.[75]

X. The Pentacostal Churches

The Pentacostal Church originated in the United States of America.[76] It came to Kerala through Mr. Berg, a German Protestant Missionary, in 1909.[77] It has no bishops or priests and its congregations are placed under pastors. It has no church building and their places of worship are known as "faith homes". This sect is more keen to win over members of existing churches than in converting non-Christians. They believe in faith healing and avoid medicine.[78] Because of disagreement between the leaders, this church was divided into different groups leading to the evolution of many Pentacostal Churches.[79]

XI. The Church of God

It is of American origin. It was Pastor Cook who started its work in Kerala in 1913. The very name

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75. See supra n.55 at 116.
76. Ibid. at 116.
77. See supra n.58 at 56.
78. See supra n.55 at 117.
79. See supra n.67 at 229.

implies a profession of faith in God as the only founder of the church and a protest against other "man-made" institutions.[80] Any person who believes in Lord Jesus Christ can be a member of this church.[81] In Chengannoor, Haripad, Poovathur, Cheppad, Pandalam, Pazhanji and Chalissery there are established houses for this church.[82]

XII. The Salvation Army

It is a non-sectarian religious organisation founded in London by William Booth in 1865. They started their work in India by 1882. The church is founded on the pattern of the British Army, with uniforms, brass bands, titles, marching orders, furloughs and knee drills.[83] It has no episcopacy or clergy, but it has officers with different ranks to supervise its work. Its places of worship are called 'halls' and there are no altars in them. They have done remarkable work with the depressed classes especially the Pulayas in the former Travancore and Cochin States. They co-operate with the Mar Thoma Church and the Church of South India in preaching the Gospel and in the work of Bible society and the Y.M.C.A.[84]

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80. See supra n.58 at 60.
81. See supra n.55 at 117.
82. See supra n.67 at 275-277.
83. See supra n.58 at 56.
84. See supra n.55 at 117-118.

XIII. The Seventh Day Adventist Church

This church was founded in America. Its head-quarters have been in Washington D.C, since 1903. The church government is based on democratic principles. Poona is the head-quarters of this congregation in India. In Kerala they started their work in 1915 and have now more than one hundred centres.[85] The main centres of their activities are Trivandrum, Kottayam, Kottarakara and Pathanamthitta.

XIV. The Lutheran Church

The Lutheran Church in Kerala may be included in the presbyterian section of the Protestant Church. They claim to be the real descendants of Martin Luther, the German Reformer, and believe that their church alone is true, out-side of which there is no salvation. They started their work at Peroorkada near Trivandrum in 1911[86] and now they have spread to other localities in Kerala.[87]

XV. Yuyomayam (Anchara Vedam)

It is a break away group from the Anglicans. There are also some Marthomites and Hindu

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85. See supra n.51 at 56-57.

86. Ibid. at 63.

87. See supra n.55 at 118.

converts in this group. This church was founded by Justus Joseph (Vidwan Kutty). On his death in 1903, his son Jacobu Kutty became the leader of the church.[88] There were different shades of opinion as to whether the members of the Yuyomayam sect were Christians. But the High Court of Kerala held that the members of Yuyomayam sect are Christians.[89]

XVI. Jehovah's Witnesses

It is a movement started by Russel Charles Taze who travelled on preaching missions throughout the U.S.A and Europe. He denied the existence of hell and the doctrine of Trinity. Presently this sect operates from Brooklyn, Newyork. It's followers came to Mallappally, near Thiruvalla in 1925 and started their work.[90] It has of late been held by the Courts that "Yehovah's witnesses" are not a denomination by itself within the meaning of Article 26 of the Constitution of India. They are only members of a corporate body. They basically subscribe to the fundamental notions of

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88. See supra n.58 at 59.

89. Achamma Thomas v. Aleyamma Thomas, 1968 K.L.T 48 (DB). Also see Travancore Christian Committee Report (1912) at 61. In this Report the Committee found that members of Yuyomayam sect denied that they were Christians. The above decision was rendered without reference to the Christian Committee Report.

90. See supra n.58 at 61-62.

Christianity. Jehovah's Witnesses therefore cannot be said to constitute a denomination different from the believers of Christian religion.[91] In 1986, while considering the question whether Jehovah's Witnesses are Christians, the Court quoted with approval a decision of the Australian High Court[92] and held that Jehovah's Witnesses are Christians.[93]

XVII. The Cheramar Daiva Sabha

This church was established by Solomon Markose, a Christian convert from Pulaya community as he was very much disappointed by the treatment meted out to the converts from Pulaya community by the Syrian Christians in Kerala. Its aim was the social and spiritual upliftment of the Pulayas. He had some followers and his congregations are to be found at six places in central Travancore.[94]

XVIII. Chaldean Syrians (Surayikal)

In 1874, the Chaldean Patriarch sent a bishop named Mellus, a Roman Catholic, to Malabar. He was

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91. Bijoe Emmanuel v. State of Kerala, 1985 K.L.T 1045.

92. Adelaide Company of Jehovah's Witnesses v. The Common Wealth, 67 C.L.R 116.

93. Bijoe Emmanuel v. State of Kerala, (1986)3 S.C.C 615 at 621=1986 K.L.T 1037.

94. K.C. Alexander, "The problems of Neo Christians". Man in India. Vol.47 at 317-330.

later suspended and ex-communicated by the Pope. He revolted and refused to obey the Pope. He retained a following at Trichur and elsewhere. In 1887 the Chaldean Patriarch made formal submission to Rome and recalled bishop Mellus from India. In 1887, before leaving India bishop Mellus appointed Mar Abdeso and a Chorepiscopus in charge of the people who adhered to him. In 1889 bishop Mellus submitted himself to Rome, but Mar Abdeso was not reconciled and kept alive the independent Syro-Chaldean Church of Malabar.[95] This church is also known as the Church of Trichur and its followers are also called Chaldean Syrians.[96]

In addition to the aforementioned churches, there are other smaller churches in Kerala and new ones are taking birth as time passes on, but none of the newer Churches has made any impact either in the social, religious or legal circles.

The other South Indian States have also considerable Christian population. Tamil Nadu, Andhra Pradesh,

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95. See supra n.58 at 64.

96. See Dr. Xavier Koodapuzha, "Bharatha Sabha Charithram". (Indian Church History) Malayalam. (1980) Manganam, at 604.

Maharashtra, Karnataka, Goa, and Pondicherry together account for 41% of the total Christian population in India.[97] They are mostly Latin Catholics and of different denominations of Protestant Christians. The Protestants have united and formed the church of South India (C.S.I) on 27th September, 1947.[98]

THE CHRISTIANS OF NORTH INDIA

The consolidation of British rule in India paved the way for the Christian Missionaries to establish educational institutions in North India. As the great majority of the Britishers were not Catholics but protestants, the missionaries who followed them also happened to be mostly Protestants. The Church of Scotland was followed by the Basel Mission and the American Presbytarian Mission. During the first war of Indian Independence in 1857, missionaries as well as other Europeans were attacked, and Indian Christians also suffered because of their connexion with Europeans.

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97. Kerala accounts for about 31.60% of the Christian population in India and the other South Indian States account for about 41%, thus Christians in South India represent about 73% of the total Christian population of India.

98. See supra n.63.

About twenty mission workers are known to have lost their lives in the War; many more must have lost their lives without any record.[99] As a result of the War, the administration in India was brought directly under the British Government and this made a very favourable enviornment for Christian Missions to develop. The Methodist Episcopal Church of America, the University Missions, the English and Canadian Presbyterians, the Canadian Baptists, the society of St.John the Evangelist, etc. received new impetus to extend their work throughout the country.[100] The Catholics were either under the Portuguese padroado or under the propaganda ie, under the Pope directly. Missionaries under both were at work in various parts of India and there were some conversions among the higher castes, but the great majority came from the Sudras and the depressed classes and from aboriginal tribes. In 1950, there was an agreement between Rome and Portugal, whereby Portugal renounced what remained of her padroado rights in dioceses within the Indian Union, and undertook to consider a revision of the boundaries of the arch-diocese of Goa accordingly.[101] Thus, there are both Protestants and Catholics of the Latin Rite in

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99. See supra n.3 at 181-189.

100. Ibid. at 190.

101. Id. at 223.

the northern and southern side of the Vindhyas. The Protestant churches in North India, later formed themselves into the Church of North India, in 1970. The constituents of the Church of North India are the United Church of Northern India, the (Anglican) Church of India, Pakistan, Burma, and Ceylon, the (British and Australian) Methodist Church and the Council of the Brethren and the Disciples of Christ. The only major faction that opted out of the unity move was the Methodist Church of Southern Asia.[102]

There is a considerable number of Latin Catholics in Bombay, Pune, Raigarh, Ranchi, Sambalpur and other North Indian dioceses. In short, the North Indian Christians can be mainly grouped into two categories viz, Catholics of the Latin Rite and Protestants belonging to the Church of North India.

CHRISTIANS IN NORTH-EAST INDIA

There is considerable presence of Christians in the North-East India[103] consisting of the States of Assam, Manipur, Meghalaya, Nagaland, Tripura, Mizoram and Arunachal Pradesh. As per the Census Report 1971, these States have

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102. Sebastian Champappilly, "The Christian Law". (1988) Cochin, at 11.

103. Iscot Marbaniang, "Assam In a Nutshell". (1970) Shillong, at 96.

about 12.55% of India's Christian population. Ethnically they represent an admixture of relatively pure strains of the Dravidian, Mongoloid and Aryan racial groups. The people of the plains are largely Hindus. Christians form only a small portion of the population in the plains. The hills surrounding the plains are inhabited by a number of tribes of the Indo-Mongoloid group. Their traditional culture is primitive. It is among these hillsmen that the Christian movement has taken roots.

A small Catholic settlement of refugee 'Portuguese' soldiers dating back to the early 18th century could be found at Bondashill in the Cachar District of Assam. They did not evangelise the local population and remained isolated and outside the mainstream of the Christian movement[104] and they still remain so. Mission Stations were opened by the Protestant Missionaries especially after the British established their political power over Assam after the Anglo-Burman War (1824-'26).[105] The efforts of Welsh Presbyterians led to a substantial number of conversions to Christianity and the Presbyterian Church had a large number of Christians converted

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104. See supra n.3 at 267.

105. Dr. O.L. Snaitang, "Christianity and Social Change in North-East India" (1993) Calcutta, at 43. The British claimed sovereignty over most of the North East after the War.

from Khasi tribe. The American Baptists could convert a good number of Garos, the second major tribe of Meghalaya and they are associated with the Garo Baptist Churches. The Garos have the largest number of Christians of any single tribe. The Baptists could effect conversion from the Ao tribe in Nagaland. The Anglicans mainly worked among the Cacharis. The Roman Catholics made their headquarters in Shillong. The Boros were evangelised by the Santal Mission of Bengal. The American Baptists began their work in Manipur and the Welsh Presbytarians and British Baptists in Mizoram. After the First World War, there was rapid growth of the Christian community in Meghalaya, Mizoram, Manipur and Nagaland.

After the failure of the Kuki Rebellion of 1917-'19 in Manipur, the Kuki tribesmen in the interior areas turned to Christianity, but they preserved their life style and culture and kept their identity in the midst of change.[106] After the Second World War, the Roman Catholics took up their work in the Garo Hills, and there was rapid expansion for the Roman Catholic Church.[107] Till independence, Roman Catholics had been permitted to work only in Meghalaya and Assam plains, and to a certain extent in Tripura. But in the post independence period such restrictions were removed and this led to a rapid growth of the Catholic Church

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106. See supra n.3 at 271.

107. See supra n.105 at 81.

in this area. The largest groups in the North Eastern area are the Presbyterian and Roman Catholic Churches, but there are a number of smaller groups that have also played a role in the changes that have taken place.[108] The various Christian denominations in the North-Eastern States are the following:-

1. The Presbyterian Church of North-East India

The Welsh Missionaries (of Wales) entered the Khasi-Jaintia Hills on 22 June, 1841 and their efforts at evangelisation led to a few conversions to Christianity. But the spread of Christianity was mainly due to the work of Khasi-Jaintia Christians themselves rather than the activities or financial investment of missionaries.[109] When it came to be organised into a local Church, it assumed the name of the Presbytarian Church of North East India. By 1989, the Presbytarian Church had more than 200 churches with a total membership of about 60,000 spread throughout the Jaintia area, and 84 churches with a membership of about 16,000 in the Cherrapunji-Shella area. In the entire North-East, at the turn of the century, there were only 282 local churches, while in 1988, the number increased to more than 800.[110] The supreme legislative,

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108. See Ibid. at 6.

109. See Id. at 74.

110. See Id. at 98, 101 and 112.

administrative and executive body of the Presbytarian Church of North East India is its Synod since the re-organisation of the Church in 1953.[111]

2. The Catholic Church

Towards the end of 1891 the first Khasi convert to Catholicism was baptised. The German missionaries were deported when the First World War broke out and they were not permitted to return to work in India. The missionary work was first assigned to the Jesuits and then to the Salesians of Don Bosco (in 1921). By 1941, the membership of the Catholic Church increased to about 50,000. But when the Second World War broke out the work was not seriously affected as there were missionaries of other nationalities (other than German and Italian) to carry on in addition to Indian Salesians from South India. Following World War II and the attainment of independence by India, the growth of the Catholic Church throughout North East India got momentum. Though the Church was formerely under a single diocese centred in Shillong, it has now been re-organised into eight dioceses, with Shillong diocese elevated into the Archdiocese of Shillong-Guwahati in 1969. The eight dioceses are: Shillong (1934),

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111. See Id. at 110-111.

Dibrugarh (1951), Tezpur (1964), Silchar (1969), Tura (1973), Kohima (1980), Imphal (1980) and Diphu (1983).[112] The total number of Catholics in the North East has gone up to 4,41,515 by 1980.[113] The Roman Catholics of North East India follow the Latin Rite and the Code of Canon Law, (1983) is made applicable to them.

3. The Anglican Church

This church did not undertake missionary work in the North-East. It looked after the needs of the British members of that Church. It received into its fold the Khasi-Jaintia who could not be married in the Presbytarian Church because of its adherence to the traditional customs of the community. This Church became a constituent of the Church of North India. The entire North East is covered by one diocese, with the Bishop residing at Shillong.[114]

4. The Seventh Day Adventists

The Mission entered the North East region in the year 1933. It had about 1500 members in the Khasi-Jaintia hills by the end of 1989. Its main centres are Shillong and Thadlaskein.[115]

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112. See Id. at 78-81.

113. See supra n.96 at 541-545.

114. See supra n.105 at 82-83.

115. Ibid. at 83.

5. The Church of God

Khasi Christians who broke away from the Presbyterian Church due to idealogical differences formed a new indigenous Church in 1902, called the Church of God. The growth of the Church was steady. By 1990, they established churches in 420 villages over the Khasi-Jaintia hills with a total membership of about 50,000.[116]

6. Church of God-Ecclesia

This is an offshoot of the Church of God. It was formed by the dissidents in 1940. While there are about 31 congregations in the Cherrapunji-Shella area in this Church with 4000 members by 1990, there has recently been a tendency for these churches to return to the mother church- the Church of God.[117]

7. Christ National Church

This church was established in 1924. It is a splinter group from the Presbyterian Church. They believe that marriage is not a mere civil contract but a divinely ordained religious institution concerning which the courts have no right to interfere. The Church gained some

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116. Id. at 84-90.

117. Id. at 90-91.

ground in the East Khasi Hills and the Jaintia Hills. But its impact is minimal.[118]

8. The Assembly Church of Jesus Christ (Full Gospel)

This is yet another splinter group from the Presbyterian Church. It was formed in 1932. It strengthened its position by its association with similar organisations in the U.S.A. Its membership is reported to have been more than 6,500 in the entire Khasi-Jaintia Hills by 1990. They are also involved in missionary activities in other parts of India.[119]

9. All-One-in-Christ Fellowship

This Church was founded in 1955. Its impact is mainly confined to several villages in West Khasi hills and it has less than 4000 members in the whole area by 1990.[120]

10. The Unitarian Church

It is an indigenous church having roots in the liberal Christian tradition. They wish to purify the traditional Khasi-religion rather than simply condemn it. With the support of foreign agencies, the Unitarian movement grew in the Khasi-Jaintia hills, but its influence on the

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118. Id. at 92-93.
119. Id. at 93-95.
120. Id. at 95.

Khasi-Jaintia society is minimal.[121]

Other missions like the Pentacostal Churches started by outside groups did not make any significant impact in the area.

Both the Catholics and the Protestants allowed the converts to retain the social elements of their customs such as the clan system, laws on inheritance, the land holding system, the status of women, marriage relations and village administration.[122] The ancient stock of people even while embracing an alien faith resisted the attendant impositions and showed the will to retain their customs and traditions tenaciously and the Church has rightly conceded to it.

The origin of the various sects of Christians in different parts of India shows that it is not plausible to categorize the community into two factions, viz, Catholics and Protestants, as is generally done in Europe and elsewhere. This is because the Syrian Christians in Malabar formed a separate church that originated and maintained its identity outside the Roman Empire. Further,

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121. Id. at 95-97.

122. Id. at 127-129.

the converts to Christianity in various parts of India retained their customs and traditions, within the church. The Syrian Christians of Malabar mainly followed the customs and traditions of their Hindu neighbours. Therefore, the development of the church along with the Roman Empire is not a model applicable to India. The advent of the Portuguese, Dutch and the English could bring about certain western influence on the Malabar Church, but its adherence to customs and traditions having deep roots in the soil could not be changed. This is evident from the fall out of the Synod of Diamper (1599) and the Coonen Cross Revolt (1653). The latter dealt a severe blow to the efforts to westernise the Malabar Church.[123]

However the advent of the Portuguese, the Dutch, the British etc. have had some impact and the latter half of the nineteenth century saw the Syrian Christians conceding to the demands of certain laws which had some impact on their marriage and divorce. This situation has paved the way for certain amount of confusion in the area of family law. This is the result of a lack of understanding of the historical background of the community. As history is the root of law and law its fruit, any law or legal system divorced from its history is most likely to fail as effective enforcement of law depends upon its being understood in proper perspectives for social acceptance.

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123. See supra n.39-47 and the accompanying text.

The history of Christianity in India thus presents a peculiar picture. It could not hold on its own in spite of its organized nature. In relation to law also it cannot present a picture of unity. This is reflected in the definition of the term "Christian". The Courts in India have given a broad meaning to this term. According to judicial decisions baptism is not essential to be a Christian.[124] Further, a person would continue to be a Christian even after excommunication, if he professes the Christian faith.[125] In short:-

> "Consensus of judicial opinion is that one who professes the Christian faith, is a Christian and that baptism or ex-communication, is not determinative".[126]

This is also the tenor of the definitions given in the various statutes affecting Christians in India.[127]

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124. Maharam v. Emperor, A.I.R 1918 All. 168. Also see K.J.B. David v. Neelamani Devi, A.I.R 1953, Orissa 10.

125. Pakkiam Solomon v. Chelliah Pillai, A.I.R 1924, Madras 18 (FB).

126. See supra n.50 at 59.

127. See section 3 of the Indian Christian Marriage Act, 1872 and section 3 of the Cochin Christian Civil Marriage Act, 1920 and section 2(d) of the Indian Succession Act, 1925.

Also, the denominational differences have been recognised under the Indian Christian Marriage Act, 1872. This Act has made distinct provisions for solemnisation of marriages for different denominations of Christians in India, and even provides for recognition of Personal law of the parties to the marriage by enacting section 88. Thus, the denominational differences become relevant to-day for identification and application of the personal law of various denominations of Christians in India. Further, the evolution of the law of Christians has a direct bearing on the denominational differences among them. And this becomes evident when one examines the present laws relating to Christians in India.

CHAPTER-II

EVOLUTION OF CHRISTIAN LAW IN INDIA

Prior to the arrival of the Westerners like the Portuguese, Christians in India had by and large been following the customs and traditions of their Hindu brethren. It was the Portuguese and later the English who tried to bring in Western concepts of law to be applied to the Christians in India. Their efforts had not always been completely successful though. The attempts made by the Portuguese to westernise the law of succession of the Syrian Christians of Malabar for example ended in a fiasco.[1] The English has however succeeded in injecting their concepts into the body of Christian law by a slow process.

The English East India Company was conferred with limited legislative powers and broad powers to administer justice in the settlements by the Charter of 1661. Justice was required to be administered according to English law.[2] The prevailing concept of law in British India in those days was that law was a personal and religious institution. There was no concept of a territorial law. There was no uniform or common lex loci to regulate inheritance, succession and other subjects. In civil cases, justice was administered according

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1. See supra chapter I, n.39-47 and the accompanying text.

2. M.P. Jain, "Outlines of Indian Legal History". (Fifth Edition, 1990) (Reprint 1993) at 7-8.

to the personal laws of the Hindus and Muslims.[3] The judicial system in the Presidency Towns was designed primarily to administer justice to the Englishmen. But with the passage of time, the Indian population of these settlements increased and, adjustments had to be made in the judicial system with a view to provide for the administration of justice to these people as well.[4] Still it was not until 1726, that Courts having Royal authority came to be established in India. Under the Charter of 1726, the Mayor's Courts came to be established in the Presidency Towns. The Mayor's Court was to act as a court of record and thus had power to punish persons for its contempt. The Court also had testamentary jurisdiction and could thus grant probates of wills of the deceased persons. In the case of a person who died intestate, it could grant letters of administration.[5] The Charter of 1726 was further modified by the Charter of 1753. Again, Warren Hasting's Plan of 1772 by Article XXIII provided:-

> "in suits regarding inheritance, marriage, caste and other religious usages and institutions, the laws of the Koran, with respect to Mohammedans, and those of the Shaster with respect to the Gentoos (Hindus) shall be invariably adhered to".

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3. Ibid. at 9.
4. Id. at 11.
5. Id. at 37.

The rule in question applied only to Hindus and Mohammedans. But, besides these two large classes, there were many other categories of persons like Parsis and Christians, who had their own peculiar laws and usages in many cases connected with their religious beliefs. It was nowhere mentioned as to what law was to be applied to such persons. The reason for the failure to prescribe any specific law for these classes was perhaps ignorance on the part of the early British administrators of the actualities of the Indian scene.[6] The Act of settlement of 1781 laid down that the Supreme Court established at Calcutta[7] had jurisdiction over the inhabitants of Calcutta in all matters. At the same time Hindus and Muslims were to be governed by their personal laws.[8] No law including the one that established the Supreme Court had however, specifically provided for the laws to be applied to the other communities including the Christians. To all those who were neither Hindus nor Mohammedans, therefore English law came to be applied.[9]

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6. Id. at 420.

7. Under the provisions of the Regulating Act of 1773 a Supreme Court was established at Calcutta under a Royal Charter in 1774. But the jurisdiction of the Court over Indians was vague.

8. Section 17 of the Act of Settlement provided for this. See supra n.2 at 98.

9. J.S. Jebb v. C.Lefevere 1. Morton by Montriou, 161 (1826). Also see supra n.2 at 417.

In 1827, the Elphinstone Code of Bombay Regulations came into force. A provision was made in the Code for applying the 'customs' of the 'country' and the 'law of the defendant' which phrases were not necessarily limited to Hindus and Muslims alone but covered all the various classes of people.[10] The adalats in the three provinces developed a uniform practice of applying their peculiar laws and customs. On the basis of justice, equity and good conscience, the Courts administered to everyone, other than Hindus and Muslims, the substantive law of the country of such person, or of his ancestors. This involved a determination of the intricate question of the pedigree of the individual concerned before the Courts could decide what law was to be applied to the facts of the case.[11]

In these circumstances, the First Law Commission was appointed by the Government of India in 1835 on the basis of the Charter Act of 1833. The Commission considered the question of law applicable to non-Hindus and non-Muslims and presented the Lex Loci Report on 31.10.1840, and submitted the draft of a Lex Loci Act in 1841. It provided for the extention of English law to India, but nothing in the Act was to apply to non-Christians in matters of marriage, divorce or adoption. It also wanted to protect and preserve the indigenous law or usage and customs of the people in the

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10. Supra n.2 at 454.
11. Ibid at 478.

mofussil. Serious objections were raised against the Report and the Draft of the law, and the proposal died by efflux of time.[12] The Charter Act of 1853 again made provisions for the appointment of a law commission, and the Second Law Commission was appointed in 1853. The Report of the Second Law Commission was submitted on 13.12.1855. The Commission arrived at the conclusion that what India wanted was a substantive civil law, in preparing which the law of England should be used as a basis.[13] The events of 1857 gave a rude shock to the authorities and the Government of India was taken over by the Crown.[14] On 2.12.1861, the Third Law Commission was constituted for the purpose of preparing a body of substantive law, in preparing which the law of England should be used as a basis, but which once enacted should itself be the law of India on the subject it embraced.[15]

With this aim in view laws relating to marriage, nullity of marriage, divorce etc came to be enacted and applied in India. The earliest Act that was made applicable to Christian marriages in India was the English Statute 14 and 15 Victoria, Chapter 40. This was supplimented by the Indian Act VIII of 1852

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12. Id. at 487. But a part of the Lex Loci Act was enacted as The Caste Disabilities Removal Act, 1850.

13. Id. at 493.

14. See Vincent A. Smith. "The Oxford History of India". 3rd Edn. (1964) London, at 668. (The first war of Indian Independence was fought in 1857).

15. Supra n.2 at 497.

and then by Act XXV of 1864 and then again by Act V of 1865. But running through all these pieces of legislation was the philosophy that if there was a custom existing in a particular area it should be saved. It was in consonance with that, that the Indian Christian Marriage Act, 1872 came to be enacted and enforced selectively. Obviously this Act was never made applicable to the Christians in Travancore-Cochin, Manipur, Jammu and Kashmir where customary laws have been in existence. Similar is the case of Christians in other parts of India who are governed by customary laws.

However, the Indian Divorce Act 1869 came to be applied to the Christians throughout India except the former Portuguese and French settlements and certain tribal areas. It was perhaps an accident of history that its provisions came to be applied by all the Courts throughout India without any resistance probably because of the tendency of the bar and the bench to adhere to the idea of applying the English legal concepts without much ado. Or else, because of the absence of provisions for effecting divorce in the customary law it must have got itself stealthily into the arena through the door of justice equity and good conscience'. In this context it is worthwhile to inquire into the laws relating to marriage and divorce among the various denominations of Christians in different regions of India as,such an inquiry might be helpful to examine the evolution of Christian law in India.

THE LAW OF MARRIAGE AND DIVORCE AMONG CHRISTIANS IN NORTH-EAST INDIA

The Indian Christian Marriage Act, 1872 extends to North-East India, except the State of Manipur. Among the Khasis, Christians and non-Christians alike still observe the Khasi customary law of consanguinity. A person cannot marry the children of his father's brother. So also, it is sin to marry father's sisters or their grand children. He cannot marry the daughter of his paternal aunt either.[16] These prohibitions are a fairly long list. And those prohibitions are protected by Section 88 of the Indian Christian Marriage Act, 1872, and hence they are legally enforceable.

Among the Khasis, divorce is quite common because if a man and woman cannot live happily together, they agree to divorce. The common causes for divorce may be barrenness, adultery, ill-treatment, non-maintenance and such others.[17] But both parties must agree to the proposition of divorce. Among the War Tribe, the one who gives a divorce without the consent of the other party has to pay compensation.

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16. S.K. Chattopadhyay has edited 27 Articles of various authors into a book entitled the "Tribal Institutions of Meghalaya". (1985) Gaughati. See Dr.(Mrs) Helen Giri's Article "Social Institutions among the Khasis with Special Reference to Kinship, Marriage, Family Life and Divorce" at 161.

17. Ibid.at 170.

Thus, it can be seen that divorce is permitted on mutual consent when the husband and wife disagree on vital matters of life. Village elders preside over the proceedings which entail a thorough inquiry.[18]

Among the Jaintias marriage is a socially approved and arranged union. Unlike other tribes in North-East India, premarital chastity was not insisted upon among the Jaintias in the past.[19] The Jaintias prohibit not only a marriage within the same clan but also a marriage with a paternal uncle or aunt. The marriage is strictly monogamous among the Jaintias and there is no system of either polygamy or polyandry.[20]

For the Garos, the Garo Hills District Council has enacted, "The Garo Hills (Christian Marriage) Act, 1954" and it received the assent of the Governor of Assam on 6th April, 1955.[21] Among the Garos, Christianity has considerably changed the customary law of marriage and divorce.[22]

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18. Kamaleswar Sinha, "Meghalaya Triumph of the Tribal Genius". (1970) Delhi, at 142.
19. P. Passah, "Marriage Among the Jaintia Tribe of Meghalaya" in supra n.16 at 211.
20. Ibid. at 112.
21. Julius Marak, "Garo Customary Laws and Practices". (1986) Shillong, at 197.
22. Ibid. at 196.

Among the Garos, the law of monogamy is strictly adhered to by the Christians. No Christian is allowed to have two wives at the same time and can only remarry after the death of the first wife.[23] The marriage custom and law of the Garos are strictly exogamous; the boy and the girl must belong to different sects.[24] The marriage laws of the Garos are based on the matrilineal system, according to which the descent is always traced from the mother. Hence a Garo woman can marry from the family of her father's mother.

A sociological study lists the following features of the customary law of divorce prevailing among the Garos.[25]

The Garo man and woman observe strict conjugal fidelity. But the customary law permits a man or woman to seek relief from the conjugal partnership if the conduct or character of the partner compels one of them to do so. Divorce on sufficient grounds is therefore permissible.

Although marriage is a religious ceremony, it is not considered a sacrament. There are neither sacraments nor couvertures in pagan marriages (Songsarek). But in all cases, a divorce must be initiated and approved by the wife's chra.[26]

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23. Id. at 121.
24. Id. at 96.
25. See Id. at 125-127.
26. "Chra" is a body of men consiting of the maternal uncles, brothers and other male relations of the girl.

Divorce can be obtained on the following grounds:-

(i) If there is imminent danger to the life and security of any one of the spouses.

(ii) When a wife or a husband commits adultery with another man or woman (So'mal donna).

(iii) When either of the spouses is insane.

(iv) When a wife and a husband live separately and maintain no connection for two years and upwards.

(v) When a husband or the wife is cruel and is a cause of fear or harm and injury in the mind of the other partner (Bamgija wachagrika).

(vi) When the husband or the wife is hermaphrodite or if either of them makes himself or herself sterile.

(vii) When the spouse refuses to maintain the family.

(viii) When a wife or husband denies conjugal union.

(ix) When a wife conceives a child by someone other than her own husband, and

(x) Impotency.

Before taking any step for divorce, it is necessary for the husband or the wife to inform their respective chra and mahari[27] first. If the husband intends to divorce his wife,

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27. "Mahari" consists of the relatives of a person with their husbands and wives.

he should first tell her chra and mahari the reason so that her chra and mahari will have the time and the opportunity to correct her. The wife also should do the same to the chra and mahari of her husband. The character and conduct of a husband or a wife can be rectified only by their respective chra and mahari. Inspite of repeated warnings given by their respective chra and mahari, if the couple do not rectify themselves, then divorce may be effected. If the above procedure is not complied with the divorce effected will not be recognised by the society and no dai can be claimed by any one.

If any man abandons his wife and children without reasonable cause and without her consent or against her wish, or wilfully neglects her and her children for more than a year, and the family suffers for want of maintenance, his wife can sue for a decree of divorce giving sufficient grounds and witnesses. To such a wife and her children the erstwhile husband shall have to pay a dai of Rs.60/- and in addition a sum of Rs.15/- has to be paid to the village. If any husband or wife, after divorce returns to the family, he or she shall have to pay a dai of Rs.15/- to the wife or the husband as the case may be, for breaking the family tie. After such a reunion between the husband and the wife, if any misunderstanding crops up again, their chra and the mahari will no longer take the responsibility of settling the case. But if the chra and mahari

of both the husband and the wife find that their lives will be in danger by their continuing to live together and separation is the only alternative, they may mutually agree to interfere and effect a separation. Under such circumstances, if divorce takes place, no dai is to be paid by any one.

At present, the amounts of Rs.60/- and Rs.15/- have been raised to Rs.100/- respectively in the Goalpara District of Assam. The amount for the payment of dai for divorce remains unchanged in the districts of Garo Hills.

It is interesting to note the development of a practice evolved by the tribal genius in the place of the onerous provisions of the Indian Divorce Act, 1869. It shows the vitality, nay, the survival instinct of the customary practices to beat the modern legal norms. Among the (Garo) Christians it is almost impossible to effect a divorce under the Indian Divorce Act. At present the Garo husband and wife therefore get separated without any legal formalities, after paying the fine traditionally fixed. A man who gets separated from his wife in this manner can start living with another woman of his choice as husband and wife without much social opprobrium, because according to traditional norms (though it may fall a little bit short of the ideal) such unions are recognised provided the former marriage is socially dissolved by payment of the fine. There is a clear

cut term, "seke donga" (living as husband and wife without the proper marriage ceremony) for such unions.[28]

Law of Marriage and Divorce in Goa, Daman and Diu

By virtue of the Goa, Daman and Diu (Administration) Act, 1962 and the Goa, Daman and Diu (Administration) Removal of Difficulties Order, 1962,[29] the Portuguese Civil Code of 1867 and subsequent decrees apply in Goa, Daman and Diu in matters relating to marriage and divorce. The Civil Code of 1867 was substantially amended in 1910.[30] From 26.5.1911 all Portuguese marriages were made civil marriages, and only such a civil marriage was valid.[31] And Civil Courts alone were given jurisdiction for declaration of nullity of marriages.[32] But prior to 26.5.1911, the Ecclesiastical Courts exercised jurisdiction in these matters. But by virtue of Article 22 of the Treaty[33]

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28. D.N. Majumdar, "Garo Family, Changes in its Structure and Function" in supra n.16 at 297.

29. See infra n.121-123 and the accompanying text for details.

30. By Decree No.1 dated 25.12.1910, published in Government Gazette No.70 dated 27.12.1910, Family Laws No.1 was brought into force from 26.5.1911.

31. See Article 3 of Family Laws No.1.

32. See Article 65 of Family Laws No.1.

33. By this treaty the jurisdiction of Ecclesiastical Courts came to be restored both in Portugal and Goa.

entered into between Portugal and the Holy See, the Portuguese Government bound itself to acknowledge civil effects to marriages solomnised in conformity with the Canonical laws.[34] This treaty came to be enforced in Goa, Damn and Diu with effect from 4.9.1946.[35] The decree was a law in force at the time of liberation of Goa on 19.12.1961 and it continued to be in force by virtue of Section 5(1) of the Goa, Daman and Diu (Administration) Act, 1962.[36] Further, the law in force in Goa, Daman and Diu was brought in conformity with the changed administrative set up by an Order issued under clause 2 of the Goa, Daman and Diu (Administration) Removal of Difficulties Order, 1962.[37] Thus, the provisions of Decree No.35461 of 1946 govern canonical marriages of Catholics.

Under the law in force in Goa, Daman and Diu, the Civil Court has no power to decree a divorce where the marriage is a canonical marriage. Nor is there a right for the parties to the marriage to seek a divorce. This is specifically provided under Article 4, which enacts:-

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34. This was implemented in Portugal with effect from 25.7.1940, but it was not implemented in the Colonies.

35. See Decree No.35461 dated 22.1.1946, Published in the local official Gazette No.23, Series I dated 6.6.1946.

36. See infra n.121.

37. See infra n.122-123 and the accompanying text.

> "In consonance with the essential characteristics of the Catholic marriage it is deemed, after the coming into force of this Decree, by the very fact of solemnization of the canonical marriage, that the spouses shall renounce the civil right of seeking divorce, for which reason the Civil Courts shall not have the power to decree the same in relation to such a marriage".[38]

Further the cognizance of causes regarding the nullity of canonical marriages is reserved to the Ecclesiastical Courts and Offices. Article 19 enacts:-

> "The cognizance of causes regarding the nullity of canonical marriage and regarding the exemption of non-consummated religious marriage is reserved by the competent Ecclesiastical Courts and Offices".

The grounds for declaration of nullity of canonical marriages are not specified in the Civil Law. Hence they are to be found in the canon law of the church of Rome. It is of interest to note that the decisions and judgments of the Ecclesiastical Courts or Offices, when they become final are to be enforced by the High Court without revision and confirmation.[39] Further the Ecclesiastical

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38. Article 4 issued under Decree No.35461 of 1946.

39. It is so provided in Article 19, Paragraph 1 of Decree No.35461 of 1946. Also see The Law Commission of India's 90th Report (1983) at 7.

Tribunal can request the Civil Court for service of summons or notice to the parties, experts, witnesses, as well as doing of any act of enquiry which are deemed convenient.[40] Above all, the Civil law recognises, as regards the canonical marriages of natives, the Papal privileges as well.[41] But such a privilege is not allowed where the marriage is solemnised with the intervention of an official of Civil Registration or if the marriage is registered.[42]

As regards the law of divorce, the law in force in Goa, Daman and Diu is the one issued in 1910.[43] But this is not applicable to canonical marriages of Catholics.[44]

The grounds of divorce are given in Article 4 of the law of divorce.[45] It enacts:-

> "The contested divorce may be obtained only on the following grounds and on no other:
>
> (1) Adultery committed by the wife;

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40. See Article 19, Paragraph 2 and Article 38 Paragraph 1 of Decree No.35461 of 1946.
41. Under canons 1142 and 1143 of the Code of Canon Law, 1983, the Pope has the power of dissolving a marriage in favour of the faith of the party who receives baptism.
42. Article 43 of Decree No.35461 of 1946 (supra n.35).
43. It was published in the Government Gazette No.26 dated 4.11.1910 and was to take effect from 26.5.1911.
44. See supra n.38 and the accompanying text.
45. See supra n.43.

(2) Adultery committed by the husband;

(3) Final conviction of one of the spouse to undergo any of the major penalties provided in Articles 55 and 57 of the Penal Code;

(4) Ill-treatment or serious injuries;

(5) Complete abandonment of the conjugal domicile for a period of not less than three years;

(6) Absence, where nothing has been heard of the absentee, for a period of not less than four years;

(7) Incurable unsoundness of mind when at least three years have elapsed after its pronouncement by judgment, become final for want of appeal, as per Article 419 onwards of the Code of Civil Procedure;

(8) De facto separation, freely consented, for ten consecutive years, whatever may have been the cause of that separation;

(9) Chronic vice of gambling;

(10) Contagious disease found incurable or an incurable disease involving sexual aberration.

Paragraph 1. Divorce, on the ground provided under clause 3 may be sought only if the petitioner has not been convicted as co-accused or abetter or accomplice in the offence which resulted in the conviction of the other spouse.

Paragraph 2. Where divorce is sought on the grounds provided under clauses 3 and 7 hereof, the defendant shall be represented in the respective suit by the Public Prosecutor and the latter shall also represent in the cases coming under clauses 5 and 6, if the defendant fails to appear or to be represented on the summons being served on him as per the law.

Paragraph 3. In a case coming under clause 8, the evidence shall be restricted to the fact of separation, its continuity and duration.

Paragraph 4. In a case coming under clause 10, no suit shall be instituted without the nature and the characteristics of the incurable disease being verified by way of previous examination carried out as per Articles 247 and 260 of the Code of Civil Procedure".[46]

And divorce by mutual consent is also recognised under the law.[47] It can be seen that no discrimination is made in this law on the basis of sex or on any other ground.

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46. Article 4 is quoted as translated by M.S. Usgaocar in his "Family Laws of Goa, Daman and Diu". Volume 1. 2nd Edition. (1992) Panaji, at 73-74.
47. See Ibid. Articles 35 and 36 at 83-84.

Law of Marriage and Divorce in Pondicherry

Even after the merger of Pondicherry into the Indian Union, the French Civil Code continues to be in force as an "existing law" at the time of merger.[48] Though various Central enactments were extended to Pondicherry by the Pondicherry (Extention of Laws) Act, 1968, the Indian Divorce Act, 1869 was not extended to that area. Even though The Indian Christian Marriage Act, 1872, the Converts Marriage Dissolution Act, 1866 and the Child Marriage Restraint Act, 1929 were extended to Pondicherry, they were specifically excluded from their application to the Renoncents of Pondicherry by the provisions of the Pondicherry (Extention of Laws) Act, 1968. Therefore there are three catogories of Christians in Pondicherry from the legal point of view.[49] And the French Civil Code will continue to apply to the Renoncents of Pondicherry.[50]

Some of the salient features of the French Civil Code are worthy of examination. It is a uniform law applied to all in Pondicherry who opted for it and hence it is relevant in the context of the constitutional directive for the enactment of a uniform civil code.

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48. See infra n.154-157 and the accompanying text.
49. See infra n.158-160 and the accompanying text.
50. E.D. Devadason, "The Christian Law in India". (1974) Madras at 280.

Under the French Civil Code, 'consent' is the essential requirement for a valid marriage, and there is no marriage where there is no consent.[51] This is in conformity with the prescriptions under the canon law. The minimum age of marriage for a man is 18 years and for a woman is 15 years.[52] A son who has not attained the age of 25 years and a daughter who has not attained the age of 21 years, cannot marry without the consent of their father and mother: if they disagree, the consent of the father is sufficient though.[53] If either parent is dead, or in a condition that he/she is unable to consent- ie, under a sentence of interdiction or a lunatic- the consent of the other is sufficient.[54] But if the father and mother are dead, or if they are in such a condition that they are unable to give consent, the grandparents replace the parents. And if the grandfather and the grandmother of the same line disagree, the grandfather's consent will be sufficient. And if there is disagreement between the two lines, such disagreement has the effect of a consent.[55] Marriage is prohibited between all legitimate ascendants and descendants in the direct line and between persons connected by marriage in the line aforesaid.[56] So also marriage is prohibited in the collateral line between the legitimate or illegitimate brothers and sisters and between

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51. See Article 146 of the French Civil Code.
52. See Article 144.
53. See Article 148.
54. See Article 149.
55. See Article 150.
56. See Article 161.

persons who are connected by marriage and related in the same degree.[57] A marriage is also prohibited between uncle and niece and aunt and nephew.[58] But dispensation from the prohibited relations for a marriage can be given by the President of the Republic, on good cause being shown, from the prohibitions contained in Article 162 as to marriage of brothers and sisters-in-law, and those contained in Article 163 as to marriage between uncle and niece and aunt and nephew.[59] And all marriages in Pondicherry are civil marriages in the sense that they are to be registered.[60] Nobody can claim the rights of a husband or of a wife through a court of law without producing a certificate of marriage from the register of civil status.[61]

Adultery committed by the wife is a ground for the husband to demand a divorce from his wife.[62] The same ground is available to the wife as against her husband.[63] The other grounds for divorce are cruelty, harshness, or serious legal injury or insult of one towards the other.[64] Imprisonment which affects the person and is branded with infamy is a good

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57. See Article 162.
58. See Article 163.
59. See Article 164.
60. Subash C. Jain, "French Legal System in Pondicherry: An Introduction". 12 J.I.L.I. 573 at 595. Also see Article 165 of the French Civil Code.
61. See Article 194.
62. See Article 229.
63. See Article 230.
64. See Article 231.

cause for divorce.[65] Divorce by mutual consent owing to incompatibility of temper was a ground under the French Civil Code.[66]

For a valid marriage, the free consent of the parties is required.[67] The validity of a marriage which has been contracted without the free consent of both the parties, or without the free consent of one of them, can be impugned by the parties to the marriage, or by the party whose consent was not freely given. Where there was a mistake as to the personality of the person with whom the marriage was contracted, the validity of the marriage can be challenged by the person who was led into the mistake.[68] A marriage contracted during minority, or a bigamous marriage, or a marriage between persons within the prohibited degrees of consanguinity may be impugned by the parties themselves or by the others interested or by the Public Prosecutor.[69] Further, a marriage which has not been contracted publicly, and which has not been celebrated before a competent public officer can be impugned by the aforesaid persons.[70] If a marriage is contracted in good faith, the declaration of nullity of marriage would not

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65. See Article 232.
66. It was a ground under Article 233. But it was repealed by law on 27th July, 1884.
67. See supra n.51 and the accompanying text.
68. See Article 180.
69. See Article 184 read with Articles 144,147,161,162,163 and 188.
70. See Articles 191 and 193.

affect the civil consequences of a marriage so far as the parties thereto and their children are concerned.[71] But, if only one of the parties to the marriage alone has acted in good faith, the legal consequences of the marriage arise only in favour of such person and the children born of the marriage. As regards the grounds of divorce and nullity of marriages, the French Civil Code as applicable in Pondicherry does not appear to be discriminatory against women.

Christian Law of Marriage and Divorce in other parts of India

The Indian Christian Marriage Act, 1872 applies to the whole of India except the territories which, immediately before the 1st day of November, 1956, were comprised in the State of Travancore-Cochin, Manipur and Jammu and Kashmir.[72] But this must also be read subject to the other exceptions and exemptions mentioned here-in-before.[73]

The Indian Divorce Act, 1869 is applicable to the whole of India except the State of Jammu and Kashmir.[74] But, as mentioned earlier, inspite of the application of the Act,

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71. See Article 201.

72. See Section 1 of the Indian Christian Marriage Act, 1872 as amended upto date.

73. As regards the implications of the application of the Indian Divorce Act, 1869 in the Travancore-Cochin areas of the State of Kerala, see detailed discussions in chapters 3 and 4.

74. See Section 2 of the Indian Divorce Act, 1869.

other local laws hold sway in their respective areas. At any rate, subject to such exceptions, as discussed earlier, generally speaking, the Indian Divorce Act, 1869 is the law of divorce for Christians in India. But the survival of different systems of laws on marriage, divorce and succession in Goa, Pondicherry, North-East Indian States, Travancore and Cochin has brought about a peculiar situation in the field of law. Further, inspite of the application of the aforesaid enactments, Christians, like others, can opt to be subject to the Special Marriage Act, 1954. Once an option is exercised by the husband and the wife, the law of marriage, divorce and succession are regulated by the provisions of that Act and related enactments.

The Law of Succession

It has to be pointed out that in the first instance, the third law commission appointed on 2.12.1861 directed its attention to the preparation of the draft of the law of succession and inheritance generally applicable to all classes of persons other than the Hindus and the Muslims. The first report containing a draft of such laws was submitted on June 23, 1863. The Bill was enacted into law in India by the Governor-General in Council, with little variations under the title of the Indian Succession Act, 1865.[75]

It is pertinent to point out at this juncture that just before the submission of the report with the draft of

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75. Supra n.2 at 498.

the Succession Bill (on 23.6.1863), the Privy Council delivered its celebrated judgment on the law applicable to Christians in India on 13.6.1863.[76] In that case it was held that a convert to Christianity could still choose to be governed by the law of the community to which he had earlier belonged. Subsequent to the passing of the Act the Privy Council got another opportunity to re-consider the question of law of succession applicable to communities other than Hindus and Muslims in India. It was held that it was not for a court to enter upon an examination of the conduct of the intestate so as to prevent the Indian Law of intestate succession getting its full and proper application.[77] It held that the Act was applicable to Christians. In 1925, the Act of 1865 was revised and the Indian Succession Act, 1925 was enacted. Some amendments had been made in the Act since 1925, but the process has been rather slow and hence not perceptible.[78] Neither the Indian Succession Act of 1865, nor the Act of 1925 was to apply to Christians in the whole of India. Section 332 of the Act of 1865 contained a provision which empowered the State Governments to exempt any

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76. Charlottee Abraham v. Francis Abraham 9. M.I.A. 195. Obviously the Law Commission did not have the opportunity to deliberate up on this judgment.

77. Kamawati v. Digbijai Singh, I.C. Vol 64 at 559=A.I.R 1922 P.C.14.

78. The Law Commission of India in its 110th Report (1985) on the Indian Succession Act, has suggested a thorough reform of the Act.

race, sect or tribe or any part of such race, sect or tribe from the operation of the Act, by way of a notification. A similar provision was enacted under Section 3 of the Indian Succession Act, 1925. In exercise of this power, the Native Christians in the province of Coorg (Mysore) were exempted from the application of the provisions of the Indian Succession Act.[79] The Khasis and Jyentengs in the Khasi and Jaintia hills in North East India were also exempted.[80] The Mundas and Oraons in the province of Bihar and Orissa are also exempted from the application of the provisions of the Indian Succession Act.[81] By virtue of the provisions of the Goa, Daman and Diu (Administration) Act, 1962, it is the Portuguese Civil Code and not the Indian Succession Act that applies in Goa. In Pondicherry, the French Civil Code still survives as per the provisions of the Treaty of Cession.[82] And the Garos of Meghalaya are also not subject to the provisions of the Indian Succession Act and they follow their customary matrilineal system of inheritance.[83] This protection is granted by the Constitution of India and also by Section 29(2) of the Indian Succession Act, 1925.[84]

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79. See Gazette of India dated 25.7.1868 page 1094, Foreign Department, Judicial, 23.7.1868 No.204. Also see Alicia alias Alice v. Percival Felix Pinto. 1967(2) Mys.L.J 210 (D.B).
80. Gazette of India 1877 at 512.
81. Turi Oraon v. Leda Oraon. 36. I.C.206.
82. David Annoussamy, "Pondicherry: Babel of Personal Laws". (1972) J.I.L.I, 420 at 422.
83. See supra n.21 at 135.
84. See Constitution of India. Articles 13(3), 366(10), 244 and the 6th Schedule. Also see 1954 C.W.N. 14.

The position of law that emerges from the above analysis is that unless a customary law is proved in a suit as a law in force within the meaning of Article 13 of the Constitution of India, the law of succession for Christians in India, is the Indian Succession Act, 1925. This is so, because, Section 29(2) of the Indian Succession Act, 1925, saves "any other law for the time being in force". Therefore, it is possible for a party to prove a custom[85] contrary to the provisions of the Indian Succession Act, 1925 to establish that it does not apply to any particular group. Except in such situations, the law of succession for Christians in India, other than those specified above, is the Indian Succession Act, 1925.

Till the Supreme Court handed down its decision in Mary Roy's Case[86] the Kerala Christians were governed by their customary law as well as separate statutory laws, which were considered to be saved by S.29(2) of the Indian Succession Act, 1925.

Under the customary law of Christians in Kerala, women were given Streedhanom at the time of their marriage and they were not to have any right in the property of the father or mother if he/she died intestate. In other words, what was given to them

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85. E.D. Devadason, "A Hand Book on Christian Law". (1988) Madras, at 111.

86. Mary Roy v. State of Kerala (1986)2 S.C.C 209=A.I.R 1986 S.C.1011=1986 K.L.T 508. See discussions in chapter V infra.

as streedhanam was considered their share in the property of the parents. Though the amount of streedhanam was limited to Rs.5000/- in the event of intestacy, generally the amount of streedhanam actually given at the time of marriage far exceeded this limit and in many a case, it was perhaps more than the share of a son.

Having regard to the historical development of the customary law, the reasoning of the Supreme Court in Mary Roy's Case[86] seems unsatisfactory. So it deserves separate treatment. Therefore it is proposed to examine first, the development of the law of Christians in the other regions.

Law of Succession relating to Christians in North-East India

The Indian Succession Act is not applicable to the Christians who are the converts from the various tribes such as the Khasis of the Khasi and Jaintia Hills; the Garos, the Nagas, the Mizos, the Meiteis and a large number of other tribes.[87] From the beginning of British administration in North East India, they adopted a policy of non-interference in the internal affairs of the frontier tribes so long as peace was not disturbed, or its authority seriously threatened.[88] The hill areas of North East India were excluded from the application of English law, and a different administrative set up was adopted to maintain

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87. See supra n.18 at 248, 226, 170, 169, 167 and 100.

88. J.N. Chowdhury, "Arunachal Through the Ages" (1982) Shillong, at 179.

this distinction. Soon after the implementation of the Government of India Act, 1919, the Khasi leaders felt the need for a Durbar. The Khasi National Durbar came to be established and it was this body which codified the traditional law on property of the Khasis.[89] The position of the 25 Khasi States at the time of Independence was similar to that of all Princely States.[90] The Federation of Khasi States joined the Indian Union by signing the Standstill Agreement and the Instrument of accession.[91] And when the Constitution of India was inagurated in 1950, special provisions were made in Article 244 and 275 and in the 5th and 6th Schedules to the Constitution for tribal autonomy in these states. The matters of succession, marriage and divorce were made over to the legislative jurisdiction of the District Councils and Regional Councils.

The tribal Christians in these states still follow their customary laws. Their conversion to Christianity did not affect their traditional ways.[92] The Khasis still follow their customary law of inheritance and it has not yet been codified.[93] Yet, the law can be identified from various literary sources.

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89. Dr.O.L. Snaitang, "Christianity and Social Change in North East India" (1993) Calcutta, at 53-54.
90. Ibid. at 55.
91. Id. at 56.
92. Id. at 127.
93. Kynpham Singh, "The Khasi Law on Property" in supra n.16 at 129.

The main divisions of the Khasi Tribes are 1. The Khasis, 2. The Synteng or Pnar, 3. The War, 4. The Bhoi and 5. The Lynngam.

The Khasi Christians follow the matrilineal system of inheritance.[94] They have taken special care to preserve their customs.[95] And as such the right of inheritance to the property of the parents either movable or immovable goes to women. The first ever call for codification of the Khasi law on property was made in an article published in the Newspaper "U Nongphira" No.142 of 1914.[96] In the Khasi tribe, the woman is the absolute owner of the wealth or property and she alone has the right to dispose, transfer or alienate the property. On the death of the mother, if there be no bar, the youngest daughter succeeded to the position of her mother. She becomes the caretaker and custodian of the ancestral property. When the elder daughter gets married, as soon as possible, a new home

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94. R. Tokin Roy Rimbai, "Evolution of Modern Khasi Society". Appendix II in J.N. Chowdhury's, "The Khasi Canvas" (1978) Shillong, at 426.

95 Mary Pristilla Rina Lyngdoh, "The Festivals in the History and Culture of the Khasi". (1991) New Delhi, at 98.

96 Supra n.93 at 129.

is built for her and her husband. There is clear segregation of the wealth and property of the father and the mother. There cannot be any indiscriminate mixing up and application of the incomes from the two sources. The property in the hands of Khasis can be classified as follows:-

1. Ancestral property (Movables).
2. Self acquired property.
3. Wealth generated by male members before marriage.
4. Ornaments and heirlooms.
5. Ancestral landed property.
6. Acquired landed property.
7. Original house of the Kur (Clan).
8. Original house of a branch of a Kur (Clan).
9. Original house of a branch of the Kur (Clan) originating from a sister elder to Ka Khadduh (the youngest sister).
10. Ornaments and heirlooms jointly owned and inseparable.
11. The personal effects of the parents which must remain as part of Ka Nongtymmen (ancestral property).
12. Khun Khadduh (Property of the youngest of the sister).

The Khasi law of property can be classified into three catagories, viz, (1) The General law, (2) Supplementary laws and (3) Special Usages and Practices.[97]

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97. See supra n.93 at 121-136.

1. The General Law

If the parents have only one daughter, she personally inherits all ornaments, except those which form part of the ancestral property, and the self acquired property. But if there are more than one daughter then apart from the landed property and movable property and self-acquired property merged with ancestral property, all the daughters may take equal shares. Once movable property is apportioned it cannot be claimed back.

All incomes from land shall be shared by all the sisters, but a part shall be set aside for the custodian for repairs and maintenance.

If no particular land (ri-tymmen) has especially been set aside for the repair and maintenance then all members of the Kur or the Kpoh or the Skum must make contributions for this purpose.

A male, married or unmarried, so long as he is still staying with his Kur,[98] enjoys jointly the income from Ka ri-tymmen but cannot take any part of it to his family.

The management of property will be done by the male members, with the eldest as the head, or if he is incapable,

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98. "Kur" means Clan, ie maternal relations descending from a common ancestress.

by any other male member chosen by the family. If the income from such property be substantial then remuneration shall be given to such male member.

No person who marries from the same clan shall be allowed to remain with the Kur or be keeper of the home. Such a person must move out and shall have no more claim to the property. In that event he can take away only his or her personal share. If the parents are still living then the family can deprive such person of all property.

Any daughter or female member who has committed adultery or leads an immoral life shall not be allowed to remain in the Kur and shall be deprived of her share in the ancestral or family property. She may be allowed to take away only such property as has been given as her personal property after the death of her parents.

The converts to other religions shall lose all right to the ancestral or family property. They shall also lose all such property as was already apportioned to them. If they use and occupy ancestral property then they are liable to pay rent.

Persons prohibited from or deprived of deriving a share in the ancestral property as provided above, shall be completely cut off in inheritance or in any participation in regard to property from their Kur.

In the case of a male who cultivates or makes use of Kur-land for the benefit of his family he is liable to pay rent for the use of the Kur-land.

II. The Supplementary laws

The above is a liberal summarisation of the law on property. But over and above the general regulations other subsidiary regulations exist. They are:-

1. Children cannot demand as of right property belonging to the father before his marriage.

2. A man can take to his wife's home only his personal belongings which must be returned to his Kur on his death.

3. When the elder sisters marry they must move out of their mother's house.

4. The movable properties are divided first into parts equal to the number of sisters and one part goes to the youngest sister. The remainder is divided again into the same number of parts and one part is given to the youngest sister. The sisters then take each of the remaining shares. The mother's house remains with the youngest sister who will also get her mother's ornaments, as her personal property.

5. A man while remaining at his wife's house cannot possess and enjoy landed property of his Kur without their consent.

6. A man's children do not have right over landed property belonging to the man's Kur just because the family enjoyed the income therefrom during the father's life time.

7. The self-acquired property of a man, from the time he stayed with his wife and children, and which he wholly applies towards the welfare of his children belongs to his children. His Kur cannot have any right to such property.

8. A man cannot take away with him self-acquired property on the death of his wife. It remains with the children. But he has the right to enjoy such property so long as he stays with his children.

9. If the wife dies without issues, the house and property, movable and immovable, brought for the wife will be shared equally between the husband and the Kur. If the husband dies, the property will be shared equally between the wife and the man's Kur, but the personal property of the wife should remain with the wife.

10. When a man after marriage devotes his time and energy to the management of property belonging to his Kur and if he applies the income or part of the income derived therefrom to the use of his family and to build up a property for their use, then such property, on his death, will revert to his Kur, provided that, an understanding could be reached during his life time, that such property would remain with his family.

11. If a man acquires property for his Kur out of his own earnings, after marriage and after staying with his children, the family can have no claim over such property after his death.

12. If the wife commits adultery, then separation is automatic and complete. The husband has the right to take away the whole of the property generated by his labour. He may leave a portion for his children, though they do not have any claim.

13. If a man leaves his wife he ceases to have any right over property acquired by him for his family. If a separation is by mutual agreement then the property will be shared according to mutual arrangement between the parties.

14. A mistress and her children have no claim whatsoever to the property belonging to or acquired by the father of her children.

III. Special Usage and Practices

1. There is a practice in Khasi families to make apportionment of the family property during the lifetime of the mother. Such apportionments take effect after the death of the mother in the following manner.

a) As regards self-acquired property the apportionment is done by the father, mother and children in consultation with the mother's brothers.

b) In the matter of ancestral property the apportionment is done in the presence of all those who have a right to the property.

c) After apportionment, in the case of movable properties, they are identified and symbolically handed over to the person to whom it should belong after the death of the mother.

d) If the property is immovable, then the person to whom it should belong is taken to the site to make her familiar with the position and boundaries of the site.

e) Apportionments are made only in favour of female members

f) The apportionment is not binding during the lifetime of the mother. The apportionment can be rescinded if the beneficiar does any act which is disapproved by her family or her Kur.

g) The apportionments so made may be verbal or documental. Verbal apportionments are generally honoured after the death of the mother.

h) Mutation and Registration, wherever required of such apportionment, are usually done on application by the beneficiary if supported by all interested members, including the male members.

2. Gifts:

a) By the very nature of the System, a Khasi man because of his unique position in relation to his Kur and Kha,[99] cannot inherit. Assuming that he does inherit, if unmarried his inherited property by custom merges with his Kur's property; if married his property either should revert to his Kur or pass on to his family.

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99. "Kha" means paternal relations.

But it is against custom to transfer property to his family. However, a man and his family can transfer property in favour of his children, in either case without consideration. Such transfers are in the nature of gifts and are effected by consensus on both sides during the lifetime of the donors.

b) There is another kind of gift. This is made to the female members during the lifetime of the mother, usually as a marriage gift to the daughter. This property of the married daughter is not treated as ancestral property, but only as property acquired before the marriage.

3. Rap-iing. This is a mode of continuing the possession of property within the Kur when there are no more female issues of direct descent.

4. The law on property is so much tied up with the Kur or family that a will, which gives a person an absolute right to alienate his or her property, whether ancestral or acquired, can find no place in Khasi Law.[100]

In fact, among the Khasis, property is owned by the woman, but the controlling power and authority over it are in the hands of the man.[101] In the event of divorce there is no hard and

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100. Supra n.93 at 130-134.

101. N.K. Das, "Descent, Filiation and Affinity among the Matrilinea Tribes of Khasi and Garo Hills of North East India" in supra n.16 at 364.

fast rule about the division of the household at the time of divorce.[102] The self acquired property of a man before his marriage belongs to his mother.[103]

The advent of Christianity in this region has not changed the social component of their culture. Thus, they maintain the Clan system, inheritance laws, the land holding system, the status of women, marriage relations, village administration etc. The converts are allowed to continue these customs within the church.[104] And the Catholic Church has gradually approved most of the Khasi traditional religious elements.[105]

The Garo Law of Succession

Among the Garos, the customary law of inheritance still prevails as they are exempted from the applicability of the Indian Succession Act.[106] The major tribes that constitute the Garos are: (1) The Achhikrong, (2) The Abeng, (3) Kochunasindiya, (4) The Kochu or Counch and (5) The Nuniyas or Dugol. The Nuniyas are said to be different from that of the other Garos: they are admitted to be of the highest rank.[107]

The Garo Society follows the matrilineal system.[108] The inheritance is through mother and restricted to the female lin

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102. Ibid.at 368.
103. Supra n.87 at 140.
104. See supra n.89 at 128.
105. Ibid. at 127.
106. See supra n.83 and 84 and the accompanying text.
107. Supra n.18 at 237.
108. See supra n.21 at 135.

Men do not inherit property. Male children cannot receive or claim any part of the property even if it is acquired by their own efforts. The property acquired after the marriage by the husband becomes the property of his wife though.[109]

The law relating to succession among the Garos can be summarised as follows:-[110]

1. In any family where parents have no daughters to inherit the property, the Chra[111] and the Mahari[112] shall have to search for an adopted daughter from the same motherhood (Ma' ganda-Noganda) and keep her to look after the adopting parents and to inherit the property. If the adopted daughter brought by the chra and the mahari, marries the own nephew (Gritang-sokchi) as A'Kim, she shall have the rights to inherit the property of the adopting parents.

2. In case either of them die first, and the chra and the mahari of the husband or the wife as the case may be, do not provide a substitute as required by customary law, that particular chra and mahari shall have no right to claim the property of the deceased.

3. A substitute wife or an adopted daughter shall

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109. Julius L.R. Marak, "The Garo Customary Laws of Inheritance" in supra n.16 at 269.

110. See supra n.21 at 142-156.

111. See supra n.26.

112. See supra n.27.

have no right to inherit the property of the common ancestors. They shall inherit only those ancestral and other properties which have been promised to them by the chra and the mahari at the time of negotiation (sing'a).

4. On the death of the wife, the widower cannot marry a women of his own choice except the one that has been chosen by the chra and the mahari of the deceased. However, if he marries the girl offered by the chra and mahari of his deceased wife the man shall forfeit his right to the property of his deceased wife. (And the property becomes the property of his second wife if approved by the chra and mahari).

5. If a daughter, after the death of her mother does not allow her father to marry another woman even though he wants to, and subsequently her father marries a second wife against her wishes some property may be given to him.

6. When a wife deserts her husband and marries another man, she loses her right to the property. In such a case the property will be vested temporarily in the deserted husband, who shall be compelled when the desertion is proved, to marry a wife from his deserting wife's motherhood. The new wife will then be the sole heiress of the deserting wife's property.

7. If an heiress dies without a daughter, her sister if any, or the daughter of the sister shall inherit the property or as is decided by the chra and the mahari. But if the widower marries one of his deceased wife's sisters, she will be heiress to the entire property.

It is interesting to see how the provision came to be enforced by the Assam High Court. In a case,[113] a husband died and was survived by his wife and two daughters. The widow remarried and her estate was then held in the name of the second husband. She also died. The Mahari gave the elder of her two daughters by the first husband as successor wife to the surviving widower, and from this wedlock they had a daughter who inherited the estate. The younger of the said two daughters claimed the estate against her elder sister. The Assam High Court held that her mother, the elder sister of the claimant, stepped into the shoes of her mother and inherited the property and that, after her death, the property devolved on her daughter. It was also held that the condition necessary for inheriting the property was that she should have been nominated by her chra and mahari as heir to the mother.

8. If the heiress runs away from the house because of her parents' harsh treatment, she does not thereby forfeit her right to property. But if she refuses to return to her parents inspite of the chra and mahari's requests' she forfeits her right over the property. However, if the oppression is intolerable, she can demand separation by convening a Mahari Meeting in which the mahari may grant separation. Under such circumstances, she will not lose her rights to the property.

9. After the death of the mother, the father is the natural guardian of the children. But if he marries a girl of

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113. See Assam High Court's decision in S.K.No.77/57 (Un reported)

another clan, then one of his sisters-in-law becomes the guardian of his children and property until the question of heiress is settled.

10. The second wife of a widower can claim a share of the property of the former wife before she consents to the marriage. However, it is for the chra and the mahari to decide the matter. If the property is not granted as demanded by her, she may refuse her consent to the marriage. Any property acquired prior to the second marriage cannot be claimed by the second wife, if there are children by the first marriage.

11. If the widower marries a widow who has a daughter, the daughter is entitled to inherit her mother's property after her death but not the property of her step-father's former wife.

12. In the event of her mother's death if the daughter refuses to support her father, she has to share the property with him to provide him with a livelihood or as is decided by her chra and the mahari.

13. If a woman is supported by her son, she may, with the consent of the chra and mahari give some portion of her property to him. Such property can be utilised by him during his life time. After his death, all the properties given by his mother will revert to his motherhood.

14. If a barren woman adopts[114] an orphan girl without the prior consent of her chra and the maharî, such an adopted child has no right to property.

15. Although the parents usually distribute the family property among the daughters, the approval of the chra and the maharî is essential. Such a decision is final and binding on all the concerned parties.

16. If a wife commits adultery and is persuaded to poison her husband, she may be disinherited and may be driven away. But the rights over the property will go to her daughter.

17. When a man forcibly marries a second wife of a different clan even when his first wife is alive, then neither he nor his second wife can claim the property, and they may be driven away from the house.

18. All the property acquired by a man prior to his marriage and retained by him after his marriage, with the permission of his parents and chra, can be claimed back by his motherhood after his death.

19. When a husband divorces his wife for her fault and her chra and maharî fail to provide him with another wife, he may then, with the consent of his wife's clan, marry anyone and, in

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114. Adoption of a girl is permissible, but it is subject to the approval of the chra and the maharî.

that case, he would then retain a life interest in the property.

20. When a man is divorced by his wife, he cannot claim any property other than that which has been given to him by his wife.

21. According to the Garo Customary Laws and Practices the Nokkrom (Heiress) can also be disinherited in certain given situations. It can therefore be said that the rights of a Nokkrom are not absolute.

22. Wills are not recognised and practiced according to the Garo Customary Laws and Usages.[115]

23. The property of the Garo family is considered to be the property of the wife. The husband cannot sell or mortgage it without the consent of his wife and her chra. So before selling any movable or immovable property the chra and mahari must be consulted first. If any property is sold or mortgaged without the consent of the chra and the mahari, such mortgage or selling would be invalid.[116]

The administration of justice in the Garo Hills is now carried on in accordance with the provisions of the Garo Hills Autonomous District Administration of Justice Rules, 1953,

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115. See supra n.21 at 149.

116. Ibid. at 156.

passed by the Garo Hills District Council,[117] and these incorporate mostly the customary law of the Garos. It is interesting to note that Christianity which has been a great force of change in other spheres of Garo life, has contributed very little in changing Garo family or their customary law.[118]

Law of Succession in Goa, Daman and Diu

The Portuguese established their rule in Goa by 1510 A.D.[119] With that began the inflow of the Portuguese concepts of law into that territory. By a decree of 28.7.1542 daughters were given a claim on the movable properties of their father and by further decree of 23.3.1559 and 16.4.1583 daughters who were converted to the Catholic religion were given right of inheritance to their father's property in the absence of sons. And by 15.1.1691, the Portuguese laws of succession were made applicable in Goa.[120] The Portuguese Civil Code of 1867 came to be enforced in Goa with effect from 1.7.1870. It remained a uniform civil code for more than a century, governing the juridical relations of the citizens irrespective of their race, sex, caste

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117. Milton S. Sangma, "Administration of Justice in Garo Hills" in supra n.16 at 287.

118. See supra n.28 at 305.

119. See supra n.14 at 328-329.

120. Julian Saldanha, "Conversion and Indian Civil Law" (1981) Bangalore, at 113.

or creed. After the liberation of Goa on 19.12.1961, the Indian Parliament enacted the Goa, Daman and Diu (Administration) Act, 1962. It provided:-

> "All laws in force immediately before the appointed date in Goa, Daman and Diu or any part thereof, shall continue to be in force therein until amended or repealed by a competent legislature or other competent authority".[121]

As the Portuguese Civil Code contains references to "Portuguese Citizens" it became necessary to issue a Citizenship Order[122] in 1962 and also the Goa, Daman and Diu (Administration) Removal of Difficulties Order, 1962. It has been provided:-

> "Wherever words like Portuguese Nationals, Portuguese Citizens, Portuguese Sovereignty, Portuguese flag or any other words upholding Portuguese sovereignty or supremacy within these Territory occur in any law enacted before the 20th day of December 1961 and which is now in force within these Territories, such words and phrases shall be read as if the words, "Portugal and Portuguese", had been substituted by the word "India and Indian".[123]

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121. See Section 5(1) of the Goa, Daman and Diu (Administration) Act 1962. The appointed day under the Act is 20.12.1961.

122. The Goa, Daman and Diu (Citizenship) Order, 1962. It was issued under Section 7 of the Citizenship Act, 1955.

123. See Order No.175/2/M.G. Published in the Government Gazette of Goa, Daman and Diu, Series I No.22 dated 7.6.1962.

Therefore, the Portuguese Civil Code of 1867 still remains in force in Goa, Daman and Diu. It may be noted that, in Portugal, the Civil Code of 1867 was repealed and a new Code was enacted in 1966.

Under the Portuguese Civil Code as applicable in Goa, marriage creates between the spouses, a communion of assets. It is provided:-

> "The marriage as per the custom of the country consists in the communion between the spouses of all their properties, present and future, not excluded by law".[124]

Further as provided under Article 1119, the immovable properties, whether common or exclusive of either spouse, cannot be alienated or charged in any manner without the consent and agreement of both the spouses. But under Articles 1117 and 1189 the management of all the properties of the spouses belongs to the husband, and the wife can manage the property only in the absence or incapacity of the husband. But in the event of mal-administration by the husband, the wife can apply for the separation of her properties to the civil Judge, and under Article 1223, once separation is granted by the judgment of the civil Judge, the wife shall be given administration of her properties.

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124. See Article 1108 of the Portuguese Civil Code, 1867.

As regards succession, there are two ways, one under a will and the other known as legal succession.[125] Any person who is of sound mind and is not a minor of less than 14 years of age can execute a valid will. A blind person or those who cannot read or write are not allowed to make a closed will.[126] Wills in favour of guardian,[127] instructors or school masters or any person who exercise control over the person making the will, at the time of making of the will are prohibited.[128] Thus a patient is not allowed to make a will in favour of the physician, nor can a will be made in favour of confessors,[129] or the Notary Public.[130] An adulterous spouse cannot make a will in favour of the accomplice.[131] Where a married person has descendants or ascendants, he is debarred from disposing by will his entire estate in favour of strangers. He can dispose of half of his estate and the remaining half is called the indisposable portion or legitime,[132] which passes to the legal heirs as a matter of right. The restriction applies also to dispositions by way of gift. Even in respect of the disposable share, the spouses are not allowed to dispose of specific assets since there is no specific right for either of them in the conjugal estate.[133]

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125. See Ibid., Article 1735.
126. See Id. Article 1764.
127. See Id. Article 1767.
128. See Id. Article 1768.
129. See Id. Article 1769.
130. See Id. Article 1772.
131. See Id. Article 1771.
132. See Id. Articles 1774 and 1784.
133. See Id. Article 1766.

The testator can appoint one or more person or persons as executor or executors of the will.[134] But minors cannot be appointed as executors.[135] A married woman cannot be appointed as executrix without authorisation from her husband, except where she is judicially separated of person and properties.[136] When no time limit has been fixed by the will for its execution, normally, the executor has to carry it out within one year from the date on which he has taken charge as an executor.[137] If he does not intend to act as executor, he has to give it up within three days from the date of knowledge of the will, before the authority competen to register it, failing which he shall be liable for damages.[138] The periods of dispute regarding the validity of the will is excluded for calculation of the period of limitation.[139] The executors are liable to render accounts of their management to the heirs or to their legal representatives.[140] The expenses incurred by the executor for carrying out the will shall be satisfied from the estate of the deceased.[141] The executor, who in the performance of his obligations, has acted in bad faith, shall be liable for compensation for damage and may be removed by an order of the Court, at the instance of the parties.[142] It is of interest to note that no probate is required under the Portuguese Civil Code.

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134. See Id. Article 1885.
135. See Id. Article 1886.
136. See Id. Article 1887.
137. See Id. Article 1903.
138. See Id. Article 1890.
139. See Id. Article 1903.
140. See Id. Article 1905.
141. See Id. Article 1908.
142. See Id. Article 1909.

In fact the question of succession arises only in respect of the "legitime"[143] or when there is intestacy, or in the event of a will being annulled, revoked or lapses.[144] Under the Civil Code such a succession is termed as legal succession. The legal succession shall devolve in the following order.[145]

1) To the descendants;
2) To the ascendants subject to the provisions of articles 1236;[146]
3) To the brothers and their descendants;
4) To the surviving spouse;
5) To the Collaterals not included in (3) above up to the sixth degree;
6) To the State, subject to the provisions of article 1663.

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143. See supra n.132 and the accompanying text.

144. See Article 1968 in supra n.125.

145. See Ibid. Article 1969.

146. Article 1236 enacts:- "Where the re-married spouse remains with the properties of the issues of any marriage inherited from their deceased father or mother or of ascendants of the latter, and there being full blood brothers/sisters of the deceased issue or descendants of the deceased full blood brothers/sisters, then the ownership of the said properties will belong to the latter and the father or mother will only have the usufruct thereof".

The relatives closer in degree shall exclude, within each group, the more remote.[147] And the relatives, who are in the same degree, shall inherit per capita, or in equal proportion,[148] subject to the provisions of article 1983.[149] In reckoning degree, each generation is taken as a degree,[150] and in the direct line, the degrees are counted by the number of generations, excluding the Progenitor.[151] As for legal succession, the persons incapable of acquiring property by will shall not acquire by legal succession also.[152]

Law of Succession in Pondicherry

The Christians of Pondicherry, who were converts from Hindus, had not changed their ways of life and customs. They observed the caste system and followed the laws and customs, ie, the Hindu law and usages.[153] The establishment of French rule did not bring about any major change in these matters. The French Civil Code was extended to Pondicherry in 1819 A.D. But

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147. See supra n.125, Article 1970.
148. See Ibid. Article 1971.
149. Article 1983 provides:- "The representatives shall only inherit, as such, what the person represented would have inherited, if living".
150. See supra n.125. Article 1973.
151. See Ibid. Article 1976.
152. See Id. Article 1978.
153. Herchenroder, "Study of the Law applicable to Native Christians in the French Dependencies in India" 18.J. Comp. Leg and International law. 186 (1936).

it was provided that people of Indian origin would continue to be governed by their laws and customs. This position continued under the French Constitution of 1946 and 1958. Thus, Christians continued to be governed by the Hindu law, but in matters of marriage and divorce and allied matters, they were brought under the French Civil Code.[154] The Treaty of Cession[155] brought Pondicherry into the Indian Union. Then the people of Pondicherry were given an option to declare themselves as Renoncents and still continue to be governed by the French law, that is, the French Civil Code. It appears that only a few Christians have opted for it.[156] The subsequent legislation also provided for the continuance in force of the existing laws.[157] Even under the Pondicherry (Extention of Laws) Act, 1968 neither the Indian Divorce Act, 1869, nor the Indian Succession Act, 1925 was extended to Pondicherry. Though the Indian Christian Marriage Act, 1872 was extended to Pondicherry, it was made specifically inapplicable to Renoncents. But it is not correct to assume that the French Civil Code applies to

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154. See supra n.82 at 421.

155. This treaty was concluded between India and France on 28th May 1956. As per the terms of the treaty it came into force on 16th August, 1962.

156. See supra n.85 at 18.

157. See Section 4 of the Pondicherry (Administration) Act, 1962.

all Christians in all matters in Pondicherry. Even Christians who are not Renoncents are governed by Hindu customary law and they continue to be governed by the old Hindu law.[158] Thus the Christians of Pondicherry can be classified into three catagories, viz,

1) The Christian Renoncents who are French Nationals and to whom the French Civil Code as amended from time to time in France, applies.

2) The Indian Christian Renoncents to whom the French Civil Code applies as it stood on 16th of August, 1962.[159]

3) The Indian Christians to whom the Indian Christian Marriage Act, 1872 is made applicable by the Pondicherry (Extention of Laws) Act, 1968.[160]

There are thus different sets of laws applicable to the Christians in Pondicherry. And as regards succession the French Civil Code contains interesting provisions.

Article 718 of the Code provides:-

> "A Succession becomes open by either natural or civil death".

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158. See supra n.60 at 601.

159. See supra n.155 and 157.

160. It is interesting to note that those Indian Christians in Pondicherry do not have a statutory law for divorce or succession.

But the concept of Civil death is no more recognised by law.[161] In the event of simultaneous death of several persons, the male is presumed to have survived the female for purposes of succession.[162] But the relatives of the paternal and maternal line are equally and simultaneously entitled to succeed to the property of the deceased.[163] It is only when there are no relatives up to the twelth degree that the wife is made entitled to succeed. In other cases she has only a life interest[164] over a share of the property. But the position of the husband is also the same.[165] As regards sons and daughters, they inherit equally.[166] Where the intestate has left no lineal descendants, the father and mother inherit half of the property and they share it equally.[167]

Under the French Civil Code, all properties acquired after marriage are treated as common property; that is, they accept the community of goods in the properties acquired after marriage.[168] But the immovable properties belonging to either husband or wife at the time of marriage or which they inherited during marriage do not form part of the common properties.[169] And a man can dispose of only half of his property by gift inter

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161. See E. Blackwood Wright, "The French Civil Code". Vol.II at 109.
162. See Ibid. Article 722.
163. See Id. Article 733.
164. See supra n.161 at 112.
165. See Ibid. Article 767.
166. See Id. Article 745.
167. See Id. Article 748.
168. See supra n.85 at 160.
169. See supra n.50 at 284.

vivos or by will if he leaves a legitimate child. If he leaves two children he can dispose of only one third of his property and if there are three or more than three children, he can dispose of only a quarter of his property.[170] Even an illegitimate child is entitled to a share in the "la reserve".[171]

The laws of Christian succession thus present a disparate picture. In many regions the customary laws are retained, whereas in other areas the Indian Succession Act has been clamped.

An evaluation of the laws relating to Christians in different regions of India shows that gender discrimination is rampant in both the customary as well as statutory laws. For example, under the French Civil Code as applicable in Pondicherry, consent of the father is sufficient for the marriage of the children under the prescribed age.[172] In another situation where several persons die simultaneously, the male is presumed to have survived the female for purposes of succession.[173] The

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170. See Article 913 of the French Civil Code.

171. The part of a man's property which he is unable to dispose of by law is called "la reserve" ie, the portion reserved by law for the relatives.

172. See supra n.53 and the accompanying text.

173. See supra n.162 and the accompanying text.

position is not that different in Goa either. Male domination is explicit as a married woman can not be appointed executrix without authorisation from her husband.[174] In the North East India as already discussed elaborately, the customary law is heavily loaded against man.[175] The discrimination against women in the matter of succession so far as the Christians in Kerala is concerned, the matter is discussed in detail in Chapter V in the context of Mary Roy's Case.

As the above discussion indicates, the very evolution of laws among Christians in India does not present a uniform pattern. Nor are the statute law imposed without having any regard for the customary rules. Also, with regard to the treatment of women and their rights, the laws do not conform to any uniform pattern. While in the North East, the law is discriminatory against men, laws in other parts are generally discriminatory to women. Efforts are necessary to avoid discrimination. Legislative efforts to strengthen the law, however, needs indepth study of the reasons for the differences in law and it is highly necessary to identify them as the first step.

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174. See supra n.136 and the accompanying text.

175. See supra n.96-103, 109 and the accompanying text.

CHAPTER-III

GENDER DISCRIMINATION IN LAW RELATING TO VALIDITY OF MARRIAGES AMONG CHRISTIANS

Marriage has developed into an institution in all civilisations. Therefore, it is essential to know as to what is meant by marriage in common parlance and in law. As for Christians, none of the statutes relating to marriage, nullity of marriages or divorce has defined as to what is a Christian marriage. The legislature does not seem to have taken it seriously. Attempts have however been made by Courts to define as to what is a Christian marriage. The earliest attempt in this area seems to be the one made in Lindo v. Belisario.[1] In this case, Lord Stowell, who was one of the most eminent of the ecclesiastical judges in England, held:-

> "According to juster notions of the nature of the marriage contract, it is not merely either civil or religious contract. It is a contract according to the law of nature, antecedent to civil institutions, which may take place to all intends and purposes wherever two persons of different sexes engage by mutual contracts to live together.....A mere casual commerce, without the intention of cohabitation, and bringing up of children, would not constitute marriage under any supposition. But when two persons

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1. Lindo v. Belisario (1795)1. Hag. Con 216.

agree to have that commerce for the procreation and bringing up of children, and for such lasting cohabitation, that in a State of nature would be a marriage".[2]

Quoting from Henry Swinburne (1560-1623) on Espousals, Lord Stowell proceeded:-

"It is a present and perfect consent which alone maketh matrimony, without either public solemnisation or carnal copulation, for neither is the one, nor the other, the essence of matrimony, but consent only".

Still later Lord Penzance in Hyde v. Hyde and Woodmansee, attempted to define a Christian marriage as the voluntary union for life of one man and woman, to the exclusion of all others.[3] Chitty L. improved this "to the exclusion of all other connubial unions".[4]

The Travancore High Court in 1882 applied the principles enunciated in Hyde v. Hyde and proceeded to hold:-

"Marriage is very commonly spoken of as a contract. But it differs markedly from other contracts. (1) Marriage contract cannot be modified according to the pleasure of the parties. (2) Nor can it be dissolved by consent. (3) Nor will the legislative interference

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2. Ibid. at 230.
3. Hyde v. Hyde and Woodmansee (1866)1 P.D. 130 at 133. See infra n.33 of Chapter IV.
4. 1885. Re Ulee, The Nawab Nizam of Bengal's Infants 53, L.T 711 & 712.

of any particular country with its essential principles be extra-territorially recognised. Marriage too involves a complete change of status upon which various incidents follow which I need not pause to consider. Marriage is thus a contract and something more".[5]

In 1948, the House of Lords in Baxter v. Baxter[6] endorsed the view taken in Lindo v. Belisario. Of late, the High Court of Kerala opined:-

"Marriage is something more than a contract either religious or civil to be an institution. It postulates mutual rights and obligations as all contracts do, but beyond that it confers a status. The position or status of 'Husband' and 'wife' is a recognised one throughout the world and the law of our country enjoins that status a variety of legal incidents during the lives of the parties and induce definite rights upon their offsprings. I hold the opinion that in India as well as in most civilised countries, marriage is a religious as well as a natural and civil contract. I conceive

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5. Sirkar v. Idicheria Mammen II. T.L.R 89 at 92. Though this decision was over-ruled in XI T.L.R 33(FB), the basic concept of marriage laid down in the decision still holds good.

6. Baxter v. Baxter, (1948) A.C. 274.

> that it is a great mistake to suppose that because it is the one, therefore it may not likewise be the other ....."[7]

In this context, it is of interest to note as to what the Bible speaks about marriage and divorce. St.Mark quotes Jesus Christ on marriage and divorce as under:-

> "But from the beginning of creation, "God made them male and female". For this reason a man shall leave his father and mother and be joined to his wife and the two shall become one. What therefore God has joined together, let not man put asunder".[8]

But St.Paul, the great exponent of the teachings of Christ, has gone further in his first letter to the Corinthians, wherein he said:-

> "It is well for a man not to touch a woman. But because of the temptation to immorality, each man should have his own wife and each woman her own husband. The husband should give to his wife her conjugal rights, and like wise the wife to her husband....." [9]

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7. Raghavan v. Saroja, 1987(1) K.L.T 376 at para 9. Though this decision is rendered while deciding a marriage dispute under the Hindu Marriage Act, yet the principle laid down is general.
8. St.Mark, The Gospel according to Mark: The Holy Bible (London) Chapter 10:6-9. But among the Jews it was lawful for a man to write a certificate of divorce and send his wife away.
9. St.Paul: The Holy Bible: The First letter of St.Paul to the Corinthians. Chapter 7: 1-3.

"A wife is bound to her husband so long as he lives.

If the husband dies, she is free to be married to whom she wishes, only in the Lord".[10]

Thus the Biblical concept is that marriage is a life long union of a man and a woman. In the course of history free consent was laid down as the foundation of marriage and where this consent was lacking the marriage was deemed to be null and void.[11] And today marriage is regarded as a covenant by which a man and a woman establish between themselves a partnership of their whole life, and which of its own very nature is ordered to the well-being of the spouses and to the procreation and upbringing of children, and has been raised to the dignity of a sacrament within the church.[12]

Now, therefore, the age old definitions of a Christian marriage cannot hold good any longer. The present position is that marriage among Christians can be avoided as there are provisions both under the personal law and the statutory law. Therefore, a Christian marriage in the present times may be defined as both a sacrament as well as a contract based on mutual consent, establishing a life long union of a man and a woman to the exclusion of all others, unless it is void or voidable, creating legal status for both

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10. Ibid. at 7. 39.
11. See "The Code of Canon Law". English translation. Bangalore. 1983. Chapter VI.
12. Ibid. see Canon 1055. Same is the position under Canon 776 of the Code of Canons of the Eastern Churches, 1990.

the parties to the marriage and to their offsprings. But there are certain denominations of Christians who deny the sacramental aspect of a marriage.

It is interesting at this juncture to note the development of laws relating to marriages and dissolution of marriages by way of declaration of nullity. Since the Kerala situation is very peculiar, it may be discussed first to identify the points for analysis and discussion. It is perhaps here the conflicts between personal and civil law come to the fore frequently.

As regards solemnisation of Christian marriages and the declaration of nullity of marriages, the legal system in the State of Kerala presents a peculiar picture. In order to analyse and appreciate the legal ramifications, it is necessary to examine the history of the evolution of the legal system in Kerala.

The present State of Kerala was formed on the 1st November, 1956.[13] It consists of three regions namely Travancore,[14] Cochin and Malabar. Travancore and Cochin were native states and Malabar was part of Madras Presidency. Since the laws as applied to Christians in these regions differed it is necessary to be aware of the extent of these regions in the State. Much

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13. See The States Reorganisation Act, 1956 (Act No.37 of 1956).

14. See Sections 4 & 5 of the State Reorganisation Act. Part of the territory of the former state of Travancore is now in Tamil Nadu.

of those then existing laws still continue to be in force in these regions.

I. Malabar

The Malabar region comprises the following areas that were part of Madras presidency: 1. Kasargod, 2. Kannoor, 3. Wynad, 4. Kozhikode, 5. Malappuram, 6. Palakkad District excluding Chittur Taluk, (but including 14 villages of Chittur Taluk), 7. Chavakkad Taluk in Thrissur District and 8. Fort Cochin in Cochin Taluk in Ernakulam District.

II. Cochin

The following areas were part of the erstwhile state of Cochin:-
1. Cochin Taluk excluding Fort Cochin, 2. Kanayannoor Taluk excluding Manakunnam, Thrikkakara North, Edappally North and South Villages (in Ernakulam District), 3. Thrissur District excluding Chavakkad Taluk, and 4. Chittur Taluk excluding 14 villages in Palakkad District.

III. Travancore

The following regions which were part of the erstwhile Travancore now form part of the State of Kerala:- 1. Thiruvananthapuram, 2. Kollam, 3. Pathanamthitta, 4. Alappuzha, 5. Kottayam and 6. Idukki Districts. And it also includes (a) Parur (b) Aluva (c) Kunnathunad (d) Muvattupuzha and (e) Kothamangalam Taluks; and Manakunnam, Thrikkakara North, Edappally North and Edappally South Villages in Kanayanoor Taluk in the present Ernakulam District.

The laws relating to solemnisation of marriages and related matters in the three regions of the State of Kerala are disparate. As Malabar was part of British India, the British Indian Statutes applied there. Though the Indian Christian Marriage Act, 1872 was applicable in Malabar, marriages among Roman Catholics and others there have been solemnised in accordance with their personal law and customs, and the requirements under the Indian Christian Marriage Act have not been observed. This practice seems not to be at variance with the intention of the legislature as the Indian Christian Marriage Act, 1872 was not considered to make any interference with the personal law of the parties to the marriage.[15] As the statute is not given effect to, it remains a dead letter as far as Malabar region is concerned. So is the case of the Indian Divorce Act, 1869. At any rate, instances of divorce under the provisions of the Indian Divorce Act, 1869 have not been reported from Malabar as the church holds its sway and decides the disputes themselves.

In Cochin, there was no statute governing solemnisation of Christian marriages till 1920. When the parish churches of different denominations of Christians came under an interdict owing to disobedience to the authorities of the churches and the priests did not bless marriages, at the request of the members of the various

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15. See Peter Philip Saldanha v. Anne Grace Saldanha. I.L.R 54 Bom. 288 and Section 88 of the Indian Christian Marriage Act, 1872.

Christian communities, the Government decided to rescue them by passing a regulation to provide for legalising civil marriages between persons professing Christianity.[16] Thus the Cochin Christian Civil Marriage Act (V of 1095 M.E=1920 A.D) was enacted for the purpose of legalising civil marriages between persons professing Christian religion.[17] It may be mentioned that the provisions of this Act have not usually been pressed into service by the community in these days as the Act deals only with civil marriages and as a matter of fact civil marriages among Christians in this area are very rare. Therefore, the Act is ignored by many. It may be pertinent to note that the Cochin Christian Civil Marriage Act is still in force as it had not been repealed before the commencement of the Constitution of India. It was an "existing law" as defined under Article 366(10) of the Constitution of India. And, hence, it became a "law in force" as explained under Article 372(2) and thus saved by Articles 372(1) and 13(3)(b) of the Constitution of India.[18]

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16. See L.K. Ananthakrishna Ayyar, "Anthropology of the Syrian Christians". (1926) Cochin Govt Press, Ernakulam, at 65.

17. See Preamble to the Cochin Christian Civil Marriage Act, 1920, which came into force w.e.f. 17.1.1920.

18. See Articles 366(10); 372(1) &(2); and 13(1) and (3) of the Constitution of India. Article 13(3)(b) saved even those laws which were not in operation at the commencement of the Constitution, if that had not been repealed earlier.

It may be noted that the Adaptation of Laws Order, 1950 or the Kerala Adaptation of Laws Order, 1956 did not amend or repeal the Cochin Christian Civil Marriage Act. Further, S.119 of the States Reorganisation Act, 1956 protected the 'law in force' in the territories which came to be re-organised. And, further, Section 1 of the Indian Christian Marriage Act had been amended to exclude its application to Cochin, by the Part B States (Laws) Act, 1951.[19] In short, the Constitution, the Adaptation of Laws Orders and related enactments, have not repealed or amended the Cochin Christian Civil Marriage Act and hence it is still in the statute book[20] though its provisions are not being invoked by the Christian community.

This Act does not make any inroads into the personal law of Christians in Cochin. It does not deal with church marriages. Nor does it prohibit such marriages. Further it provides:-

> "Nothing in this Act shall be deemed to validate any marriage which the personal law applicable to either of the parties forbids him or her to enter into".[21]

Thus the applicability of personal law, even for a civil marriage under the Act, has been recognised by Section 37 of the Act.

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19. See The Schedule to the Part B States (Laws) Act, 1951.
20. Sebastian Champappilly, "The Christian Law". (1988) Cochin, at 87.
21. See Section 37 of the Cochin Christian Civil Marriage Act, 1920.

It can be noted that this Section is a verbatim reproduction of Section 88 of the Indian Christian Marriage Act,[22] which also saves the customary law. Therefore it can be stated that it is the customary law, ie, the personal law of Christians which has been made applicable to the parties to Christian marriages in Cochin.[23]

As regards divorce for the Christians in Cochin, the Indian Divorce Act, 1869 is made applicable with effect from 1.4.1951 by virtue of the Part B States (Laws) Act, 1951.[24] Prior to 1.4.1951, there was no statute on divorce for the Christians in Cochin. But the Courts entertained suits for declaration of nullity of marriages. With the introduction of Divorce Act in Cochin, there arose conflicts between the statute law administered by Courts and the Personal law administered by Eparchial Tribunals.[25]

The Christians in Travancore had no separate authoritative treatise on the law of marriages and the Travancore High Court had opined that it had no reason for supposing that any special written law existed.[26] Therefore the Courts in

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22. See Section 88 of the Indian Christian Marriage Act, 1872. See infra n.95 and 97 and the accompanying text.
23. See supra n.15 at 298 where the same reasoning is made by the Bombay High Court in the context of Section 88 of the Indian Christian Marriage Act, 1872.
24. See Sections 3,6 and the Schedule to the Part B States(Laws) Act, 1951.
25. See infra n.53,59 and 71 and the accompanying materials for further detailed discussion on these aspects.
26. See supra n.5 at 91. Also see Sirkar v. Matthu Kuruvila XI. T.L.R 33(FB) at 35. This judgment was rendered on 13.8.1894.

Travancore had to search for the personal law of the parties for adjudication of matrimonial disputes. In Eapen Punnen v. Koruthu Maria,[27] the Travancore High Court undertook a voyage through historical materials for this purpose and it ultimately traced the origin of the personal law of Christians to Rome. The Court identified the evolution of marriage and divorce and found that before the time of Justinian in Rome, marriage was purely a civil contract and it was not necessary to obtain the authority of any tribunal for the dissolution of marriage. If husband and wife agreed to separate, the State never interfered. All that was required was a simple formal intimation from either party to terminate the union. Though subsequent legislation restricted the right of repudiation of marriage by one party alone, the principle of divorce by mutual consent survived.[28] It was only after the fifth century that the church under the influence of St.Augustine, began to attribute the marriage bond a religious character. And it was not till the sixteenth century, when the Council of Trent (1545-1563 A.D) assembled, that solemnisation of marriage in a church was rendered essential to its validity.

The Council of Trent in its twenty-fourth session held in November, 1563 enacted a decree known as the Tametsi decree. It affirmed marriage as a sacrament and declared that clandestine

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27. Eapen Punnen v. Koruthu Maria X. T.L.R 95. (Judgment dated 17.5.1892).

28. Ibid. at 100.

marriages entered into otherwise than in facie ecclesiae as null and void.[29] This decree bound all Roman Catholics in the countries in which it was promulgated. It was promulgated in Portugal and the Portuguese must be deemed to have taken it with them to India as part of their personal law.[30] When the Portuguese came here they found that the Church order and customs of the Syrian Christians were not in tune with the western church to which they belonged.[31] They wanted to westernise the Syrian Christians and their attempt at the Synod of Diamper is now part of history.[32] By the decrees of the Synod, the marriage discipline contained in the Tametsi decree of the Council of Trent came to be imposed on the Syrian Christians. This was resented by a section of the Syrian Christian community and they revolted against the Portuguese supremacy in their religious affairs, which is usually referred to as the Coonen Cross Revolt of 1653 A.D.[33] Yet the decrees of the Synod of Diamper were passed on to the posterity as the Canon Law of the Syrians of Malabar and were recognised as such by the Propaganda under the Pope.[34]

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29. See Ibid. at 101. Also see for further details of the Council, John L. Murphy, "The General Councils of the Church" (The Bruce Publishing Co. Milwaukee. U.S.A) 1960 at 162-169.
30. See supra n.15 at 292.
31. C.B. Firth, "An Introduction to Indian Church History" at 70-71.
32. See chapter I. Notes 39 to 47 and the accompanying text.
33. See chapter I. Note 46 and the accompanying text.
34. Cardinal Eugene Tisserant, "Eastern Christianity in India" at 166.

While so, the Tametsi decree of the Council of Trent came to be promulgated all over the world on 2nd August, 1907. Thus, the marriage discipline contained in the decrees of the Council of Trent and modified by the Synod of Diamper applied to the Syrian Catholics. Later codification of the canon law applicable to Catholics of the oriental churches, including that of the Syrian Catholics was attempted by Pope Pius XI in 1929 and the matrimonial law of the Oriental Churches was promulgated on 22nd February, 1949 which took effect from 2nd May, 1949.[35] And it remained the personal law of the Syrian Catholics at the time of the commencement of the Constitution of India. It continued to be the personal law till the Code of Canons of the Eastern Churches was promulgated on 18th October, 1990 which became effective from 1st October, 1991.[36]

As far as the Latin Catholics in India were concerned, their personal law was codified in Codex Iuris Canonici (1917) and it was revised in 1983. Therefore, there is no difficulty in tracing out the development of the personal law of Latin Catholics in the pre and post constitution era. As regards the marriage discipline and the grounds for decree of nullity of marriages, there are no material differences between the canon law of the Syrian Catholics and that of the Latin Catholics.

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35. Victor J. Pospishill, "Code of Oriental Canon Law- The Law on Marriage". (1962) Chicago, at 17.

36. See "Code of Canons of the Eastern Churches". (Translated by the Oriental Institute of Religious Studies, Vadavathoor, Kottayam). Pages XI to XIX.

The personal law of Syrian Christians belonging to the Jacobite Church and the Malankara Orthodox Church is contained in the Hudaya Canon which is also known as Nomocanon. Both the groups admit that the Canons are contained in a work by name Hudaya compiled in Syrian language by Bar-Hebreus, in the 13th century. But they have produced two different versions of the work and the High Court of Kerala found that there was no independent evidence on the basis of which the rival claims on this point could be adjudicated and therefore it was held that neither version of the canons was proved to be binding on the community as a whole.[37] This decision of the High Court of Kerala was appealed against and it is pending final adjudication before the Supreme Court.[38]

However, different Codes of Canon Law came to be applied to different denominations of Christians in India. And in the administration of justice they came to be applied by the Courts. At the same time Syrian Christians continued to follow

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37. Moran Mar Baselius Marthoma Mathews I v. Most Rev. Paulose Mar Athanasious. 1990(2) K.L.T (Suppliment) Pages 12-26. (Ten chapters of Hudaya Canon were translated into Malayalam by Jacoob Mar Julius Metropolitan and published by Seminary Publications, Mulanthuruthy in 1974. This is the text relied on by the Jacobite Church).

38. Civil Appeal No.4958 to 4960 of 1990 on the file of the Hon'ble Supreme Court. (Also see chapter I. Notes 59-64 and the accompanying text). As the controversy is not settled by the decision of the Supreme Court, the provisions of the Hudaya Canon are not taken up for discussion in this study.

their customs and traditions which were not in conflict with the laws of the church and the state did not intervene in these matters; nor was there any attempt to bring in legislation in these areas. In order to have a better appreciation of the status of personal law of Christians, it is useful to trace its origin and development in the Travancore context.

Administration of justice in its modern sense began in Travancore with the establishment of Courts. For the first time Courts came to be constituted in 1811 A.D,[39] by Colonel Munro, the Resident Dewan, and it marks a distinct epoch in the history of the legal system in the State. By 1834 a general scheme of judicial administration was conceived and carried out. Regulations came to be passed, and from 1858 to 1872, there was a spate of legislation. Generally, the Travancore legislature took the British Indian enactments as their model and altered their provisions where necessary, to suit local requirements and usages.[40] The Courts then came to be reorganised and the Appeal or Sadar Court was established on 15th August, 1861.[41] At last the Sadar Court was constituted into a High Court on 18th January, 1882.[42] It was the High Court which had occasions to deal with marital disputes among Christians that caused evolution of the principles of law governing the Syrian Christians in this part of India.

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39. S.A. Azariah, "A Judicial History of Travancore".(1932) Trivandrum, at 7.
40. V.Nagam Aiya, "The Travancore State Manual".(1906) Trivandrum, at 546-547.
41. See Regulation No.1 of 1037 M.E (1861 A.D).
42. See Regulation No.II of 1057 M.E (1882 A.D).

It was at this stage that the Travancore High Court examined an important question as to whether the Court had jurisdiction to entertain a petition for declaration of nullity of marriage where the parties were Protestant Christians belonging to the Church of England, domiciled in the State.[43] The High Court held that such a suit was a suit of civil nature, and therefore it had the jurisdiction to entertain it and that the case ought to stand or fall by the rules of Canon law, and the principles laid down by the English Courts. But even at the very out set, the Court made it clear that the decision had nothing to do with the law applicable to Roman Catholics.[44] And in 1894, in a case where the parties were Jacobite Syrian Christians, the Court held that in the absence of a statutory enactment, the law governing the marriages of Jacobite Syrian Christians in Travancore was the law of custom and not the canon law.[45] Thus, by 1894, the High Court had held that canon law applied to one sect whereas the customary law applied to another sect.

The Travancore High Court became Travancore-Cochin High Court[46] on 7th July, 1949. And it was during this time that the Court got an occasion to dwell on the applicability of canon law to Syrian Catholics in Travancore-Cochin. The Court explained:-[47]

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43. See supra n.27.
44. See Supra n.27 at 100.
45. Sirkar v. Matthu Kuruvila XI.T.L.R 33(F.B) (13.8.1894). Though the Hudaya Canons of the 13th century was applied by the Church, the Court held the view that it had no binding force over and above the customary law.
46. The United State of Travancore and Cochin was formed on 1st July, 1949. See infra Chapter V, n.39.
47. Cheriya Varkey v. Ouseph Thresia. A.I.R 1955 Travancore-Cochin 255. Para 8. (1956) K.L.T 429.

"Although the canon law does not as such apply to Catholics belonging to Oriental Churches including Syrian Catholics, the principles relating to marital obligations embodied in the canon law apply to all Catholics".[48]

It is to be noted that while discussing the impact of canon law, the Court had in view only the Code of Canon Law of 1917 which was applicable to Latin Catholics alone. It appears that no one brought to the notice of the Court the existence of the canon law on marriage for Eastern Churches promulgated on 22.2.1949.[49] And that was not relied upon by the Court. In such a situation the Court was left with no alternative than to adopt the traditional approach of deciding issues on the basis of justice, equity and good conscience paving way for the opening up of doors for the entry of English common law.[50] However, the Court ruled that in the absence of statute law and customary law, canon law should be applied.

In due course of time, the High Court of Kerala has had occasions to consider the law of marriage and nullity of marriage among Christians. In the year 1986, the Court was called

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48. Ibid. at 257.

49. It was on 22.2.1949 the canons on the sacrament of marriage of Eastern Churches (Oriental Churches) was promulgated in Motu Proprio Crebrae allatae. See supra n.35.

50. Supra n.47 at para 9.

upon to decide a question whether a Christian woman, whose marriage was declared null and void by the Eparchial Tribunal[51] was entitled to get maintenance under Section 125 of Cr.P.C. The Court held:-

> "When Parliament has enacted a law[52] providing for dissolution and for decree of nullity of Christian marriage, Eparchial Tribunals cannot adjudicate upon those matters so as to affect the civil rights of parties to the marriage".[53]

As regards the authority of the Eparchial Tribunal to annul a marriage the Court observed:-

> "Whatever be the jurisdiction of the Eparchial Tribunal in ecclesiastical matters, it can not

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51. Following the directive of St.Paul, the Catholic Church developed a long tradition to settle disputes through its own tribunals. Such tribunals exist at the Eparchial (Diocesan), Metropolitan and even at a higher level. These tribunals can decide apart from other issues, the validity or otherwise of a Catholic marriage in case of dispute, in accordance with their personal law, ie, in the present case canon law.

52. The law referred to here is the Indian Divorce Act, 1869. It may be pointed out that the Kerala High Court's opinion in Mary Soniz Zacharia v. Union of India, 1990(1) K.L.T 130 per Justice K.T. Thomas that this Act was passed by British Parliament, is not correct. The Indian Divorce Act, 1869 was enacted by the Governor-General-in-Council, in India, in 1869. See infra n.38-40 of Chapter IV.

53. Kurian v. Alphonsa. 1986 K.L.T 731 at 733.

affect the civil rights of the parties. Rights flowing out of a legal marriage cannot be interfered with by the Eparchial Tribunal".[54]

It may be noted that the Court granted maintenance to the wife on the ground that the decree of nullity granted by the Eparchial Tribunal would not affect the validity of the marriage.

In fact, there was no occassion or necessity for the Court to express any opinion as to the validity of the decree of nullity, in view of Section 125 of Cr.P.C.;[55] and the provisions of canon law which explicitly provide for the civil effects of marriage to be regulated by the civil law. According to canon law maintenance should have been decided under Section 125 Cr.P.C. This is evident from Canon 1672 of the Code of Canon law. It provides:-

"Cases concerning the merely civil effects of marriage pertain to the civil courts, unless particular law lays down that, if such cases are raised as incidental and accessory matters, they may be heard and decided by an ecclesiastical judge".[56]

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54. Ibid. at para 9.

55. Section 125(1) Explanation (b) of Cr.P.C enacts:-
" 'wife' includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried".

56. See "Code of Canon Law". English translation. Theological Publications in India. (1983) Bangalore. This is applicable to Latin Catholics only.

The parties to the marriage in Kurian v. Alphonsa were Syrian Catholics. So the provisions of canon law contained in the Pius XII, Motu proprio Crebrae allate 1949 which was the personal law of the parties should have been made applicable.[57]

It's canon 5 is specific:-

> "The marriage of baptised persons is ruled not only by Divine Law but also by Canon Law, save for the competency of the civil authority in regard to the merely civil effects of marriage".[58]

This position of canon law was however not brought to the notice of the Court.

The ratio in Kurian was reiterated by a Division Bench of the High Court of Kerala in Jose v. Alice,[59] wherein the Court held:-

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57. See supra n.35 and 49 and the accompanying text.

58. See Pius XII, Motu Proprio Crebare allatae. 1949. It was repealed by the Code of Canons of the Eastern Churches, 1990, which came into force with effect from 1.10.1991. This also provides for the civil effects of marriage to be regulated by civil law as is evidenced by canons 780 and 1358 of that code.

59. Jose v. Alice. 1989 Cri LJ.1527(Ker.H.C)=1988(2) K.L.T 890 (DB). Here the marriage between the parties was solemnised at the Syrian Catholic Church, Santhipuram in Mukundapuram Taluk of Thrissur District. This is an area coming under the territorial limits of the former state of Cochin.

> "a Christian marriage can be declared null and void only by a decree of Court as provided for in Sections 18 and 19 of the Indian Divorce Act....." [60]

And it also held:-

> "Marriage between the parties creates civil rights and the ecclesiastical tribunals have no jurisdiction to annul marriages involving the civil rights of parties".[61]

It may be pertinent to note that the Court in this case built up the entire edifice of its thesis on the wrong assumption that the marriage was solemnised in accordance with Section 5 of the Indian Christian Marriage Act, 1872.[62] But the areas of Travancore and Cochin have been specifically excluded from the operation of the Indian Christian Marriage Act.[63] Therefore, the very foundation of the Court's reasoning is non-est. That apart, as has already been pointed out,[64] canon law has specifically left the civil effects of marriage like maintenance to be administered by the civil law. Therefore, the

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60. See Ibid. at 896. Also see infra notes 99-102 and the accompanying text.
61. See Ibid. at 893.
62. See Id. at 891 and 897. (See infra notes 78-79 and the accompanying text).
63. See The Schedule to the Part B States(Laws) Act, 1951.
64. See supra notes 56 and 58.

Court should have decided the case even without reference to the proceedings before the Eparchial Tribunal as the claim of the petitioner in the case was maintenance. Hence there was no need or necessity for the Courts to have looked into the validity or otherwise of the dissolution of marriage granted by the Eparchial Tribunal. This is especially so, as the criminal court exercising jurisdiction under section 125 Cr.P.C has the jurisdiction to enter into an independent enquiry when the marriage is disputed by one of the parties. In the case of nullity of marriage, it is in fact a dispute regarding the existance of marriage. In such cases the Criminal Court should decide the question without leaving the woman to establish her status in a civil court.[65] The Court could have entered into an independent enquiry into the grounds of nullity of marriage alleged by the husband. Instead, the Court tried to draw strength from English precedents. And the Court's apparant equation of Eparchial Tribunal to the Ecclesiastical Courts in England does not seem to be correct or relevant today as the Eparchial Tribunals here stand on a different historical and legal footing.[66]

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65. Krishan Kaur v. Kartar Singh, 1988 Crl LJ 717 at 719 (J & K).

66. See supra n.16 at 135. Also see Dr. Scaria Zacharia. "The Acts and Decrees of the Synod of Diamper" at 209. Here the Bishops exercised jurisdiction in these matters.

In this context, it appears that the Division Bench did not correctly apply the ratio of the decision of the Supreme Court which was rendered as far back as 1972. The Supreme Court ruled that the canon law was applicable to Christians in certain respects. It observed:-

> "The question of capacity to marriage and impediments in the way of marriage, would have to be resolved by referring to their personal law. That for the purpose of deciding the validity of marriage, would be the law of the Roman Catholic Church, namely, the canon law of that church".[67]

Thus,when the Apex Court accepted canon law as the personal law of Catholics and relied upon it to supplement the civil law, the view of the High Court of Kerala to the contrary appears to be inappropriate. In fact the High Court should have been liberal

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67. Lakshmi Sanyal v. S.K. Dhar (1972)2 S.C.C. 647=A.I.R 1972 S.C.2667. Para 10. The Supreme Court held the canon law to be applicable law in this case because the prohibited degrees were not mentioned in the statute law whereas they were mentioned in the canon law. But it appears that the Governor-General-in-Council had issued a notification indicating prohibited degrees. See J.C. Forbes, "The Law and Practice of Divorce in India". (1938) Bombay, at 28 and 324.

in its interpretation as the Supreme Court in Reynold Rajamani[68] held that the Courts must adopt a liberal approach in the areas of marriage and divorce.

The High Court of Kerala had another occassion to examine the question afresh. In Leelamma v. Dilip Kumar,[69] Justice Chettur Sankaran Nair emphatically stated that the personal law of Syrian Catholics is canon law and that their marriages are governed by canon law.[70]

While matters remained thus, a Full Bench of the Kerala High Court re-examined and revised the position of law in 1994 in George Sebastian v. Molly Joseph.[71] The question that arose for consideration in this case was whether the declaration of nullity of the first marriage of the respondent, effected by the

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68. Reynold Rajamani v. Union of India (1982)2 S.C.C 474= A.I.R 1982 S.C. 1261.

69. Leelamma v. Dilip Kumar. A.I.R 1993 Kerala 57=1991(1) K.L.T 651.

70. On this, Professor George Nedungatt of the Pontifical Oriental Institute, Rome, in his forward to "Marriage Laws in Canon Law and Civil Law" by Dr. Joseph Vadakkumcherry opined:-

> "What is surprising is that it took Kerala twenty years to follow up and fall in line with a sentence of the Supreme Court of India given in 1972, which had recognised canon law as the personal law governing Catholics. Perhaps the responsibility for this delay has to be shared by the legal profession both civil and canonical".

71. George Sebastian v. Molly Joseph. A.I.R 1995 Kerala 16=1994(2) K.L.T 387 (FB).

Eparchial Tribunal-the marriage being null and void ab initio- was to be recognised by the civil court as valid so as to deem her free with capacity to effect a valid marriage subsequently. It was after obtaining the decree of nullity from the Eparchial Tribunal, the wife contracted the subsequent marriage with the petitioner in accordance with the personal law (canon law) of the parties. After some time the relations between them got strained and the husband moved the District Court for a decree of nullity of the marriage under Sections 18 and 19 of the Indian Divorce Act, 1869, on the ground that her (wife's) first marriage still subsisted, inasmuch as the decree of nullity granted by the Eparchial Tribunal was not legally valid. Even without taking evidence the District Court accepting husband's plea granted a decree of nullity and forwarded it for confirmation to the High Court.

The High Court remanded the case directing the District Judge to conduct an enquiry into the allegation relating to the subsistance of the former marriage. While doing so it thought it proper and necessary to review the position of the law that got re-established in Leelamma.

At the outset, it may be noted that the Full Bench of the High Court found that the decree of the District Court was in violation of the procedural requirements under Section 47 read with Section 45 of the Indian Divorce Act, and the basic rules of natural justice inasmuch as the District

Court without conducting an inquiry granted the decree of nullity merely on the admission made by the parties in their pleadings. The Court noted:-

> "All those would suggest that the District Judge is not to pass a decree of nullity of marriage just after reading the pleadings of the parties. At any rate, Section 45 of the Divorce Act is not a carte blanche for dispensing with any enquiry as to the existance of a ground for nullity of marriage merely because no dispute regarding that ground has been raised by the other party".[72]

Having found violation of procedural rules and also denial of principles of natural justice and having decided to remit the case for fresh disposal the Court could have avoided a decision on the powers of Eparchial Tribunals. Yet the Court went on to examine the case on merit. But there was no valid decree to be examined on merits. One wonders whether in these circumstances there was any justification for laying down any principle of law on the binding nature of a decree of nullity of marriage granted by the Eparchial Tribunal. The case came up before the High Court only for confirmation under Section 20 of the Act, and there was no reference under Section 9 for the decision of the High Court. It is significant in this

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72. See Ibid. at 390.

context to refer to the mandate under Section 9 of the Act which provides for a decision on a reference made by the District Court to the High Court. Therefore, the opinion in the case cannot be considered as a good precedent.

Be that as it may, let us examine the opinion of the Full Bench. It ruled:-

> "Our conclusion is the legal position laid down by the Division Bench in Jose v. Alice (1988(2) K.L.T 890) vis-a-vis the canon law is the correct position and requires no change".[73]

This conclusion was made on reasoning thus:-

> "When there is a statute governing the area, the statute has primacy over any personal law in that regard.....[74]after the Divorce Act came into force dissolution or annulment granted under such personal law cannot have any legal impact as statute has provided a different code for divorce or annulment.....[75] In other words, personal law stands clipped to the extent statutory law has stepped".[76]

It may be pointed out that the entire edifice of the

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73. See Id. at paragraph 27.
74. See Id. at paragraph 16.
75. See Id. at paragraph 18.
76. See Id. at paragraph 18.

judgment in Jose v. Alice[77] was built on a foundation that there is a statutory law applicable to the parties for solemnisation of marriage. This is evident from the judgment. The Court began to weave out its thesis thus:-

> "It is not disputed that the minister had received episcopal ordination and was competent to solemnise the marriage under sub Section (1) of Section 5 of the Indian Christian Marriage Act, 1872".[78]

It proceded further:-

> "There is no dispute that the marriage in the present case was solemnised in accordance with the personal law applicable to the parties. The minister who had received episcopal ordination and had solemnized the marriage in accordance with the sub-Section(1) of Section 5 of the Indian Christian Marriage Act of 1872 should be presumed to have ensured that the parties had given free consent for the marriage and such presumption will hold the field until the High Court passes a decree of nullity of marriage on the ground of force or fraud in obtaining the consent".[79]
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> (Emphasis supplied)

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77. See supra n.59. It may be noted that S.L.P.Crl.No.303/89 is pending final adjudication in the Supreme Court against the decision in this case.

78. Ibid. at 891.

79. Id. at 897.

As noted above it is to be seen that in Jose v. Alice, the Division Bench went wrong on the very fundamental assumption that there is a statutory law applicable for solemnisation of Christian marriages in the concerned area.[80] This wrong assumption that largely influenced the decision in Jose v. Alice was not taken note of by the Full Bench. And it is this decision of the Division Bench which is per in curiam that is affirmed by the Full Bench in George Sebastian,[71] without even a reference under Section 9 of the Indian Divorce Act.

The Indian Christian Marriage Act, which the Full Bench considers applicable, is not, as already discussed, applicable to the areas which formed part of Travancore or Cochin. If what the Court speaks of ("the statutory law has stepped") is the Indian Divorce Act, then it deals mainly with Divorce and Nullity of marriages and not solemnisation of Christian marriages. That is regulated by the personal law, the canon law and custom.[81] Therefore, the Court need not have decided the question as to whether there was a validly solemnised marriage without recourse to the personal law. In any event, this question could not have been examined by looking into the provisions of the Divorce Act alone.

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80. It can be noted that, the marriage in this case was solemnised in the former state of Cochin. The Indian Christian Marriage Act is specifically excluded from its application to this area by the Schedule to the Part B States(Laws) Act, 1951.

81. See supra notes 47 and 69.

This is especially so, after the Supreme Court has held:-

> "The attempt to exclude altogether the personal law applicable to the parties from consideration also has to be repelled".[82]

Thus the relevance of personal law was brought home by the Supreme Court even in a maintenance case. Therefore, whether it is in the case of maintenance or for other matrimonial reliefs, a wife or a husband must establish her/his civil status as a wife or husband with reference to the personal law applicable to the parties.[83]

In George Sebastian,[71] the capacity of the respondent (wife) to contract the marriage in question could be determined only by resort to the personal law applicable to the parties and if according to the personal law, the earlier marriage was void ab initio, the question of nullity of the marriage between the petitioner and the respondent under Section 19(4) would not arise as Section 19(4) of the Indian Divorce Act, 1869 will be attracted only if there was a marriage according to the personal law. If the marriage was void ab initio the marriage would be non est and it would have had no legal effect at all and since

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82. Yamunabai Anantrao Adhav v. Anantrao Shivram Adhav. (1988)1 S.C.C. 530 at 536. This decision was rendered in the context of Section 125 Cr.P.C as was the case in Jose v. Alice.

83. Sebastian Champappilly, "Kerala High Court on Christian Law-Recent Trends". (1994(2) K.L.T. Journal 49 at 54.)

that marriage was only a simulation of marriage, that law which allowed the solemnisation of marriage (Canon Law) has the power to declare that the marriage was non est. That being so, the question of the former marriage being then in force as contemplated under Section 19(4)[84] would not arise.

Further, the Full Bench of the High Court seems to have proceeded on the assumption that the Indian Divorce Act, 1869 form the comprehensive law on the subject.[85] This does not appear to be correct as is evident from the Preamble to the Indian Divorce Act, 1869 which states:-

> "Whereas it is expedient to amend the law relating to the divorce of persons professing the Christian religion, and to confer upon certain courts jurisdiction in matters matrimonial".[86]

It is pertinent to note that it was not to 'make' or 'consolidate' the law, but to 'amend' that the Act was passed. That means there was some law then existing and the Divorce Act was to be part of that law. The concept of amendment in law

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84. Section 19(4) provides that a decree of nullity may be made on the ground:- "that the former husband or wife of either party was living at the time of the marriage, and the marriage with such former husband or wife was then in force".

85. See supra n.71. Paragraph 16 at 393. (See infra n.101 and the accompanying text).

86. See Preamble to the Indian Divorce Act, 1869. (Act No.4 of 1869).

postulates an antecedent law in force and in some cases the bulk of that antecedent law is kept alive and only the dead wood removed. Wherever there is no law, the legislature would specifically note the position. On the contrary wherever there is a law and when the legislature wants to consolidate and amend the law, such intention is expressed in explicit terms. For example the Preamble to the Indian Christian Marriage Act may be read in contra distinction with that of the Indian Divorce Act, 1869. Preamble of the former reads:-

> "An Act to consolidate and amend the law relating to the solemnisation in India of the marriages of persons professing the Christian religion".[87]

Now, therefore, it becomes evident that the Indian Divorce Act does not consolidate the law of divorce, but it only amends[88] the law and aims only at a limited intervention in the law by conferring jurisdiction on the Courts to exercise the same in these matters. And in the exercise of that jurisdiction the Court has to act on the principles of English Divorce Courts as is made mandatory under Section 7 of the Act.

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87. See Preamble to the Indian Christian Marriage Act, 1872. It is interesting to note that Section 88 of this Act recognizes personal law applicable to the parties. It is thus a balanced piece of legislation to that extent. See infra n.97 and the accompanying text.

88. See supra n.67. Para 6.

At this juncture, it is of interest to note that even in England, the substantive law on matrimonial causes was not altogether abrogated by the Matrimonial Causes Act, 1857.[89] Lord Merriman opined that the principles that the Courts in England must follow in nullity cases were those of the old Ecclesiastical Courts and that neither the statute nor the common law of England had interfered with the pre-Reformation canon law.[90]

It shows that the legislature had made only a limited intervention in the substantive law on matrimonial causes in England in 1857[91] and the Indian Divorce Act of 1869 was not substantially different from the English law on the subject.

The Indian Christian Marriage Act, 1872 consolidated the law relating to 'solemnisation' of Christian marriages rather than the substantive law of marriages such as capacity to marry cetera. This is abundantly evident from the various provisions of the enactment. This position was correctly appreciated by the Bombay,[92] Madras[93] and Allahabad[94] High Courts.

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89. See infra notes 32-37 of Chapter IV and the accompanying text.
90. Hartan v. Hartan. P 115. C.A. p.126. Seq.
91. See Preamble to the Matrimonial Causes Act, 1857 as given in "Rayden's Practice and Law in the Divorce Division of the High Court of Justice and on Appeal therefrom". Second Edition. (1926) London. Appendix-I at 403.
92. See supra n.15.
93. In re Kolandaivelu (1917) 40 Mad. 1030 (FB).
94. Alfred v. Titili A.I.R 1933 All. 122.

The Supreme Court appears to have approved of the finding of the Bombay High Court to the effect that the whole of the Indian Christian Marriage Act 1872 deals with the ceremony of marriage,[95] and repelled the contention that it was not open to the courts to travel beyond Section 19 or the provisions of the Divorce Act to discover whether an impediment which renders the marriage null and void ab initio existed.[96] In fact the Supreme Court travelled beyond the provisions of the statutory law to decide the validity or otherwise of a Christian marriage. And this was made possible by the Legislature by enacting Section 88 of the Indian Christian Marriage Act, 1872. It provides:-

> "Nothing in this Act shall be deemed to validate any marriage which the personal law applicable to either of the parties forbids him or her to enter into".[97]

Thus it was not intended to make any infraction on personal law which was to be held as substantive law. It was by resort to Section 88 that the Supreme Court in Lakshmi Sanyal[98] recognised and applied the canon law as personal law of Catholics in deciding

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95. See supra n.67 at 654.
96. Ibid. at paragraph 10.
97. See The Indian Christian Marriage Act, 1872. (Act No.15 of 1872). (Also see supra n.22 and the accompanying text).
98. See supra n.67.

upon the validity of a marriage solemnised under the Indian Christian Marriage Act, 1872. It was a case where the statutory law, ie, the Indian Christian Marriage Act, was made specifically applicable and yet the Supreme Court gave effect to personal law by resort to Section 88 of the Act. In George Sebastian,[71] there was no statutory law relating to solemnisation of marriages,[99] that could be applied. Yet the Full Bench failed to fall in line with the decision of the Supreme Court which upheld the importance of personal law time and again.

The British Indian Courts had taken a balanced view in those matters as is evident from the decision of the Bombay High Court which held:-

> "any marriage which should for any reason be invalid in the eyes of that law (canon law) must also be held invalid in a civil court".[100]

The above reasoning of the Court appears to stand fortified as the Court would get jurisdiction in a case of nullity of marriage only if the parties approach it under Section 18 and 19 of the Act. And nowhere in the entire Act,

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99. See supra n.81.

100. See supra n.15 at 313. It is pertinent to note that this decision was rendered in the context of the Indian Christian Marriage Act, 1872 and the Indian Divorce Act, 1869.

is it provided that a declaration of nullity of marriage rendered under the personal law of the parties can have no legal effect.

In this context the opinion of the Full Bench of the Kerala High Court requires further examination. The Court seems to have laboured under the following notion:-

> "The grounds enumerated and envisaged in S.19 are exhaustive for nullifying a marriage. The Court is not empowered to go outside the contours of the Divorce Act for granting a decree of divorce or a decree of nullity".[101]

This is again another fundamental error. Section 19 of the Indian Divorce Act is not exhaustive. A mere look at the Indian Christian Marriage Act, 1872 shows that there are other grounds. It provides:-

> "Marriages to be solemnised according to Act- Every marriage between persons, one or both of whom is or are a Christian, or Christians, shall be solemnized in accordance with the provisions of the next following Section; and any such marriage solemnised otherwise than in accordance with such provisions shall be void".[102]

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101. See supra n.71 at 393 (Paragraph 16).

102. Section 4 of the Indian Christian Marriage Act, 1872.

It is obvious that any Christian marriage solemnized in contravention of Section 5 of the Indian Christian Marriage Act is void.[103] It would thus become clear that the opinion of the Full Bench that the Court cannot go outside the contours of the Divorce Act, cannot stand legal scrutiny. In fact the Supreme Court had already set the precedent to travel beyond Section 19 of the Indian Divorce Act, 1869 to decide upon the validity or otherwise of a Catholic marriage.[104]

Viewed from this perspective the note of dissent struck by the Full Bench of the High Court of Kerala from the ratio of Leelamma's Case[69] or for that matter the non application of the Supreme Court's decision in Lakshmi Sanyal by way of distinguishing it was unwarranted. Having said in Moore v. Valsa[105] that suppressing the fact of vasectomy[106] would amount to 'fraud'; it is difficult to understand as to how their Lordships were able to take a different

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103. See infra n.46-50 of chapter IV and the accompanying text. (The jurisdiction to declare a marriage null and void for contravention of Section 5 of the Act rest with the ordinary Court of civil jurisdiction and not the District Court or the High Court).

104. See supra n.67 and 96 ((1972)2 S.C.C 647 at 654).

105. 1991(2) K.L.T 504.

106. It may be noted that the fact (vasectomy) is amenable to correctional measures like re-canalisation. Further such a concealment has never been brought within the field of Penal Law.

view disagreeing with Justice Chettur Sankaran Nair, on the content of 'fraud' in Section 19 of the Indian Divorce Act as held in Leelamma's Case. One fails to understand this stand particularly when the reasoning in George Sebastian is examined in the light of the following observation in Moore:-

> "The pristine view that scope of fraud in matrimonial law has a narrow radius need not rigidly be adhered to in modern times.....In a way a more liberal out look was adopted by the Courts in recent years".[107]

It appears that the view taken by Justice Chettur Sankaran Nair in Leelamma's Case, even apart from canon law, is impeccable because a false representation as to caste has been held to be cheating[108] and further a consent signified by a woman is no consent at all, if the consent is given under a deception.[109]

It appears that their Lordships of the Full Bench had ignored a vital aspect in upholding civil law against canon law, that they were dealing with a situation where there was no civil law but only canon law. The Full Bench relied on the Indian

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107. Moore v. Valsa. 1991(2) K.L.T 504. Para 7.
108. Mohim Chuder Sil (1871)16 W.R. (C.R) 12.
109. See literature on Section 375 of the Indian Penal Code dealing with consent of a woman in rape case.

Divorce Act to find out the principles governing marriage. While doing so it failed to appreciate that the law relied on was not the Indian Christian Marriage Act or for that matter any other Marriage Act but a legislation which deals with post marriage status only. The question whether a previous marriage of one of the parties is or is not still subsisting, must be examined in the light of law applicable to that marriage at that time.[110] And here, it should have been examined under the canon law.

Viewed from the context of the Constitution of India, it appears that canon law and its forums and procedure can claim protection under Articles 372 read with 13(3)(b) and 366(10) of the Constitution of India, as a "law in force" or as an "existing law" at the commencement of the Constitution of India. This is more so, as the term "law" includes substantive law as well as procedural law. It may be noted that certain provisions of canon law come within the definition of substantive law and certain other provisions, especially dealing with the functioning of Eparchial Tribunals come within the definition of procedural law. Therefore, there is no reason to exclude the procedural aspects of canon law while recognising the substantive law contained therein. It can safely be considered that both the substantive and procedural aspects of canon law would come within the Constitutional scheme of "law", which may be both "existing law" and therefore a "law in force"

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110. Khambatta v. Khambatta (1934) 36 Bom L.R 1021.

at the commencement of the Constitution. At any rate, it seems certain that the legislature has not thought it necessary to enact a comprehensive legislation on these items and there are certain areas still left to the personal law to govern.

In this context it may be mentioned that if a Certificate of marriage issued under the authority of canon law is sufficient for the civil court to accept the marriage as valid, there is no reason why the civil court should not accept and act upon a certificate or decree granted under the authority of the same canon law, which provides for the grounds and a machinary to declare that no such valid marriage has taken place. Therefore any such declaration to the effect that a marriage is non-est which should for any reason be valid in the eyes of that law (canon law) must also be held valid in a civil court.

This is especially so,when Muslims in India are allowed to be governed by their personal law in these matters. Even in the realm of Penal law, ie, in the matter of prosecution for bigamy, the Muslim personal law has been given effect to as is evident from the dictum of the Kerala High Court which held:-

> "So long as the personal law by which the parties are governed does not prohibit a second marriage, it cannot be said that an offence of bigamy is

committed".[111]

This being the position so far as Muslims are concerned even under the Criminal Law, there is no rhyme or reason for the non-recognition of a decree of nullity of marriage granted by the Eparchial Tribunal, by the Civil Court.[112]

Further, the decision of the Full Bench of the High Court of Kerala seems to strike at the fundamental rights of Catholics. As far as they are concerned, marriage is a sacrament. Canon Law provides:-

> "Canon 1055.(1) The marriage covenant, by which a man and a woman establish between themselves a partnership of their whole life, and which of itsown very nature is ordered to the well being of the spouses and to the procreation and upbringing of children, has, between the baptised, been raised by Christ the Lord to the dignity of a sacrament.

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111. Abdulla v. Noorjahan 1987 (1) K.L.T 885. In the field of divorce, the right of Muslim husband to make a unilateral "Talaq" is recognised by the civil court without any reservation whatsoever. Also see Mst. Payari wife of Faquir Chand v. Faquir Chand Alaka. A.I.R 1961. Panjab 167.

112. It is common knowledge that the church does not allow dissolution of marriage except on valid grounds.

(2) Consequently, a valid marriage contract cannot exist between baptised persons without its being by that very fact a sacrament".[113]

And the administration of the sacraments and sacramentals is an essential religious practice of Catholics. Therefore, the interference with the essential religious practice of proper administration of the sacrament of marriage can be termed as an interference with the free exercise of religion guaranteed by Article 25(1) read with Article 26(b) of the Constitution of India. Article 25(1) provides:-

"Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion".

And Article 26(b) provides that every religious denomination or any Section thereof shall have the right to manage its own affairs in matters of religion, and this freedom is subject only to public order, morality and health. Therefore, unless the religious practice is either violative of the fundamental rights of someone or against public order, morality and health,

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113. See supra n.56. Canon 1055 at 189. The same is the position in Canon 776 of the Code of Canons of the Eastern Churches, 1990. See supra n.58.

there cannot be any interference with the functioning of the Eparchial Tribunals as they are part of the administration of the sacrament of marriage which is an essential part of the practice of religion among Catholics. The rulings of such Tribunals are indeed respected by our legal system. For example, in Goa, Daman and Diu, the civil courts recognise and execute the processes, orders and judgments of the Eparchial Tribunals.[114]

While discussing the scope and impact of Art.26(b), the Supreme Court opined that the right of every religious denomination to manage its own affairs in matters of religion is a fundamental right which not even the legislature can take away. The Supreme Court then held:-

> "A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might extend even to matters of food and dress".[115]

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114. See supra notes 39-40 and the accompanying text of chapter II.

115. Commissioner H.R.E v. L.T. Swamiar. A.I.R. 1954 S.C. 282 at 290.

In yet another case, the Court further held:-

> "that the matters of religion in Art.26(b) include even practices which are regarded by the community as part of its religion" [116]

Quoting the above opinion with approval, a Bench consisting of 6 Judges of the Supreme Court reiterated:-

> "It would thus be clear that religious practice to which Art.25(1) refers and affairs in matters of religion to which Art.26(b) refers, include practices which are an integral part of religion itself and the protection guaranteed by Article 25(1) and Art.26(b) extends to such practices". [117]

Therefore, it emerges that the civil court is bound to recognise and enforce the decisions of the Eparchial Tribunals under the legal system as it remains today. And the decision of Full Bench of the Kerala High Court seems to run counter to the constitutional mandate.

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116. Venkataramana Devaru v. State of Mysore. A.I.R 1958. S.C.255 at 264.

117. Shri Govindlalji v. State of Rajasthan. A.I.R. 1963 S.C.1638 at 1660.

In this context it is worthwhile to examine the opinion of academic writers on these issues. It was opined that when personal law has the jurisdiction to celebrate a marriage between Catholics, the right to declare nullity of marriage is implied.[118] Jurists go even beyond this. One author observes:-

> "Since the Christians in these parts constitute a separate class for the purposes of marriage and divorce having regard to the tight grip of the church on them it would be in the fitness of things if Ss.18 and 19 of the Divorce Act are not made applicable to them. The eparchial court being the custodian of canon law may be conferred with the jurisdiction to decide the question concerning dissoultion of Christian marriages".[119]

The response of the community was also not different.[120]

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118. M.I. Joseph, "Conflict between personal law and civil law". 1986 K.L.T (Journal)84. (This author was also under a wrong notion that the Indian Christian Marriage Act, 1872 applied to the case under his comment, ie, Kurian v. Alphonsa. 1986 K.L.T.731).

119. Prof.K.N. Chandrasekharan Pillai, "A comment on Leelamma v. Dilip Kumar alias Kochaniyan. 1992(1) K.L.T 651"-in 1992(1) K.L.T. Journal 53 at 56 and 57.

120. See Rev.Dr.Joseph Vadakumcherry, "Reflections on Leelamma v. Dilip Kumar 1992(1) K.L.T 651"- in 1992(1) K.L.T. Journal at 73.

It may be relevant to note the opinion of the Christian community on these issues. Eighty Six per cent of the respondents in a survey[121] opined that a thorough reform of the law relating to Christians in these areas is essential and 76% of them believe that the provisions of the Indian Divorce Act, 1869 are discriminatory to women. Whereas, the provisions of canon law are non-discriminatory. In this view the Courts opinion seems to run counter to public opinion also.

Therefore, the recognition of personal law in Leelamma's Case[122] in tune with the Supreme Court decision in Lakshmi Sanyal's Case[123] for deciding the validity of a marriage seems to be correct, when there is no comprehensive statutory law governing these areas.

Indeed, the legislature has not been prompt enough in coming up with a comprehensive legislation on these subjects.

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121. The present writer under took an empirical study on these areas in connection with his Ph.D. Programme under the Law Department of the Cochin University of Science and Technology. See infra notes 67 and 103 of Chapter VI.

122. See supra n.69.

123. See supra n.67.

Therefore, the law relating to nullity of Christian marriages are disparate in the various regions of India. In areas governed by the Indian Divorce Act, 1869, the grounds of nullity are those provided under Section 19 of the Act, and the one available under Section 4 and 5 of the Indian Christian Marriage Act, 1872.[124]

Section 19 of the Indian Divorce Act, 1869 enacts:-

"GROUNDS OF DECREE- Such decree may be made on any of the following grounds:-

1. that the respondent was impotent at the time of the marriage and at the time of the institution of the suit,

2. that the parties are within the prohibited degrees of consanguinity (whether natural or legal) or affinity ;

3. that either party was a lunatic or idiot at the time of the marriage ;

4. that the former husband or wife of either party was living at the time of the marriage, and the marriage with such former husband or wife was then in force.

Nothing in this Section shall affect the jurisdiction of the High Court to make decrees of nullity of marriage on the ground that the consent of either party was obtained by force or fraud".

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124. See supra notes 102-103.

Thus, it can be seen that the Section provides four grounds for obtaining a decree of nullity of marriage. Further, the jurisdiction of the High Court to make decrees of nullity of marriages on the ground that the consent of either party was obtained by "force or fraud" has been saved.

In short, grounds for declaration of nullity of a marriage under Section 19 of the Indian Divorce Act, 1869 can be classified into two catagories viz void and voidable. The grounds falling under sub-Section 2 and 4 of Section 19 come within the category of void as the position cannot be improved or changed by the will or act of the parties subsequent to the marriage. And the other grounds in Section 19 come within the catogory of voidable marriages.

Coming back to the laws relating to Christian marriages in other areas, it can be seen that in Goa, Daman and Diu the canonical marriages (Catholic marriages) and the declaration of nullity of such marriages are regulated by canon law.[125]

Under Canon Law, void marriages are rendered 'ipso facto' invalid by reason of diriment impediments existing at the time of solemnisation of marriages. Void marriages due to diriment impediments are given both in the Codex Iuris Canonici, 1983[126] and in the

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125. See Chapter II, notes 37-41 and the accompanying text.

126. Codex Iuris Canonici (The Code of Canon Law) was promulgated by Pope John Paul II on 25th January, 1983. Hereinafter this code will be referred to as the Code of Canon Law, 1983 or C.I.C.

Codex Canonum Ecclesiarum Orientalium 1990.[127] As per the provisions of Canon Law of Catholics, void marriages are:-

1. Marriages contracted by those who are below the age of 16 for men and 14 for women.[128] The Episcopal Conference is given the right to prescribe a higher age for the celebration of a lawful marriage.[129]

2. Antecedent and perpetual impotence to have sexual intercourse, whether on the part of the man or on that of the woman, whether absolute or relative invalidates a marriage.[130] (But sterility neither forbids nor invalidates a marriage).

3. A person bound by the bond of a previous marriage, even if not consummated, invalidly attempts marriage.[131]

4. Marriage solemnized between a Catholic and a non-Christian[132] is void unless permission from the Bishop is obtained.[133]

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127. Codex Canonum Ecclesiarum Orientalium (Code of Canons of the Eastern Churches) was promulgated by Pope John Paul II on 18th October, 1990 with effect from 1st October, 1991. Hereinafter, this code will be referred to as C.C.E.O.

128. See Canon 1083 of C.I.C and Canon 800 of C.C.E.O.

129. The Catholic Bishops Conference of India has prescribed 21 years for men and 18 years for women to enter into marriage in conformity with the civil law.

130. See Canon 1084 of C.I.C and Canon 801 of C.C.E.O.

131. See Canon 1085 of C.I.C and Canon 802 of C.C.E.O.

132. See Canon CIC 1086 and Canon C.C.E.O 804.

133. For Conditions under which mixed marriages are permitted see Canon C.I.C 1124-1126 and Canons C.C.E.O 813-815.

5. Marriage of those in Holy orders (Diaconate and Priesthood).[134]

6. Marriage of those who are bound by a public perpetual vow of chastity in a religious institute.[135]

7. Marriage between a man, and a woman who has been abducted, or at least detained, with a view to contracting a marriage with her, unless the woman, after she has been separated from her abductor and established in a safe and free place, chooses marriage of her own accord.[136]

8. Marriage in view of which death was caused by one of the couple either to his/her own or to the other's spouse.[137]

9. Marriage contracted between those who are related by consanguinity in any degree of the direct line, whether ascending or descending, legitimate or natural and up to the fourth degree in the collateral line.[138]

10. Marriage contracted by those who are related by affinity in any degree of the direct line.[139]

11. Marriage contracted by those who are related by affinity in the collateral line, in the second degree.[140]

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134. See Canon C.I.C 1087 and Canon C.C.E.O 804.
135. See Canon C.I.C 1088 and Canon C.C.E.O 805.
136. See Canon C.I.C 1089 and Canon C.C.E.O 806.
137. See Canon C.I.C 1090 and Canon C.C.E.O 807.
138. See Canon C.I.C 1091 and Canon C.C.E.O 808.
139. See Canon C.I.C 1092 and Canon C.C.E.O 809.
140. See Canon C.C.E.O 809.

12. Marriage concluded by those who are affected with the impediments of public propriety. It arises when a couple live together after an invalid marriage or from a notorious or public concubinage. It invalidates marriage in the first degree of the direct line between the man and those related by consanguinity to the woman and vice versa.[141]

13. Marriage by those who are bound by the canonical form of celebration of marriage live together after having attempted a civil marriage or a marriage before a non-Catholic minister.[142]

14. Marriage entered into by those who are legally related by reason of adoption in the direct line or in the second degree of collateral line.[143]

15. Marriage contracted between those who are under a spiritual relationship which arises in connection with baptism. It exists between the sponsor and the baptised person and the parents.[144]

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141. See Canon C.I.C 1093 and Canon C.C.E.O 810.
142. See Canon C.C.E.O 810(3). This is applicable only to the Oriental Catholics.
143. See Canon C.I.C 1094 and Canon C.C.E.O 812.
144. See Canon C.C.E.O 811. It applies only to the Oriental Catholics.

Voidable marriages under the Canon Law are the following:-

1. Marriage contracted by those who lack sufficient use of reason, or those who suffer from a grave lack of discretionary judgment concerning the essential matrimonial rights and obligations to be mutually given and accepted ; or those who, because of causes of a physchological nature are unable to assume the essential obligations of marriage.[145]

2. Marriage contracted by those who are ignorant of the fact that marriage is a permanent partnership between a man and a woman, ordered to the procreating of children through some form of sexual co-operation. But this ignorance is not presumed after puberty.[146]

3. Marriages contracted under error of person renders a marriage invalid. But error about a quality of the person, even though it be the reason for the contract, does not render a marriage invalid unless this quality is directly and principally intended.[147]

4. Marriage entered into by fraud perpetrated to obtain consent, concerning some quality of the other party which of its very nature can seriously disturb the partnership of conjugal rights.[148]

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145. See Canon C.I.C 1095 and Canon C.C.E.O 818.
146. See Canon C.I.C 1096 and Canon C.C.E.O 819.
147. See Canon C.I.C 1097 and Canon C.C.E.O 820.
148. See Canon C.I.C 1098 and Canon C.C.E.O 821.

5. Marriage contracted by those who have shown a positive act of will to exclude marriage itself or any essential element of marriage or any essential property of marriage.[149]

6. Marriage contracted by reason of force or of grave fear imposed from outside, even if not purposely, from which the person has no escape other than by choosing marriage.[150]

It is pertinent to note that canon law does not recognis divorce. Perhaps only in one instance the church could be said to grant divorce in the true sense. That is, a non-consumated marriage between baptised persons can be dissolved by the Roman Pontiff (Pope) for a just reason, at the request of both the parties or of either party even if the other is unwilling.[151]

As regards civil marriages in Goa, Daman and Diu, the grounds for nullity of marriages is given in Article 4 of Family Laws No.1 of 1910. It provides:-

> "The following shall not contract marriage:- 1. Relatives by consanguinity or affinity in a direct line, although the marriage, which is the cause of affinity, has been dissolved;

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149. See Canon C.I.C 1101 and Canon C.C.E.O 824.
150. See Canon C.I.C 1103 and Canon C.C.E.O 825.
151. See Canon C.I.C 1142 and Canon C.C.E.O 862, and also see Dr. Joseph Vadakkumcherry, "Marriage Laws in Canon Law and Civil Law", (1992) Cochin, at 47.

2. Legitimate or illegitimate brothers and sisters by full-blood or consanguineous or uterine;

3. Those males below the age of eighteen years, and females below the age of sixteen years;

4. Those under disability due to insanity, declared by judgment become final for want of appeal, or notorious; as well as those divorced on the ground of contagious disease found incurable or of an incurable disease involving sexual aberration;

5. Any spouse who has been convicted of committing, or abetting the commission of, or of the attempt to commit murder of the other spouse, with any other person convicted of committing or abetting the commission of the same offence;

6. Those joined by another marriage, not yet dissolved".[152]

And Article 11 provides that the marriage celebrated in contravention of any of the clauses of Article 4, as between the contracting parties, could be declared null and void in law as if it had never existed.

In Pondicherry, the law relating to marriages is similar to t one in canon law. Article 180 of the French Civil Code provides the grounds for declaration of nullity of marriages.[153] It provides:-

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152. See Family Laws No.1 Published in Govt Gazettee No.70 dated 27.12.1910.

153. See E. Blackwood Wright, "The French Civil Code". Vol.I at 37.

"The validity of a marriage which has been contracted without the free consent of both the parties, or without the free consent of one of them, can only be impugned by the parties themselves, or by the party, whose consent was not freely given. When there has been a mistake as to personality of the person with whom the marriage has been contracted, the validity of the marriage can only be impugned by the person who was led into the mistake".

Mistake as contemplated in Article 180 has been held to include mistake as to qualities of an individual.[154] The Court of Cassation in France held that where a man was deprived by law of an appreciable part of his civil rights (eg. a convict) the marriage was annulable, if the other party did not know the fact. There have been decisions which extend the grounds for nullity further, and which hold that Article 180 includes mistakes as to moral character of the person married. Thus nullity has been pronounced for pregnancy unknown to the husband. These decisions seem to be of doubtful authority though.[155]

Among the tribal Christians of North East Indian States, as discussed earlier, the questions relating to marriage and nullity of marriages are regulated by customary laws.[156] And

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154. Sirey. 1861 Part 1 Page 241 (Court of Cassation).
155. See supra n.153 at 37.
156. Dr.(Mrs) Helen Giri; "Social Institutions among the Khasis with Special Reference to Kinship, Marriage, Family Life and Divorce" as published in Tribal Institutions of Meghalaya. (1985) at 161.

therefore occasions for conflict with canon law do not usually arise.

Whether it is under the personal law or otherwise (under the statutes), the declaration of nullity of marriage results in serious problems in the personal life of the parties to the proceedings. As regards children of annulled marriages, their right of succession is limited and in certain cases, no such right exists under the present law.[157] But the Courts have the power to grant maintenance to such children.[158] The law does not come to the rescue of the woman whose marriage is annulled either under the statutory law or under the personal law. The denial of maintenance to women of annulled marriages is perhaps one of the compelling reasons for the civil court to refuse to recognise a decree of nullity of marriage granted by the Eparchial Tribunal.[159] Whether a decree of nullity of marriage granted by the Eparchial Tribunal is recognised by the Civil Court or not, it has both religious and social sanction. Even when the "State" is interested in safeguarding the civil effects of a marriage, the civil law has also not provided for granting maintenance or alimony to such women, whose marriage is declared null and void even under the civil law, as she may not be

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157. See Section 21 of the Indian Divorce Act, 1869.

158. See Ibid. Section 43. Also see Section 125 of Cr.P.C.

159. See supra notes 53, 59, 71 and the decision in J.F.S. Eric D'Sousa v. Florence Martha A.I.R 1980 Delhi 275 (FB).

covered under the explanation of the term "wife" in Section 125 of Cr.P.C. In this context, it would be interesting to note the development of the law in these aspects in England.

The Ecclesiastical Courts in England had the power to grant permanent alimony to a wife who was divorced a mensa et thoro, even when the wife was guilty of misconduct.[160] But a female petitioner who obtained a decree of nullity of marriage could not obtain maintenance before the Matrimonial Causes Act, 1907 was enacted. The Court, under this Act, however, for the first time, exercised its discretion in favour of a female respondent, by granting maintenance in 1913.[161] This right of women got further crystallized under Section 190 of the Judicature (Consolidation) Act, 1925, which empowered the Court to order maintenance to the respondent in a proceeding for nullity of marriage. In 1934, after a decree of nullity of marriage on the ground of incapacity of the woman to consummate the marriage, the Court, on the facts, made an interim order for her maintenance to be limited dum sola and reviewable within a fixed period.[162]

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160. Goodden v. Goodden (1892) P.1: 65 L.T 542:40 W.R 49:8 T.L.R 32.

161. Gullan v. Gullan otherwise Goodwin (1913) P.160.

162. Edwards v. Edwards otherwise Cowtan (1934) P.84: 151. L.T.36.

Section 7(1) of the Matrimonial Causes Act, 1937, made a marriage voidable where it has not been consummated owing to the wilful refusal of the respondent. But it contained no definition of consummation. In this context, in a case, it was held that the habitual use of a rubber sheath or the practising of coitus interruptus by the husband would entitle a wife to obtain a decree of nullity of marriage on the ground of non-consummation of the marriage.[163] And it was further held that when a decree of nullity of marriage is granted, the Court has power to make an order for secured maintenance even in favour of a "guilty" wife.[164] But the Court has to exercise its discretion after taking into consideration the particular circumstances of the case such as : (1) the fortune of the wife, if any, (2) the ability of the husband, and (3) the conduct of the parties.[165] But once alimony is granted, the past conduct of the parties is irrelevant in a petition for reduction of alimony payable to the wife.[166] Thus, in England, both the statutory provisions and judicial decisions have come to the rescue of the women whose marriages are declared null and void. Some Courts in India too drawing strength from English decisions, have tried to come to the rescue of women in the event of divorce by holding

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163. Cowen v. Cowen (1945)2 All E.R 197.
164. Dailey v.Dailey (1947)1 All E.R 847.
165. Ibid. at 850. (Also see Section 37 of the Indian Divorce Act, 1869).
166. Hall v. Hall (1914) 111. L.T 403. C.A.

that even a "guilty wife" is also entitled to maintenance.[167] But the Courts in India have not addressed themselves to the problems faced by women regarding maintenance and alimony in nullity cases. Neither Section 125 of Cr.P.C, nor the civil law on the subject has remedied the situation. Therefore, a declaration of nullity of marriage puts the woman in a difficult situation, as the woman is not entitled to get maintenance from her "former" husband, since a woman whose marriage is declared null and void is not a "wife" within the meaning of Section 125 of Cr.P.C, or any other law. Perhaps, it was only in Leelamma's Case[168] that the Court granted permanent alimony after declaration of nullity of the marriage.[169] Unfortunately for women, a Full Bench of the High Court revised the position of law in George Sebastian,[170] putting the clock back and perpetuating discrimination against women.

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167. See Patel Dharmashi Premji v. Bai Sakar Kanji. A.I.R 1968 Guj. 150, Rajagopalan v. Kamalammai A.I.R 1982 Mad. 187; Smt. Sugandhabai v. Vasant Ganpat Deobhat. (1992) Crl.L.J 1838. Also see Sydenham v. Sydenham and Illingworth 1949(2) All. E.R 196 and Clear v. Clear 1958 (2) All E.R 353.

168. See supra n.69.

169. See Ibid. at para 20.

170. See supra n.71.

The decision of the Full Bench has another impact as well. The husband or the wife as the case may be, is not entitled to contract a second marriage, as the declaration of nullity of marriage made by the Eparchial Tribunal is not recognised by the civil law. And in the event of a second marriage being solemnised, the party who contracts the second marriage can be prosecuted for bigamy, and the priest who solemnises the subsequent marriage can be prosecuted for abetment of bigamy.[171]

On the contrary, the Catholic Church does not recognise a civil marriage[172] nor does it recognise a divorce obtained from a civil court and the Vatican, in a letter to all Catholic bishops, has reiterated the exclusion of divorced and remarried people from Holy Communion.[173]

These problems can be solved only by recognising the decree of nullity granted by the Eparchial Tribunal at least till a Common Civil Code is enacted. It appears that while this question is being considered, the civil authorities are concerned with the denial of maintenance to the wife on account of the earlier marriage being declared a nullity by the Eparchial Tribunal and thereby, the wife becoming not a "wife" within the meaning of Section 125 of Cr.P.C. It can be over-come by necessary amendments

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171. See The ratio of Govindan Nambiar v. Rohini. 1986 K.L.T 96.

172. See supra n.142 and the accompanying text.

173. "Vatican : No Holy Communion for divorced". Indian Express, Kochi, 16th October, 1994 at 7.

to Section 125 Cr.P.C wherein, a "wife" whose marriage is declared null and void either under the personal law or statutory law should also be made eligible to get maintenance under Section 125 of Cr.P.C. This is all the more so, because the purpose of Section 125 Cr.P.C is to prevent vagrancy. It may have to be pointed out that as the law now stands, a "wife" whose marriage is declared null and void under Section 19 of the Indian Divorce Act is not entitled to get maintenance under Section 125 of Cr.P.C. But in the event of a divorce even a "guilty" wife is entitled to get maintenance or alimony. In fact, this distinction is based on the principles of canon law, as the consequence of a decree declaring a marriage null and void is the restoration of the original status of both the parties as man and woman making them free with capacity to contract marriage again. Therefore, in the eye of the canon law as there was no marriage, there could be no liability in between the parties. In fact, it is the canon law that is reflected in the provisions relating to nullity of marriages in the Indian Divorce Act. Whatever be the theoretical basis for such a position in law, practically and also in the eye of the general public, there is no distinction between these two catagories of women. At any rate, the incorporation of the grounds and principles of canon law into the Indian Divorce Act, 1869, and thereby denying maintenance to women whose marriages are declared null and void works out great hardships and injustice to them and it is definitely discriminatory to them. Therefore, it is

time that the legislature should remedy this problem. While doing so, the difficulties arising from recognition of a decree of nullity of marriage granted by the Eparchial Tribunal can also be remedied.

If the decree of nullity of marriage granted by the Eparchial Tribunal is recognised by the civil court, then the question of bigamy arising out of subsequent solemnisation of marriage under the personal law would not arise, and therefore the question of prosecution of the priest for abetment of bigamy is out of question. This problem is not peculiar to India alone. In countries which derive their legal system from the English common law, similar problems still exist. For example, in the Irish Republic, when the Ecclesiastical Court (Catholic) declares a marriage null for reasons specific to canon law or when the Pope dissolves a marriage super rato, there is no method of securing an equivalent dissolution in the civil courts and if one of the parties remarries he could be prosecuted for bigamy; and the man dying intestate, the first wife would inherit. The problem has been partially, but only partially, solved by the State not prosecuting in such cases.[174]

In India, the prosecution for bigamy is left to the

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174. Dom Peter Flood, "The Dissolution of Marriage". (1962) London, at 107.

aggreived parties as it is made a non-cognizable offence.[175] In short, the laws relating to marriages nullity of marriages and maintenance among Christians in India present a peculiar picture. While in certain areas it is the customary law, which has the pristine quality of maintaining the relations without conflict, what governs in other areas is the statute law juxta posed with the vestiges of waining customary law. It is in the latter areas that the need for adjustment/ assimilation is frequently felt. It is also in these areas that discrimination is mostly perceived.

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175. See Sections 494 and 495 of I.P.C and the First Schedule to the Code of Criminal Procedure, 1973.

CHAPTER- IV

GENDER DISCRIMINATION IN THE LAW OF DIVORCE AMONG CHRISTIANS

As has already been found in the earlier chapters, though the laws relating to marriage and divorce are the customary law in certain parts of India, the Indian Divorce Act came to be applied to the whole of India probably because it was considered superior and beneficial to the Indian Christian Community. It had also acted as the entry point for the English law and practice into India. But the operation of the Act has played havoc in certain areas where earlier the customary law had its grip over the community. In certain areas where the customary law has been retained and the Church commands respect and obedience, it is ignored as in the case of Travancore and Cochin. So is the case among the tribal Christians of North-East India where the customary law still reigns supreme. Even when the Divorce Act was given effect to by the legal system the Church disregarded its application and did not permit second marriage after the divorce. The discrimination writ large on the various provisions of the Act is not tolerated by the community and it wants to modulate its stand in tune with the twentieth century concepts of man and wife.

In this context it is worthwhile to examine the background in which the Indian Divorce Act came to be enforced in the whole of India and to identify the discrimination inherent in the various provisions.

The Indian Divorce Act, 1869 extends to the whole of India except the State of Jammu and Kashmir.[1] As originally enacted, it extended to the whole of British India, and so far only as regards British subjects within the dominions of Princes and States in India in alliance with her Majesty.[2] But when India became independent, the State of Jammu and Kashmir was excluded from the application of the Act, and the Act came to be extended to the whole of India, except the Part B States.[3] But in 1951, it came to be extended to the

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1. See Section 2 of the Indian Divorce Act, 1869 as modified by subsequent amendments.

2. H.A.B. Rattigan, "The Law of Divorce Applicable to Christians in India". Wildy & Sons. Lincoln's Inn Archway, (London) Law Publishers. (The Pioneer Press) (1897) Allahabad, at 1.

3. See Adaptation of Laws Order, 1950. No. C.O.4 dated 26th January, 1950.

Part B States as well.[4] It applies only to persons professing Christian religion.[5] It was intended to be an Act to "amend" the law relating to divorce and matrimonial causes of Christians, and to confer jurisdiction upon the High Courts and District Courts in matters matrimonial and it was not intended to be a comprehensive legislation on the subject.[6] It was not a comprehensive one with reference to England either.[7] The Courts in India were ordained to regulate the proceedings under the Act in accordance with the provisions of the Act and the Code of Civil Procedure.[8] In case of absence of provisions in the Act and the C.P.C to govern a situation, Section 7 of the Act mandates the Courts in India to follow, so far as possible, the practice of the

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4. See The Part B States (Laws) Act, 1951 (Act 3 of 1951).
5. See Preamble to the Indian Divorce Act, 1869.
6. See supra notes 86-90 of Chapter III and the accompanying text.
7. See supra note 91 of Chapter III and the accompanying text.
8. See Section 45 of the Indian Divorce Act, 1869.

Court for Divorce and Matrimonial Causes in England.[9] Therefore, the decisions of the Probate and Divorce Court in England must be taken to be a guide to the Courts in India, except when the facts of any particular case, arising out of peculiar circumstances of Anglo-Indian life, constitute a situation such as the English Court was not likely to have had in view.[10] And the principles and rules are not merely rules of procedure such as the rules which regulate appeals but are the rules of quasi substantive rather than of mere objective law,[11] and it includes the requirements of a certain degree of evidence and other cognate matters.[12] Therefore, a proper appreciation of the application of the provisions of the Indian Divorce Act, 1869 in India requires an examination of the law in England and its development through the centuries.

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9. See Section 7 of the Indian Divorce Act, 1869. Also see infra notes 45 to 47 and the accompanying text.

10. Fowle v. Fowle (1879)IV. I.L.R Calcutta, at 260.

11. A.V.B (1898)22 Bombay 612 at 615. Also see Miller v. Miller (1925) 52 Calcutta, at 566.

12. Wilkinson v. Wilkinson (1923) 47 Bombay, at 843= A.I.R 1923 Bom. 321.

From early Saxon times, side by side with the civil law, there existed ecclesiastical law, even when the Court had jurisdiction in both civil and ecclesiastical matters. There was an intimate union of Church and State, a union in which the royal authority constantly upheld the authority and national position of the Church. The superior clergy took a major role in legislative activities and in the administration of justice as well as in general government. With the defeat of King Harold at the battle of Hastings in 1066 A.D, by William le Batard (the conqueror) with the support of the Pope, the practice of dealing with ecclesiastical and temporal affairs in the same court was abolished and the bishop and the Archdeacon had his own Court.[13] And the marriage law of England became the canon law.[14] The substantive law that was administered in the Church

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13. Sir William Blackstone Knt, "Commentaries on the Laws of England". Book III. 15th Edition (1809) London, at 62.

14. Pollock & Maitland, "The History of English Law". Vol.II. (1968) Cambridge, at 367-368.

courts, (Courts Christian) was, first and foremost, the Holy Scriptures in the so-called "Vulgate" version, the one made by St.Jerome in the fourth century. And a mass of specific regulations announced by various councils, both general and local, as well as the decrees of Popes, had all the aspects of legislation and were treated as laws.[15] All the compilations and collections were, from the sixteenth century on, known as the Corpus Juris Canonici, (the Body of Canon Law) formed the basis of the law administered in the Church courts.[16] An authority on history notes:-

> "The ecclesiastical Courts had, certainly from the twelfth century undisputed jurisdiction in matrimonial causes. Questions as to the celebration of marriage, as to the capacity of the parties to marry, as to the legitimacy of the issue, as to the dissolution of marriage, were decided by the ecclesiastical Courts administering the canon law".[17]

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15. Max Radin, "Anglo-American Legal History". (1936) Minnesota, at 101-102.

16. Ibid. at 104.

17. Sir William Holdsworth, "A History of English Law" Vol.I (1966) 7th Edition (Re-print) at 621.

Difficulties began to develop between Church and State. In 1164 A.D, King Henry II wanted to abolish many of the privileges of the clergy, and forbade appeals to Rome. But later, the King had to give up his efforts. In 1532 A.D, King Henry VIII forbade marriage case appeals to the Pope in the Statute of Appeals.[18] This was followed by the Act of Submission of the Clergy.[19] Finally, when the King could not get an annulment of his marriage by the Pope, he proclaimed himself 'Supreme Head in Earth of the Church of England', in the year 1534.[20] By another Act, it was provided that dispensations for marriage could be given only by the Crown, but at the same time, there was to be no departure from the true Faith of the Catholic Christian Church.[21] The Church courts became royal courts after Henry VIII, but retained their independence of the Common Law Courts. The older Canon Law was not repudiated, but a new canon law was built up on it.[22] It is pointed out:-

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18. See supra n.13 at 65-66.
19. 25 Henry VIII C.19.
20. 26 Henry VIII C.1.
21. 25 Henry VIII C.21. S.13.
22. See supra n.15 at 105.

> "The influence of the Canon Law on English law in general is a Chapter of English legal history that has not yet been written.....Further investigation of the interrelation of the law of the Courts of King and of the bishop is certain to give fruitful results".[23]

The Statutes subordinated the Church to the State, and the Church Courts to the law of the land.[24] But it would be wrong to suppose that the Church was to lose her liberty in toto. The position that emerged out of the conflicts was that the state law was to have predominance, over the Church law only when there was a conflict between the two. Otherwise, the Church law was to have its sway.[25]

The right of the Church to have her own courts and her own law remained unchallenged.[26] But an Act of 1836 had paganised marriages by providing for marriages before a civil Registrar.[27] With certain exceptions, the matrimonial law of the Church survived until 1857. The Matrimonial Causes Act,

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23. Ibid. at 108-109.
24. Potter H, "Historical Introduction to English Law" 3rd Edition. (1958).
25. Dom Peter Flood, "The Dissolution of Marriage" (1962) London, at 7.
26. Ibid. at 19.
27. See 6 & 7 Will. IV c.85. S.1.

1857[28] established a new temporal (civil) court to exercise jurisdiction in all matrimonial causes. Thus, marriage, which had once been a sacrament was now becoming merely a civil contract in England and the logical sequel was that it could no longer be held to be indissoluble. This led to the introduction of divorce a vinculo by a temporal Court.[29] And the Church lost the last remnant of her jurisdiction in matrimonial causes in England. The Established Church not only lost her jurisdiction in marriage cases, but also in her ministry and in her attempts to revise her canon law. She had to look to Parliament for its assent for needed changes even in canon law.[30]

But a closer look into these developments would show that the substantive law on marriage and the basis of its validity still continued to be the canon law. It can be found that the Matrimonial Causes Act, 1857[31] did not substantially differ from the substantive law contained in

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28. See 20 & 21 Vic. C.85.

29. Gorham v. Bishop of Exeter 2. Rob. Eccles. 1 in the Arches' Court on appeal to Privy Council 1850. 14 L.T. (o.S) 521.

30. See supra n.25 at 13.

31. See supra n.28.

canon law as the Act was not a comprehensive legislation on the law of marriage and it only made certain amendments to the then existing canon law as is evident from its Preamble which reads:-

> "An Act to amend the law relating to divorce and matrimonial causes in England.
>
> Whereas it is expedient to amend the law relating to divorce, and to constitute a court with exclusive jurisdiction in matters matrimonial in England, and with authority in certain cases to decree the dissolution of marriage: Be it therefore enacted....." [32]

And the Courts continued to apply the principles of Canon Law for deciding the validity or otherwise of a marriage. In 1866 Lord Penzance in his judgment said:-

> "Marriage as it is understood in Christendom is the voluntary union for life of one man and one woman

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32. See the Preamble to the Matrimonial Causes Act, 1857; Rayden's Practice and Law in the Divorce Division. 2nd Edition. (1926) at 403.

to the exclusion of all others".[33]

The statutory provision and the position of law remained the same even after the enactment of the Judicature Act, 1873.[34] This Act finally vested the jurisdiction in matrimonial causes in the High Court of Justice (Matrimonial, Probate and Admirality Division).[35] The various Acts that followed did not effect major changes in the substantive law. And the Supreme Court of Judicature (Consolidation) Act, 1925 specifically provided:-

> "The jurisdiction vested in the High Court and the Court of Appeal respectively shall, so far as regards procedure and practice, be exercised in the manner provided by this Act or by rules of Court, and where no special provision is contained in this Act or in rules of Court with reference thereto,

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33. Hyde v. Hyde and Woodmansee. L.R (1866) 1 P.D. at 130-133. Also see supra n.3 of Chapter III.

34. See Section 23 of the Judicature Act, 1873. (33 & 37 Vic. C.66).

35. See supra n.25 at 83.

> any such jurisdiction shall be exercised as nearly as may be in the same manner as that in which it might have been exercised by the Court to which it formerly belonged". [36]

And such jurisdiction formerly belonged to the Ecclesiastical Courts in England. Therefore Lord Merriman laid down that the principles which the Court must follow were, in nullity cases, those of the old Ecclesiastical Courts and that neither the statute nor the common law of England had interfered with the pre-Reformation canon law.[37]

If one goes through the entire statutory law of England from 1857 to 1925, it can be seen that the civil law had not specified any ground for declaration of nullity of marriage and those grounds remained the same as those provided under the laws of the Church. The statute came into being for the purpose of conferring exclusive jurisdiction on certain courts and to provide for grounds of divorce which the Church had not recognised.

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36. See Section 32 of the Supreme Court of Judicature (Consolidation) Act, 1925. (15 & 16 Geo. 5. C.49).

37. Hartan v. Hartan. P.115 C.A. P.126. Seq.

The Indian Divorce Act, 1869 is to be understood and interpreted in the background of the development of the law in England, as explained above. The Bill was framed by Mr. Whitely Stokes.

The Draft of the Bill was submitted to the several High Courts for their opinion and the communications received from the Judges at Calcutta and Bombay were laid before the Council of the Governor-General. The Bill was originally introduced by Sir Henry Maine on the 24th December, 1862. Mr. Maine, in moving for leave to introduce the Bill, stated that its object was to give effect to the policy embodied in the High Court Act passed in 1861[38] and the Letters Patent issued by Her Majesty for constituting the High Courts. The object of the High Courts Act, he said, seemed to have been, not so much to create new branches of jurisdiction, as to constitute and re-distribute the power already existed. The 9th Clause gave power to the Government to confer on the High Courts such matrimonial jurisdiction as it thought fit. But the Government did not attempt to confer on the High

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38. 24 & 25 Vict. C.104.

Courts such jurisdiction as was exercised by the Divorce Court in England. The Secretary of State had, therefore, requested the Governor-General[39] to introduce a measure, conferring jurisdiction on the High Courts here similar to that exercised by the Divorce Court sitting in London. The Bill, after having been for seven years before the Council of the Governor-General, received the assent of the Governor-General on 26th February, 1869.[40]

It was specified that the object of the Bill was to place the matrimonial law administered by the High Courts, in exercise of their original jurisdiction, on the same footing at the Matrimonial Law administered by the Court for Divorce and Matrimonial Causes in England.[41] In other words, the High Court should have the same jurisdiction as the Court for Divorce and Matrimonial Causes in England established under the Matrimonial Causes Act, 1857[42] and in regard to which further provisions were made by the Matrimonial

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39. Letter Judicial No.24 dated 14.5.1862. See Calcutta Gazette 1863 at 173. (See supra n.52 of Chapter III).

40. See supra n.2 at 1.

41. See supra n.39.

42. See supra n.28.

Causes Act, 1859,[43] and the Matrimonial Causes Act, 1860.[44] It was further specified that by vesting the High Court with powers of the court for Divorce and Matrimonial Causes in England, it was not intended to take away from the courts within divisions of the Presidency not established by Royal Charter any jurisdiction which they had in matters matrimonial.[45] For example, a suit based on the ground of non-observance of the essential ceremonies of marriage has still to be instituted in the ordinary court of civil jurisdiction and not in the High Court.[46] Whereas, when a marriage was solemnised outside India, the matrimonial courts in India have no jurisdiction to grant a decree of nullity.[47] In such cases, the jurisdiction of the civil court to entertain a suit for declaration that the marriage is a nullity, is not barred by the provisions of the Act.[48]

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43. See 22 and 23 Vic. C.61.
44. See 23 and 24 Vic. C.144. But all these enactments were repealed by the Supreme Court of Judicature (Consolidation) Act, 1925. (15 & 16 Geo. 5 C.49).
45. See the text of supra n.39.
46. See J. Dienadoh v. S.S. Chopra (1982)1 D.M.C. 24.
47. See Section 2 of the Indian Divorce Act, 1869.
48. Bhagavan v. Choloffe. I.L.R 1959(1) Cal 84. The Civil Court can grant such a relief under Section 42 of the Specific Relief Act, because it involves the adjudication of a status.

Moreover, the jurisdiction of the matrimonial courts under this Act does not extend to entertain a suit for a declaration that a certain marriage is valid.[49] Further, when a marriage is void under the provisions of Sections 4 and 5 of the Indian Christian Marriage Act, 1872, again it is the ordinary court of civil jurisdiction that should be moved for a decree of nullity of marriage and not the matrimonial court under the Indian Divorce Act, 1869. But in the course of an adjudication of a matrimonial dispute, if the validity of a marriage is challenged otherwise than under the provisions of the Indian Divorce Act, the matrimonial Court is not precluded from looking into the validity or otherwise of a marriage.[50] In short, the Indian Divorce Act, 1869 is not to be construed as a comprehensive legislation in these matters.

The Draft of the Bill had been prepared to give effect to the Secretary of State's instruction,[51] but some variations from the English Statutes in respect of procedure

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49. Adelaide v. David. A.I.R 1923 Pat. 301.
50. Consterdine v. Samarine. 47 I.C. 544.
51. See supra n.39 at 173.

have been adopted. For the purpose of uniformity in procedure in the several branches of jurisdiction, the Bill provided for adoption of the procedure of the C.P.C, instead of the Rules of Her Majesty's Court for Divorce and Matrimonial Causes in England. When the Bill was finally enacted into law, Section 7 provided:-

> "Section 7:- Court to act on principles of English Divorce Court- Subject to the provisions contained in this Act, the High Courts and District Courts shall, in all suits and proceedings hereunder, act and give relief on principles and rules which, in the opinion of the said Courts, are as nearly as may be conformable to the principles and rules on which the court for Divorce and Matrimonial Causes in England for the time being acts and gives relief : Provided that nothing in this Section shall deprive the said Courts of Jurisdiction in a case where the parties to a marriage professed the Christian religion at the time of the occurrence of the facts on which the claim to relief is founded".

Now, therefore, it emerges that the courts in India are to grant relief based on the principles and rules of the Court for

Divorce and Matrimonial Causes in England; and the English Courts, in turn, are to follow the principles and practice of the old Ecclesiastical Courts.[52] In other words, the Courts in India are to grant relief in matrimonial causes (under the Indian Divorce Act, 1869) on the basis of the principles evolved by the old Ecclesiastical Courts in England.

Now a question would arise as to what extent those principles can be applied here. In all matters which are provided for in the Code of Civil Procedure, the Courts must regulate their procedure in accordance with the provisions contained therein,[53] and not with the Rules and Regulations of the Court for Divorce and Matrimonial Causes in England.[54] But in the absence of any provision on the subject in the Code of Civil Procedure, Section 7 of the Act enables the Courts in this country to follow, as nearly as may be,[55]

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52. See supra n.36 and 37 and the accompanying text.

53. See Section 45 of the Indian Divorce Act, 1869.

54. Abbott v. Abbott and Crump. 4 B.L.R, O.C.51.

55. Hay v. Gordon (1872) 21 W.R. 11. Also see Joseph v. Ramamma (1922) 45 Mad 982 (F.B).

the practice of the English Courts,[56] and the decisions of those courts are to be taken as a guide to the Courts in India,[57] under the Indian Divorce Act, 1869. And the Bombay High Court applied the English Divorce Rules in 1895.[58] The principles and rules contemplated under Section 7 of the Act are not merely the rules of procedure such as the rules which regulate appeals but are the rules and principles which determine the cases in which the court would grant relief to the parties appearing before it, or refuse that relief-rules of quasi substantive rather than of mere objective law,[59] including the requirement of a certain degree of evidence and other cognate matters.[60] Thus, it can be found that the legislative authority was aware of the principles and rules upon which the Court in England then acted and gave relief.[61] The object of this section was to

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56. The Rules and Regulations of the English Court of Divorce were issued on 26.12.1865 and it came into effect from 11.1.1866.
57. See supra n.10 at 260.
58. Mayhew v. Mayhew (1895) 19 Bom. 293.
59. See supra n.11.
60. See supra n.12.
61. B. Iswarayya v. S. Iswarayya A.I.R 1931 P.C.234.

make the Indian law on divorce flexible and not static. In other words, intention of incorporating this provision in the Act was that the law here should develop alongside with the English law.[62] The Madras High Court went to the extent of holding that the Court may apply not only the principles and rules of law but also statutory provisions and statutory rules in force relating to matrimonial causes in England.[63] But the Calcutta High Court had taken a different view that Section 7 does not empower the Court to import the entire law of procedure prevailing in England.[64] Later, the Madras High Court fell in line with the note of caution expressed by the Bombay High Court,[65] and held that Section 7 can not be read as interfering with or extending the grounds of dissolution of marriage provided under Section 10 of the Act.[66] The Supreme Court also had an occasion

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62. Rames Ramanlal Sariya v. Kusum Madgaokar A.I.R 1949 Bom 1 (D.B).
63. Mrs. Y.G.M. Lewis v. A. Lewis AIR 1949 Mad 877. Also see K.K. Gounder v. A. Gounder A.I.R. 1970 Mad 178.
64. Steedman v. Wheeler (1944)1 Cal 248.
65. See supra n.12.
66. A.G. Cornelius v. E.D. Samadanam. A.I.R 1970 Mad 240 (S.B). Also see T.M. Bashiam v. M. Victor A.I.R 1970 Madras 12 (S.B).

to dwell on the applicability of English law in these matters. While considering the scope of Section 7, the Supreme Court held that the rules laid down by the House of Lords would provide the principles and rules which the Indian Courts should apply to cases governed by the Indian Divorce Act.[67] But the Court asserted that it was unthinkable that legislation whenever made by the Parliament of a foreign state should automatically become part of the law of another sovereign state. According to it legislation by incorporation can never go that far. Whatever interpretation of Section 7 was permissible before the 15th August, 1947 when British Parliament had plenary powers of legislation over Indian territory, no interpretation which would incorporate post 1947 British law in Indian law is permissible.[68] Now, therefore, the intention of the legislative authority to develop the Indian law alongside with the English law[69] cannot be fulfilled due to change

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67. Earnist John White v. Kathleen Olive White A.I.R 1958 S.C. 441.

68. Reynold Rajamani v. Union of India (1982)2 S.C.C 47= A.I.R 1982 S.C. 1261.

69. See supra n.62.

of sovereignty. Though the law in England has been amended over and again to cope with the changing times, the Indian law remains still and sterile, still wedded to the concepts of the bygone century. And this is so inspite of the categorical ruling of the Supreme Court not to use Section 7 of the Divorce Act as a vehicle to import English law.

As regards divorce, the grounds enumerated in Section 10 of the Indian Divorce Act, 1869 remain still the same. It provides:-

> "When husband may petition for dissolution:- Any husband may present a petition to the District Court or to the High Court, praying that his marriage may be dissolved on the ground that his wife has, since the solemnisation thereof, been guilty of adultery.
>
> When wife may petition for dissolution:- Any wife may present a petition to the District Court or to the High Court, praying that her marriage may be dissolved on the ground that, since the solemnisation thereof, her husband has exchanged his profession of Christianity for the profession of some other religion, and gone through a form of marriage with another woman;

or has been guilty of incestuous adultery,
or of marriage with another woman with adultery,
or of rape, sodomy or bestiality,
or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce a mensa et toro, or of adultery coupled with desertion, without reasonable excuse, for two years or upwards.

Contents of petitions- Every such petition shall state, as distinctly as the nature of the case permits, the facts on which the claim to have such marriage dissolved is founded".[70]

Adultery committed by the wife after the solemnisation of the marriage is the sole ground on which a divorce can be sought for by the husband under the Act. Yet the term "adultery" has not been clearly defined under the Act.

This situation makes one to undertake a search for its definition elsewhere. And naturally one lands up in the not

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70. See Section 10 of the Indian Divorce Act, 1869. (Act No.4 of 1869). Also see infra n.125 and the accompanying text.

so luminous area of the Indian Penal Code. S.497 of which defines adultery for the purposes of I.P.C.

To constitute that offence, the woman with whom sexual intercourse is committed must be or must be known to be or must be reasonably believed to be the wife of another man, and the act of sexual intercourse must be committed without the consent of the man (husband of the woman) and it must not amount to an offence of rape. In other words, under this definition if a man commits the act of sexual intercourse with an unmarried woman, a widow, a prostitute or with the consent or connivance of the husband of the woman with whom sexual intercourse is committed, he is not guilty of adultery. This definition applies only to male offenders and the woman cannot be said to be guilty of adultery.[71] And therefore this concept of adultery is of no use for the husband to invoke S.10 of the Indian Divorce Act. It has to be different from the adultery in S.497 I.P.C.

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71. See Section 497 of I.P.C. It further provides that in such cases the wife shall not be punished as an abettor.

It is generally argued that since the Indian Divorce Act authorises a husband to present a petition for the dissolution of the marriage on the ground of adultery of his wife, the term "adultery" in Section 10 must be construed in a wider sense.[72]

There is another argument to the effect that the English concept of adultery should be accepted for application in India. And this argument is fortified with the plea that under Section 7 of the Indian Divorce Act, the Courts in India are to apply the principles and rules laid down by the Matrimonial Courts in England in respect of matters which are not covered by the Indian Divorce Act. Under the English matrimonial law, adultery consists in the voluntary sexual intercourse of a married person with a person other than the husband or the wife.[73] For adultery to be the foundation for divorce, it must be voluntary. When the party is compelled by force or ravishment; or wife has carnal

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72. See Sebastian Champappilly, "The Christian Law". (1988), Cochin, at 416.

73. Crawford v. Crawford. (1886) II. P.D. 150. Also see Long v. Long and Johnson (1890) 15 P.D. 218.

knowledge of a man not her husband through error or mistake, she believing him to be her husband; or when, the wife marries another man through a belief that her former husband is dead and during the continuance of this belief lives in matrimonial intercourse with the latter, the offence justifying a divorce is not committed. Nor where the wife is forced against her will to have sexual intercourse or is incapable of understanding the nature of the act could she be found guilty of adultery. In such cases the husband's petition for divorce on ground of adultery should be dismissed.[74] And where the Court was satisfied that the wife had been raped by a man unknown, and as a result she gave birth to a child, it was held, there was no adultery and the husband's petition for divorce was dismissed.[75] A divorced woman cannot be held guilty of adultery; but she could also be held to have committed adultery, it was so held, if she knows that the man with whom she has sexual intercourse is married and that his marriage subsists at that time.[76]

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74. Long v. Long and Johnson (1890)15 P.D.218. Also see Yarrow v. Yarrow (1892) 66 L.T. 383.

75. Clarkson v. Clarkson (1930) 143 L.T. 775.

76. Abson v. Abson (1952) 1 All. E.R. 370.

In the absence of a clear definition of adultery committed by wife, in fact, the husband in India is at a disadvantage so far as the invocation of S.10 for divorce is concerned. Even if the English concepts are accepted, it seems, his position is not improved inasmuch as there are many exceptions engrafted to the definition of adultery committed by wife even in English law.

Under Section 10 of the Indian Divorce Act the wife may present a petition for dissolution of marriage on the ground of change of religion and remarriage by the husband after the solemnisation of marriage or on the ground of incestuous adultery[77] committed by the husband, or if the husband is guilty of bigamy with adultery (which means adultery with a woman with whom the bigamy is committed). The bigamy and adultery must be with the same woman.[78] Yet another ground available to the wife is marriage with another woman with adultery. This situation arises where the husband

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77. See Section 3(6) of the Indian Divorce Act for the defintion of incestuous adultery.

78. Russel's Case (1901) A.C.446. Also see Ellam v. Ellam (1889) 61 L.T 338. For definition see Section 3(7) of the Indian Divorce Act.

has the capacity to enter into more than one marriage and the second marriage would not be legally termed as bigamy. In such a case if the second marriage is consummated, the consummation viz-a-viz the first wife amounts to "marriage with another woman with adultery" and the first (Christian) wife is entitled to a divorce.[79]

Rape committed by the husband is another ground available to the wife. But the term "rape" has also not been defined under the Act. Section 375 of the Indian Penal Code defines rape. But an order of conviction by the Criminal Court is not conclusive and evidence would be allowed to be adduced de novo to enable the wife to establish rape and thus to obtain a divorce.[80] Even on the ground of an attempt to have unlawful carnal knowledge of a girl under the age of thirteen years[81] or even when the husband was convicted of an indecent assault,[82] the wife could get an order

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79. See Mrs.A.A. Chitnavis v. Mr. A.S. Chitnavis A.I.R 1940 Nag. 195 (S.B). For definition see Section 3(8) of the Indian Divorce Act.
80. Virgo v. Virgo (1893) 69 L.T 460.
81. Coffey v. Coffey (1898) P. 169: 78 L.T. 796.
82. Bosworthick v. Bosworthick (1901)86 L.T 121; 18 T.L.R 104.

of divorce. Also, if a husband is guilty of sodomy, or bestiality the wife is entitled to get a divorce. And the terms 'sodomy' or 'bestiality' are not defined in the Act. Section 377 of the Indian Penal Code defines the offence of sodomy and bestiality as voluntary carnal intercourse against the order of nature with any man, woman or animal. The wife is entitled to a decree of divorce if she can prove that her husband has committed sodomy or bestiality with any man, woman or beast.[83] If sodomy is committed by a husband with his wife against her consent he is guilty of sodomy which will entitle the wife to get divorce.[84] Sodomy means non-coital carnal copulation with a member of the same or opposite sex, eg. per anus or os, and if it is committed by the husband against the will of his wife, she is entitled to get a divorce on this ground.[85] Yet another ground of divorce available to the wife is adultery coupled with cruelty on the part of the husband. The term cruelty is

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83. Statham v. Statham (1929) P.131. C.A; 140 L.T. 292; 45 T.L.R 147.

84. C.V.C.(1905)22 T.L.R 26.

85. Grace Jayamani v. E.P. Peter A.I.R 1982 Kant. 46. (S.B).

also not defined in the Act. In the eye of the law, bodily injury, reasonable apprehension thereof or injury to health are the tests of legal cruelty.[86] Further adultery coupled with desertion[87] for a period of two years or more is another ground for divorce available to a wife.

It is generally argued that under S.10 of the Indian Divorce Act while the husband can seek dissolution of marriage on the ground that his wife has been guilty of adultery simpliciter, the wife has to prove that the husband has been guilty of adultery with something more. This position, according to many is discriminatory to women. Firstly, it is very difficult to prove adultery of a husband. If it is to be proved with other conditions it becomes all the more difficult for her to obtain a decree of divorce.

The position of the husband also is not that different. It is argued that since the wife has been given a good number of grounds for divorce whereas the man has been

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86. Tourkins v. Tourkins (1858)1 Sw & Tr 168; 164 E.R 678.
87. Desertion is defined under Section 3(9) of the Indian Divorce Act.

given only one ground (adultery by the wife) which is comparatively difficult to prove, the provision works out injustice violating man's right to equality. This plea raised recently in Anil Kumar Mahsi[88] has come to be rejected by the Supreme Court. It was argued that sodomy and bestiality are not available to the husband as grounds for divorce whereas they are available to the wife, and this also is discriminatory to men. The Court responded:-

> "Taking into consideration the muscularly weaker physique of the women, her general vulnerable physical and social condition and her defensive and non-aggressive nature and role particularly in this country, the legislature can hardly be faulted if the said two grounds are made available to the wife and not to the husband for seeking dissolution of the marriage. For the same reasons, it can hardly be said that on that account the provisions of S.10 of the Act are discriminatory as against the husband".[89]

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88. Anil Kumar Mahsi v. Union of India. 1994(2) K.L.T (S.C) 399=J.T 1994(4) S.C.409. (W.P. (c) No.1285 of 1989 on the file of the Supreme Court of India, decided on 20th July, 1994).

89. Ibid. at paragraph 9. But the Court seems to have overlooked another fact that change of religion and contracting of another marriage by the husband is a ground for divorce available to the wife, whereas the same ground is not available to the husband as against his wife.

It seems the central philosophy running through the Indian Divorce Act is based on the victorian attitude of treating woman as the chattel of man. This becomes evident if one examines certain provisions. The principle embodied under Section 34 of the Act which enables a husband to claim damages from the adulteror of his wife as compensation, is an extention of the tortious liability incurred for trespass. And under S.11 the alleged adulteror has to be made a party to the proceedings. This smacks of the right of the chattel owner to bring an action against trespasser to his property. This view gets strength from the position that the wife is not given such a right by the Act. Further, Section 39 of the Act makes provision for settlement of wife's property for benefit of husband and children, if the wife is found guilty of adultery and either a dissolution of marriage or an order of judicial separation is made by the Court on that ground. Thus a wife stands to lose even her property for committing adultery but a husband is not visited with any such rigours under the Act. The above position of law itself demands the abolition of the Indian Divorce Act lock, stock and barrel.

The Divorce Act is patently discriminatory in another aspect. As discussed above while even a "guilty wife" has been afforded the protection of maintenance consequent on divorce, a woman whose marriage is declared null and void under the Act is not granted maintenance. May be it is due to the accident of history by which the jurisdiction exercised by the Ecclesiastical Courts came to be engrafted to the civil court when the Divorce Act was passed. Since these Courts never used to grant maintenance on the decree of nullity the civil court-successor is also not given the authority to order maintenance. In practice this worked out injustice and as a result of this situation the legislature in England made provision for maintenance even in such cases and the Courts have been enforcing this provision diligently.

However this is not being followed in India inspite of S.7 permitting to import the English practice. Courts in India have generally not resorted to Section 37 of the Act for the granting of permanant alimony in nullity cases.[90]

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90. The decision in Leelamma v. Dilip Kumar A.I.R 1992 Kerala 57=1992(1) K.L.T 651 is an emulable exception to the general practice, where the Court granted permanent alimony after a decree of nullity.

And this position is discriminatory to women in India.

In this context, it may be interesting to note that the French Civil Code as applicable in Pondicherry provides for gender egalitarian grounds of divorce. This is evident from the provisions of the Code. Article 229 enacts:-

> "A husband is entitled to demand a divorce owing to his wife's adultery".

The same ground is made available to the wife also. Article 230 provides:-

> "A wife is entitled to demand a divorce owing to the adultery of her husband".

Whereas Article 231 is common to both husband and wife. It provides:-

> "Both parties are entitled to demand a divorce for cruelty, harshness, or serious legal injury, insults of the one towards the other".

The position is not different for the husband and wife under Article 232 which enacts:-

> "The fact that one of the parties has been sentenced to punishment which affects the person

and is branded with infamy is a good cause of divorce".

And prior to 27th July, 1884, divorce by mutual consent was available, but that provision has since been repealed.

The law of divorce in Goa, Daman and Diu provides the same grounds for both husband and wife.[91] Article 4 provides:-

"The contested divorce may be obtained only on the following grounds and on no other:

1. Adultery committed by the wife;
2. Adultery committed by the husband;
3. Final conviction of one of the spouses to undergo any of the major penalties provided in Articles 55 and 57 of the Penal Code;
4. Ill-treatment or serious injuries;
5. Complete abandonment of the conjugal domicile for a period of not less than three years;
6. Absence, where nothing has been heard of the absentee, for a period of not less than four years;
7. Incurable unsoundness of mind when at least three

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91. But these provisions are not applicable to Catholics. See supra n.38 of Chapter II.

years have elapsed after its pronouncement by judgment, become final for want of appeal, as per Articles 419 onwards of the Code of Civil Procedure;

8. De facto separation, freely consented for ten consecutive years, whatever may have been the cause of that separation;

9. Chronic vice of gambling;

10. Contagious disease found incurable or an incurable disease involving sexual aberration

Para 1:- Divorce, on the ground provided under clause 3 may be sought only if the petitioner has not been convicted as co-accused or abettor or accomplice in the offence which resulted in the conviction of the other spouse.

Para 2:- Where divorce is sought on the grounds provided under clauses 3 & 7 hereof, the defendant shall be represented in the respective suit by the Public Prosecutor and the latter shall also represent in the cases coming under clauses 5 and 6, if the defendant fails to appear or to be represented on the summons being served on him as per the law.

para 3:- In a case coming under clause 8, the evidence shall be restricted to the fact of separation, its continuity and duration.

Para 4:- In a case coming under clause 10, no suit shall be instituted without the nature and the characteristics of the incurable disease being verified by way of previous examination carried out as per Articles 247 and 260 of the Code of Civil Procedure".[92]

It is of interest to note that under the Portuguese laws as is in force in Goa, divorce is obtainable even on "mutual consent" as is provided under Article 35. It reads:-

"Divorce by mutual consent can be sought only by the spouses who have been married for over two years (substituted by "five" instead of "two" by Art.1472 of Code of Civil Procedure of 1939) both having completed at least 25 years of age".[93]

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92. See Art.4 of the Law of Divorce, published in Govt. Gazette No.26 dated 4.11.1910. It came into force with effect from 26.5.1911.

93. See M.S. Usgaocar, "Family Laws of Goa, Daman and Diu". (1992) Vol.1 at 83.

But there are certain other conditions to be satisfied by the spouses before a divorce on "mutual consent" could be obtained. Those conditions are set forth in Article 36 of the Code. It reads:-

> "In order to obtain divorce by mutual consent, the spouses shall file an application, without being in paragraphs, before the court of their domicile, setting forth the respective relief, supported by the following documents:-
>
> 1. Marriage Certificate, 2. Birth Certificate, 3. Detailed Statement of all their properties with documentary evidence, 4. Any agreement that they may have arrived at, about the custody of their minor children, if there are any, 5. Declaration concerning the contribution that each spouse shall make for the maintenance and education of minor children, 6. Certified copy of the antenuptial contract, if any as well as of its registration, if any".[94]

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94. See Ibid. at 84.

In the case of the Christians of North East India, the customary law of divorce still holds good. Among the Garos, tradition permits divorce on the part of both the spouses and it involves the payment of a fine by the defaulting spouse to the aggrieved spouse. Divorce may be made on the following grounds:-

"(i) If there is imminent danger to the life and security of any one of them.

(ii) When a wife or a husband commits adultery with another man or woman (So'mal donna).

(iii) When a man or woman is insane.

(iv) When a wife and a husband live in different places and no longer maintain any connection for two years or more.

(v) When the husband or the wife is hermaphrodite or if either of them makes himself or herself sterile.

(vi) When a wife or a husband is cruel and is a cause of fear of harm and injury in the mind of the other partner (bamgija wachagrika).

(vii) Refusal to maintain the family.

(viii) When a wife or a husband denies conjugal union.

(ix) When a wife conceives a child by someone other than her own husband.

(x) Impotency".[95]

Inspite of the extention of the Indian Divorce Act, 1869 to these areas, it is still the customary divorce that is resorted to here.[96]

Among the Khasis, divorce is common. If a husband and wife cannot live happily together, they agree to divorce. The common cause for divorce may be barrenness, adultery, ill-treatment, non-maintenance and such others.[97] Among the Garos and the Khasis, the grounds of divorce available under their customary law do not bring about gender discrimination.

In this context it is interesting to note the judicial response to the discriminatory aspects contained in Section 10 of the Indian Divorce Act, 1869. In 1954, the Madras High Court[98] justified the different grounds for divorce, made available to husband and wife under Section 10.

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95. Julius Marak, "Garo Customary Laws and Practices". (1986) at 125-126.

96. See supra n.28 of Chapter II and the accompanying text.

97. Dr.(Mrs) Helen Giri, "Social Institutions among the Khasis with Special reference to Kinship, Marriage, Family Life and Divorce". Published in the "Tribal Institutions of Meghalaya" at 170.

98. Dr. DWaraka Bai v. Prof. Ninan Mathews A.I.R 1953. Madras 792.

It ruled that Section 10 appeared to be based on sensible classification. The Court reasoned that an adultery by wife is different from an adultery by husband as the husband cannot bear a child as a result of such adultery and make it a legitimate child of his wife to be maintained by the wife. But if a wife bears a child as a result of adultery, the child becomes a legitimate child of the husband and the presumption under Section 112 of the Evidence Act would pin him down for maintaining the child. The Court found:-

> "It is obvious that this very difference in the result of the adultery, may form some ground for requiring a wife, in a petition for divorce not only to prove adultery by the husband but also desertion and cruelty, whereas the husband need prove only adultery by the wife".[99]

In 1970, a Full Bench of the Madras High Court however opined that the provisions of the Indian Divorce Act, 1869 bring about gunuine hardship and that there was urgent need for re-examination of the provisions of the Act so as to render

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99. Ibid. at paragraph 31.

them humane and up-to-date.[100] Similar views were expressed by several courts. In 1980, the Delhi High Court observed:-

> "Perhaps when this Act was passed by the legislature in 1869, it was a progressive law. Today one can almost say that it is an archaic law requiring serious reconsideration by Parliament to bring it in line with other laws governing marriages, like the Hindu Marriage Act. We can only express the hope that the legislature would take note of this aspect and amend the law so as to make citizens of India, irrespective of the faith they profess, to lead a happy, full and useful life".[101]

In the year 1982, the Supreme Court opined:-

> "It is for Parliament to consider whether the Indian Divorce Act, 1869 should be amended so as to include a provision for divorce by mutual consent".[102]

At the same time Chinnappa Reddy. J. added:-

> ".....divorce by mutual consent should be available

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100. Bashiam v. Victor A.I.R 1970 Mad 12 (F.B).

101. J.F.S. Eric D'Souza v. Florence Martha A.I.R 1980. Delhi 275 at 277. (F.B).

102. See supra n.68.

to every married couple, whatever religion they may profess and however they were married. Let no law compel the union of a man and woman who have agreed on separation.....But the woman must be protected. Our society still looks askance at a divorced woman. A woman divorcee is yet a suspect.....If the divorce law is to be a real success, it should make provision for the economic independence of the female spouse".103

In 1985, the Supreme Court again had another occassion to opine on the need for reform of divorce law thus:-

"Legislative competence is one thing, the political courage to use that competence is quite another.....

.....We suggest that the time has come for the intervention of the Legislature in these matters...."[104]

A full bench of the Madhya Pradesh High Court also recommended updating of the Indian Divorce Act, 1869.[105] And the Calcutta High Court in 1989 opined:-

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103. Ibid. at 481.

104. Mrs. Jorden Diengdeh v. S.S. Chopra (1985)3 S.C.C. 62= A.I.R 1985 S.C. 935.

105. See Neena v. John. A.I.R 1985 M.P. 85 (F.B).

"We are inclined to think that our Parliament or State Legislature (Marriage and Divorce being matters in the Concurrent List) should very seriously consider the question of introducing similar amendments in the Divorce Act, 1869 to bring it in harmonious conformity with other analogous enactments on the subject governing the other communities in India".[106]

And in 1990, the Kerala High Court directed the Union of India to take a decision on the recommendations of the Law Commission of India in its 90th Report for making amendments to Section 10 of the Indian Divorce Act, 1869.[107]

In 1994 also as pointed out earlier the Supreme Court had an occasion to deal with the issue. However, the Court thought it proper to speak on avoiding of Divorce Act rather than on the need for amending it. It pointed out the availability of other liberal legislation like Special Marriage Act and asserted that in its presence if a person elects to be governed by the Divorce Act, he cannot complain of its rigours later. The Court observed:-

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106. Swapna Gosh v. Sadananda Gosh. A.I.R 1989 Cal. 1 (F.B).
107. Mary Sonia Zacharia v. Union of India. 1990(1) K.L.T 130.

> "What is further, the individuals not willing to submit to the Indian Divorce Act or any other personal law are not obliged to marry exclusively under that law. They have the freedom to marry under the Special Marriage Act, 1954. Having however, married under the Act and accepted its discipline, they cannot be heard to complain of its rigours, if any".[108]

Indeed, there appears apparent discrimination against man also in the Indian Divorce Act. Likewise in certain cases it works out injustice to the women too. It may be that even if Section 10 was looked upon as discriminatory to the husband, it would have been saved by the principle of protective discrimination[109] in favour of the weaker sex permissible under Article 15(3) of the Constitution.

Though the Court claims to have got very valuable assistance from the bar,[110] it appears, it did not get a chance to examine the recommendations made by the Law Commission of India in 1983 in this regard.[111] The Commission was of the

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108. See supra n.88 at 403.
109. See Yusuf v. The State A.I.R 1954 S.C.321=(1954) S.C.R. 930.
110. See para 3 of supra n.88.
111. See Law Commission of India. "90th Report on the grounds of Divorce Amongst Christians in India. Section 10. Indian Divorce Act, 1869". Submitted in 1983.

view that the provision in Section 10 was blantantly discriminatory against Christian women. According to the Commission the women are placed in a much more unfavourable position than the men.[112] The Commission also disagreed with the decision of the Madras High Court,[113] and opined that Section 10 of the Indian Divorce Act violates the Constitutional mandate under Article 14. It further opined that Section 10 would seem to violate Article 15(1) of the Constitution, and therefore, there is an urgent need to remove the discrimination that is writ large in Section 10 of the Indian Divorce Act, 1869 and to introduce equal treatment in the matter of divorce for both the sexes.[114] It stressed the need for reform thus:-

> "We have come to the conclusion that there is urgent need for amending Section 10 of the Indian Divorce Act, 1869, as to remove the element of discrimination from which that Section definitely suffers".[115]

The Commission further incorporated a draft of the amended Section 10, along with its Report.[116] Unfortunately, the legislature

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112. See Ibid. at 3.
113. See supra n.98.
114. See supra n.111 at 4.
115. Ibid. at 17.
116. Id. at 18.

has not yet acted upon the recommendations of the Law Commission.

While matters remained so, the High Court of Kerala rendered its decision in Mary Sonia Zachariah.[117] In this case, the petitioners challenged the constitutional validity of Section 10 of the Indian Divorce Act, 1869, on the ground that the Section is violative of their fundamental rights guaranteed under Articles 14, 15 and 21 of the Constitution of India. The petitioner's contention was that the women's requirement of proving adultery along with cruelty and desertion to make out a ground for divorce under Section 10, violates their right to equality and the right to live with dignity and personal liberty enshrined in Articles 14, 15 and 21 of the Constitution of India and that denial of divorce on the ground of cruelty or desertion without reasonable excuse for a period of two years or upwards accepted as grounds for divorce for Indians of all other religions except Christians works out discrimination based solely on the ground of religion. Further Section 10 confers on the husband

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117. Mary Sonia Zachariah and another v. Union of India and others. Judgment dated 24.2.1995 in O.P.No.5805 of 1988 and O.P.No.4319 of 1991 (F.B). (Not yet reported).

a right to get divorce on proof of adultery simpliciter, while the wife is obliged to prove either cruelty or desertion along with adultery to get a divorce. It was contended that this provision is discriminatory against women solely on the ground of sex which is violative of Article 15 of the Constitution.

The Court ventured to explore the history of legislative inertia in the matter and then found:-

> "The Act is evidently pre-constitution legislation passed by the British Parliament adopting according to the petitioner mechanically the provisions of the Matrimonial Causes Act, 1857 which was then in force in England. Even after the lapse of a century and quarter the provisions of the Act have remained as such especially Section 10, though there had been some immaterial State amendments to some of the Sections of the Act".[118]

It may be pointed out that the Court begins its reasoning with a material error on the genesis of the Indian Divorce Act,

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118. See Ibid. at para 12.

1869. It has already been pointed out that the Indian Divorce Act was not enacted by British Parliament.[119] Be that as it may, the reasoning of the Court does not appear to be sound. It treats adultery committed by the husband and adultery committed by the wife on the same footing. This thesis was developed by the Court by disputing the correctness of the ratio in Dr. Dwaraka Bai[120] on the ground that the sensible classification justified by the Madras High Court therein cannot now be justified as it is a classification based on sex. But one cannot deny the vitality of the reasoning of Justice Panchajakesa Ayyar in that judgment. It was with a view to strike a balance between the husband and wife that Section 10 was enacted.

After Mary Sonia Zachariah the balance of Section 10 is gone and now it can be described as discriminatory to men. And the plight of men is further aggravated by the Kerala

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119. See supra n.38-40 and also see supra n.52 of Chapter III; and 1994(2) K.L.T (Journal) 49 at 54.

120. See supra n.98.

High Court's decision in Mathew v. Annamma Mathew[121] and the Supreme Court's decision in Kundu v. State of West Bengal[122] to the effect that the parentage test would not be acceptable in India. In the given circumstances, so long as Section 112 of the Evidence Act remaining the same, judicial construction of Section 10 of the Indian Divorce Act, 1869 to treat "adultery" of the husband and the wife at par is nothing but a subversion of legislative intent.

Further a look into the judgment in Mary Sonia Zachariah would show that the decision has led to a re-writing of Section 10 of the Indian Divorce Act, 1869 whereby several independent grounds of divorce are made available to Christian wives while Christian husbands are left high and dry with only one ground-adultery committed by the wife after the solemnisation of the marriage- and no other. This must be understood in the context of judicial decisions which hold that pregnancy contracted through another man prior to the solemnisation of marriage and even when the fact of pregnency was concealed, that would be no ground for the husband for any matrimonial relief under the Indian Divorce Act, 1869.[123]

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121. Mathew v. Annamma Mathew, 1993(2) K.L.T 1016 (D.B).

122. Goutam Kundu v. State of West Bengal. A.I.R 1993 S.C. 2295=1993(3) S.C.C 418.

123. Moss v. Moss (1897) P.263=77 L.T 220.

This situation is brought about by the operative portion of the judgment in Mary Sonia Zachariah, which reads:-

> "We would accordingly sever and quash the words 'incestuous' and 'adultery coupled with' from the provisions in Section 10 of the Act and would declare that Section 10 will remain hereafter operative without the above words".[124]

The net result of the decision is to make that part of Section 10 of the Indian Divorce Act, 1869 to read as follows:-

> "WHEN WIFE MAY PETITION FOR DISSOLUTION-
>
> Any wife may present a petition to the District Court or to the High Court, praying that her marriage may be dissolved on the ground that, since the solemnisation thereof, her husband has exchanged his profession of Christianity for the profession of some other religion, and gone through a form of marriage with another woman;

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124. See supra n.117 at paragraph 47. (For a text of Section 10, See supra n.70).

or has been guilty of.....adultery,

or of bigamy with adultery,

or of marriage with another woman with adultery,

or of rape, sodomy or bestiality,

or of .....such cruelty as without adultery would have entitled her to a divorce a mensa et toro,

or of.....desertion, without reasonable excuse,

for two years or upwards".[125]

Thus, though Section 10 had remained discriminatory towards Christian women, now by way of judicial decision, it has been made discriminatory towards Christian men. Indeed, the intention of the Court is laudable as it is to give a fair deal to women, but one cannot judge the judgment by good intentions alone. The Court was indeed aware of the limited nature of its efforts but hoped this decision would activate the authorities to go in for a comprehensive legislation. It observed:-

"Finally we may observe that what we have done is only a limited attempt at reform of the law and there is real need to have a comprehensive reform.

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125. The Courts in Kerala would have to enforce Section 10 as is shown here, in a petition filed by a wife.

> We hope that this judgment will have a compelling effect on the Central Government in finalising its proposal for introducing comprehensive reform in the law governing marriages and divorce among Christians in India!' [126]

Apart from the Courts, the Law Commission of India,[127] public opinion[128] and academic writers[129] also consider that the provisions of the Indian Divorce Act are gender discriminatory and that there is urgent need for a thorough reform of the law.

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126. See supra n.117 at paragraph 50.

127. See supra n.108-112 and the accompanying text.

128. See Chapter VI, n.103 and the accompanying text.

129. See A.K. Balagangadhar Tilak, "The Indian Divorce Act of 1869 requires amendments to bring it on par with marriage laws of other major religions in India". A.I.R 1995 (Jour) 9 at 11-12.

CHAPTER- V

GENDER DISCRIMINATION IN THE LAWS OF SUCCESSION AMONG CHRISTIANS

It has been the general impression that Christian law of succession is discriminatory to women as the Christian Divorce Law has been. In fact the Indian Succession Act applicable to Christians in most parts of India contains a safety valve through which the customary laws which are contrary to the provisions of the Indian Succession Act can be retained as the law of succession in certain areas. However, the decision of the Supreme Court of India in Mary Roy[1] overturned this position in the case of Kerala Christians. And so far as those Christians are concerned, there is urgent need for a fresh look.

Since 31.60 per cent of the total Christian population of India is in Kerala and as it is on the Kerala Christians that the impact of extention of the Indian Succession Act, 1925 by virtue of the provisions of the Part B States (Laws) Act, 1951, is felt more, it is proposed to examine the issue in the Kerala context to identify the discrimination prevalent in the law of succession, as the law relating to other areas has already been discussed in Chapter II.

It is generally believed that by virtue of the decision in Mary Roy's Case, the Supreme Court has made the Indian

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1. Mary Roy v. State of Kerala. (1986)2 S.C.C 209=A.I.R 1986 S.C. 1011=1986 K.L.T 508.

Succession Act, 1925, applicable to Christians all over India. But this is not so.[2] Even in Kerala, the Vaniya Christians of Chittoor Taluk of erstwhile Cochin State are still governed by their customary law, viz, the Hindu Mitakshara Law.[3] The members of the Anglo-Indian and Parangi communities of Cochin are also not affected by the decision in Mary Roy as they were exempted from the operation of the Cochin Christian Succession Act, 1921.[4] In Travancore, by virtue of the exemption granted under Section 3 of the Travancore Christian Succession Act, 1916, and the exemption granted under Section 29(2) of the Indian Succession Act, 1925, the Marumakkathayam Christians (Latin Catholics) of Neyyattinkara Taluk are also not governed by the provisions of the Indian Succession Act, 1925 and hence they still continue to be governed by the Marumakkathayam law in matters of succession.[5] When such a diverse system of law of succession among Christians prevails in various parts of India, it is interesting to examine as to how the Indian Succession Act, 1925 is made to apply to Christians of

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2. See supra Chapter II, n.86, 87, 94-96, 106, 120-125, 154, 158 and the accompanying text.
3. See Lurthu Mary Amma v. Souriyar. 1987(1) K.L.T 288 (DB).
4. See Section 2 of the Cochin Christian Succession Act, 1921. (Act No.VI of 1097 M.E).
5. See Section 3 of the Travancore Christian Succession Act, 1916 (Act No.II of 1092 M.E). For the reasons of such exemption see The Christian Committee Report, 1912 at 50. Also see the reasoning in supra n.3.

Travancore by the decision in Mary Roy. Further, an examination of the provisions of this Act in the constitutional context would be necessary to comprehend the impact of the law on Christians in India. With the decision in Mary Roy, the Indian Succession Act, 1925 has become the law of succession applicable to the greatest majority of Christians in India. But its immediate impact has been felt only in Travancore and Cochin areas of the State of Kerala. Hence, an examination of the development of the law of succession in Travancore and Cochin would be appropriate at this juncture.

In the early centuries the Syrian Christians of Travancore, Cochin and certain areas of Malabar were said to have followed the Biblical law as laid down by Moses for the guidance of the ancient Jews, but with the passage of time those laws were no longer observed by them, as the community evolved certain customary usages following the Hindu law, with certain modifications. Such customary usages varied among the different sections of the Christian community and the Courts had to determine the customary law on evidence from case to case.[6] According to the customary

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6. L.K. Ananthakrishna Ayyar, "Anthropology of the Syrian Christians". (1926) Ernakulam at 119-121. The adhearance of the early Syrian Christians to the Biblical law as laid down by Moses points towards the probability of the early converts being Jews who settled down on the Malabar Coasts. The gradual adoption of the customary usages of the Hindus might have been the result of conversion of the Hindus to the fold of Christianity. And the different customary usages for different sects might point to the possibility of the converts from different sects of Hindus carrying with them, their customary usages.

usages, Christian women whether married or not were excluded from inheritance, even if they had no brothers and the property devolved on male collaterals of the intestate.[7] This system of inheritance was disapproved by the Synod of Diamper in 1599 A.D. The Synod decreed:-

> "DECREE-XX:- FEMALES TO INHERIT IN DEFAULT OF MALE ISSUE:- Whereas an unreasonable custom has obtained in this diocese, viz that males only inherit their father's goods, the females having no share at all thereof; and that not only when there are sons, but when there are daughters only, and they unmarried, and many times infants, by which means great numbers of them perish, and others ruin themselves for want of necessaries, the father's good falling to the males that are next in blood, though never so remote or collateral, there being no regard had to daughters any more than if their parents were under no obligation to provide for them; all which being very unreasonable, and contrary to the natural right that sons and daughters have to succeed, to the good of their parents; the kindred who have thus possessed themselves of such good, are bound to restore them to the daughters as the lawful heiresses to them; wherefore the Synod doth decree and declare this custom to be unjust, and that the next akin

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7. Ibid. at 120-122. Also see supra Chapter I n.41.

can have no right when there are daughters to inherit their father's estate; and being possessed of such estate, are bound in conscience to restore them; neither is it lawful for the males to divide the estate among them, without giving an equal portion to the females; or if they have not done it already, they stand indebted for their portions; or if the father has disposed of the third part of his estate by will, the remaining two parts shall be equally divided betwixt the sons and the daughters, the portions that have been received by those that are married being discounted; all which the Synod doth command to be observed, intreating and commanding all the Christians of the diocese to receive this decree as a law, and observe it entirely, it being laid as a duty upon their consciences; and if any shall act otherwise, and being a kinsman, shall seize upon the goods belonging to daughters; or being a son, shall deny to give portions to his sisters, or being in possession of the said goods, shall refuse to make restitution; the prelate, if it cannot be done otherwise, shall compel them to it by penalties and censures, declaring them excommunicate, without any hope of absolution, until such time as they shall pay an effectual obedience, and shall make restitution".[8]

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8. Session IX, Decree No.20. See Dr. Scaria Zacharia, "The Acts and Decrees of the Synod of Diamper, 1599". I.I.C.S. (1994) Edamattom, at 211.

The Synod tried to change the customs, but the community refused to observe the decrees of the Synod relating to the customary law on succession and they continued to follow their own customs in the matter of succession.[9] With the split in the Syrian Christian Community, for the Jacobites the 'Nomo Canon' also known as the 'Hudaya Canon' became the highest authority in ecclesiastical matters.

The practice of bequeathing one's property by means of a will, to a certain extent was in existence among the Syrian Christians of Travancore, for centuries. These and other practices seem to have been borrowed from the Nomo Canons.[10] The right of Christians to make wills has always been recognised by the Courts in Travancore,[11] and their wills, no matter how made, have always been given effect to. They were guided by no rules and were not required to conform to any.[12] While so, the Travancore Wills Regulation was enacted on the 30th May, 1899. The Regulation did not profess to repeal any part of the personal law, it only sought to supplement the personal law of those who did not possess testamentary power, by empowering them to devise their property,

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9. Julian Saldanha, "Conversion and Indian Civil Law". (1981) Bangalore, at 109.
10. See supra n.6 at 120. Also see supra n.37 of Chapter III.
11. See I. T.L.R 88 and III T.L.R 16.
12. See Statement of Objects and Reasons of the Travancore Wills Regulation of 1899.

subject to certain limitations suggested by the general scheme and policy of their personal law, and to lay down Rules for general observance in the execution of Wills.[13] While enacting the Travancore Wills Regulation, the desirability of incorporating the provisions of the Indian Succession Act, 1865 on probate and administration was considered and rejected by the Legislative Council. Probate was allowed as an alternative to registration or deposit of a will. No will could take effect unless it was registered, deposited or proved in a Probate Court. It was believed that the cheapness of registration or deposit would be preferred by the natives to the comparatively heavy cost of obtaining a probate.[14] Therefore, Section 16 of the Regulation provided:-

> "Every will or codicil made in Travancore shall be either registered in the manner provided in Part IX of Regulation I of 1070, or deposited under Part X of the said Regulation, or proved in the manner and within the time prescribed in the law, if any, for the time being in force relating to probate".[15]

And the period of limitation was fixed as 12 years under

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13. See Ibid. at para 3.
14. See The Legislative Council proceedings dated 25.9.1897.
15. This was applicable to other communities as well.

Article 101 of the Limitation Regulation.[16] Therefore, it can be seen that the testamentary disposition of property by the Christians in Travancore was regulated not only by their personal law but also by the provisions of the Travancore Wills Regulation of 1899.

The Syrian Christians in Cochin, like their counter parts in Travancore, followed their customary law in matters of succession in earlier times. But the absence of a settled law of inheritance was a fertile source of litigation among Syrian Christians.[17] In these circumstances, there were several instances when the Chief Court of Cochin applied the Indian Succession Act, 1865 to the Syrian Christians in the years 1879 and 1880.[18] But there were also occasions when the Court refused to follow the principles of the Indian Succession Act.[19] Thus, 'the state of affairs' in Cochin, as far as Christian Succession was concerned, remained most unsatisfactory. At any rate custom could be proved from case to case and the Court held that in the absence of proof of special custom, the rules under the Indian Succession Act applied to the Syrian Christians of Cochin State.[20] And there was no statutory law applicable to Christians in the matter of testamentary succession

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16. See 13 T.L.R 187. (Even now the period of limitation under Article 106 of the Schedule to the Limitation Act, 1963, is 12 years).
17. See supra n.6 at 121.
18. See A.S.No.132 of 1054 M.E and A.S.No.59 of 1055 M.E of the Cochin Chief Court.
19. See The Christian Committee Report 1912 at 16.
20. Narasinga Mallan v. Mariam. 10 C.L.R 319 (F.B).

by execution of wills in Cochin.[21] Yet that right was recognised by the Chief Court of Cochin.[22]

Among the Syrian Christians, in matters relating to the execution and enforcement of wills and adoption deeds, the Bishop and Prelates exercised powers. The authority of the Syrian Bishop extended to all temporal and spiritual matters and they were the judges in all civil and ecclesiastical matters among Syrian Christians.[23] This is evident from the decrees of the Synod of Diamper. Session VIII, Decree XXXVIII laid down:-

> "DECREE XXXVIII:- BISHOPS TO SEE TO THE EXECUTION OF WILLS:- The Synod doth declare, that the execution of last wills lawfully made by deceased Christians does by the canon law belong to prelates and bishops, who are to take care that they be observed; and that whatsoever Christian has made a will that is valid according to the custom of the place, if it is not complied with in a year after the death of the testator, the Bishop shall by

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21. K.T. Ninan, "The Law relating to Christians in Kerala". (1971) Kottayam, at 14.

22. See Punnose v. Koruthu. 1951 K.L.T 223.

23. See supra Chapter I n.29-30 and the accompanying text.

censures, and other penalties, if found necessary, constrain the heirs or others, whose duty it is to fulfil the same".[24]

And further Decree XV of Session IX provided:-

"Decree XV:- THE DISPUTES OF CHRISTIANS TO BE DECIDED BY THE BISHOP:- Whereas by the ancient custom consented to by the whole government of the Christians of this bishopric, not only in spirituals but, temporals also, is devolved to the church and the bishop thereof, who is to determine all differences that are among Christians, and that some, dreading the justice and judgment of the prelate in their controversies, do without any fear of God, carry them before infidel kings and their judges, who are easily bribed to do as they would have them, to the great prejudice of Christianity, the said kings taking occasion from thence to intrude themselves into the affairs of Christians; for by which means, besides that they do not understand such matters, being tyrants and idolaters, they become very grievous and vexatious to Christians; for the avoiding of which, and several other mischiefs arising from thence to Christianity, the Synod doth strictly command all the Christians of this diocese, not upon any pretence whatsoever, to presume to carry any of their causes before infidel kings or their

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24. See supra n.8 at 200.

judges, without express licence from the prelate; which, whensoever it shall be judged necessary, shall be granted to them as shall be first carried before the prelate, that he may judge or compose them according to reason and justice; and all that shall do otherwise, shall be severely punished for the same, at the pleasure of the prelate, and he thrown out of the church for so long time as he shall think fit".[25]

During this time there was no properly organised system of administration of justice in these areas. For the proper administration of justice in Travancore, Zilla Courts were established in 1811 A.D.,[26] and a general scheme of judicial administration was carried out only by 1834 A.D.[27] With the establishment of Courts in Travancore, matters relating to Christian Succession came to be adjudicated upon by the Courts. The earliest decision which laid down the order of succession among Syrian Christians of Travancore was made in 1868. The whole of the extract published in the Gazette is as follows:-

"The order of succession among the native Syrian Christians of this coast is as follows:- first sons, failing these daughters, failing these,

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25. Ibid.at 209.
26. S.A. Azariah, "A Judicial History of Travancore" at 7.
27. V. Nagam Aiya, "The Travancore State Manual". Vol.III. (1906) Trivandrum, at 547.

brothers and their children and lastly, sisters and their children".[28]

This decision had been cited as an authority in subsequent cases.

In the meanwhile a High Court was established in Travancore by Regulation No. II dated 18th January, 1882.[29] In 1906, without properly adverting to the earlier decisions, the Travancore High Court considered the customary law of succession among Christians and held in Geevarghese Maria[30] that there was no specific rule to resolve the dispute and hence the Court decided the matter by applying the provisions of the Indian Succession Act, 1865. It may be pertinent to note that the Indian Succession Act, 1865 was not a law in force at that time in the State of Travancore. Further, the customary law of the Syrian Christians was already recognised and enforced by the Courts in Travancore.[28] Yet the precedent of Geevarghese Maria was followed in yet another case in 1907.[31] By now the Court had had enough occassions to consider the question of succession relating to almost all Christian denominations and the final

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28. Judgment in A.S.No.182 of 1039 M.E. Published in Govt Gazette dated 21st January 1868.
29. See supra n.27 at 557. Also see supra n.26 at 25.
30. Geevarghese Maria v. Kochukurian Maria 22 T.L.R 192 (1906).
31. Ouseph Mathai v. Ouseph Kora 22. T.L.R 205 (F.B).

position of law as established by precedent was that though there was no enacted legislation- as a matter of policy of applying the principles of justice, equity and good conscience- the principles embodied in the Indian Succession Act, 1865 would apply to the Travancore and Cochin Christians in matters of succession.

It was in these circumstances that the Christian community took the lead to get a Succession Act enacted for them. And the matter was taken up by prominent Christians in the Sri Mulam Popular Assembly.[32] This was supported by all the Bishops (except five) exercising jurisdiction in the state. And His Highness's Government appointed a committee in 1911, consisting of six members belonging to different denominations of Christians to:-

> "enquire into the customs and practice now in vogue among the several denominations of the Indian Christian communities in Travancore in the matter of inheritance and succession to real and personal and report whether any legislation is necessary and, if so, on what lines it should be".[33]

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32. A Legislative Council was established in Travancore for the purpose of making laws and regulations, by Regulation dated 30th March, 1888. Also see supra n.27 at 548.

33. Order No.J 3520 dated Trivandrum, 23rd July, 1911.

This Committee was called "The Christian Committee". It probed into the customs and practices among various sections of the Christians in Travancore and even Cochin and Malabar and considered the feasibility of introducing the Indian Succession Act into Travancore and it came to the conclusion:-

> "In social matters, legislation, to be effective, must not be greatly in advance of the public sentiment at least so far as a conservative people, like the Travancoreans, are concerned. Even if introduction of the Indian Succession Act is the best thing for the Christians of Travancore- a proposition of whose correctness we are, by no means, quite sure- it is better to bring about the second best thing with the intelligent approval of the people as a whole rather than go against the sentiments of the community in the attainment of what one considered to be the best".[34]

The Committee, then, submitted its report on 13.6.1912, along with a draft of the proposed bill on the Christian Succession Regulation and it was enacted as "The Christian Succession Regulation" on 21.12.1916,[35] with very minor changes from the

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34. Report of the Christian Committee, 1912 at 55.

35. Regulation No. II of 1092 M.E. It is otherwise called the Travancore Christian Succession Act, 1916.

draft bill. Therefore, intestate succession among Christians in Travancore was to be regulated by the Travancore Christian Succession Act, 1916. As regards testamentary succession, their customary law as modified by the Travancore Wills Regulation of 1899, was to prevail, and the applicability of the Indian Succession Act, 1865 was expressly ruled out by the Travancore Legislature.

In these circumstances it is interesting to note the rules of distribution applicable to women under the provisions of the Travancore Christian Succession Act. Under S.24 of the Act, a widowed mother has only a life interest terminable at death or remarriage, over any immovable property. Under S.28 female heirs who had already received their streedhanom were not to be given any share in the case of intestacy because the daughters have only a right to get streedhanom and it was computed as one fourth of the share of a son or Rs.5000/- whichever is less. Daughters, could get shares in the intestate's property only in the absence of male heirs. Even the unmarried daughters, had only a right to get streedhanom which was to be calculated as aforesaid. Thus, the Travancore Act contained several provisions which could be described as discriminatory to women though this could be satisfactorily explained otherwise by the protagonists of retention of the system. It can be argued that a daughter/sister is married away at the prime of her age and she toils and works for the benefit of her matrimonial home and would not contribute anything for the betterment of

her own (natural) family, while at the same time it is the son/brother and his wife and perhaps children who contribute to the family property and make accretions to it. Hence there may be no justification for the daughter/sister to claim an equal share with that of her brother when intestate succession opens up, perhaps, decades after her marriage. Therefore, if the deep rooted customary practices among the Christians is taken into consideration, the prescription of ¼th share of a son to be given to the daughter may not be unjust. It is perhaps only the prescription of Rs.5000/- as the ceiling limit that causes hardships. But one may have to bear in mind that the amount of Rs.5000/- was fixed in the year 1916 and the failure to revise the ceiling limit is that of the Legislature. Even this line of argument cannot hold water in the case of an unmarried daughter, as she too remains in the family and toils for the benefit of the family, as in the case of a son. Her case has to be treated at par with the son.

As far as the position of law in this regard in British India was concerned, the Indian Succession Act, 1865 was later repealed and a comprehensive legislation on the subject, the Indian Succession Act, 1925, was enacted by the Legislature in India established under the Government of India Act, 1919. Though the British Crown had suzerainty over Travancore, the Indian Succession Act, 1925 was not made applicable to Travancore because power of legislation over Travancore had never been conceded to the British.

The position being so, the British Parliament enacted the Indian Independence Act, 1947 on 18th July, 1947 and by virtue of Section 7(1)(b) of the Act, the suzerainty of His Majesty over Indian States lapsed, with effect from 15th August, 1947. But Section 18 of the Act provided for continuance of the existing laws ,[36] with a provision for adaptation or amendment or repeal by competent authorities in the new Dominions of India and Pakistan. Independence of Travancore was declared by the Dewan, Sir C.P. Ramaswamy Aiyar but due to popular disapproval, he had to resign.[37] This paved the way for an Interim Constitution in Travancore. Section 33(1) of the Travancore Interim Constitution provided:-

> "Subject to the provisions of this Act all the law in force in Travancore immediately before the commencement of this Act shall continue to be in force except in so far as the same are altered by competent authority".[38]

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36. See Sections 7 and 18 of the Indian Independence Act, 1947. (10 & 11 Geo.VI, C.30) See D.D. Basu, "Commentary on the Constitution of India". Vol.VI, (constitutional documents) 5th Edition, (1966) Calcutta, at 331. Thus the applicability of the Indian Succession Act, 1925 in British India was maintained with such exemptions that were already allowed.

37. George Woodcok, "Kerala- A Portrait of Malabar Coast". (1967) London, at 249. (The declaration was made on 11th June, 1947).

38. The Travancore Interim Constitution Act, 1123 (24.3.1948) Act VI of 1123. (1948).

Thus, the declaration of independence or the formation of the subsequent Interim Constitution in Travancore did not affect the continuance of the laws of Travancore and thus the law relating to marriage and succession among the Christians continued in force.

In the meanwhile, the process of unification of Indian States was under way. The Rulers of Travancore and Cochin, with the concurrence and guarantee of the Government of India, entered into a covenant for the merger and unification of these two states into the United State of Travancore and Cochin, in May, 1949.[39] Formation of the United State of Travancore and Cochin was proclaimed by the Government of India on 8th June, 1949 and the appointed day was Ist July, 1949, and the Ruler of Travancore became the Ist Rajpramukh.[40] Article 11 of the covenant authorised the Rajpramukh to promulgate Ordinances for the peace and good government of the United State or any part thereof. In exercise of the powers conferred by Article 11 of the covenant the Rajpramukh promulgated an Ordinance to make provision for the continuance of the laws in force in that

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39. The covenant was signed by the Maha Raja of Travancore on 27th May, 1949 and by the Maha Raja of Cochin on 29th May, 1949. And shri. V.P. Menon, Adviser to the Government of India, Ministry of States signed it on behalf of the Govt of India.

40. See Articles 2 and 4 of the covenant.

portion of the territory of the United State, which immediately prior to the Ist day of July, were in force. Section 2(b) of the Ordinance defined the existing law of Travancore thus:-

> "Existing law of Travancore shall mean any proclamation, law, order, bye-law, rule or regulation in force in the State of Travancore immediately prior to the appointed day, except the Travancore Interim Constitution Act, 1123".[41]

A similar definition of "existing law of Cochin" was made under Section 2(e) of the Ordinance. And Section 3 of the Ordinance provided for the existing laws of Travancore to continue in force in the territory of Travancore[42] and Section 4 was to the same effect as regards Cochin. This ordinance was repealed by the Travancore-Cochin Administration and Application of Laws Act, 1125 (M.E) and the provisions regarding "existing laws" continued to be the same. And Section 9 of the Act provided:-

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41. See S.2(b) of the United State of Travancore and Cochin Administration and Application of Laws Ordinance, 1124. Ordinance No.1 of 1124. (1949).

42. Section 3 provided:-

> "The existing laws of Travancore to continue in force in the territory of Travancore:-(1) Subject to the provisions of the Ordinance, the existing laws of Travancore shall, until altered, amended or repealed by competent authority, continue to be in force mutatis mutandis in that portion of the territories of the United State which before the appointed day formed the territory of the State of Travancore".

"Power of Courts for removal of difficulties:-

In the application of the existing laws of Travancore or the existing laws of Cochin by virtue of the operation of Section 3 or Section 4, the Courts of the State of Travancore-Cochin shall have power for the removal of difficulties, if any, arising out of, or in connection with, such application, to interpret such laws as to effectuate the purpose intended by this Act".[43]

In terms of this provision the decision rendered by the Travancore-Cochin High Court should have been accorded finality in cases involving succession among Christians.

As per the provisions of Article 9 of the covenant,[44] the Rajpramukh executed a supplementary instrument on 14th July, 1949, by which he accepted the legislative powers of the Dominion Legislature, over matters enumerated in List I and List III of the 7th Schedule to the Government of India Act, 1935 (with the exception of taxation). And on 24th November, 1949 the Rajpramukh declared and directed:-

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43. See The Travancore-Cochin Administration and Application of Laws Act, 1125 (Act No.VI of 1125). Published in T.C. Gazette. Extra. Dated 28.12.1949, which came into force from 28.12.1949.

44. See supra n.39.

"That the Constitution of India shortly to be adopted by the Constituent Assembly of India shall be the Constitution for the United State of Travancore and Cochin as for the other parts of India and shall be enforced as such in accordance with the tenor of its provisions. That the provisions of the said constitution shall as from the date of its commencement, supersede and abrogate all other constitutional provisions inconsistant therewith which are at present in force in this state".[45]

Thus, all the laws in force in the territory of Travancore-Cochin became subject to the Constitution of India when it came into force,[46] on 26th January, 1950. And the United State of Travancore and Cochin became a Part B State within the constitution of India on that day.

The Constitution of India provided for the continuity of the existing laws. This is evident from Article 372(1) which provides:-

"372:- Continuance in force of existing laws and their adaptation:- (1) Notwithstanding the repeal by this constitution of the enactments referred to in Article

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45. See A.N. Lakshman Shenoy v. The Income Tax Officer. A.I.R 1958 S.C.795 at 797.

46. Ibid.at 797 and 798.

395 but subject to the other provisions of this constitution, all the laws in force in the territory of India immediately before the commencement of the constitution shall continue in force therein until altered or repealed or amended by a competent legislature or other competent authority".

And the President of India was given the power to make such adaptations and modifications of such law by order under Article 372(2) of the Constitution within a period of "three years" [47] from the commencement of the Constitution. The expression "law in force" was explained under Article 372(3) and Article 13(3)(b) and "existing law" has been defined under Article 366 (10). Obviously these constitutional provisions saved the Travancore Christian Succession Act, 1916 and the Cochin Christian Succession Act, 1921.

In exercise of the powers conferred under Article 372(2) of the Constitution, the President of India issued the Adaptation of Laws Order, 1950[48] dated 26th January 1950. By Section 2(1)(e) of the Adaptation of Laws Order, 1950, "existing law" was defined

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47. Substitued by the Constitution (First Amendment) Act, 1951. S.12, for "two years".

48. Published in Gazette of India, Extraordinary, Page 449 as amended by Notification No. S.R.O.115 dated 5.6.1950, Gazette of India, Extraordinary, Part II, S.3, Page 51, and subsequent notifications of 4.11.1950; 4.4.1951 and 2.7.1952.

to mean an existing central, provincial or state law. And Section 18 provided:-

> "As from the appointed day,[49] all existing state laws shall, until repealed or altered or amended by a competent legislature or other competent authority be subject to the adaptations directed in the order".

It may be pertinent to point out that inspite of making adaptations and alterations in a number of central, provincial and state enactments, the Travancore and Cochin Christian Succession Acts were not touched by these orders and at the same time the Indian Divorce Act was extended to the whole of India except the Part B States.[50]

This being so, in 1951, the Part B States (Laws) Act,[51] was enacted by Parliament, whereby, certain enactments mentioned in the Schedule to that Act, including the Indian Succession Act, 1925, were amended and extended to the Part B States, by Section

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49. The appointed day was defined under Section 2(1)(a) as 26th January, 1950.

50. See The Adaptation of Laws Order, 1950.

51. The Part B States (Laws) Act, 1951. (Act No. III of 1951) Dated 22.2.1951 which came into force on 1.4.1951. See Gazette of India 1951 Section 3. Page 354.

3 of that Act.[52] And Section 6 of the Act of 1951 provided for repealing the corresponding Acts and Ordinances then in force in the Part B States.

It may be noted that at the time of the re-organisation of the states[53] specific provisions were made to save the "existing laws" and the "law in force" by Section 119 of the States Re-organisation Act, 1956. The State of Kerala was formed by including most of the territories of Travancore-Cochin and the major portion of Malabar District of the State of Madras and Kasargod Taluk of South Canara District.[54] Section 120 of the Act provided for adaptation of laws and in exercise of such

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52. Section 3:- "Extension and amendment of certain Acts and Ordinances. The Acts and Ordinances specified in the schedule shall be amended in the manner and to the extent therein specified, and the territorial extent of each of the said Acts and Ordinance shall, as from the appointed day and in so far as any of the said Acts or Ordinances or any of the provisions contained therein relates to matters with respect to which Parliament has power to make laws, be as stated in the extent clause thereof as so amended".

53. The States Re-organisation Act, 1956. (Act No.37 of 1956).

54. See Ibid. (Section 5).

powers, the Government of Kerala made the Kerala Adaptation of Laws Order, 1956.[55] Section 5(2) of the Kerala Adaptation of Laws Order provided:-

> "Referrence to Travancore in the laws in force in the Travancore-Cochin area of the State or in any portion thereof, where such references denote the territories of the former State of Travancore, shall be construed as references to such territories excluding the portion thereof which from the Ist day of November 1956 form part of the State of Madras by virtue of the provisions of Section 4 of the States Re-organisation Act, 1956".

And this Order or the subsequent orders[56] did not effect any change in the law relating to Christian marriage, divorce or succession in Travancore, Cochin or Malabar.

While so, the "Christian Succession Acts (Repeal) Bill, 1958" was introduced in the Legislative Assembly of the State of Kerala to repeal the Travancore Christian Succession Act, 1916 and the Cochin Christian Succession Act, 1921. It may be relevant to quote from the Statement of Objects and Reasons for the Bill. It reads:-

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55. Published in Kerala Gazette Extraordinary No.2 dated Ist day of November, 1956.

56. The subsequent orders are: (1) The Kerala Adaptation of Laws Amendment Order, 1957 and (2) The Kerala Adaptation of Laws (No.2) Order, 1957.

"The Christian Succession Act (Travancore Act II of 1092) and the Cochin Christian Succession Act, VI of 1097, provide for intestate succession among Christians in the Travancore and Cochin areas of the State respectively, while Part V of the Indian Succession Act, 1925, dealing with intestate succession apply to Christians in the Malabar area".

"It is considered necessary to have a uniform law to govern the intestate succession among Christians for the whole of the State and for that purpose to repeal the Travancore Christian Succession Act and the Cochin Christian Succession Act. The Bill is intended for this purpose." 57

But this Bill was not enacted into law and it lapsed.[58] Thereafter the question of intestate succession among Christians in Kerala became a live topic of discussion among the members of the community and also in the press.[59] Then the Law Commission of Kerala decided to take up the subject for examination at its meeting held on 21st August, 1967. After collection of evidence

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57. Law Commission of Kerala. Fourth Report, 1968. Page 55. (This Bill was introduced by Justice V.R. Krishna Iyer, when he was the Law Minister of Kerala).

58. See Ibid. at 7.

59. See Letter to the Editor published in "Malayala Manorama" daily dated the 12th August, 1967. Also see Letter to the Editor published in "Keraladhawani" dated the 27th July, 1967.

from the public by holding sittings at the District Centres and other places, the Commission submitted its report to the State Government on 15.2.1968 with a recommendation to have a new self-contained Bill modelled on the Central Act incorporating the necessary changes, the transitory provisions and provisions abolishing joint families among Tamil Christians.[60] It also included a draft bill in the Report.[61] But the Government did not act upon the recommendations of the Law Commission of Kerala.

Then the question of revision of the Indian Succession Act, 1925 and also the applicability of the Act to Travancore and Cochin area of the State of Kerala was taken up by the Law Commission of India on its own and submitted a Report,[62] on 25th February, 1985, and recommended to the Central Government to take a decision, as a matter of social policy, to repeal or not to repeal the Travancore and Cochin Christian Succession Acts.[63] It was in these circumstances that the Supreme Court came up with its epoch-making decision in Mary Roy.[1] The Supreme Court of India entertained a batch of Writ Petitions under Article 32 of the Constitution of India, filed by Mary Roy and

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60. See supra n.57 at 25.
61. See Ibid. at 41.
62. Law Commission of India. 110th Report on the Indian Succession Act, 1925.
63. Ibid. at 276.

others and rendered its judgment on 24.2.1986, holding that by virtue of the provisions of the Part B States (Laws) Act, 1951, the Travancore Christian Succession Act, 1916 stood repealed with effect from 1.4.1951, which was the appointed day under the Act of 1951.

This decision witnessed many changes in the practice of the Supreme Court. At the outset itself it has to be pointed out that decision on issues such as those in Mary Roy have usually not been discussed by the Supreme Court in a case under Article 32 of the Constitution. But such issues became subject matter for discussion in Mary Roy.

The challenge in Mary Roy's Case[64] was against sections 24, 28 and 29 of the Travancore Christian Succession Act, 1916 on the ground that those provisions were violative of Articles 14 and 15(1) of the Constitution of India.[65] The petitioner's father died intestate in November 1959. He was survived by his wife, two daughters and two sons.[66] The petitioner filed the case against the State of Kerala (Ist respondent), her mother, married sister and two brothers as respondents. There was no

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64. Writ Petition (Civil) No.8260 of 1983.

65. See Ibid. paragraph 10 and 13 of the petition and ground II and prayer (a) and (b).

66. See Ibid. paragraph 4.

serious challenge to the Travancore Christian Succession Act, 1916 on the ground of extension of the Indian Succession Act, 1925, by virtue of the provisions of the Part B States (Laws) Act, 1951. While admitting the writ petition on 6.2.1984, the Supreme Court passed an order as follows:-

> "Issue Rule NISI.
>
> It will be open to the State Government to frame appropriate law on the question involved in this writ petition. Hearing of the writ petition expedited".[67]

It seems that the Ist respondent- State of Kerala- did not prosecute the case with the required enthusiasm. However, it filed a counter affidavit,[68] and submitted before the Court:-

> "At the outset I say that the State of Kerala is not interested in the dispute raised by the petitioner and her brothers and unmarried sister and mother and hence it is not necessary to reply to the petition in

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67. This is the order as conveyed to the 4th respondent in the writ petition, who is the brother of Mary Roy.

68. The affidavit was dated 10.1.1985 sworn to by the Secretary in the Department of Law in the Government of Kerala on behalf of the State of Kerala.

so far as the petition deals with the relationship between the parties".[69]

But at the same time, the State of Kerala, went on to make averments that had no connection with the case. For example:-

"The petitioner has not given full facts in the petition as to whether she received any share in the property of her father during his life time and if so whether that share was equal to the shares which her brothers and unmarried sister are now able to enjoy after the death of their father".[70]

And it further submitted:-

"The Government are also considering how to improve the interest of the unmarried daughter in the case of intestate succession....."[71]

It is interesting to note that the State- the first respondent- brought into the discussion the plight of the unmarried daughters, while there was no unmarried daughter involved in the case. It seems it was mentioned in the affidavit to draw the attention

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69. See Ibid. paragraph 2.

70. See Id. paragraph 11.

71. See Id. paragraph 12.

of the Court, nay to deflect its attention from the real issues to the issue of discrimination which admittedly was there in the case of unmarried daughters/sisters. Mary Roy had no unmarried sister, nor has she made any mention of the plight of unmarried daughters in the case of intestate succession. It is interesting to note that in the reply affidavit[72] filed by Mary Roy, no mention is made about any unmarried sister. And in the Counter Affidavit[73] filed by the 4th respondent (Mary Roy's brother) prior to the counter affidavit of the Ist respondent, did not deal with the question of unmarried sister.[74] It is therefore evident that the purpose of this mention was to make the Court to concentrate its attention to an issue which was not referred to it by either party. In any case it can be said that the Court was not informed of the correct factual position.[75] And it decided the case on a ground that was not seriously raised in the Writ Petition, ie, the impact of the Part B States (Laws) Act, 1951. This is not in conformity with the established precedent of the Supreme Court itself from the very begining of the inaguration of the Constitution. For example, the Supreme Court in the year 1951 held thus:-

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72. Reply affidavit dated 27.7.1985.
73. Counter affidavit dated 19.1.1984.
74. There was no possibility to deal with the matter as the Ist respondent filed the Counter subsequently on 10.1.1985.
75. It is likely that these averments must have had a bearing on the decision in Mary Roy's Case.

"Article 32 is not directly concerned with the determination of constitutional validity of particular legislative enactments. What it aims at, is the enforcing of fundamental rights guaranteed by the Constitution, no matter whether the necessity for enforcement arises out of an action of the executive or of the legislature.....the sole object of the Article is the enforcement of fundamental rights guaranteed by the Constitution... .....A proceeding under this Article cannot really have any affinity to what is known as a declaratory suit".[76]

The same view was reiterated by the Supreme Court in the Khyerbani Tea Company's Case,[77] wherein the Court opined:-

"In dealing with petition under Article 32, this Court naturally confine the petitioners to the provisions of the impugned Act by which their fundamental rights are either affected or threatened".

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76. Chiranjit Lal v. Union of India. A.I.R 1951 S.C.41. Para 44 and 45. Also see Lakshmanappa H.J. v. Union of India. A.I.R 1955 S.C. 3 and Ram Chandra Palai v. State of Orissa. A.I.R 1956 S.C. 298.

77. Khyerbani Tea Company Ltd v. State of Assam. A.I.R 1964 S.C.925. Para 43.

In Ujjam Bai,[78] the Supreme Court opined that the remedy in a case where the petitioner challenges the constitutionality of an Act, otherwise than on grounds of infringement of fundamental rights is by way of a petition under Article 226 of the Constitution. The Supreme Court had taken this consistant stand in case after case. Thus a petition under Article 32 is maintainable only if there is any restriction on the enjoyment of fundamental rights. If a right infringed is not a fundamental right conferred by Part III of the Constitution, it is outside the purview of Article 32 of the Constitution. In other words, in such cases the petitioner cannot invoke Article 32. As Article 32 confers a fundamental right to enforce any other fundamental right or to avert a threat to a fundamental right, it cannot be pressed into service for determining the validity of an enactment unless that enactment infringes a fundamental right.

In Mary Roy, petitioners were allowed to advance a case outside their pleadings. And the decision of Supreme Court thereon is nothing but a declaratory decree, as the Court did not think it necessary to examine whether there was violation of fundamental rights of petitioners. It is felt that the judgment was rendered without bearing in mind the procedural and the jurisdictional limitations, which the Court had imposed

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78. See Ujjam Bai v. State of U.P. A.I.R 1962 S.C 1621. Para 34 at 1635. P.R. Naidu v. Govt of A.P. (1977)1 S.C.C 561 and M.V. Kuriakose v. State of Kerala (1977)2 S.C.C 728.

on itself by a long line of decisions herein before noticed.[79] In the light of these time tested precedents the only course open to the Court was to examine the validity of the Travancore Christian Succession Act on the touchstone of the Constitution. Then the effect of the judgment would only have been prospective and many of the problems that arose would not have arisen.

The above arguments based on the invocation of Article 32 is only one of the grounds that undermine the legal foundation of the decision in Mary Roy. Yet another aspect was that the Court and also the concerned parties particularly the State of Kerala before the Court did not advert to the historical evolution of the law of succession in Travancore and the saving of the Travancore Act by a chain of legislative measures as detailed above. It can be seen that even in the midst of transformation of the State of Travancore and its accession to the Indian Union, the "existing law" and the "law in force" continued to be jealously guarded and carried into the Constitution, and the Constitution further protected it and saved it from extinction.[80] The decision in Mary Roy

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79. See supra n.76,77,78 and the accompanying text. Also see Sebastian Champappilly, "Christian Law of Succession and Mary Roy's Case". (1994)4 S.C.C. (jour) 9 at 14, and 1994(1) K.L.T. Journal 12 at 18.

80. See supra n.36-50.

was therefore the result of an unfortunate foray made by the Court into an area insulated by the Constitution itself. In this view, Mary Roy decided without reference to the "law in force" could be described per incuriam.

Also, an analysis of the judgment in Mary Roy reveals a contradiction in thought. This is evident from the following aspects. The Court considered a possible argument that both Chapter II of Part V of the Indian Succession Act, 1925 and the Travancore Christian Succession Act, covered the same field and dealt with the same subject matter, namely intestate succession among Indian Christians and hence there was no implied repeal of the Travancore Christian Succession Act, by the extention of Chapter II of Part V of the Indian Succession Act, 1925 and that the continued operation of the Travancore Christian Succession Act, was saved by Section 29 sub-Section 2 of the Indian Succession Act, 1925. To this proposition the response of the Court was thus:-

> "We very much doubt whether such an argument would have been tenable but in any event, in the present case, there is no scope for such an argument, since the Travancore Christian Succession Act, 1092 stood expressly repealed by virtue of Section 6 of Part B States (Laws) Act, 1951".[81]

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81. Mary Roy v. State of Kerala. (1986)2 S.C.C 209. Para 6.

The finding of the Court that the Travancore Christian Succession Act, 1092 stood expressly repealed by virtue of Section 6 of Part B States (Laws) Act, 1951 does not appear to be correct.[82] It is contradictory to the stand taken by the Court which stated thus:-

> "When the Indian Succession Act, 1925 was extended to Part B States of Travancore-Cochin every part of that Act was so extended including chapter II of Part V and the Travancore Christian Succession Act, 1092 was a law corresponding to Chapter II of Part V, since both dealt with the same subject matter, namely, intestate succession among Indian Christians and covered the same field".[83]

That being so, Section 29(2) of the Indian Succession Act, 1925, was also extended to Travancore-Cochin at the very same time, which provides for saving of any other law for the time being in force. As the Travancore Christian Succession Act, 1092 (M.E) cannot be and ought not be deemed to be a corresponding law as envisaged under Section 6 of the Part B States (Laws) Act, 1951, the Travancore Act can very well be considered as within the scope of "any other law for the time being in force" as

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82. See infra n.88.

83. Ibid. at 215. Paragraph 6. Also see infra n.90.

envisaged under Section 29(2) of the Indian Succession Act, 1925 and thus saved by Section 29(2) of the Act.[84]

It is interesting to note that the petitioner (Mary Roy) did not even have a case on facts as is evident from the subsequent developments. On the strength of the declaration of the Supreme Court that the Travancore Christian Succession Act, 1092 (M.E) stood repealed with effect from 1.4.1951, Mary Roy filed O.S.No.323/1988 on the file of the Principal Subordinate Court, Kottayam for partition and separate possession of her share of property in accordance with the provisions of the Indian Succession Act, 1925. And the Court found that Mary Roy had no right to claim a share as she had already received her share even before filing the writ petition in the Supreme Court and the suit was dismissed on 13.1.1994.[85] These developments reinforce the argument that the Supreme Court made a declaration in 1986, when the petitioner (Mary Roy) had no case even on facts. In fact Mary Roy had no claim on the property at the time of institution of the case as in accordance with the settlement deed No.3184/59

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84. It provides:-

> "Section 29:- Application of Part:-1. This part shall not apply to any intestacy occuring before the first day of January, 1866, or to the property of any Hindu, Muhammadan, Buddhist, Sikh or Jaina.
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> 2. Save as provided in sub-Section (1) or by any other law for the time being in force , the provisions of this part shall constitute the law of (India) in all cases of intestacy".

85. Against the decision in O.S.No.323 of 1988, Appeal Suit No.648 of 1994 was filed in the High Court of Kerala and it is pending final adjudication.

executed by her father, her mother alone had life interest in the property. On her death only, could Mary Roy have got some interest in the property. Hence it is felt that the decision came to be rendered without appreciating the facts and also the historical background of the law of succession applicable to Christians in India, being placed before it.

In spite of Mary Roy, in 1987, a Division Bench of the High Court of Kerala held that the Tamil Vaniya Christians of Chittur Taluk are still governed by the Hindu Mitakshara Law.[86] It is submitted that it is the correct reading of Section 29(2) of the Indian Succession Act, 1925, as a valid custom is also held to be a law in force within the context of the Constitution of India.[87] Therefore, if the customary law prevalent in Travancore can still be held to be saved by Section 29(2) of the Indian Succession Act, 1925, there is no rhyme or reason to hold that the Travancore Christian Succession Act, 1092 (M.E) to be deemed to be repealed in so far as there is no express repeal of the Act by the Part B States (Laws) Act, 1951 and this is especially so when the Travancore Act was not

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86. Lurthu Mary Amma v. Souriyar. 1987(1) K.L.T 288 (D.B). Also see Chinnaswamy Koundan v. Anthonyswamy. A.I.R 1961. Ker 161 (D.B).

87. D.R. Rao v. State of A.P. A.I.R 1961. S.C.564.

repealed by the Repealing and Amending Act of 1960.[88]

Viewed from another angle, it can be found that Section 6 of the Part B States(Laws) Act, 1951 provided for repeal of corresponding Acts only. In other words, it provided for repeal of those Acts that corresponded to the Acts or Ordinances extended to the Part B States.[89] The Indian Succession Act, 1925 and the Travancore Christian Succession Act cannot be treated as corresponding Acts.[90] The Travancore Christian Succession Act

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88. Central Act No.LVIII of 1960. By this enactment various Acts, including that of Travancore, were expressly repealed. But neither the Travancore Christian Succession Act, nor the Travancore Wills Regulation was expressly repealed by the Act of Parliament in 1960. As the decision in Kurian Augusthy v. Devassy Aley, (A.I.R 1957 T.C.1) was known to Parliament, then the Travancore Christian Succession Act would have been expressly repealed, if Parliament had that intention.

89. "Section 6-Repeals and Savings-- If immediately before the appointed day, there is in force in any Part B State any law corresponding any of the Acts or Ordinances now extended to that State, that law shall, save as otherwise expressly provided in the Act, stand repealed".

90. See Sundra v. Girija. A.I.R 1962 Mys. 72 (FB) and Shivadeviamma v. Sumanji A.I.R 1973 Mys. 299 (FB). (The Indian Succession Act was not an Act exclusively meant for Christians. See supra n.11-16 of Chapter II and the accompanying text).

is a special legislation that amended and codified the customary law of Christians in Travancore alone. Whereas the Indian Succession Act is a general legislation meant for general application irrespective of religion. Apart from this, The Indian Succession Act is a comprehensive one dealing with testamentary succession, administration and probate, whereas the Travancore Christian Succession Act deals with only intestate succession among Christians of Travancore. Therefore, the finding of the Supreme Court that the Travancore Act is a '*corresponding Act*' does stand on quick sands.

Inshort, in *Mary Roy*, the Supreme Court treaded on slippery grounds to give relief to the petitioners bypassing the customary law of the Indian Christians of Travancore and that too without noticing the established precedent in these matters. Through the decision in *Mary Roy*, an alien law was forced upon the Christians of Travancore.

Following the decision of the Supreme Court in *Mary Roy*, the High Court of Kerala ruled that the Cochin Christian Succession Act, 1921 also stood repealed by the Part B States (Laws) Act, 1951.[91] Though these Courts did not expressly give retrospective effect to these judgments, the mere declaration that the Travancore and Cochin Acts stood repealed on 1.4.1951,

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91. V.M. Mathew v. Eliswa. 1988(1) K.L.T 310 (D.B). Also see Joseph v. Mary. 1988(2) K.L.T 27 (D.B).

gave these judgments retrospective effect overturning the then existing law and practice among the Christians of Travancore and Cochin.

It may be pertinent to mention that the Travancore and Cochin Christians conducted their property transactions in the belief that they were governed by the provisions of the 1916 and 1921 Acts of Travancore and Cochin respectively, in matters of intestate succession. The Travancore Wills Regulation of 1899 which allowed the customary law, was believed to govern testamentary succession among Christians of Travancore. This belief was instilled in them by the Travancore-Cochin High Court in 1956[92] and the Madras High Court in 1978.[93] It was affirmed and reaffirmed by the aforesaid courts that the Travancore Act still remained in force, inspite of the Part B States (Laws) Act, 1951. When the Supreme Court declared in 1986 in Mary Roy that, that was not

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92. Kurian Augusthy v. Devassy Aley-A.I.R 1957 T.C.1=1956 K.L.T 559. J. Duncan M. Derret in "The Personal Law of Syrian Christians in Tamilnadu" 1975 K.L.T (Jour) at 3 has acclaimed the decision in Kurian Augusthy as laying down the correct proposition of law.

93. D. Chelliah v. G. Lalitha Bai. A.I.R 1978 Mad 66 (D.B).

the law, the property transactions of many a Christian, in both testamentary and intestate, happen to be illegal.[94]

These decisions have had another impact as well. As already discussed, under the Travancore and Cochin Acts, there were no provisions for probating of wills. However, in Travancore, there was a specific enactment called, the Travancore Wills Regulation of 1074 M.E (1899) which was in effect from 30.5.1899. Under this law, the personal law on wills, of various communities, including that of Christians was saved, and the regulation simply sought to supplement the personal law and to lay down rules for the general observance in the execution of wills.[95] This Regulation was not repealed and it was not mandatory for the Travancore Christians to probate their wills. But now under Section 213 of the Indian Succession Act, 1925, it is mandatory for Christians to get their wills probated. Therefore, as a consequence of the decision in Mary Roy, family settlement deeds based on wills that were not probated have suddenly become invalid in view of the application of Section 213 with effect from 1.4.1951.[96]

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94. Sebastian Champappilly, "Christian Law of Succession and Mary Roy's Case". (1994)4 S.C.C (Jour) 9 at 10.

95. See supra n.10-13 and the accompanying text.

96. See Sebastian Champappilly, "Christian Succession and Probate of Wills- Need for change". 1993(2) K.L.T Journal 32.

In the case of intestate succession, partitions or family settlements made in accordance with the provisions of the Travancore Act also became invalid. Such documents now, cannot be used as securities for financial transactions,[97] and further daughters of the deceased parents, who were excluded from the share, (under the provisions of the Travancore or Cochin Acts) can now cause the matter to be reopened. Inshort, many a title deed in the hands of Christians and those obtained from Christians and held by members of other communities remain defective and this would adversely affect the stability and progress of the Christian community in particular, as all the settled property relations may have to be unsettled and resettled.[98]

An argument has been advanced that there are not many cases arising in the matter of Christian intestate succession consequent on the decision of the Supreme Court, and that the law of limitation would put an end to all surviving claims and the matter is only to be ignored, as now the Christian community is not opposed to giving equal share to women in the matter of intestate succession. This impression arising from complacency would be short-lived as indicated by the case law.

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97. See infra notes 102-106 and the accompanying text.

98. Sebastian Champappilly, "Christian Law of Succession". 1994(1) K.L.T (Jour) 12 at 13.

It can be found that the High Court of Kerala upheld the claim of a Christian woman for share in the property of her father, though she was married in the year 1950 and intestacy occured in the year 1944. The case was brought before the High Court in 1988.[99] In another case, the High Court allowed the woman to recover Streedhanom only.[100] There seems to be apparent conflict in the views of the Court in these matters.

There are instances of misuse too. In a case, a brother who excluded his sister from sharing of property, pledged the title deed to the property as security for a loan. On default of payment, the Bank instituted a suit and the property was sold in execution. When delivery of the property was to be effected, the woman(sister) apparently at the instance of her brother, filed a suit claiming her rights in the property and moved for stay of delivery of the property and the High Court ordered stay of delivery of a part of the property and remanded the case to the trial Court.[101]

Apart from all these problems, the decision in Mary Roy has certain other dimensions as well. Banking

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99. Joseph v. Mary. 1988(2) K.L.T 27 (D.B). This case is a classic example as to how the settled property relations can be unsettled even after many years.

100. Sosa v. Varghese. 1993(2) K.L.T 798. (This is a case whether the petitioner could have claimed an equal share along with her brothers, by an amendment to her plaint. But the legal system miserably failed to deliver the goods inspite of the decision in Mary Roy).

101. Un-reported judgment dated 28.10.1993 in C.M.A. No.169 of 1993 on the file of the High Court of Kerala.

institutions have ever since been on the guard in their credit policy towards Christians on the strength of the title deeds of their property in the Travancore and Cochin areas. This is evident from the Circular issued by the State Bank of India in 1986. It states:-

> "In all cases where the Bank has obtained immovable property of Travancore Christians as security for the advances granted by the Bank, a review should be made by the Branches. This should be made on a top priority basis. The Title Deed Security Report obtained from the panel Advocate may be forwarded to the Advocates who had given the earlier opinion to re-examine the title of the property on the basis of the above decision of the Supreme Court".[102]

The same course of action was taken by the State Bank of Travancore.[103] Further the Bank issued another circular which states:-

> "In future, the advocates may be advised to certify that the title of the intending mortgagor is not hit by the decision reported in A.I.R 1986 S.C 1011 and

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102. Circular Letter to All Branches in Trivandrum Module issued by the Chief Regional Manager, State Bank of India, Regional Office, L.M.S. Compound, Trivandrum. Letter No. CRM/LAW. 3 dated 6.10.1986.

103. See State Bank of Travancore. Circular Letter No.ZH/KTM/LAW/ 115/91 dated 13.12.1991.

1988(1) K.L.T 310, while giving title clear certificates".[104]

This was followed by individual letters in this regard to the Advocates on their Panel and a meeting of the Advocates was convened on 14th March, 1992.[105] Similar was the response of other Banks in the State of Kerala. At any rate, the economic interests of Christians in particular and others who purchased properties from the Christians came to be adversely affected by the decision in Mary Roy. Now, therefore, the difficulties arising out of the decision in Mary Roy would demand solution and limitation may not be of any avail in many a case to avoid tampering with settled property relations.[106]

It is the general impression that the provisions of the Indian Succession Act are not discriminatory to women. This is not true. If one reads S.33 with S.42 it becomes

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104. State Bank of Travancore. Circular Letter No.ZM/KTM/LAW/15 dated 7.2.1992.

105. See Letter dated 18.2.1992 of the Zonal Manager, State Bank of Travancore, Kottayam.

106. See supra n.98 and the accompanying text. In this context it is of interest to note that a sociological study conducted by Prof.B. Alwin Prakash, Department of Economics, University of Calicut, has also revealed that the Christian Community is facing a crisis due to the retrospective effect of the decision of the Supreme Court in Mary Roy. (The result of the study is yet to be published).

clear that if any child dies intestate without any lineal descendant, leaving the mother and father alive, it is the father rather than the mother who inherits the property. Under S.47 of the Act, if the intestate has left no children, father or mother, the wife is entitled to only half the property and the remaining half may go to even distant relatives of the intestate. Likewise, Section 42 read with Ss.35 and 33(b) make it clear that when a Christian woman dies intestate leaving no issues., it is her father who gets half of her property to the exclusion of her mother. Under S.60 of the Act, father is given absolute right to appoint a guardian for his minor children by way of a will, but no such right is given to the mother even in a case where the father is of unsound mind. S.22 enables the father to make a premarital settlement of the minor's property, but no such right is given to the mother. A widow may not get a share of her husband's property if she had made a prenarriage contract to that effect. The benefit of minimum guaranteed payment provided under S.33 A is also denied to Christian women. In short, one cannot boast of the egalitarian nature of the Indian Succession Act. It still contains discriminatory provisions.

Prior to the decision in Mary Roy, the Indian Succession Act, 1925 applied only to 34% of India's Christian

population.[107] But the decision in Mary Roy brought another 30% of India's Christian population within the ambit of the Indian Succession Act, 1925. In this context it would be of interest to know the response of the Christian community towards the provisions of the Indian Succession Act, 1925 in particular, and other related enactments in general.[108] Their responses are varied. In response to a question[109]

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107. As has already been found, predominantly Christian areas like Travancore, Cochin, Goa, North East India, Pondicherry etc were not to be governed by the Indian Succession Act, 1925.

108. The present writer undertook an empirical study by distributing a questionnaire (Appendix II) among 1000 Christians mainly in Kerala and also in the States of Tamil Nadu, Karnataka, Goa, Meghalaya, and other places like Pondicherry, Bombay and Pune. Though the questionnaire were distributed among 1000 Christians, only 145 of them responded. But the respondents are a representative sample as they belong to different professions and life situations.

109. Question No.20. See Appendix-II.

whether the provisions of Section 33[110] read with Section 42[111] of the Indian Succession Act, 1925 are discriminatory to Christian women, which confer rights of succession only on the father of the intestate, even when the mother of the intestate is alive, 82% of the respondents consider it to be discriminatory

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110. Section 33:- "WHERE INTESTATE HAS LEFT WIDOW AND LINEAL DESCENDANTS, OR WIDOW AND KINDRED ONLY, OR WIDOW AND NO KINDRED-- Where the intestate has left a widow:-

a) If he has also left any lineal descendants, one third of his property shall belong to his widow, and the remaining two-third of his property shall go to his lineal descendants, according to the rules hereinafter contained :

b) Save as provided by Section 33-A, if he has left no lineal descendants but has left persons who are of kindred to him, one-half of his property shall belong to his widow, and the other half shall go to those who are of kindred to him in the order and according to the rules hereinafter contained :

c) If he has left none who are of kindred to him, the whole of his property shall belong to his widow".

111. Section 42:- "WHERE INTESTATE'S FATHER LIVING:- If the intestate's father is living, he shall succeed to the property".

to women, while only 18% opined otherwise.[112] The respondents have also stressed that this is an area which requires change in the provisions of law.

In response to the question whether Section 47[113] of the Indian Succession Act, 1925, which provides that if the intestate has left no children, father or mother, the wife is entitled only to ½ of the property (of her deceased husband) and that the rest should go to the intestate's other relatives, is unjust to Christian women, 56% of the respondents hold the view that this provision is discriminatory while 42% feel otherwise. Two percent of them have no response. And to the next question,[114] whether in such a situation, the whole property must belong to the wife, 80% of the respondents answered in the affirmative, while only 20% replied in the negative. In this context it is worthwhile to mention that one of the respondents added that the whole property should devolve on the wife in

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112. Question No.21 in Appendix-II.

113. Section 47:- "WHERE INTESTATE HAS LEFT NEITHER LINEAL DESCENDANTS NOR FATHER, NOR MOTHER:- Where the intestate has left neither lineal descendant, nor father, nor mother, the property shall be divided equally between his brothers and sisters and the child or children of such of them as may have died before him such children (if more than one) taking in equal shares only the shares which their respective parents would have taken if living at the intestate's death".

114. Question No.22 in Appendix-II.

such situations, provided the situation is not created by her own deeds.[115] It emerges from the study that the great majority of the respondents (80%) feel that the provisions of Section 47 needs revision as it is discriminatory to women.

The great majority of respondents (83%) feel that the provisions of Section 60 of the Indian Succession Act, 1925 which enables only the father to appoint a guardian for his minor children, while denying any such right to the mother, is discriminatory to women.[116] Therefore, it appears that Section 60 of the Act also needs a fresh look to bring it in conformity with the present concept of equality, especially after the inauguration of the Constitution.

Under Sections 33(b) and 42 read with Section 43 of the Indian Succession Act, 1925,[117] when a Christian woman dies intestate leaving no issues, her father gets ½ of the property,[118] but her mother does not inherit any property. If the father is

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115. It may be mentioned that the same view was taken by the Kerala Law Commission in its 4th Report, 1968, at 12.

116. In response to Question No.23 given in the Appendix-II only 17% thought that the provision is not discriminatory.

117. See supra notes 110 & 111. Further Section 43, provides:- "WHERE INTESTATE'S FATHER DEAD BUT HIS MOTHER, BROTHER AND SISTER LIVING:- If the intestate's father is dead but the mother is living and there are also brothers or sisters of the intestate living and there is no child living of any deceased brother or sister, the mother and each living brother or sister shall succeed to the property in equal shares".

118. The father gets ½ of the property if her husband is alive. Otherwise, the father inherits the whole of the estate.

dead, the mother gets only one share,[119] sharing equally with the brothers and sisters of the intestate. The great majority of respondents (82%) are of the opinion that these provisions are discriminatory to women.[120]

"Streedhanom" has been a bone of contention among various interest groups within the Christian community. Though Section 28[121] of the Travancore Christian Succession Act dealing with "Streedhanom" was challenged in Mary Roy, unfortunately,

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119. The position is the same even when the intestate is her son.

120. In answer to Question No.24 in Appendix-II, only 18% of the respondents gave a negative answer.

121. "Section 28:- The share of son in group(1) of Section 25:- Without prejudice to the provisions of Section 16, the male heirs mentioned in group(1) of Section 25, shall be entitled to have the whole of the intestate's property divided equally among themselves, subject to the claims of the daughter for Streedhanom.

The Streedhanom due to a daughter shall be fixed at one-fourth the value of the share of a son, or Rs.5,000/- whichever is less.

DAUGHTER'S STREEDHANOM AND ITS VALUE:

Female heirs who were paid Streedhanom to be ordinarily left out of consideration:- Provided that any female heir of an intestate to whom Streedhanom was paid or promised by the intestate, or in the intestate's life-time either by such intestate's wife or husband, by her or his heirs shall not be entitled to have any further claim in the property of the intestate when any of her brother or the lineal descendants of any such deceased brother shall survive the intestate".

the Supreme Court did not consider the constitutional validity of this Section. In this context, specific questions were raised in the course of research, on "Streedhanom" which is commonly considered as "dowry". A few of the respondents (24%) have opined that the Dowry Prohibition Act should not be made applicable to Christians in this area as some of them explained that "Streedhanom" as is understood and practised here is different from the concept of "dowry" as envisaged under the Dowry Prohibition Act, 1961.[122] At the same time, 70% of the respondents have answered that the amount usually given by the bride's parents or relatives to the bridegroom at the time of marriage be considered as the bride's share in her parent's property in the event of intestate succession.[123] But 67% of the respondents felt that the Dowry Prohibition Act did more good than harm. According to them it was rather beneficial than harmful.[124] But the greatest majority of respondents (85%) felt that in the event of a divorce or

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122. This is in response to Question No.27 of Appendix-II. But 74% of the respondents favoured the present applicability of the Dowry Prohibition Act, while 2% did not have any response.

123. In answer to Question No.28, only 27% gave a negative reply while, 3% remained without giving any response. See also discussion in Report of Law Commission of Kerala (1968) at 21-24.

124. 33% of the respondents in answer to Question No.29 felt otherwise.

declaration of nullity of marriage, the amount given to the bridegroom at the time of marriage should be returned to the woman and that legislation to safeguard the interests of the woman in this matter is called for.[125] To a specific question[126] whether the decision in Mary Roy would adversely affect the cohesiveness of the Christian family/community in Travancore-Cochin area, the majority of the respondents from Travancore-Cochin area answered in the affirmative, but the response from the other areas was otherwise. But at the same time, 86% of the respondents considered it essential to have a thorough reform of the law relating to Christians in India.[127]

Inspite of the decision in Mary Roy the law relating to succession is not uniform among Christians. Different sections of Christians in India are still governed by laws that are diverse[128] and uncertain. The extention of the Indian Succession Act, 1925 to the Part B States has not made any significant change to the development of the law. But, the clamping of the Indian Succession Act, 1925 on a community which has always been resisting imposition of laws which it considered alien, all on a sudden,

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125. In answer to Question No.30, only 15% gave a negative answer.

126. See Appendix-II, Question No.19.

127. In response to Question No.31 of Appendix-II, only 12% gave a negative answer, while 2% did not respond to the question.

128. See supra n.2-5 and the accompanying text.

by way of a judgment after the lapse of near about 34 years, overturning their interrelationships has left the community high and dry. The social impact has been so tremendous that it has an unsettling effect on what was regarded as settled and acted upon for a long time. It may be said that such social legislation are always enacted after careful study spanning over a period of time.[129] Their impact is taken care of. No study worth the name has preceded the Mary Roy's Case. Nor was there a history that indicated the willingness of the community for the law's reception. In fact the Christian community in Kerala showed their unwillingness to accept the Indian Succession Act and went for a new legislation exclusively for it.[130] In such circumstances, it was unfortunate that the Court came up with the decision in Mary Roy, which could in no way eliminate gender discrimination in the law of succession among Christians.

In Goa, Daman and Diu there does not appear to be any discrimination against women in these matters. Nor is there any in Pondicherry. But so far as the Christians in North East India are concerned, as we have already seen in Chapter II, there appears to be discrimination against men rather than women. There,

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129. In Mary Roy the Reports of the Law Commission of Kerala and that of India were not even taken into consideration.

130. See supra notes 32-35 and the accompanying text.

succession to property revolves round the woman in the family. Modern legislation has not so far been allowed to make any crack into the steel frame of customary law that protects the Christian women in North East India.

Religious faith and religious practices may lead to uniformity but it is very difficult for a community to tackle the shackles of customs that united the society from time immemorial. It is hard and painful for them to disassociate themselves with the customs to achieve uniformity. What the law in such a situation should do is not to tamper with them. Or if it is considered essential to change them, it is better to adopt the policy of being slow and steady, winning the confidence of the community in the process by socio-legal measures.

CHAPTER- VI

EFFORTS TOWARDS LEGISLATION- AN EVALUATION

The need for reforming the law of marriage, divorce and succession was being felt by the members of the Christian community for the last several years. However, no serious attempts were being made towards legislation; discussions, debates, Commission Reports and private members' bills notwithstanding. This inertia continued in spite of difficulties created by the lack of statute law in the field of adoption, guardianship etc. As has already been discussed, it was Mary Roy which was a shot in the arm for the community and there started a strong movement towards legislative reforms. This movement, mainly stressing on reforms of laws on marriage, divorce and succession, is yet to culminate into legislation. It may therefore be worthwhile to evaluate these efforts with a view to offer suggestions for improvement.

As regards the law of marriage and matrimonial causes of Christians, statutory law[1] has been found to be not satisfactory both by the community and by the Courts.[2]

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1. The Indian Christian Marriage Act, 1872 and the Indian Divorce Act, 1869.
2. See Mrs. Jorden Diengdeh v. S.S. Chopra (1985)3 S.C.C. 62= A.I.R 1985 S.C.935. Also see J.F.S. Erie D' Souza v. Florence Martha A.I.R 1980 Delhi 275.

The community took initiative for reforms and indeed Private Bills were introduced in Parliament. Thereupon, the question of revision of the law on the subject was referred by the Government to the Law Commission of India.[3] The Commission invited suggestions from all persons interested in the matter, took evidence, and submitted its 15th Report on the Law of Christian Marriage and Divorce on the 19th August, 1960. It also proposed a bill- The Christian Marriage and Matrimonial Causes Bill, 1960.[4] The Ministry of Law, in implementation of the Report of the Commission, prepared a formal bill (The Christian Marriage and Matrimonial Causes Bill, 1961) for approval of the Central Government before introduction in Parliament. It was however decided by the Government that public opinion should again be elicited on the Bill and that this should be done through the Law Commission. Thus the matter came up before the Commission

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3. See Law Commission of India. 15th Report (1960) at 1.

4. Ibid. at 49. It may be mentioned that the Roman Catholic Church under the leadership of the late Cardinal Gracias took a prominent part in the formulation of the Bill.

once again. It examined the questions again and finalised its twenty-second Report on the 15th December, 1961.[5] It suggested some changes in the Bill of 1961. On the basis of this Report, the Government of India introduced the Christian Marriage and Matrimonial Causes Bill, 1962 in the Lok Sabha,[6] to amend and codify the law relating to marriage and matrimonial causes among Christians. It was however referred to a joint select committee of the Parliament. And the Bill was reported on by the Joint Committee promptly.[7] But it lapsed when the Lok Sabha was dissolved.

While so, the Chairman of the Law Commission received a letter[8] in 1981, which narrated the sad plight of Christian women who were treated with severe cruelty by their husbands, as a consequence of which the women had to undergo a lot of suffering, resulting in their mental breakdown. It also mentioned many other cases of cruelty by Christian husbands

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5. Law Commission of India. "Twenty Second Report on the Christian Marriage and Matrimonial Causes Bill, 1961".

6. The Christian Marriage and Matrimonial Causes Bill, 1962. Bill No.62 of 1962.

7. See infra n.9 at 7.

8. Letter addressed to the Law Commission by Ms. Aud Sonia Roberts, New Delhi, dated 15th September, 1981.

who even force their wives to enter into prostitution. These women remained helpless because of the difficulty of getting a divorce in such cases; it was stated that these women have no hope of redeeming their lives and finding happiness for themselves and their children.[9] On these representations, revision of Section 10 of the Indian Divorce Act, 1869, was taken up by the Law Commission suo motu in view of the existing element of discrimination based on sex under the Indian Divorce Act as applicable to Christians in India. The Commission also thought that in the field of marriage law, extensive developments have taken place both in law and in society. Therefore it was found proper that these developments should be taken note of and the law applicable to Christians be brought in tune with the times.[10] The Law Commission came to the conclusion that there was urgent need to remove the element of discrimination from which women

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9. See Law Commission of India. "90th Report on the Grounds of Divorce amongst Christians in India. Section 10. Indian Divorce Act, 1869", dated 17th May, 1983.

10. See the forwarding letter dated 17th May, 1983 written by Justice K.K. Mathew, Chairman, Law Commission, in the 90th Report of the Commission (1983).

definitely suffer. The Commission found that an amendment to Section 10 of the Indian Divorce Act was a constitutional imperative. It was specifically pointed out that a comprehensive legislation covering the entire field was necessary; but having regard to the past history of proposals for reform on the subject, the Commission proposed amendment of Section 10 of the Indian Divorce Act, 1869 as an urgent measure.[11] Inspite of such an urgency being pointed out by the Law Commission, the Government had not come forward to bring in new legislation on the subject.

This brought about indignation among social activists engaged in advocating a fair deal to women. In 1983 the campaign for changes in the Christian personal laws started gathering momentum.[12] The women activists issued an appeal to reform the law of marriage, divorce, succession and also adoption. Their ultimate object was enactment of a common law for Christians in the matter of family law,

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11. See supra n.9 at 17. This recommendation can be considered only as an interim measure.

12. This was initiated by the Joint Women's Programme, C.N.I. Bhavan, New Delhi.

recognising the equality of sexes.[13] Seminars were organised at different places. And the Joint Women's Programme led a delegation of Christian women to meet the then Prime Minister Shri. Rajiv Gandhi in 1985 to appraise him of the need for reform of the archaic and discriminatory legislation. The Prime Minister wanted the opinion of the church. The drafts were sent for comments to all the churches. By 1988, women activists came up with a write up[14] listing out the essential changes required in the law,. While so, the Christian Marriage and Matrimonial Causes Bill, 1989[15] was introduced in the Lok Sabha as a Private Member's Bill. In July, 1989, the Jacobite Syrian Christian Lay-Men's Association submitted a memorandum to the Prime Minister of India, setting out the reasons for reform of the law.[16] In the

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13. Joint Women's Programme. An Appeal (1983) Delhi. (Un Published).

14. Christian Marriage and Matrimonial Causes Bill, 1988 by Joint Women's Programme.

15. Bill No.10 of 1989 introduced by Shri.Thampan Thomas. M.P.

16. Memorandum submitted to the Hon'ble Prime Minister of India, by the Jacobite Syrian Christian Lay-Men's Association (1989) (Un Published).

meanwhile, the women activists prepared drafts on the Christian Marriage and Matrimonial Causes Bill, 1989, Indian Succession Bill and the Christian Adoption Bill.[17] At this stage other organisations of Christian women came forward to support the Bill introduced in the Lok Sabha.[18] Thereafter several meetings were held in different places, participated in by Bishops, Clergy, Lawyers, the Laity of the Churches and social activists and the consensus reached at these discussions was that the Christian personal law as enacted and administered in India, were out-dated, unjust and inhuman and did not meet the needs of the century.[19] Thereupon, the Joint Women's Programme (J.W.P) along with the Church of North India drafted a new Christian Marriage and Matrimonial Causes Bill, 1990. It was published in May, 1990.[20] The

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17. Letter dated 12.4.1989 of the Joint Women's Programme, New Delhi (Un Published).

18. See All India Council of Christian Women, (A Unit of the National Council of Churches in India) in their letter dated 21.4.1989 addressed to Shri. Thampan Thomas, supported the move. (Un Published).

19. See the paper presented at the Catholic Bishops Conference of India, Meeting, New Delhi, 1994.

20. Indian Currents. New Delhi, May 7, 1990. Vol.No.32, Page 10 and in the following issues of Indian Currents.

draft of this bill was discussed by the representatives of various churches, including the Catholic Bishops Conference of India (C.B.C.I), the National Council of Churches, the Church of North India, the Church of South India etc.[21] This bill was submitted to the Government in February, 1992.[22] In the meanwhile, the Catholic Bishops Conference of India, after deliberations and consultations, evolved a different strategy as the general feeling among them was not to go in for a new bill that would take too long to be enacted. Therefore, they put forward a proposal to repeal the Indian Divorce Act, 1869 and to amend the Indian Christian Marriage Act, 1872 by incorporating all the grounds available under the Special Marriage Act, 1954, including the provisions for "divorce on mutual consent".[23] The C.B.C.I issued a press release

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21. See Archbishop Alan de Lastic's letter dated 19.4.1992 addressed to all the Bishops in his capacity as Coordinator of C.B.C.I for Marriage Legislation. (Un Published).

22. It was given to the then Minister of State for Parliamentary Affairs Shri. M.M. Jacob without consulting or informing the C.B.C.I.

23. On this, the present writer expressed his reservations in an Article on, "Christian Marriage Laws- Response to the Proposed Amendments". 1993(1) K.L.T Journal 51.

explaining its reasons for such a stand.[24] The Law Ministry of the Government of India had also taken a stand that the Christian Personal law would be changed as soon as the proposals as approved by all the churches in India were placed before the Government.

By now, differences of opinion reached a clear divide between Catholics and the Protestants.[25] The Catholic Bishops were concerned about the urgency of a comprehensive bill and updated legislation on marriage which is equitable to women. As there was no way out of the impasse, the standing committee of the C.B.C.I at its meeting, (September 1993), decided not to object to the presentation of the draft bill to the Government. It also decided to help finalising the draft, so that the bill has, as far as possible, a Christian character.[26] Finally, Christians of all denominations-

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24. Christian Personal Law- A C.B.C.I. Press Release. Published in the Examiner, Bombay, on 22.8.1992.

25. This is evident from the letter written by the Director of Joint Women's Programme dated 27.2.93 addressed to Rt.Rev. Alen de Lastic, the Archbishop of Delhi.

26. See the paper presented at the C.B.C.I. Meeting at New Delhi. (September, 1993).

the Catholic Bishops Conference of India (C.B.C.I), 27 member churches of the National Council of Churches of India (N.C.C.I) and others- have come to a consensus that the Indian Divorce Act, 1869 should be repealed immediately and the Government be requested to do so.

Catholics had already pointed out certain provisions of the Bill of 1990 as not acceptable to them. At last these objections were also taken care of and a draft of the law was finalised.[27] This was given to the Prime Minister of India, who referred it to the Minorities Commission. In the Minorities Commission, certain objections were taken by some groups as they felt that they were not consulted earlier. Again, those groups were consulted and their objections were also taken care of and a new Bill was formulated under the caption, the Christian Marriage Bill, 1994.[28] This was presented to the Government with the approval of all the known Christian denominations in India. It is yet to be introduced in Parliament.

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27. It was given the title. "Christian Marriage Act, (Sic) 1993".

28. Even this Bill is a compromise on various issues.

It is fruitful, at this juncture, to have a look into the various proposals in the Bill, which may need further improvement. Clause 3 of the Bill provides:-

> "Marriage of Christians solemnised according to Act:- Every marriage between persons one or both of whom is or are Christians, may be solemnised in accordance with provisions of this Act: except in the case of such tribal Christians whose Customs and Practices demand that both be Christians".

Clause 5 specifies persons authorised to solemnise marriage as follows:-

> "Persons Authorised to Solemnize Marriages:- Marriage may be solemnised under this Act (a) by any Minister of a Church, or (b) by or in the presence of marriage Registrar appointed under this Act; or (c) by any licensed Minister".

And Clause 57 prescribe penalties for unauthorised solemnisation of marriages thus:-

> "Solemnising marriage without due authority:- Whoever not being authorised by Section 5 to

> solemnise a marriage, <u>solemnises or professes to solemnise under this Act</u> a marriage between persons one of whom is a Christian, shall be punishable with imprisonment for a term which may extend to ten years, and shall also be liable to fine which may extend to two thousand rupees".

A combined reading of Clauses 3,5 and 57 would lead us to the conclusion that any person can solemnise a marriage between Christians or between a Christian and a non-Christian if he does not profess to solemnise the marriage under the provisions of this law as it is not made mandatory that a Christian marriage be solemnised under this law. Thus Clause 3 leaves room for individuals and groups to conduct their marriages in accordance with their sweet will. Once the law is codified, it is not desirable to allow such a situation to exist in modern times. If at all needed, the only other opinion should be the one under the Special Marriage Act, and it must be specified too.

Clause 4 of the Bill specifies the conditions for a Christian marriage. Sub Clause(iv) of Clause 4 provides:-

"The parties are not within the degree of prohibited relationship, unless the custom or usage or rules of the church governing each of them permits of a marriage between the two".

The attempt to prevent marriages within the prohibited degrees of consanguinity is made ineffective as even a small group can claim exemption by making rules to bye-pass the prohibitions.

The provisions for appointment of Marriage Registrars and registration of marriages do not take into account the ground realities. For example, Clause 10 provides:-

"Magistrate when to be Marriage Registrar:-

When there is only one Marriage Registrar in a district, and such Registrar is absent from such district, or ill, or when his office is temporarily vacant, the Magistrate of the district shall act as, and be, Marriage Registrar thereof during such absence, illness or temporary vacancy".

When the District Magistrate is to solemnise a marriage under the provisions of Clause 10, it is most likely that the

marriage may not be solemnised in accordance with the convenience of the parties to the marriage, as the District Magistrate is already burdened with other responsibilities under numerous enactments. Further, there are no provisions in the Bill for taking custody of or maintenance of Marriage Register by the District Magistrate and this would further create practical difficulties in making entry of a marriage in the Marriage Register. In fact the elaborate provisions made in Clauses 7 to 23 can be condensed by providing that persons authorised under Clause 5 to solemnise a marriage be authorised to issue a Certificate of marriage which should be registered in a Marriage Register to be kept by the Registrar appointed under the Registration Act 1908 and such Registrar can be conferred with the powers of a Registrar under the law on marriage. A provision for mandatory registration of all Christian marriages before a Civil Authority would only be in the best interest of the community for all the purposes of law in modern times. Thus, the different procedures provided under Clauses 15,16 and 17 in matters relating to issue of certificate of notice of intended marriages, objections to certificates and applications to District Court and the binding nature of the

orders of the District Court can all be brought within the simplified procedure. The different procedures provided under the Bill, to be adopted by different denominations of Christians make the Bill voluminous and it looks like a Church Union Agreement rather than a piece of legislation. Here clarity and precision have become the casuality.

Further, in this Bill, Clause 4(ii) enacts that a marriage may be solemnised under the Act if "at the time of marriage, neither party is of unsound mind". And any marriage solemnised in contravention of this condition is declared to be a nullity under Clause 28. At the same time Clause 29(3) makes a marriage only voidable if "either party was a lunatic or idiot at the time of marriage". Thus the distinction between "Void" and "Voidable" is lost sight of in the Bill and the confusion becomes more confounded on further analysis. It is almost impossible to prove that a party to the marriage was of unsound mind or lunatic at the time of marriage. If the party was of unsound mind and remained to be of unsound mind in a case of incurable mental illness, the presumption of incapacity to contract is not recognised even in this Bill. This difficulty has been experienced in the working of the earlier enactments on the subject and the present Bill has not improved the situation in any way.

The provisions made under Clause 29(2) for the declaration of nullity of marriage on the ground of non-consummation is again bereft of clarity especially in the background where the English Courts have held that even the use of a condom amounts to non-consummation of marriage.[29] Hence a proper definition of the term is essential as otherwise the Courts will be left with no option but to go to English precedents on this issue.

Again the provisions incorporated in Clause 29(4) for recognition of the decree of nullity of marriage given according to the rules and regulations of the Church is ineffective as a decree of nullity is again required from the civil court under Clause 29 itself. The provisions and procedure followed under the Portuguese Civil Code in Goa could be followed in this matter.[30]

Yet another provision for declaration of nullity of marriage as given in Clause 29(5) is that consent for the marriage was obtained by "fraud". And the term "fraud"

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29. See supra Chapter III, n.163.

30. See supra Chapter II, n.39-40 and Chapter III, n.114.

has been eluding a clear definition through out the last more than a century and the Courts went on holding that even concealment of pregnancy contracted through someone other than the man who contracts the marriage would also not amount to fraud. Hence an appropriate definition of the term "fraud" is essential as otherwise the inclusion of that ground for declaration of nullity of marriage is of no use.

The further provision in Clause 37(b) that the petitioner be "residing" in India at the time of presentation of petition, would lead to procedural difficulties in modern times. In fact, it could be that the petitioner should have his/her domicile in India or be residing in India at the time of presentation of the petition.

The provisions made in Clause 44 for maintenance pendente lite for the applicant alone is conceptually wrong and legally unsustainable. The benefit must be given to the respondent in the proceedings also as otherwise it would lead to miscarriage of justice.

Further under Clause 2(h) "divorce" is defined as the termination of civil effects of marriage, and the term

"nullity" is left undefined, whereby a nullity granted by the church is to be recognised by the civil court under Clause 29(4) whereas no corresponding duty is imposed on the church whereby the present situation of conflict with the civil court[31] is still left open.

And the provisions contained under Clause 74 dealing with repeal of enactments have not specifically covered the law in force in North East India and the Cochin Christian Civil Marriage Act, 1920. Inshort, the Bill requires re-examination and re-drafting to suit the needs of the community.

The efforts of certain individuals against the legislative inertia has resulted in a decision by the Kerala High Court in Mary Sonia Zachariah[31(a)] in 1995. In this case, the Full Bench of the Kerala High Court has struck down

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31. See supra Chapter III, n.25, 53, 59, and 71 and the accompanying text.

31(a). Mary Sonia Zachariah v. Union of India. O.P. No.5805 of 1988. See supra n.117 of Chapter IV.

certain words[31(b)] from S.10 of the Indian Divorce Act, 1869 as violative of Art.14 on the ground of discrimination based on sex. In fact the intention of the Court was to remove gender discrimination; but as a matter of fact, this has led to reverse discrimination against men as has already been discussed.[31(c)] Inshort, the aforesaid decision of the Kerala High Court is a classic example of the pitfalls inherent in judicial legislation. To sum up, the decision has not helped to remove gender discrimination reflected in Section 10 of the Indian Divorce Act, 1869, and it is no alternative to a thorough reform of the law of marriage and divorce by the legislature. It appears that this position was acknowledged by the Court itself.[31(d)]

The movement for reform of Christian law of succession in Kerala has already been discussed in detail.[32] The efforts of the Kerala Law Commission did not culminate

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31(b). See supra n.123 of Chapter IV and the accompanying text.

31(c). See supra n.121-122 and the accompanying text of Chapter IV.

31(d). See supra n.125 and the accompanying text of Chapter IV.

32. See supra n.57-58 of Chapter V and the accompanying text.

in reforming the law. The Law Commission of India took up the matter suo motu and considered the necessity of revision of the provisions of the Indian Succession Act, 1925, in the prevailing social and constitutional set up. And the Commission submitted its 110th Report[33] on 25th February, 1985, to the Government of India. The Commission dwelt on the question of the law of succession among Christians in general and also considered the problems in Travancore and Cochin areas of the State of Kerala and recommended to the Government to take a decision on the continued application of the Travancore Christian Succession Act, and the Cochin Christian Succession Act, as it was considered to be a matter of social policy.[34] It appears from the Report that the Law Commission of India was not aware of the earlier recommendations of the Law Commission of Kerala.[35] It seems, had the Law Commission of India had the Report of the Law Commission of Kerala before it, its recommendations would have

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33. Law Commission of India. One Hundred and Tenth Report on the Indian Succession Act, 1925.

34. See Ibid. at 54 & 276.

35. Law Commission of Kerala. Fourth Report. Law of Succession Among Christians in Kerala, February, 1968.

been different. The Law Commission of Kerala was aware of the social, political and legal background of the enactment of the Travancore Christian Succession Act, 1916, which in fact was codification of the customary law among Christians in Kerala.[36] And to that extent the Kerala Law Commissioner's Report reflected the aspirations of the community. Even this report is not a result of an indepth study of the matter. The Government of India is yet to act upon the 110th Report of the Law Commission of India, submitted on 25th February, 1985.

In the meanwhile, social Activists were seized of the necessity of reform of the law of succession for Christians. The Joint Women's Programme had already pointed out the gender discriminatory aspects in the law of succession in the year 1983 itself.[37]

While matters remained thus, the Supreme Court of

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36. The codification was made on the recommendations of the Christian Committee. This Committee was appointed by His Highness' Govt by Order No.J 3520 dated, Trivandrum, 23rd July, 1911. It submitted its Report in 1912.

37. An Appeal was made to all concerned by the Joint Women's Programme, C.N.I. Bhavan, New Delhi, in 1983. (Un Published).

India rendered its decision in Mary Roy's Case.[38] The Court did not advert to the 110th Report of the Law Commission of India. Nor did the Court look into the recommendations of the Law Commission of Kerala, or the historical background of the Travancore Christian Succession Act as revealed in the Report of the Christian Committee of 1911. As the adverse effects of the decision became clear, the community took initiative to cushion the impact.[39] Seminars were organised at different places in Kerala and papers[40] were presented highlighting the difficulties arising out of the decision in Mary Roy's Case. This was followed by a memorandum submitted by the All Kerala Catholic Congress before the Government.[41] In the meanwhile, a Private Member's Bill- The Indian Christian Succession Bill, 1986- was introduced

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38. Mary Roy v. State of Kerala (1986)2 S.C.C 209=A.I.R 1986 S.C.1011.

39. For a detailed discussion of the adverse impacts see Chapter V and also see Sebastian Champappilly, "Christian Law of Succession and Mary Roy's Case". (1994)4 S.C.C. (Journal)9 and 1994(1) K.L.T. Journal 12.

40. E.M. Joseph, Advocate, Palai presented such a paper in November, 1986. (Mimeographed).

41. This memorandum was given to the then Minister of State for Parliamentary Affairs, Shri. M.M. Jacob in December, 1986.

in the Lok Sabha.[42] This Bill was almost a verbatim reproduction of Part V of the Indian Succession Act, 1925 and it cannot claim any credit for original thinking, nor can it claim support from any research. This Bill was not enacted.

As the decision in Mary Roy's Case brought about retrospective effect by way of its reasoning, it was felt that the retrospective effect must be removed. Towards this end, a Bill was introduced in the Lok Sabha on 24th November, 1986.[43] But it was not enacted as the Central Government took the view that matter covered by the Bill was a concurrent subject and therefore, the State has legislative competence to do it.

This was followed by a period of relative calm in the efforts towards legislation. By 1990, along with the proposals for reform of the law of marriage and divorce, the matters relating to Succession, Adoption and Maintenance

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42. The Indian Christian Succession Bill, 1986. Bill No.92 of 1986 was introduced in the Lok Sabha by Shri. Thampan Thomas. M.P.

43. Bill No.129 of 1986, entitled "The Travancore Christian Succession Validation Bill, 1986" introduced by Prof. P.J. Kurian M.P. as a Private Member's Bill.

were also taken up by social Activists and others. Thus the Indian Succession Amendment Bill, 1990 and the Christian Adoptions and Maintenance Bill, 1990 were drawn up after consultations and deliberations among various groups of Christians in India. These Bills were submitted to the Government of India on 11th February, 1992. The Indian Succession Amendment Bill, 1990 identified areas of gender discrimination in the law of succession under the Indian Succession Act, 1925. But, the Executive and the Legislature remained unresponsive to these demands made by the community. At the same time, it is worthwhile to note that there was always one or the other pressure group working against the move of the mainstream of Christians for legislative changes.

However, the Kerala Catholic Bishops' Conference took up the matter in 1991 and passed a resolution on 5.6.1991 demanding removal of the retrospectivity of the decision of the Supreme Court.[44] Another meeting was organised at the Archbishop's House, Trivandrum on 2.7.1992. This was

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44. See Report of the meeting of K.C.B.C. held on 4th, 5th and 6th June, 1991.

attended by Bishops, the Speaker of the Legislative Assembly, the Law Minister and 26 Christian M.L.As belonging to different Political Parties and different denominations of Christians. The participants called upon the State Government to take steps to solve the problems created for the community by the decision of the Supreme Court in 1986.[45] But the Law Minister opined that the Government wanted to get the opinion of the Bishops of the various other Christian denominations and the Archbishop of Trivandrum agreed to collect the opinion of others and wrote letters to all of them individually. In response to these letters, the Bishops supported the move for removal of retrospective operation of the judgment of the Supreme Court. The Malankara Orthodox Syrian Church (Catholicate of the East) supported the move.[46] The Mar Thoma Syrian Church of Malabar also supported the same.[47]

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45. See Report in the Indian Express dated 3.7.1992 and Malayala Manorama dated 3.7.1992 and the Hindu dated 4.7.1992.

46. See Letter No.P 392/92 dated 12.10.1992 written by Mar Baselios Marthoma Mathews II to the Archbishop of Trivandrum.

47. See Letter dated 4.9.1992 of Dr. Alexander Mar Thoma, Metropolitan and Letter No.5728/92-93 dated 19.9.1992 of Rev. P.M. George, Sabha Secretary.

The Executive Committee of the Diocese of Madhya Kerala (C.S.I) appointed a Special Committee which recommended urgent legislative measures in this regard. This was communicated by the Bishop.[48] The Episcopal Synod of the Malankara Jacobite Syrian Orthodox Church passed a resolution on 7.8.1992 calling upon the State Government to undertake legislative measures in this regard.[49] And all the Bishops of Kerala met at St.Thomas Apostolic Seminary, Vadavathoor on 28th October, 1993 to discuss problems confronting the Christian Community in different areas of life, and resolved among other things, that men and women should have equal rights in the possession of paternal property and welcomed the decision of the Supreme Court, but at the same time called upon the Union and State Governments to introduce immediate legislation to remove the obstacles in the sale and transfer of property which are due to the effect of the judgment and that this should be done

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48. See Letter dated 8.10.1992 written by Rt. Rev. M.C. Mani, Bishop. Church of South India (C.S.I).

49. See Letter dated 19.8.1992 of Mar Athanasius Thomas Metropolitan, Office-in-charge, Catholicate of the East.

by safeguarding the interests of those women who have not obtained their share of paternal property for any reason.[50]

The year 1992 and thereafter, witnessed expression of public opinion through the media. There were responses both for and against legislative changes. Mostly, it took the shape of a debate for gender egalitarian law in matters of succession among Christians. What is interesting is that not many voices were heard against giving equal treatment to women. Yet, in many a debate it was passion than reason that found expression. One writer[51] had described the factual position in Mary Roy's Case as a fight for gender equality. This was answered by another writer[52] that Mary Roy is not alone in her fight, but the real issue is the "retrospective effect" of the Supreme Court judgment. This was stoutly opposed by another writer who described the situation thus:-

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50. See Resolution dated 3.11.1993 of the Christian Bishops Conference held at Vadavathoor.

51. Ms.J. Gita, "Fighting for right of equality". Indian Express, March 7, 1992.

52. George Isaac, "She is not alone". Indian Express, Kochi, June 4, 1992.

"When new laws or new decisions on existing legislation come, often some confusion or implementation difficulties arise. Naturally, in the case of the 1986 decision of the Supreme Court doing justice to Christian daughters in Kerala also, there are some difficulties in implementing it. They have to be circumvented".[53]

While the debate is thus going on, the efforts made by the present writer caught the attention of the media and the community.[54] In the period that followed, debates were organised by various organisations.[55] Academic writers including the present writer have been writing on various aspects of Mary Roy's Case.[56] The State Government of Kerala also formulated a Bill- The Travancore and Cochin Christian

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53. DR. John Berchman, "A lone Crusader". Indian Express, Kochi, June 11, 1992. It is thus evident that even the most vociferous supporter of the Mary Roy's decision acknowledges that it has created difficulties for the community.

54. "Public Debate on Christian Laws Initiated". SAR News, Bombay, March 6-12, 1993. See Appendix-I.

55. The Sunday Observer. "Sanctity of the family Versus Women's rights" by Malini Menon. Nov. 14-20, 1993. The main theme of this lead article is about denial of equal inheritance rights to Christian women.

56. See Sebastian Champappilly, "Christian Law of Succession and Mary Roy's Case". (1994)4 S.C.C.Journal 9. Also see 1994(1) K.L.T. Journal 12.

Succession (Revival and Validation) Bill, 1994.[57] And it is pending enactment by the State Legislature.

Unfortunately the Travancore and Cochin Christian Succession (Revival and Validation) Bill, 1994 has not been formulated in the manner it ought to have been done.[58] The Bill has been sent to the President of India for his prior sanction. It can be said that the said course of action was not necessary as is evident from Articles 254 and 255 of the Constitution of India. This position has been recognised by the Supreme Court also.[59] The women activists have made quick moves against legislative attempt in this regard. They presented the matter to the Central Ministers.[60] In

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57. Bill No.105 of 1994. Published in Kerala Gazette Extra No.652 dated 24.6.1994. (Also see 1994(2) K.L.T. Kerala Statutes 9).

58. See infra Chapter VII.

59. See U.P. Electric Supply Com. Ltd v. R.K. Shukla (1969) 2 S.C.C 400. Also see Karunanidi v. Union of India (1979)3 S.C.C 431. (Para 8).

60. A memorandum was submitted to Smt. Margaret Alva, Minister of State, Personal, Public Grievances and Pensions, India dated 4.3.1994 by the Forum of Christian Women for Women's Rights, Kerala.

response to the memorandum, the Minister of State for Personnel, Public Grievances and Pensions wrote to the Chief Minister of Kerala thus:-

> "I am concerned at the attempt that is being made to deny Christian women the rights conferred on them by the Supreme Court. It seems as if anything achieved by minority women whether it is Mary Roy or Shah Bhano is taken away by the Government in the name of minority rights. Do minority women have no rights at all?"[61]

She requested the Chief Minister to desist from any move that will go against the interests of Christian women. The National Commission for women also took the same stand and shot a letter to the Chief Minister of Kerala to withdraw the move for passing the bill to revive and validate the Travancore and Cochin Acts.[62] And a news item appeared in the Press that the

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61. See Letter dated 11th August, 1994 written by the Minister of State Personnel, Public Grievances and Pensions, India, to the Chief Minister of Kerala.

62. See Letter written by Jayanti Patnaik, Chairperson, National Commission for women, New Delhi, dated 4th August, 1994, addressed to the Chief Minister of Kerala.

Central Government has refused to give prior approval for the Bill as sought for by the Government of Kerala.[63] In the meanwhile, Shri. E. Balanandan. M.P. addressed a letter dated 6.9.1994 to the President of India, highlighting the necessity of introducing the Travancore and Cochin Christian Succession (Revival and Validation) Bill, 1994 in the Kerala State Legislature. In response to this letter, the Minister of State for Law, Justice & Company Affairs, Government of India informed the M.P. that the subject matter of the Bill falls under entry 5 of the Concurrent List in the Seventh Schedule to our Constitution and hence the State Legislature, subject to the provisions of Art.254 of the Constitution, is competent to enact the same.[64] And it was reported in the Press that the Bill would be returned to the State Government by the Centre.[65] However, the legislative attempt in these

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63. Mathrubhoomi (Malayalam Daily), Cochin, dated 12.9.1994. However, it is learnt that the Central Government has not taken any decision in the matter.

64. See Letter No.D.O.No.14/37/94- Leg III dated 2.11.1994 of H.R. Bhardwaj addressed to E. Balanandan. M.P. Also see the news item in Indian Express, Kochi, dated 6.12.'94.

65. See Report in Mathrubhoomi (Malayalam daily) Cochin, dated 29.11.1994.

matters have not fructified yet. As discussed earlier, same is the case with the proposals for reform of the law on marriage and divorce for Christians.

In this context it would be appropriate to analyse the response of the Indian Christian Community on the various problems facing them in matters relating to marriage, divorce and succession. The community's response has been elicited by the present writer by initiating a public debate[66] and distributing a questionnaire.[67]

As regards the problems arising out of the present set of laws, the response of the community is interesting. To a question[68] whether the decision of the Kerala High Court, to the effect that the declaration of nullity of marriage made by the Eparchial Tribunal would not be recognised by the Civil Court, is right, 53% of the respondents answered in the affirmative, while 47% of them

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66. See Appendix-I.

67. See Appendix-II. Also see supra n. 108-127 of Chapter V and the accompanying text.

68. Question No. 1 in Appendix-II.

answered in the negative. The reasoning given by 53% of them was that in matters of marriage civil law should have predominence, while 47% of them said that the law of church should have predominance.[69]

As to the question,[70] who should determine the marital status of a Christian, 52% of the respondents opined that it is the civil court that should decide the matter, while 48% of them said that the matter should rest with the Eparchial Tribunal or authorities of the Church.

To a specific question[71] as to who should conduct civil proceedings against a person, who, though married in a foreign country, contracts a second marriage here under the church law misrepresenting to the church that he is unmarried, 63% of them favoured the civil court, while 32% favoured the Eparchial Tribunal and another 5% of them opined that both the civil court and the Eparchial Tribunal should have concurrent powers. To another related question,[72] if the

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69. Question No.2 of Appendix-II.
70. Question No.3 of Appendix-II.
71. Question No.4 of Appendix-II.
72. Question No.5 of Appendix-II.

person is proceeded against by the Eparchial Tribunal on a complaint of the aggrieved spouse, should not the decision of the Eparchial Tribunal be recognised, 60% of the respondents answered in the affirmative, while 40% of them in the negative. And 58% of them opined that in such case the civil court should have the authority to declare the second marriage null and void, while 35% of them favoured a decision by the Eparchial Tribunal, and at the same time 7% of them opined that both the civil court and Eparchial Tribunal should have concurrent jurisdiction.[73] To another question[74] as to who should determine the capacity of a Christian to marry a person from another community, 65% of the respondents affirmed that it must be decided by the civil court, while only 35% of the respondents favoured a decision by the Eparchial Tribunal.

To yet another question[75] as to whether the authority of granting nullity/divorce be exclusively vested with the Eparchial Tribunal, 63% of the respondents answered in the

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73. This was in response to Question No.6 of Appendix-II.
74. Question No.7 of Appendix-II.
75. Question No.15 of Appendix-II.

negative, while the remaining 37% answered it in the affirmative. And to the specific problem of the Eparchial Tribunal having no authority to grant maintenance in a case where the marriage is declared null and void by it, a question[76] was raised whether the jurisdiction of Eparchial Tribunal be enlarged or whether such authority be exclusively reserved for the civil courts; 66% of the respondents answered that civil court alone should have such powers, while 34% of them opined that the powers of the Eparchial Tribunal should be extended.

As regards the discriminatory aspects in the grounds provided under the Indian Divorce Act, 68% of the respondents opined that the grounds of divorce available to Christians under the Act are discriminatory[77] as against their co-religionists, while only 28% of them opined otherwise. At the same time 4% of the respondents did not express any opinion. Sixty eight per cent of the respondents consider that this discrimination would lead to unhappy family ties, while 28% of them opined otherwise, with 4% of them expressing no views on this question.[78]

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76. Question No.18 of Appendix-II.
77. Question No.8 of Appendix-II.
78. Question No.9 of Appendix-II.

To a question[79] whether the grounds of divorce available to a Christian woman under the provisions of the Indian Divorce Act are discriminatory towards them, 76% of them answered in the affirmative while 21% answered in the negative, with 3% of the respondents expressing no opinion in the matter.

As regards recognition of foreign decrees of divorce by Indian Courts, 64% of them oppose the suggestion, while 33% of them favour it, with 3% of them expressing no views.[80]

In answer to questions[81] whether "mutual consent" and "irretrievable breakdown" of marriages should be made available as grounds for divorce to Christians, 80% of the respondents answered in the affirmative, while only 20% of them opposed it. To another question[82] as to if paternity of a child born after marriage is scientifically proved to be

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79. Question No.10 of Appendix-II.

80. Question No.11 of Appendix-II.

81. Question No.12 & 13 of Appendix-II.

82. Question No.14 of Appendix-II. Among the Garos when a wife conceives a child by someone other than herown husband, it is a ground for divorce. See supra Chapter IV, n.87 and the accompanying text.

of a person other than the husband, whether that alone should be a ground for divorce, 74% of the respondents answered in the affirmative while only 26% of the respondents answered in the negative.

As regards the question[83] of maintenance as provided and made applicable to Christians as well under Section 125 of Cr.P.C. 73% of the respondents favour its continued application. To a suggestion whether there should be some special law for Christians in conformity with their personal law, 58% of them answered in the negative, while 42% of them favoured a special law.[84]

As regards the application of the provisions of Section 213 of the Indian Succession Act, 1925 (which makes probating of wills of Christians mandatory) there have been a few responses. Section 213 is considered to be discriminatory towards Christians by 56% of the respondents, while 42% of them thought it to be otherwise.[85] At the same time 2% of them

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83. Question No.16 of Appendix-II.

84. This is in answer to Question No.17 of Appendix-II.

85. This was in response to Question No.25 of Appendix-II.

did not give any answer. To another question[86] whether the decision of the High Court of Kerala to the effect that the requirement of probate is not violative of Article 14 of the Constitution of India,[87] needs reconsideration, 70% of the respondents answered in the affirmative, while only 27% answered in the negative, with 3% of them expressing no opinion on the matter.[88]

As regards gender discrimination in the law of succession, where the position as per the Indian Succession Act, 1925, conferring rights of succession on the father of the intestate alone, excluding the mother from any such rights[89] was pointed out 82% of the respondents considered it as discriminatory to women.[90]

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86. Question No.26 of Appendix-II.

87. See Joseph v. Union of India 1978 K.L.T (S.N) 116 (D.B).

88. The present writer had examined the need for changes in Section 213 of the Indian Succession Act, 1925 in an Article already published. See Sebastian Champappilly, "Christian Succession and Probate of Wills- Need for Change". 1993(2) K.L.T (Journal) 32.

89. This is the combined effect of Sections 33 & 42 of the Act.

90. This is in response to Question No.20 of Appendix-II.

On another question[91] whether the provisions of Section 47 of the Act which provides that if the intestate has left no children, father or mother, the wife is entitled only to one half of the property and the rest should go to the other relatives of the intestate, is unjust to the Christian women, 56% of the respondents answered in the affirmative, while 44% of them answered in the negative. In this case even if the intestate has no brothers or sisters, when his wife is alive, half of his property shall have to be divided among those who are of kindred to him.[92] It may be that those kindred might not have seen the intestate during his life time even once. In the present day situations where both the husband and wife are employed or are actually engaged in combined business efforts, the acquisition of property in the name of the intestate might have been made by the joint efforts of both of them and if in the event of the death of one of them, half of the property shall have to be distributed among the relatives , that may workout injustice

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91. Question No.21 of Appendix-II.

92. This is the combined effect of Sections 33(b) read with Section 48 of the Indian Succession Act, 1925.

to the wife. Such provisions in the Act can only be considered as the embodiment of a philosophy of bye-gone centuries. And 80% of the respondents feel that in such cases the entire property should belong to the wife, while only 20% felt otherwise.[93]

In yet another situation when a Christian woman dies intestate leaving no issues, her father gets half of her property to the total exclusion of her mother.[94] To a specific question[95] whether it is discriminatory to Christian women, 82% of the respondents consider it to be discriminatory, while only 18% of them considered it otherwise.

In the matter of appointment of guardian for the children, the father (husband) is given powers to do so, whereas the mother (wife) has no such powers.[96] In this case,

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93. This is in response to Question No.22 of Appendix-II.

94. This is the cumulative effect of the provisions contained in Sections 33(b) read with Sections 35 and 42 of the Indian Succession Act, 1925.

95. Question No.24 of Appendix-II.

96. See Section 60 of the Indian Succession Act, 1925.

83% of the respondents feel that it is unjust to Christian women, while only 17% of them felt otherwise.[97]

While revision of the law on succession is to be undertaken, there are other aspects also to be taken into account. For example, 70% the respondents consider that the amount usually given by the bride's parents to the bridegroom at the time of marriage should be considered as the bride's share in her parent's property, while only 27% of them felt otherwise and 3% of them abstained from expressing any opinion.[98] This view finds support in the recommendations of the Law Commission of India as well. It recommends:-

> "If the Indian Succession Act, 1925, becomes applicable to the persons in question,[99] provision made for daughters by the father should be taken into account when the succession opens on intestacy. It is therefore,

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97. This may have to be evaluated in the context of the well known saying that maternity is a fact whereas paternity is a matter of faith.

98. This is in response to Question No.28 of Appendix-II.

99. The Travancore and Cochin Christians are the persons intended by this reference.

> recommended that suitable provision should be made to the effect that from the share to be distributed to a daughter on intestacy, the amount or value of property so provided by the father during his life time should be deducted....."[100]

But the Law Commission of Kerala thought otherwise as is evident from its reasoning thus:-

> "If a father voluntarily gives a portion of his property or money as a gift to his daughter at the time of marriage, he does so of his own accord, and it can hardly be distinguished from an absolute gift in favour of a son".[101]

But it appears that in this respect the Law Commission of Kerala has not formulated its recommendations based on the Report of the Christian Committee.[102] Nor did the Indian Law Commission. At any rate, it is the present view of the

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100. Law Commission of India. 110th Report, 1985 at 276.

101. Law Commission of Kerala. 4th Report, 1968 at 21.

102. Report of the Christian Committee of 1912 of Travancore which was the basis for the enactment of the Travancore Christian Succession Act, 1916.

members of the Christian Community that should take precedence over the past opinion when revision of the law is to be undertaken by the legislature. It may be noted that 86% of the respondents consider that a thorough reform of the law relating to Christians in India is essential,[103] while only 8% of them opined otherwise and 6% of them abstained from expressing any opinion.

An assesment of the efforts towards legislation made by the official and non-official agencies indicate that none of them have made an all out effort to study the historical aspects involved in the matter as well as the successful and unsuccessful attempts for legislation made in the past.

It is for the Union Legislature to act upon the recommendations of the Law Commission of India. The State Legislature is also competent to enact laws on succession as it is a subject included in the Concurrent List (VII Schedule) of the Constitution. While doing so, due weight ought to be given to the recommendations of the Law Commission

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103. This is in response to Question No.31 of Appendix-II.

of Kerala. The views of various organisations and the current views of the members of the community should also be taken into consideration while bringing in new legislation in these matters. At any rate, piecemeal legislation is not an answer to the problems facing the Indian Christian Community.

CHAPTER-VII

C O N C L U S I O N

Inquiries into the personal laws bereft of the historical development of the concerned communities will be extremely inadequate as they may not help the researcher to identify the laws' real source. In this view, the origin and development of Christian law in India has not so far been adequately gone into. Keeping in view the importance of such a study calling for an exploration of the origin and development of the Christian community and its branching out in India as a prelude to the inquiry into the Christian laws, the history of the community in India was examined and the present study indicates that Christianity in India has a diverse origin in different parts of India. And this diversity has resulted in the development of different systems of personal law for different sects among them.

At present Christians in India constitute a minority but their numerical strength is not negligible. Yet they have not been able to act as an influential group either socially or politically. Their legal problems

therefore do not get adequate attention from the State. There are different denominations among the Christians in India. And, there are differences in the laws applicable to them. Mainly five main systems and other sub-systems of law applicable to them can be identified, ranging from patriarchal to matriarchal systems, and there is no underlying uniformity in these matters. The reasons for the differences as mentioned above could be attributed to the peculiarities of the origin and development of the community in India.

In fact, in the ancient past, the Christian communities, by and large, followed the customary practices of their Hindu brothren. But with the advent of the westerners, their customs and laws were subjected to pressure for change.

Practically, the western influence brought about friction and conflicts in the community. These conflicts gradually led to divisions in the community, some showing flexibility in adjusting with the foreign law, some holding on to their age-old customs. In

the latter divisions neither the Church nor the legislature could come any way near the doorstep of the customary law regime. The community in the North East India is an example of this phenomenon.

In the former divisions indeed the statute law could steal itself into the territory of customary law. However, the influence of customs on such divisions is so strong that in spite of the application of statute law effecting changes in customary practices, the community could afford to ignore the statute law.

Customs relating to marriage, divorce and succession being inextricably associated with Church, traditionally the authority of the Bishops and the Ecclesiastical Institutions over their faithful in such matters was unquestionable. However, this 'state of affairs' could not continue. The social changes and developments that swept away the community off its feet have overturned the position and the liberals in the community inspired by the changes elsewhere could bring in some statute law to govern the arena traditionally held by the customs. This situation has given rise to

a series of conflicts resulting in the erosion of the authority of the Ecclesiastical Institutions. Perhaps, these conflicts could have been avoided had there been an attempt to examine the historical development of the legal concepts.

The history of reception of canon law concepts in different parts of India throws some light on the differences in the personal laws applicable to Christians in India. So far as the canon laws' reception in Kerala is concerned, it is seen that canon law reached the Malabar coast from Rome, travelling through Mesopotamia and Portugal, much before the advent of the British in India. The Canon Law thus received in Kerala retained its pristine purity whereas the canon law received in British India was tinged with English legal concepts. It was different from the original as at the time of Reformation canon law in Britain underwent a metamorphosis signifying the acceptance of merger of the State and the Church. This change required that any change in canon law was to be brought out with the approval of the State. In this process of synthesis

the dividing line between canon law and State law got practically obliterated. And it was this canon law, as submitted above, which got into the rest of India ruled by the British.

It is in these circumstances that we find today that the earlier British Indian laws like the Indian Divorce Act, 1869, and the Indian Christian Marriage Act, 1872 came to contain the spirit of the English canon law of the Church of England. And the introduction of the English canon law through statutes has been effected by a gradual and indirect process.

The peculiar circumstances, under which statute law came to be applied to certain Christian communities which showed willingness to assimilate foreign concepts, show that mostly they were brought as supplementary to the existing customary practices. Some were brought as laying down procedure rather than as substantive law. The Indian Christian Marriage Act, 1872 is in point. Some were brought as legislation incorporating provisions of the customary or Church law

as is the case with the Indian Divorce Act. This Act also spread the carpet for English legal concepts to get into the body of our law. 'Status quoism' being one of the characteristics of the Indian legal system, our courts still follow these concepts though their validity had been questioned in England resulting in their abolition.

To elaborate, the Indian Divorce Act is not a comprehensive legislation. It is only an amending Act, following the English law of its times- the Matrimonial Causes Act, 1857- which too was an amending Act. Under Section 7 of the Indian Divorce Act, 1869, the Courts in India are to act and give relief on principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief. It is interesting to note that this English Court in turn had to exercise its jurisdiction on the principles and rules of the Ecclesiastical Courts in England, (ie, in accordance with the principles of canon law) by virtue of section 32 of the Supreme Court of Judicature (Consolidation) Act, 1925 of England. As has been pointed

out, England has since moved far away from this position, and yet the Indian Courts are to look for principles and rules that lay buried deep in the English soil. And the attempts made by the civil courts in India to break the shackles of English law, without the authority of legislation, make matters worse.

The applicability of different systems of law in different areas and to different sects in the same area has frequently created confusion and at times conflicts. Of these the conflicts between the State Law and the Church Law have often come up before the Courts which in turn show the tendency of favouring State Law. Running through all these conflicts is the apparant sex discrimination in Christian laws on marriage, divorce and succession.

At this juncture it is to be noted that, as said earlier, in Kerala it was the original canon law that was in existence and as such there was no scope for application of the Indian Divorce Act, 1869 carrying the pride and prejudices of the Victorian England. Still

it came to be extended to that area also as there was no provision of law enabling the Christians there to effect divorce and none objected to it in the particular historical context when British Indian legislation was considered to be a right model.

As regards the law of marriage and declaration of nullity of marriages, conflicts have often come to the fore in the Kerala High Court.[1] After some uncomfortable decisions, in Leelamma's Case,[2] a balance between personal law of Catholics and the civil law in the matter of declaration of nullity of marriages was struck. And this decision was in tune with the decision of the Supreme Court in Lakshmi Sanyal.[3] Following the precedent established by the English Matrimonial Courts, permanent alimony was also ordered in Leelamma's Case even after a declaration of nullity of the marriage. This was indeed a progressive approach. And, having

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1. See supra Chapter III, n.53,59,71 and the accompanying text.
2. See Ibid. n.69,122,168 and the accompanying text.
3. See Id. n.123 and the accompanying text.

regard to the historical development of law it was also the correct approach. However this was not allowed to reign too long. The ratio of Leelamma was overturned by a Full Bench of the Kerala High Court in George Sebastian's Case[4] and thus the Court put the clock back again. At present the issue is before the Supreme Court which is yet to render a decision.

With regard to the grounds of divorce, there is apparent discrimination against women and this view is shared by both the community[5] and the Law Commission of India.[6] Yet, the Supreme Court in Anil Kumar Mahsi's Case[7] examined the question of discriminatory aspects of the grounds of divorce available to Christians under the Indian Divorce Act, from the view point of a Christian husband and held that Section 10 of the

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4. See Id. n.71.
5. See supra Chapter VI, n.19 and 77-79 and the accompanying text.
6. See supra Chapter IV, n.115 and the accompanying text.
7. See Ibid. n.88 and the accompanying text.

Act is not discriminatory and hence is not violative of Article 14 of the Constitution of India. Perhaps the Court has taken it as protective discrimination in favour of women. At any rate, this question was not examined by the Court from the standpoint of a Christian woman. Though this question is yet to be settled by judicial decisions, public opinion as elicited in a survey favours a thorough reform of the law applicable to Christians in India.[8]

In view of sex discrimination writ large on the various provisions of the Indian Divorce Act as rightly adverted to by the Law Commission of India in its 90th Report, one wonders how the Supreme Court, in Anilkumar Mahsi's Case[9] arrived at its conclusion that Section 10 of the Indian Divorce Act, 1869 is not violative of Article 14 of the Constitution of India.

Indeed, a Full Bench of the Kerala High

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8. See supra n.103 of Chapter VI and also see supra n.108 of Chapter V and the accompanying text.

9. See supra Chapter IV, n.88.

Court has in Mary Sonia Zachariah[10] ruled that Section 10 of the Indian Divorce Act is discriminatory to women. It has therefore struck down a clause of Section 10 of the Act. Though the intention of the Court was to eliminate discrimination against women, after its striking down the objectionable clause, Section 10 stands, it is argued, discriminatory to Christian husbands after the said decision of the Full Bench.

The rum part of the present law is that whenever a "guilty" women is granted the decree of divorce or judicial separation she becomes entitled to maintenance/alimony as she would be deemed to be a "wife" within the meaning of Section 125 Cr.P.C.[11] But in the event of declaration of nullity of marriage, the woman is left high and dry,[12] as she is not entitled to

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10. See supra Chapter IV, n.117-126 and Chapter VI, n.31(a)-31(d) and the accompanying text.

11. See supra Chapter III, n.164-167 and the accompanying text.

12. See Ibid. n.168-170 and the accompanying text.

get alimony or maintenance. This calls for an amendment of Section 125 Cr.P.C as well.

The discrimination inherent in the Indian Divorce Act is not to be seen in the case of application of the Portuguese Civil Code and the French Civil Code in India. This has been achieved because of the flexibility of these Codes to accommodate the personal laws on marriage, nullity of marriages and divorce. It is seen that the Portuguese Civil Code as applicable in Goa has recognised the personal law and its procedure. Further, in the case of civil marriages also, the law in Goa is not gender discriminative. This is not to say that the laws in Goa are without any blemish. But, at any rate, those laws are far ahead of the English law as applied in the rest of India, in matters relating to marriage, divorce and succession.

In fact, in matters relating to intestate succession, Christian women were in a more disadvantageous position. Inspite of the provisions of law in these areas, the community more or less got adjusted to the modern

concepts of equality between the sexes, notwithstanding stray and exceptional cases. It was in this background that the Supreme Court handed down its judgment in Mary Roy's Case.[13] In an attempt to give a fair deal to Christian women, the Indian Succession Act, 1925 was extended to the Part B States[14] and the Supreme Court construed the provisions of the Part B States (Laws) Act, 1951 in such a manner as to enable Christian women to demand equal treatment in matters of intestate succession. Notwithstanding the good intentions, the decision in Mary Roy has opened up a pandora's box. Instead of settling the problems, it has created more problems for the community by way of unsettling many an arrangements made under the earlier custom. It has thus created a storm, uprooting many families, throwing their settled arrangements out of gear.

The Indian Succession Act also signifies gender discrimination. Unfortunately the Supreme Court has not appreciated this fact. Before making its provisions

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13. See supra Chapter V. n.1.
14. See Ibid. n.51.

applicable to the areas of the Part B States, neither the Legislature nor the Court undertook a comprehensive evaluation of the historical origin and the social reasons for the development of the law of Christian succession in various parts of India. The Court has also not examined the implications of the application of Indian Succession Act to the Kerala Christians who showed the courage and wisdom to go for a separate legislation when the Indian Succession Act was in the Indian Statute Book. Quite naturally, the aggressive application of an inherently discriminatory law in the Kerala context has created more problems than it could solve. The Indian Succession Act needs toning up to be in tune with the mores of the community placed at the threshold of the twenty-first century. And further, the decision raised the question of the legitimacy of the Court in going for a policy decision, which should have been done by the legislature after giving careful attention to the pros and cons of all the aspects of the matter. At any rate, the decision of the Supreme Court in Mary Roy's Case stands on quicksands. And the attempt to remove the

difficulties arising out of the Supreme Court's decision by the Travancore-Cochin Christian Succession (Revival and Validation) Bill, 1994 proposed to be enacted in Kerala State has not been in the right direction either. What is necessary as a stop-gap arrangement is only a Bill for validation of past transactions and not a revival of the earlier law. And the Bill ought to contain a safety valve to allow those women who really want to agitate for their rights, a reasonable time to do so, within a specified time from the enactment of the Bill into law, before a designated Court.

In the matter of succession, the French Civil Code as applied in Pondicherry is also gender biased.[15] At any rate, the provisions of the French Civil Code are not as discriminatory to women as the Indian Succession Act, 1925 is. A comparison of the provisions of the Indian Succession Act, with that of the Portuguese or French Civil Code also indicates that it is the English law under the Indian Succession Act that is more discriminatory

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15. See supra Chapter II, n.162.

towards women and it is that law, that is acclaimed by many as egalitarian, without making a comparative evaluation.

In short, the Indian Divorce Act, 1869, the Indian Christian Marriage Act, 1872 and the Indian Succession Act, 1925 contain a good number of provisions that are discriminatory towards Christian women. This is violative of the constitutional mandate under Articles 14 and 15 and hence there is urgent need for a thorough reform of the law in these respects. There are other areas of family law such as the law of adoption and guardianship governed by customary practices- still remaining in the most unsatisfactory stage. All these call for urgent legislative intervention.

As a consequence of the realisation of discriminatory aspects in the law of marriage, divorce succession etc. an attempt has been made by activists and social reformers to initiate a move for reform of the law. Though the attempt towards this end has been

carried to the stage of drafting a bill[16] and it has been submitted to the Government of India after consultations at various levels among the various denominations of Christians in India, the complexity arising out of the diversity of historical origin and development of the different denominations have not been properly comprehended and for the problems arising therefrom, no solution is seen suggested or made in the bill.

Piece-meal legislation is not the answer to the problems facing the Christian communities. The efforts towards legislation made by both the official and non-official agencies, have not emanated from a comprehensive study of the subject; nor did the courts explore the matter deep before handing down judgments.

Fresh legislation is the only answer to the problems faced by the Indian Christian Community crushed under the archaic laws that embody the philosophy of a bygone century. The question that looms large before the legislator is as to what type of legislation is

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16. See supra Chapter VI, n.28.

desirable. The Constitution of India mandates the state to endeavour to secure for the citizens a uniform civil code throughout the territory of India.[17] Hence it would be useful to look into the views of the proponents of a uniform civil code. Almost all possible arguments were taken against the inclusion of Article 44 in the Constitution and they were all rejected by the Constituent Assembly before Article 44 was adopted by a motion.[18] But even after 47 years of independence, the Constitutional goal remains a mirage.

As far as the Christian community in India is concerned, they do not appear to be against the enactment of a uniform civil code as it may not make any difference to them.[19] It is described that the battle for a common civil code is a battle of the tenses, the present

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17. See Article 44 of the Constitution.

18. See Constituent Assembly Debates. Vol.VII at 447-449. (1949).

19. Vasudha Dhagamwar, "Towards the Uniform Civil Code", (1989) at 30.

representing the spirit of secular humanism, pushing into submission the past representing feudal-clerical absolutism.[20] Yet many a present are being relegated to the past, but the law and the legal system have substantially remained the same failing to incorporate the spirit of secular humanism into the system.

There is no uniformity even in the existing Hindu Personal Law because it allows variations in matters such as divorce or adoption on the ground of custom.[21] Execessive emphasis on uniformity is therefore unwarranted and undesirable. A uniform civil code will have to evolve

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20. See V.R. Krishna Iyer on "The Muslim Women (Protection of Rights on Divorce) Act". Eastern Book Company, (1987) Lucknow, at 35.

21. See for example S.29(2) of the Hindu Marriage Act, 1955. It enacts:-

> "Nothing contained in this Act shall be deemed to affect any right recognised by custom or conferred by any special enactment to obtain the dissolution of a Hindu marriage, whether solemnised before or after the commencement of this Act".

through a gradualistic approach. The emphasis should be on social justice rather than on uniformity.[22] And gender justice is more a constitutional mandate under Articles 14 and 15 than the mandate under Article 44 of the Constitution.

Following this line of approach, the laws relating to Christians in India should be reformed and secularised and it would be unrealistic and unjust to wait for the evolution of a uniform civil code. Therefore, urgent attention can be and ought to be turned to the reform of Christian personal law in India. This mandates us to take into account various issues. Among Christians in India there are various denominations. The denominational differences are such that these denominations may be poles apart on certain issues. A practical approach on the lines adopted in Section 29(2) of the Hindu Marriage Act[23] can be made in the case of

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22. See S.P. Sathe, "Personal laws need to be Secularised", Indian Express, Kochi, 27th February, 1993.

23. See supra n.22.

Christians as well. This seems to be unavoidable from the fact that there are regional, cultural and dogmatic divergences among Christians in India and the Church has not interfered with many a customary practices that are not against the basic teachings of the Church.

The efforts made in the past for reformation of the law by way of legislation has not been a success, for various reasons. Most of these efforts were not on proper lines. The half hearted, half-baked legislative proposals has had more religious overtones. What is necessary is a more secular law in tune with the times and in accord with the constitutional mandate. Once the laws applicable to Christians are reformed on the basis of justice and gender equality, it would be a step forward to the establishment of a uniform civil code. As welfare of the citizens is the most important concern of the "State", it is mandatory for it to live upto the expectations of the people as otherwise it would be failure of the "State" and the very purpose of existence of the "State" would not be then justified. Therefore, the

wisdom shown by the Maharaja of Travancore can be emulated by appointing a Christian Committee representing the various systems and sub-systems of different regions of India and thrash out their differences for the common good and enact a uniform civil code for Christians in India.

APPENDIX-I

Bom- 075 SAR NEWS March 6-12; 1993.

PUBLIC DEBATE ON CHRISTIAN LAWS INITIATED

KOCHI (SAR NEWS)

A public debate on Christian laws in India has been initiated by Mr. Sebastian Champappilly, a young advocate from the High Court of Kerala.

Mr. Champappilly has prepared and distributed a questionnaire on the existing laws, both in English and Malayalam, with probable choice of answers. The 32 questions focus on the Dowry Prohibition Act, 1961, the Indian Christian Marriage Act, 1872, the Indian Divorce Act, 1869, the Indian Succession Act, 1925, and the Christian Personal Law.

The conflict in the operation of civil law on the one hand, and the personal law through the instrumentality of Eparchial Tribunals on the other, also figures in the questionnaire.

Mr. Champappilly has also raised 13 specific issues concerning the rights of Christian women for maintenance, succession to property, grounds of divorce and

nullity of marriage, guardianship, will, child out of wedlock (Paternity), intercaste, inter-religious marriage, marriage expenses, dowry and intestate property.

Commenting on the proposed bill, which is going to be introduced in Parliament, he said "it was definitely not going to improve the situation of Christian women as far as their legitimate rights were concerned".

He said that the debate, initiated by him, was not confined to printed questions and answers and that he was ready to hold a debate on these issues with any group of Christians anywhere.

Mr. Champappilly has codified the entire Indian Christian law and has released it as a book. His efforts have led to the recognition of Christian Personal Law by the Court, as was evident from the decision in Leelamma V/S Dilip Kumar (AIR 1993 Kerala 57).

Apart from his professional commitment, he is doing his research on Christian Laws for his doctorate from the law department of Cochin University. The focus of his research is on bringing out the inequalities and inadequacies in Christian laws, and also to enlighten the Christians about the grave flaws in the proposed bill, he said.

APPENDIX-II

A REVIEW OF CHRISTIAN LAW

QUESTIONNAIRE*

1. The Indian Christian Marriage Act is not applicable to Christians in the erstwhile state of Travancore, Cochin, Manipur and Jammu and Kashmir. The Christians in these areas marry under their customary law and in accordance with their personal law. Yet the Hon'ble High Court of Kerala has held that nullity of marriage granted under the personal law by the Eparchial Tribunal would not be recognised by the Civil Courts. What is your opinion about it?

   Ans: The decision is right/not right.

2. What is the reason for your answer?

   Ans: In matters of marriage, the law of the church should have importance/Civil law should have importance.

3. Who should determine the marital status of a Christian?

   Ans: Eparchial Tribunal/Civil Court.

4. Who should initiate civil proceedings against a person who though married in a foreign country contracts a second marriage here under the church law misrepresenting to the church that he is unmarried?

   Ans: Eparchial Tribunal/Civil Court.

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* Respondents are requested to answer the questions so as to serve it as an opinion poll and the result will be incorporated in a research work on Christian Law undertaken through the Department of Law, Cochin University of Science and Technology, by Advocate C.A. Sebastian Champappilly.

5. In such a case when the person is proceeded against on the complaint of the aggrieved spouse, should not the decision of the Eparchial Tribunal be recognised?

Ans: Yes/No.

6. In such cases who should have the authority to declare the 2nd marriage null and void?

Ans: Eparchial Tribunal/Civil Court.

7. When a Christian proposes to marry a person from another community and when there is doubt as to capacity, who should determine his/her capacity to marry?

Ans: Eparchial Tribunal/Civil Court.

8. Under the Indian Divorce Act, a Christian husband can get divorce only on the ground of adultery committed by his wife. Whereas the non-Christians in India can get divorce on many other grounds. Do you consider it to be discriminatory?

Ans: Yes/No.

9. Do you consider that this discrimination would lead to unhappy family ties?

Ans: Yes/No.

10. Under the Indian Divorce Act, a Christian wife can get a divorce only if she proves many grounds. Do you consider it to be discriminatory to Christian woman?

Ans: Yes/No.

11. Do you think that a decree of divorce obtained by an Indian Christian in a foreign country should be recognised by our courts irrespective of its validity or otherwise?
Ans: Yes/No.

12. Do you think that mutual consent be included as a ground for divorce among Christians?
Ans: Yes/No.

13. Do you think that irretrievable breakdown of marriage be a ground for divorce for Christians?
Ans: Yes/No.

14. Do you think that where paternity of a child born after marriage is scientifically proved to be of a person other than that of the husband, that alone be a ground for divorce?
Ans: Yes/No.

15. Do you like to have the authority of granting nullity/divorce be exclusively vested in Eparchial Tribunal?
Ans: Yes/No.

16. Section 125 of Cr.P.C is applicable to a divorced Christian woman whereby she can claim maintenance from her former husband. Are you happy over it?
Ans: Yes/No.

17. Muslims in India have a special law (Statute) regarding maintenance to divorced women in accordance with their personal law. Do you consider that Christians should have a special law in conformity with their personal law?

Ans: Yes/No.

18. The Eparchial Tribunal has at present no authority to grant maintenance to a woman whose marriage is declared null and void. In such a situation should the jurisdiction of the Eparchial Tribunal be enlarged or should such authority be exclusively reserved for Civil Courts?

Ans: Extend the powers of the Eparchial Tribunal/Civil Court alone should have such powers.

Problems in the Law of Succession

19. Till recently Christian daughters in Travancore-Cochin areas had only very limited interests, in their parental property. But the Hon'ble Supreme Court and the High Court of Kerala have declared that the law now applicable to Christians in such cases is the Indian Succession Act, which provides for equal shares for both sons and daughters. Do you think that this will adversely affect the cohesiveness of the Christian family/community?

Ans: Yes/No.

20. Section 42 of the Indian Succession Act confers rights on the father of the intestate whereas it does not give any such rights to the mother of the intestate. Do you think

that this is discriminatory to the Christian woman?

Ans: Yes/No.

21. Section 33 and 47 of the said Act provides if the intestate has left no children, father or mother, the wife is entitled only to 1/2 of the property and the rest should go to the intestate's other relatives. Do you consider it to be unjust to the Christian women?

Ans: Yes/No.

22. Do you think that, in the case of a person dying intestate, if there are no lineal descendants nor parents living the whole property must go to the wife of the deceased?

Ans: Yes/No.

23. Section 60 of the Act enables the father to appoint a guardian for his children. But no such authority is given to the mother. Do you think that it is unjust to the Christian women?

Ans: Yes/No.

24. Under the Succession Act when a Christian women dies intestate leaving no issues, her father gets a share in her property, but not her mother. Do you consider it to be discriminatory to Christian women?

Ans: Yes/No.

25. Section 213 of the Act makes it mandatory for the will of a Christian to be probated. There is no such stipulation for persons belonging to other communities. Do you think it to be discriminatory?

Ans: Yes/No.

26. The Hon'ble High Court of Kerala has ruled in Joseph v. Union of India, 1978 K.L.T (SN) 116 that the above requirement for probate is not violative of Article 14 of the Constitution which assures equality for all. Do you think that the above decision of the High Court needs review/reconsideration?

Ans: Yes/No.

27. Do you think that the Dowry Prohibition Act should not be made applicable to the Christian women?

Ans: Yes/No.

28. Do you think that the amount usually given by the bride's parents to the bridegroom at the time of marriage, be considered as the bride's share in her parent's property?

Ans: Yes/No.

29. Do you think that the Dowry Prohibition Act does more harm than good to the Christian women?

Ans: Yes/No.

30. In the event of divorce or dissolution of marriage, the amount given to the bridegroom at the time of marriage goes unrecorded and unaccounted. Do you think that there must be some legal provision to have it accounted for and returned

to the woman?

Ans: Yes/No.

31. Do you consider that a thorough reform of the law relating to Christians in India is essential?

Ans: Yes/No.

32. In your opinion is there any other issue concerning marriage, divorce, succession etc. of Christians that should be regulated by law? If so, what is that? (you may add another sheet, if required).

Your name and address:*

Name : Profession:

Age : Male/Female:

Postal Address : Educational Qualifications:

Place:

Date : Signature:

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* The personal opinion expressed by you will be kept confidential. It is not essential to give your full address, if you want to remain anonimous.

TABLE OF CASES

Pages

Pages

Pages

Pages

Pages

Pages

Pages

Pages

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