Kerala High Court
Ammini E.J. And Etc. vs Union Of India (Uoi) And Ors. on 24 February, 1995
Equivalent citations: AIR 1995 Ker 252
Author: Ramakrishnan
Bench: M P Pillay, T Ramakrishnan, P Shanmugam
JUDGMENT Ramakrishnan, J.

1. The constitutional validity of Section 10 of the Indian Divorce Act, 1869 (for short "the Act") which regulated divorce among Christians in India for a century and a quarter is directly under challenge in the two Original Petitions at the instance of two Christian women on the ground that the provisions in Section 10 are violative of the fundamental rights guaranteed to them and other similarly situated Christian women under Articles 14, 15 and 21 of the Constitution of India.

2. Mary Sonia Zachariah, petitioner in O. P. No. 5805 of 1988 is a Syrian Christian governed by the Act. At the time of filing the O, P. she was aged 36 and was working as an Asst. Warden at Corpus Christi School, Kottayam. She was married to one P,C. Zachariah on 6-1-1972 at Emmanual Mar-thoma Church, Pazhanni, Thrissur according to the customary rites and ceremonies of the church. A daughter, Elizabeth Zachariah alias Kittu was born out of the said wedlock on 16-9-1974. On the basis of Exts. P3 and P 4 letters the petitioner has specifically pleaded that her husband has taken an irreversible decision to live with an English lady whom he met while in Nairobi where he was employed from 1977 onwards, deserting the petitioner and her child once and for all. Petitioner has specifically alleged that from 1978 onwards her husband has deserted her and has not cared to cohabit with her or to perform any of the marital obligations and to maintain her and her daughter. She has further alleged in the petition that she is not even aware of the whereabouts of her husband at present.

3. Originally, Union of India, State of Kerala and the husband of the petitioner alone were impleaded as parties to the O. P. Later certain individuals, association of persons, cultural and social institutions such as Suhruth, Reg. No. 404/ 88, Kottayam, Kerala Manila Samajam, Vazhuthacaud, Trivandrum, Jonakiya Vimochana Viswas Prasthanam belonging to the Central Kerala CSI, Diocese YMCA of Bombay; Indian Federation of Women Lawyers, Kerala Branch, Christian Institute for the study of Religion and Society, Poulose Mar Poulose, Bishop, Church of East in his capacity as Chairperson, World Student Christian Federation, Fr. K. V. Poulose, Vicar, St. Thomas Orthodox Church, Chenganacherry, Kottayam etc., have got themselves impleaded in the O. P. Over and above the persons so got impleaded as additional respondents, Peoples Council for Social Justice, Layam Road, Kochi has also got impleaded as an intervenor. Fr. K.V. Poulose and Shri M. Prabha, Advocate representing the POSJ were in fact present in Court and have made their submissions strongly supporting the case of the petitioner. Bishop Poulose Mar Poulose was also present in Court and in his behalf Fr. K. V. Poulose has submitted that Bishop also supports the prayers in the two O.Ps.

4. Ammini E. J., petitioner in O. P. No. 4319 of 1991 is also a Christian governed by the Act. At the time of filing the O. P. the petitioner was aged 39 and was working as a High School Assistant at the Government High School, Pattambi. She was married to the third respondent on 14-2-1980 at St. Peter St. Paul Church, Amaravathy, Kochi, according to the rites, ceremonies and customs of the

said church. According to the petitioner they lived together as husband and wife till 18-7-1981 and thereafter the third respondent has deserted her with the intention of abandoning her permanently against her wish. It is her further case that during the period they lived together as husband and wife, the third respondent's conduct towards the petitioner was very cruel and he had subjected the petitioner to insults, abuses and accusations of adulterous conduct even in the presence of public, her colleagues, students and relatives. She has alleged that the desertion, insults, abuses and accusations of adulterous conduct and threats of physical violence had made the continuance of the married life impossible. Before filing of this O. P., petitioner has filed O. P.

No. 153 of 1985 before the District Court, Thrissur under Section 22 of the Act for a decree of judicial separation on the ground of cruelty and desertion of the third respondent. As per Ext. PI judgment in O. P. No. 153 of 1985 dated 28-7-1988, the Addl. District Judge has specifically found that the third respondent is guilty of cruelty and desertion and has grafted a decree for judicial separation as prayed for. Petitioner has alleged that in spite of the lapse of more than two years there has no been resumption of cohabitation and there is not even an iota of chance for reconciliation. Petitioner has further alleged that even though there is no chance of reconciliation, it may not be possible for her to get a divorce since desertion and cruelty are not recognised as grounds for divorce unless adultery is also alleged and proved by her. It is in the circumstances that the petitioner has also challenged the constitutional validity of Section 10 of the Act.

5. The other material allegations, contentions and reliefs prayed for in the O. Ps. are more or less same or similar and are briefly thus: Indian women of all religions other than Christianity are entitled to get divorce on grounds of cruelty and/ or desertion which are recognised as independent grounds for divorce under the respective enactments applicable to them. For Christians who are governed by the Act, cruelty and desertion are not by themselves independent grounds for divorce. To be grounds for divorce, adultary should also be alleged and proved along with cruelty or desertion as far as Christians governed by the Act are concerned. As adultary is often committed with calculated care and utmost secrecy, direct proof of adultery is very difficult. Under the Indian social set up it is well nigh impossible for a woman to prove adultery of her husband. This renders the provisions for divorce virtually infructuaus for a woman. The requirement of proving adultery along with cruelty and desertion to make out a ground for divorce under Section 10 of the Act violates the petitioners' fundamental right to equality and right to live with dignity and personal liberty enshrined in Articles 14, 15 and 21 of the Constitution of India. Denial of Divorce on the ground of cruelty or desertion without reasonable excuse for a period of two years or upwards which are grounds for divorce for all Indians of all other religions except Christians is discrimination based solely on the ground of religion. While Section 10 confers on the husband a right to get divorce on proof of adultery simpliciter the wife is obliged to prove either cruelty or desertion along with adultery to get a divorce. This again is a discrimination based solely on sex which makes the provision constitutionally bad. In support of the contentions raised in the O. Ps., the petitioners have referred to the relevant provisions in all other enactments dealing with divorce in force in India and some of the Acts in force in England and the various recommendations made by the Law Commission of India from time to time as part of the pleadings in the O.Ps.

6. The petitioners have thus contended that Section 10 of the Act in so far as it makes adultery also necessary to be established along with cruelty and desertion as a ground for divorce is arbitrary, authoritarian and violative of the fundamental rights under Articles 14, 15, 19 and 21 of the Constitution of India.

7. The petitioner in O. P. No. 5805 of 1988 has further contended that Section 10 of the Act in so far as it incorporates the word 'incestuous' before the word 'adultery' thereby making in aggravated form of adultery alone as a ground for divorce for Christian woman whereas all other Indians including Christian men are entitled to get divorce on the ground of adultery simpliciter is violative of Articles 14, 15 and 21 of the Constitution of India.

8. The substantive reliefs prayed for in the two O.Ps. can be summarised thus: (1) to declare that Section 10 of the Act in so far as it incorporates the word 'incestuous' before the word 'adultery' the words 'adultery coupled with' occurring before 'such cruelty as without adultery would have entitled her to a divorce a mensa et toro' and 'desertion without reasonable excuse for two years or upwards' is violative of Articles 14, 15, 19 and 21 of the Constitution of India, and (2) to declare that 'adultery', 'such cruelty as without adultery would have entitled to a divorce mensa et toro' and 'desertion without reasonable excuse for two years or upwards' are grounds for dissolution of marriage for a wife under the Act.

9. Union of India has filed a counter affidavit opposing the reliefs prayed for in the O.Ps. and raising mainly the following contentions. Though the Matrimonial Causes Act, 1857, following which the Act was framed has undergone various drastic changes, the Act has remained in force unchanged till date. In spite of repeated recommendations made by the Law Commission of India for amending the law regarding marriage and divorce among Christians, Government was not able to undertake any legislations to amend the law in view of the strong opposition from the community itself. So far the constitutionality of the provisions contained in Section 10 of the Act has been upheld by various courts including the Supreme Court whenever such challenge had been made in the past. Different personal laws are applicable to different communities in India. The debates of the constituent Assembly relating to Article 35 of the draft constitution corresponding to Article 44 of the constitution leave no scope for doubt with regard to the fact that the constitution makers envisaged the continuance of personal laws applicable to different communities for quite sometime, if not indefinitely. Only by legislation amendment can be brought to the provisions in the Act, So long as such pre-consti-tutional personal laws are not changed by the legislature, such laws are protected by Article 13 of the Constitution of India. While changing a personal law like the Act, Government have necessarily to take into account the readiness of the community to accept reforms. So far the community has not expressed its readiness to accept the reforms proposed to the personal law governing marriage and divorce among Christians. As regards the scope of judicial intervention by Court, it has been consistently held by all the Courts that Section 10 of the Act specifically sets forth the grounds on which the marriage can be dissolved and no additional grounds can be included by judicial construction of similar provisions in other enactments unless the section plainly comprehends such grounds. No parallel can be drawn between the personal laws relating to one community and another community for making a ground of discrimination. Grounds for divorce are bound to differ from one law to the other depending upon the community to which it concerns. The

challenge raised against the provisions based upon the alleged violation of the fundamental rights guaranteed under Articles 14, 15 and 21 of the Constitution cannot be sustained in view of the fact that there is in built provisions in the constitution itself for treating different sections of the people differently. When one gets married voluntarily in accordance with the provisions of the Act and is governed by the Act, it may not be possible for him or her to contend that he is not bound by the provisions in the Act as far as the claim for divorce is concerned. He or she will be estopped from challenging the validity of such provisions on any ground including violation of fundamental rights. Even if it is found that any part of Section is unconstitutional the only course open to the court is to quash the section as a whole or to leave the section as such for legislative intervention and amendment pointing out the need for amending the section suitably. No declaration as prayed for declaring the provision partly unconstitutional and to retain the rest as valid is permissible since the section represents'a comprehensive scheme to regulate divorce among the married Christians in general. If adultery simpliciter, cruelty and desertion for a period of 2 years or upwards are retained as independent grounds severing the words 'incestuous' and 'adultery coupled with' from the relevant provisions in section of the Act, it will be substituting entirely new grounds different from the one provided by the legislature contrary to the scheme contemplated by Section 10 of the Act. It will amount to judicial legislation or rewriting of a provision in an enactment which may not be justifiable in law. If so rewritten, the provision will be clearly discriminatory as far as the husband is concerned since the husband will be entitled to seek divorce only on the ground of adultery while the wife will be entitled to get divorce on several other grounds including adultery. If it is held so, it will upset the scheme of legislation namely to allow divorce for wife on grounds more stringent than the ground on which the husband can get divorce. It will also totally upset the scheme envisaged by the impugned Section and enable the wife to get divorce more easily on several grounds and will place the husband in a very disadvantageous position. It was also contended that such a situation will lead to further challenge against the rewritten Section also at the hands of the husbands and the Court may have to declare such Section also totally bad. It was submitted that on that ground also the relief prayed for are liable to be refused.

10. During the final stage of the arguments the learned Central Government Pleader has produced before us a communication received by him from the Government of India, Ministry of Law, Justice and Company Affairs dated 30-12-1994. Relevant portion of the communication can usefully be extracted thus:

"In view of the fact that owing to the strong opposition from certain segments of the Christian community, the earlier action of the Government of India for bringing in a comprehensive legislation relating to marriage and matrimonial causes of the Christian community could not be got enacted. Now we have, through the efforts of the Joint Women's Programme, a voluntary women's organisation, received comprehensive proposals in the form of draft Bills for changes in the personal laws of the Christian community from the Christian churches. These Bills include the draft Christian Marriage Bill, 1994 which seeks to consolidate, amend and codify the law relating to marriage and matrimonial causes of persons professing the Christian religion and to repeal the Indian Divorce Act, 1869 and Indian -Christian Marriage Act, 1872, among other things. The grounds for divorce proposed in the aforesaid Bill are more liberal in nature in tune with the changed social-economic conditions of the community and the prevailing law relating to marriage and divorce available under

the Special Marriage Act, 1954. The grounds for divorce include desertion of the petitioner by the other spouse for a continuous period of not less than two years immediately preceding the presentation of the petition. It has been stated that the Bill has the support of the Catholic Bishops' Conference of India (CBCI) and 27 Member Churches of the National Council of Churches in India (NCCI) and some other independent churches.

Since the Christian churches have now come forward with the necessary legislative proposal, the Govenrment are actively considering the same with a view to bringing in necessary legislation as early as possible. The proposals are being studied and examined.

In view of the fact that the Government are examining the question of bringing in a comprehensive legislation relating to marriage and divorce of the Christians in India, it may not be advisable to undertake a piece-meal legislation solely for the purpose of amending Section 10 of the Indian Divorce Act, 1869 as suggested by the Law Commission of India in their 90th Report."

In the circumstances, a strong appeal was made not to interfere with the impugned section and to leave the entire matter for the Union Government to bring in comprehensive legislation taking note of the views of the community as a whole on a national level so as to avoid the confusion and uncertainty which may result from an interference as prayed for in the original petitions.

11. We may here refer to a contention raised by the learned Government Pleader based on the biblical principle that "What God, then has joined, let not man put as under (Mathew, Chapter XIX, Verse 6) and how a Christian priest and a Christian institute for the study of Religion and Society (for short 'the institute') has met the same. It was submitted that Holy Bible permits dissolution of marriage only on the ground of adultery and that is the reason while all the impugned provisions require the wife to prove adultery as a necessary part of the ground for divorce. Inasmuch as Section 10 of the (Act) is based upon the tenets contained in Holy Bible there is no justification for adding any other ground for dissolution even applying the principle of severability and retaining a portion of the provision. Fr. K. V. Poulose, one of the intervenors has replied by stating that the basis of marriage is love and if there is no love between them, the whole bond is broken and in such cases the dissolution is the only solution. The Society, the other party who got impleaded in the O. P. has also met the contention stating that it is never in the interest of any society to keep a marrige alive which has irretrievably broken down and has pointed out that when the world is heading towards adoption of 'Euthansia' as a justifiable means to put an end to a miserable human life, there is no reason why a marriage which is de facto dead is not so declared de jure without any fuss.

12. The Act is evidently pre-constitution legislation passed by the British Parliament adopting according to the petitioners mechanically the provisions of the Matrimonial Causes Act, 1987 which was then inforce in England. Even after the lapse of a century and quarter the provisions in 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. Section 10 of the Act reads thus :

"10. 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 inconstuous adultery, or of bigamy with 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 mansa et toro, or of adultery coupled with desertion, without reasonable excuse, for two years or upwards.

13. It is evident from the Section that as far as the husband is concerned, the only ground on which he can seek dissolution of marriage is adultery. But at the same time it is important to note that he need establish only adultery committed by the wife since solemnisation of the marriage. On the other hand, as far as the wife is concerned, though she has got a number of grounds for seeking dissolution of marriage adultery simpliciter is not a ground for divorce unlike the husband. As far as the wife is concerned, she has to establish not only adultery of her husband but also that the husband is guilty of either 'incestuous adultery' or 'such cruelty as without adultery would have entitled to a divorce mansa et toro' or 'desertion without reasonable excuse for two years or upwards'. Thus even if a wife is able to prove that her husband is living in adultery or that he is guilty of treating her with cruelty habitually and persistently or that he has deserted her for ever, she may not be entitled to get dissolution of her marriage with the husband who perpetrates such activities destructive of not only natural love and affection which is the very basis of the institution of the marriage but also of human dignity.

14. It is relevant in this connection to refer briefly to the other legislations now in force in India regulating marriage and divorce among people belonging to Religions other than Christianity and also Christians outside India especially in England who were also governed by an Act more or less similar to the Indian Divorce Act when the Act was passed originally.

15. Apart from the Act, divorce in India is mainly governed by 5 other major Acts, namely (1) The Hindu Marriage Act, 1955; (2) The Dissolution of Muslim Marriage Act, 1939; (3) The Parsi Marriage and Divorce Act, 1936; (4) The Special Marriage Act, 1954 and (5) The Foreign Marriage Act.

1. The Hindu Marriage Act, 1955.

Section 2 of that Act applies to all persons who are Hindus by religion in any of its forms or developments and Bhuddists, Jains, Sikhs or any person who is not a Cristian, Muslim Parsi or Jew

by religion. Section 13 of the Act lays down the various grounds for divorce. Grounds for divorce are common for both husband and wife. Cruelty and desertion have been recognised as independent grounds for divorce among several other grounds. Section 13B incorporated by way of an amendment in 1976 has provided for divorce by mutual consent subject to certain conditions which would normally show that marriage has irretrievably broken. Voluntary sexual intercourse with any other person other than his or her spouce since solemnisation of marriage is recognised as a ground for divorce.

2. The Dissolution of Muslim Marriage Act, 1939.

The above Act applies to Muslim women married under Muslim law. Section 2 of the Act lays down the grounds on which a muslim wife may seek a divorce. Such grounds takes in cruelty and desertion as independent grounds among several other grounds. It is relevant to note in this connection that there was no provision enabling a Muslim woman to obtain a decree dissolving her marriage on the failure of the husband to maintain her on his deserting her or maltreating her and it was the absence of such a provision entailing 'inspeakable misery in innumerable Muslim woman' that was responsible for the Dissolution of Muslim Marriage Act, 1939 (see Statement of Objects and Reasons).

3. The Parsi Marriage and Divorce Act, 1936.

The above Act applies to Indian Parsis. The grounds for divorce are provided in Section 32 of that Act which takes in both desertion and cruelty as independent grounds. Section 32A(i) specifically states that non-resumption of cohabitation for a period of one year or upwards after the passing of a decree for judicial separation shall form a ground for divorce.

4. The Special Marriage Act, 1934.

The above Act applies to all citizens of India irrespective of religious faith, whose marriage have been solemnised under the Act. Section 27 deals with the grounds for divorce which takes in cruelty and desertion as independent grounds. Voluntary sexual intercourse with any person other than his or her ' spouse is recognised as a ground for divorce. It also provides the relief of dissolution in case no resumption of cohabitation takes place between the parties after a decree for judicial separation. Under the Act, grounds for divorce are common to both. Even divorce by mutual consent is permitted as per Section 28 of the Act.

5. The Foreign Marriage Act, 1959.

The above Act applies to Indian citizens whose marriage has.been solemnised in a foreign country. Section 18 of Chapter IV of the Act makes Chapter VI of the Special Marriage Act which deals with matrimonial reliefs including divorce applicable to those who have solemnised their marriage under the above Act. It will be very relevant to note that in the light of the provisions contained in the above Act, a Christian wife or husband can obtain divorce on the ground of cruelty or desertion without reasonable excuse for a period of 2 years or upwards without proving adultery provided the

marriage took place abroad. However, if the marriage was solemnised in India, the parties to such a marriage may have to establish the very strict grounds provided under the Act in contrast to the comparatively liberal grounds contained in the Special Marriage Act for getting a divorce.

16. In England also the law regarding marriage and divorce has undergone drastic changes. The Matrimonial Causes Act, 1973 which is now in force in England has introduced a fundamental change in the law by making irretrievable breakdown of marriage as the sole comprehensive ground for divorce and judicial separation.

17. The analysis made above would clearly show that Parliament has brought out radical changes in the matrimonial legislations applicable to all other religions by incorporating progressive and realistic grounds for divorce taking into account the drastic changes in the nature of the family and the matrimonial relationship in the modern set up. It is specially relevant to note in this case that for Hindus who form the majority of the population in India also, marriage was and still is a secrament and was believed to be a union between a man and a woman not only for their lifetime but also for life after death. But still, as far as Hindus are concerned progessively legislation from time to time has provided several grounds for divorce including cruelty and desertion. Even consensual divorce is permitted. It is important to note that there is no severe criticism that liberalisation shown in the matter of divorce has upset the Hindu family set up perilously or prejudicially. In fact even now the criticism and demand from the public is for more liberalisation by including irretrievable breakdown of marriage as a comprehensive ground for divorce. In fact Government of India has made a reference to the Law Commission of India seeking their recommendations on the question of acceptable of irretrievable breakdown of marriage as a ground for divorce among Hindus in response to demands and suggestions from the public. In answer to the reference the Law Commission has strongly recommended the acceptance of irretrievable breakdown of marriage as a ground for divorce among Hindus and has proposed necessary amendments to the Hindu Marriage Act in their 71st Report. In the 71st Report, the Law Commission has pointed out that the majority of the replies received to their questionnaire have favoured the introduction of the new ground in the Hindu Marriage Act. Analysing the answers received, the Law Commission has pointed out the following aspects in support of their suggestion to accept the new ground.

"We need not stand on an old divorce law which demands that man and woman must be found innocent or guilty. It is desirable to get rid of the public washing of dirty linen which takes place in long drawn-out cruelty cases or in cases based on fault. If divorce is allwoed to go through on the ground of marriage breakdown, such an unhappy spectacle will be avoided.

One cannot say that it is an enhancement of the respect for marriage if there are tens of thousands of men and women desparately anxious to regularies their position in the community and they are unable to do so. People should be able to marry again where they can obtain a death certificate in respect of a marriage already long since dead."

(Law Commission 71st Report page 15) The observations of the Full Bench of the Delhi High Court in Ram Kali v. Gopal Das ILR (1971) 1 Delhi 6 (FB) also was referred to as indicative of modern trend in judicial thinking which is as follows :

....."It would not be practical and realistic approach indeed it would be unreasonable and inhumane, to compel the parties to keep up the facade of marriage even though the rift between them is complete and there are no prospects of their even living together as husband and wife....."

18. It is also useful to note that Law Commission had suggested comprehensive amendment to the Act in the Bill titled "The Christian Marriage and Matrimonial Causes Bill 1960" submitted along with its 15th Report whereby both husband and wife were given the right to seek dissolution of marriage on almost all grounds mentioned in the Special Marriage Act including the ground of adultery simpliciter, cruelty and desertion as per clause 30 of the Bill. As per Clause 31, the Law Commission also suggested to make a provision to grant divorce after a decree for judicial separation in case of non-resumption of co-habitation. On receipt of the 15th Report, the Government finalised a Bill on the lines suggested by the Law Commission and again referred the matter to the Law Commission for their views after inviting opinion from the public. Accordingly the Commission after ascertaining public opinion submitted the 22nd Report reiterating its earlier stand. Though on receipt of the 22nd report, the Christian Marriage and Matrimonial Causes Bill was introduced in the Parliament the same lapsed on the dissolution of the parliament.

19. It is relevant to note that the 15th and 22nd Reports were prepared after collecting evidence from the dignatories of the Christian Church, representatives of the Christian Associations, Members of the Christian community, Bar Associations and Judicial Officers in the country. The Reports would reveal that there was a demand from the Christian community itself for inclusion of progressive grounds for divorce like cruelty and desertion which are available in almost all modern legislations on the subject. Since the law continued as such, in 1983, the Law Commission of India headed by none other than late Honourable Justice K. K. Mathew suo motu took note of the urgent need to amend the provisions contained in Section 10 of the Act and submitted its 90th Report dated 17-5-1983 recommending urgent amendment of that Section. It is appropriate to quote the reason given in the Report which is thus :

"The reason why we attach the highest importance to amending section 10 as above may be stated. We regard such an amendment as a constitutional imperative.

In our view, if the section is to stand the test of the constitutional mandate of equality before the law and equal protection of the laws, in the context of avoiding discrimination between the sexes, then the amendment is necessary. If Parliament does not remove the discrimination, the Courts, in exercise of their jurisdiction to remedy violations of fundamental rights, are bound, some day, to declare the section as invalid....."

Though a decade and more have elapsed after the said Report, no effective action seems to have been taken by the Parliament on the basis of the same to amend Section 10 of the Act which is under challenge in these Original Petitions.

20. The Courts in India including the Supreme Court have noted the antiquated and anomalous nature of the Act and stressed the need for amendment of the law in various judgments. In S. D. Selvaraj v. Mary (1968) 1 Mad LJ 289 Alagiriswamy, J. (as he then was) has stressed the need for an

immediate amendment of the Act on the lines of the provisions contained in the Hindu Marriage Act, Parsi Marriage Act and the Special Marriage Act. In T.M. Bashiam v. M. Victor, AIR 1970 Mad 12 a Special Bench of the same court after referring to the observations of Alagiriswamy, J. in Selvaraj's case (1968(1) Mad LJ 289) has made the following observations :

"It is only under this Act (4 of 1869) that the law remains where it was, when this enactment was born, so that parties governed by this law are under the grave disadvantage that, even if a husband deserts his wife for a considerable period, that will be no ground for divorce; in our view, it is a genuine hardship, and there is urgent need for re-examination of the provisions of Act 4 of 1869, as the Act governs a large body of persons in this country to see that its provisions are rendered humane and up-to-date....."

Though as obiter A. M. Bhattacharjee, J. speaking for the special Bench in Swapna Ghosh v. Sadananda Ghosh, AIR 1989 Cal 1 had the following observations to make in regard to the constitutionality of the provisions under consideration (at pp. 3 and 4):

".....If the husband is entitled to dissolution on the ground of adultery simpliciter on the part of the wife, but the wife is not so entitled unless some other matrimonial fault is also found to be superadded, then it is difficult to understand as to why this provision shall not be held to be discriminatory on the ground of sex alone and thus to be ultra vires Art. 15 of the Constitution countermanding any discrimination on such ground.....

Then again, under the Divorce Act, Christian spouses are not entitled to dissolution of marriage on the ground of cruelty or desertion, but are only entitled to judicial separation under Section 22 which shall have the effect of a divorce on a mensa et toro, that is separation only from "bed and board", whereunder matrimonial bond remains undissolved. But spouses married under the Special Marriage Act, Hindu, Buddhist, Sikh and Jain spouses governed by the Hindu Marriage Act, 1955, Zoroastrian spouses governed by the Parsi Marriage and Divorce Act, 1936, Muslim wives under the Dissolution of Muslim Marriages Act, 1939 are entitled to dissolution of marriage, and not merely judicial separation, on those grounds. Are we then discriminating against Christian spouses and that too, on the ground of their being Christian by Religion and thus violating the mandate of Art. 15 intradicting discrimination on the ground of Religion only?"

In Raynold Rajamani v. Union of India, AIR 1982 SC 1261, the Supreme Court has observed that the history of matrimonial legislation has been towards liberalisation of the grounds for divorce. Chinnappa Reddy, J. in a separate judgment was forced to observe that "let no law compel the union of man and woman who have agreed on separation". Again in Jorden Diengdeh v. S. S. Chopra (1985) 2 DMC 42 : (AIR 1985 SC 935) the same learned Judge has made the following observations (at p. 940 of AIR) ;

"..... Surely the time has now come for a complete reform of the law of marriage and make a uniform law applicable to all people irrespective of religion or caste. It appears to be necessary to introduce irretrievable breakdown of marriage and mutual consent as grounds of divorce in all cases. The case before us is an illustration of a case where the parties are bound together by a marital tie which is

better united. There is no point or purpose to be served by the continuance of a marriage which has so completely and signally broken down....."

21. Lastly our learned brother K. T. Thomas, J. has also made the following observations and directions while passing an interim order in this case itself (O. P. No. 5805 of 1988):

"..... After independence, the Indian Parliament brought about radical changes in the marriage law applicable to Hindus, Parsis and even to foreigners living in India by incorporating progressive and realistic grounds for divorce in such enactments. But either for no reason or for reasons which are not easy to comprehend, the law of marriage applicable to Christians remains unrealistic and antiquated."

After observing so, the learned Judge has directed the Union of India to take a final decision regarding the recommendations of the Law Commission in its 90th Report already referred to within a period of 6 months from the date of receipt of a copy of the said order. In spite of such positive direction no final decision to amend the law except as already noted in para has been taken by the Government of India, though the direction was given on 13-12-1989.

21A. Being a matter relating to dissolution of marriage among Christians in India, it may be useful to understand how marriage is generally understood in the Christian world. The classical definition of Christian marriage given by Lord Stewell, the most eminent ecclesiastical Judges in England is thus :

"..... It is a contract according to the law of
nature, antecedent to civil institutions, which may take place to all intents and purposes wher
without the intention of cohabitation, and bringing up of children, would not constitute marria

(Lindo v BeTisario (1795) I Hag con 216 (230).

The definition in fact brings out neatly the essential attributes of marriage relationship.

22. The following passage from Shefford on Marriage and Divorce (1841) page 3 is relevant.
"Besides the procreation and education of children, marriage has for its objects the mutual s

engagement which one human being can contract with another. It is a contract formed with a view

23. Now we may consider the questions raised in the above background. It is evident from Section 10 of the Act that 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 is guility of adultery which is (1) incestuous, (2) coupled with cruelty which without adultery would have entilted her to divorce a mensa et toro, (3) coupled with desertion without reasonable excuse for 2 years or upwards, etc. Therefore, as far as the ground of adultery is concerned husband is in a much favourable position

when compared to the wife since she has to prove adultery with one or other aggravating circumstances indicated in the Section itself. After adverting specifically to the above difference in the law P. B. Sawant, J. has held that "to that extent, undoubtedly, it is the wife who is discriminated against." Evidently the above discrimination is one purely based upon sex and nothing else. Such a discrimination based purely on sex will be against the mandatory provisions in Article 18 of the Constitution of India and a denial of equality before law guaranteed under Article 14 of the Constitution of India.

24. Learned counsel for the Central Government has however tried to support the constitutionality of the provision relying strongly upon the reasoning contained in Dwarka Das v. Hainan, AIR 1953 Mad 792, In that case Panchapakesa Ayyar, J. has held that "since the husband even by committing adultery" does not bear a child as a result of such adultery and make it child of his wife to be maintained by the wife", the wife by committing adultery "may bear a child as a result of such adultery and the husband will have to treat it as his legitimate child and will be liable to maintain that child under Section 488, Criminal Procedure Code read with Section 112 of the Indian Evidence Act", and that "this very difference in the resut of the adultery may form some ground" of justification for this differentiation." We think that so long as the difference in the after effect of adultery committed by the husband and wife pointed out that the learned Judge as a justification for differential treatment is a difference solely resulting from sex, and that cannot be treated as a valid justification in the light of the provisions in Arts. 14 and 15 of the Constitution of India as explained by the Supreme Court in C. B. Muthamma v. Union of India, AIR 1979 SC 1868 and other cases.

25. The more important challenge levelled against Section 10 of the Act was that it is violative of the fundamental rights guaranteed under Arts. 14 and 21 of the Constitution of India. It was strenuously contended by Smt. Indira Jaisingh and Smt. Lekha Suresh, learned counsel for the petitioners, that Section 10 of the Act in so far as it obliges a Christian wife to prove adultery in addition to cruelty as without adultery would have entitled her to a divorce measa et toro or desertion without reasonable excuse for two years or upwards is totally arbitrary and violative of the right to equality under Article 14 and right to live with human dignity and personal liberty under Article 21 of the Constitution of India. There was also an alternative contention that in the matter of dissolution of marriage Christian spouses are discriminated against in as much as Section 10 of the Act does not provide for dissolution of marriage on the ground of cruelty and desertion which are independent grounds for dissolution of marriage for couples belonging to all other religions in India under the respective enactments governing them. The discrimination so made is solely based on religion and as such violative of Article 15 of the Constitution of India.

26. Dealing with the main contention, detailed submissions have been made by the learned counsel justifying the same. The quintessence of such submissions is that when a marriage is irretrieavably broken down as a result of desertion and/or cruelty meted out to a wife by her husband and the wife wants to get dissolution of her marriage, she must be able to get a dissolution on proof of desertion and/or cruelty under the relevant law relating to dissolution of marriage. There may not be any purpose of justification in keeping alive legally a marriage which is for all intents and purposes ceased to exist in reality, One must be able to put an end to the relationship entered into on the basis of mutual consent when such consent is withdrawn by both parties or at least one among them. De

jure continuance of such broken marrige may not be in the interest of either of the parties or to the society at large. It will be only give rise to perpetual bickerings, quarrels and endless litigations/ruinous to the parties and the society as a whole. There is no public purpose or individual benefit to be achieved by denying a right of dissolution of marriage in such cases and compelling the couples to live perpetually bound by a relationship which has ceased to exist de facto. If a right of dissolution of marriage is not available to a wife placed in such circumstances she will be compelled to live a subhuman life in perpetual bondage to a person who has wilfully deserted her and treated her cruelly making her married life misrable and unbearable. To be compelled to live at least in name as a wife of a person who has deserted her, cruelly treated her, who has no love and regard to her and whom she hates and considers as the wrecker of her married life will be to live as a slave without dignity and personal liberty guaranteed to every person under Article 21 of the Constitution of India. It will be a life against her will imposed by an authoritarian law. It will be an oppressed life. She will not before to choose another partner in life and to enjoy the pleasures of the marital life once again like other woman similarly situated and belonging to other religions who are entitled to get divorce on the ground of desertion and/or cruelty without proving adultery. In the absence of a provision in the Act recognising desertion and cruelty as independent grounds for dissolution of marriage a Christian wife who is deserted or cruelly treated by her husband is bound to continue that relationship till her death at lesat in name and will not be able to put an end to it. The legal effect of the provisions in Section 10 of the Act is to deny the Christian woman a right to get dissolution of marriage on grounds of desertion and cruelty even when the marital relationship has broken irretrievably as a result of desertion and cruelty shown by her husband. Such a law broken which disentitles a married Christian woman to get divorce even when her marriage is irretrievably broken down as a result of desertion and cruelty and compells her to continue her life though in name alone as the wife of a person whom she hates and considers as the wrecker of her married life can only be treated as highly unjust, unfair and oppressive and as such arbitrary and violative of the rights guaranteed under Arts. 14 and 21 of the Constitution of India. Such a law is liable to the declared as void in the light of Article 13 of the Constitution of India. Being a provision granting divorce, a declaration that the entire provision is void under Article 13 may go against the Christian woman themselves. Such a result is to be avoided by striking down the offending portions of the provision alone which makes it obligatory on the part of the Christian women to prove adultery along with desertion and cruelty, severing the same from the rest of the provisions which can stand by itself as valid provision providing 'desertion' and 'cruelty as independent grounds for dissolution of marriage. When a provision of law is bad only in part and offending part can be separated from the rest of the provision, it will always be justifiable to strike down the offending portion of the provision alone leaving the remaining portion as valid to avoid unjust results which may follow from a striking down of the entire provision of law.

27. Marriage is indisputably an institution of great importance for human beings both individually and socially. This is evident from the definition of the word 'marriage' noted already. When once a marriage takes places, its continued existence in a peaceful and healthy atmosphere is a matter of great concern for the individuals directly involved and the society as a whole. It will certainly be ideal and advisable to continue the marital relationship as a life long one as far as possible. But being a relationship between two human beings it is only but natural that at least in certain cases the relationship may break down irreversibly for one reason or other and the parties may like to put an

end to that relationship being convinced that it can never be set right again. It is to meet such contingencies that the concept of divorce or dissolution of marriage was evolved of course subject to conditions strict or liberal. The conditions to be satisfied for allowing dissolution of marriage have varied from time to time and from country to country and from people to people during the long course of progress of mankind and will continue to be so. But what is important to be noted for the purpose of this case is that divorce of dissolution of marriage is also a concept important for the parties to the marriage and the society in general and it is for the purpose of putting an end to an irreversibly broken marriage relationship that the concept of divorce was evolved possibly side by side with the institution of marriage itself. Further, as already pointed out by us, the provisions contained in the several enactments regulating marriage and divorce in force in India including the Act, a provision of which is under challenge in these O. Ps. would show clearly that laws applicable to people in India have provided for dissolution of marriage on various grounds. Indian Divorce Act itself is an Act making provisions for allowing divorce among Christians. In fact the challenge against the law is only on the ground that some of the conditions prescribed for allowing divorce under Section 10 are harsh and oppressive making the law arbitrary and violative of the rights of the petitioners and Christian women in general, guaranteed under Arts. 14 and 21 of the Constitution of India.

28. The particular provisions in Section 10 under challenge are thus :

"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."

The above provisions make it obligatory to prove adultery along with desertion and cruelty for seeking dissolution of marriage by a wife. In other words, if the wife is unable to prove adultery against her husband she may not be able to seek dissolution of marriage even if she has been deserted or cruelly treated. The legal effect of the above provisions in Section 10 undoubtedly is to compel the wife who is deserted or cruelly treated, to continue a life subject to a relationship which she hates and wanted to put an end to for living, according to petitioners, a life with dignity and personal liberty. Even if it is established to the hilt that there is not even an iota of chance of reunion of the marital relationship already broken on the basis of desertion and cruelty, there is no legal provision under which at present a Christian wife who is a victim of desertion and cruelty can get divorce under the Act without proving adultery. As such the question to be considered is whether such a law which does not permit dissolution even when it is established that the husband is guilty of desertion and/ or cruelty and the marital relationship has in fact ceased to exist, is arbitrary and as such ultra vires the Constitution in the light of the provisions in Arts. 13, 14 and 21 of the Constitution of India.

29. As regards the meaning of the word 'desertion' the Supreme Court has in terms adopted the meaning of that word as given in Rayden on Divorce and Halsbury's Laws of England thus :

"Desertion is the separation of one spouse from the other, with an intention on the part of the deserting spouse of bringing cohabitation permanently to an end without reasonable cause and

without the consent of the other spouse; but the physical act of departure by one spouse does not necessarily make that spouse the deserting party".

(Rayden on Divorce 6th Edn. page 128) "In its essence desertion means the intentional permanent formaking and abandonment of one spouse by the other without that other's consent and without reasonable cause. It is a total repudiation of the obligations of marriage....."

(Halsbury's Law of England 3rd Edn. Vol. 12 page 241) Regarding cruelty required to be established, the only guideline given in the provision is that it must be such cruelty which would have entitled her to get a divorce 'mensa et toro'. Acts of cruelty are behavioral manifestations stimulated by different factors in the life of spouse and their surroundings and, therefore, each case may have to be decided on the basis of its own facts. However, it is clear that it must be such cruelty which would justify a decree for separation. It is thus evident that it is not occasional cruelty or desertion for a very short period that is required to be proved along with adultery for dissolution. The above requirements of the Section would indicate that it is only in cases where there is reasonable ground for coming to a conclusion that marriage has actually been broken down with no chance of union that the wife can seek dissolution if she can prove adultery also. Thus, even if a wife establishes desertion and cruelty as required by the impugned provisions still she will not be entitled to get dissolution if she fails to prove adultery of her husband, which may or may not exist in particular cases. Even in cases where it exists it may be very difficult to prove the same as far as wife is concerned; practically making the provision a dead letter as far as a deserted and cruelly treated Christian wife is concerned.

30. What exactly is the impact of the above provisions on the life of the petitioners and the Christian women similarly situated like the petitioners is the most important aspect to be considered for deciding the issue before us which is of vital importance not only for the petitioners but also for the Christian , wives in general who may like to seek dissolution on the ground of adultery and cruelty. Dealing with the absolute necessity of allowing divorce whoever the couples have lost mutual love and regard the celebrated author Jeremy Bentham has this much to say in his book 'Theory of Legislation':

"..... If there were a law which forbade the taking a partner, a guardian, a manager, a companion, except on the condition of always keeping him, what tyranny, what madness it would be called. Yet a husband is a companion, a guardian, a manager, a partner, and more yet; and still, in the greater part of civilised countries, a husband cannot be had except for life.

To live under the perpetual authority of a man you hate, is of itself a state of slavery; but to be compelled to submit to his embrace, is a misfortune too great even for slavery itself. !s it said that the yoke is mutual? That only doubles the misfortune." (Page 224) The view held by Bentham would plainly justify the contention of the petitioners that the life of a deserted or cruelly treated wife who cannot get dissolution of marriage can be treated only as tyrannical. It can only be a life without liberty and dignity. A life bound to be lived always with an ignominous feeling that 4I am the wife of a man who hates me has deserted me and cruelly treated me'. Further answering the objection that if divorce is permitted liberally it will have adverse result on the society, Bentham has observed thus

:

"Divorces are not common in those countries where they have been a long time permitted. The same reasons which prevent legislators from permitting them deter individuals from availing themselves of the permission. The government which prohibits them decides, by so doing, that it understands the interests of individuals better than they do themselves. If such a law has any effect at all it must be a bad one.

In all civilized countries the woman who has experienced cruelties and bad treatment on the part of her husband, has obtained from the tribunals what is called a separation; but this is not attended by a liberty to either party of marrying again. The ascetic principle, hostile to pleasure, has only consented to the assuagement of suffering. The outraged woman and her tyrant undergo the same lot;

hut this apparent equality covers an in equality too real....." (page 229) The above observations would again succinctly show the sordid impact of law if it does not permit dissolution of marriage in cases where hatred has ousted mutual love and regard from their position and is reigning the relationship between the spouses, The reasoning of the Law Commission given in support of their recommendation to accept irretrievable breack down of marriage as aground for divorce in the Hindu Marriage Act would also to a great extent support the contention of the petitioners. Relevant observations are thus :

"..... it would be unrealistic for the law not to take notice of the fact, and it would be harmful to society and injurious to the interests of the parties if the legal bond is sought to be maintained notwithstanding the disappearance of the emotional substratum. Such a course would encourage continuous bickering, perpetual bitterness, and may often lead to immorality....."

(71st Report of the Law Commission pages 16 and 17)

31. On an anxious consideration of the submissions made by the learned counsel on behalf of the petitioners to which we have already made a detailed reference, we are of the view that life of a Christian wife who is compelled to live against her will though in same only as the wife of a man who hates her, has cruelty treated her and deserted her putting an end to the marital relationship irreversibly will be a sub human life without dignity and personal liberty. It will be a humiliating and oppressed life without the freedom to remarry and enjoy life in the normal course. It will be a life without the freedom to uphold the dignity of the individual in all respects as ensured by the Constitution in the preamble and in Article 21. It will be a life curtailed in various fields of human activity. On the whole such a life can legitimately be treated only as a life imposed by a tyranical or authoritarian law on a helpless deserted or cruelty treated Christian wife quite against her will, which she is bound to lead till her death tormented always by the ' feeling that she is remaining as the wife of a man who has treated her cruelty, hated her and deserted her for no fault of her. Such a life can never be treated as a life with dignity and liberty. It can only be treated as a depressed or oppressed life without the full liberty and freedom to enjoy life as one would desire to lead it in the way Constitution has ensured. |

32. The further question to be considered is if this be the direct and envitable consequence of the law governing dissolution among Christians governed by the Act whether such a provision will be valid in the light of Arts. 14 and21 of the Constitution of India.

33. The Supreme Court has in unmistakable terms declared in Maneka Gandhi v. Union of India, AIR 1978 SC 597 that the test or yardstick to be applied for determining whether a statute infringes a particular fundamental right is to see what exactly is the direct and inevitable consequence or effect of the impugned provision of law on the fundamental right alleged to have been violated. The test so laid down has by now to be treated as settled. Further in Maneka Gandhi's case the Supreme Court has given an expansive interpretation to the expressions 'life' and 'personal liberty' used in Article 21 of the Constitution of India which has been described as 'heart of fundamental rights' in Unnikrishnan's case, AIR 1993 SC 2178. Thus it has been held that 'life' and 'personal liberty' will not only include physical security, but would comprehend those rights enumerated in Article 19 as well as others "which would go to make a man's life meaningful, complete and worth living". In Pathumma's case, AIR 1978 SC 771, the Supreme Court has stated thus :

"The attempt of the court should be to expand the reach and ambit of the fundamental rights rather than accentuate their meaning and contents by process of judicial construction..... Personal liberty in Art. 21 is of the widest amplitude".

Guided by the above principle of interpretation and following the example in Maneka Gandhi's case (AIR 1978 SC 597} a host of new rights have also been found to be comprehended by the above expressions in Article 21 of the Constitution of India as indicated in Unnikrishnan's case (AIR 1993 SC 2178) (para 31). In Bangalore M. T. v. Muddappa, AIR 1991 SC 1902, Dr. Kochu Thomman, J. has observed that "the Constitutional mandate is to ensure that any State action is inspired by the basic values of individual freedom and dignity and addressed to the attainment of a quality of life which makes the guaranteed rights a reality for all the citizens" (para 24). In the same strain is the observations of the Supreme Court in Francis v. Administrator AIR 1981 SC 746 where the Supreme Court has observed thus:

"It (right to life) includes the right to live with human dignity and all that goes along with it, namley, the bare necessaries of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings"

(para 7) In other words, it includes the right to carry on such functions and activities adequate to give expression to 'human self'. In Board of Trustees v. Dilip AIR 1983 SC 109 (para 13), explaining the meaning and content of the word 'life' the Supreme Court has again stated as follows:

"The expression 'life' does not merely connote animal existence or a continued drudgery through life. The expression 'life' has a much wider meaning. Where therefore the outcome of a departmental enquiry is likely to adversely affect reputation or livelihood of a person, some of the finer graces of human civilisation which make life worth living would be a jeopardised and the same can be put in jeopardy only by law which inheres fair procedures."

In Ramsharan v. Union of India 1989 Supp (1) SCC 251 : (AIR 1989 SC 549), Supreme Court has held that right to live would even include, the protection of a person's tradition, culture, heritage and all that give meaning to man's life. The above observations of the Supreme Court would clearly Indicate that the right guaranteed under Article 21 is a right to 'full enjoyment of life' maintaining the quality of life and dignity of the individual in all respects.

34. Bearing in mind the meaning and content assigned by the Supreme Court to the right to 'life' and 'personal liberty' guaranteed by Article 21 of the Constitution as briefly indicated above and applying the test of 'direct and inevitable consequence' we are of the view that the impunged provisions in Section 10 in so far as it obliges the petitioners and other similarly situated Christian wives to prove adultery also along with desertion and cruelty is violative of Article 21 of the Constitution of India in the light of our finding in paragraphs 30 and 31 regarding the legal effect of the impugned provisions on the petitioners and other similarly situated Christian wives either deserted or cruelly treated and forsaken by their husbands.

35. We are also inclined to take the view that the impugned provisions in so far as they compel a deserted or cruelly treated Christian wife to live perpetually tied down to a marriage which has for all intents and purposes ceased to exist as a result of desertion and cruelty shown by the husband concerned are highly harsh and oppressive and as such arbitrary and violative of Article 14 of the Constitution of India, For, even without a detailed discussion, it can safely be stated without fear of any contradiction that no purpose whatsoever will be served by continuing the relationship of marriage which is irretrievably broken down as a result of desertion by the husband for a continuously long period and cruelty meted out which would justify an order for judicial separation. It will also not be in the interest of either of the parties or the society at large to continue such a marital relationship. On the other hand, it will only be in the interest of all concerned to allow the parties to such a marriage to put an end to that relationship legally also, when it is established that in reality it has broken down irreversibly as a result of cruetly or desertion. We find that there is also considerable force in the contention of the learned counsel that if in such circumstances, the relationship is not allowed to be put an end to it will lead to continued bickerings, quarrels, continued litigation and all sorts of accussions between the parties to the marriage. We may here usefully note that, that was one of the reasons stated by the Law Commission of India for recommending the acceptance of irretriveable break down of marriage as a ground for divorce in Hindu Marriage and Divorce Act. In fact, the basis on which divorce has been allowed in the case of people belonging to all other religions in India as per the respective enactments applicable to them and even among Christians who get married or register their marriage under Special Marriage Act or Foreign Marriage Act in India and the large majority of Christians elsewhere can only be the absolute futility of keeping up a relationship which has broken down irrversibly and the perniciousconsequences of such continuation on the individuals concerned and the society at large as already indicated by us. If in the case of spouses belonging to all other religions and even among Christians under certain circumstances dissolution of marriages is permisisble on the grouns of desertion and/or cruelty without proving adultery it will be to harsh, unfair and unjust not to allow such a right of dissolution to Christians governed by the Act alone. Whatever may be the conditions which existed in 1869 when the Act was enacted and which might have justified the incorporation of such provisions in the Act, it will be difficult to find any justifiable reason in support of the impugned

provisions in the light of the provisions in Chapter III of the Constitution guaranteeing various fundamental rights especially Articles 14, 15, and 21 incorporated, in the words of Bhagavathi, J (as he then was) "to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest extent" (see para-graph 53 of Maneka Gandhi's case) (AIR 1978 SC 597). The antiquated provisions like the one under challenge in these Original Petitions having iheir origin in pre-constitutional days can now be treated only as wholly unfair, unjust and as such arbitrary and violative of the right to equality guranteed by Article 14 of the Constitution of India. They can only be considered as antiquated laws resting on principles totally contrary to the constitutional philosophy underlying and the constitutional mandate contained in the provisions in Chapter III of the Constitution. We feel that we are justified in taking such a view about the legal implications of the impugned provisions while considering the constitutionality of the provisions as part of our judicial function in this case, in the light of the observations of the Supreme Court in Triveniben v. State of Gujarat, AIR 1989 SC 1335 which is to the following effect:

"What might not have been regarded as degrading or inhuman in days bygone, may be revolting the new sensitiveness which emerges as civilisation advances. The impact and influence of the awareness of such sensitivities on the decision of the laws validity is an inseparable constituent of the judicial functions".

We, in the circumstances, feel that such laws will be shockingly revolting to the new sensitiveness of the present day society in India including the Christian masses which has lived and developed under the constitutional philosophy indicated above for the past four and a half decades. We are happy to note that in the communication addressed to the Central Government's Counsel, a portion of which has been extracted by us already, the Central Government has stated that all sections of Christians are also now agreeable for liberal changes in the law governing dissolution and wanted an amendment of the Act by including a provision for dissolution on the lines contained in the Special Marriage Act.

36. There is a further contention that the impugned provisions perpetrate a discrimination based solely on religion and as such violative of Article 15 of the Constitution. In this connection, we find that Christian spouses alone are not entitled to get dissolution of their marriage on the ground of cruelly and desertion even if perpetrated continously for any length of time. They are entitled to get only a decree for judicial separation under Section 22 of the Act. We have already indicated in detail that spouses belonging to all other religions governed by Hindu Marriage Act, 1955, Parsi Marriage and Divorce Act, 1936, Muslim wives under the Dissolution of Muslim Marriage Act, 1939, Special Marriage Act, 1934 and Foreign Marriage Act, 1969 are entitled to get dissolution of their marriage on the ground of cruelty and desertion for the periods fixed by the respective acts. Thus, we find that in regard to the grounds allowed by law for dissolution of marriage, there is a discriminatory treatment meted out to Christan spouses. We do not find any constitutionally justifiable reason for denying a right of dissolution of marriage on the ground of cruelly and desertion to Christian wives alone when spouses belonging to all other religions are granted dissolution on those grounds also independent of adultery. The only reason set up in the counter affidavit and sought to be made out during the arguments is based on religion and the same cannot be sustained in law. We would accordingly hold that the discrimination resulting from the absence of suitable provisions

recognising cruelly and desertion for a reasonable period as grounds for dissolution of marriage in the Act can in the circumstances be treated only as one based solely on religion and as such violative of Article 15 of the Constitution.

37. One of the main contention raised in support of the validity of the section is that the Christians can also get dissolution of marriage on grounds of cruelty and desertion if they marry or register their marriage under the Special Marriage Act and as such it may not be possible to conted that there is any hostile discrimination of denial of equality before law as far as Christian spouses are concerned. In this connection, the learned counsel for the Central Government has strongly relied upon the decisions in Reynold Rajamani v. Union of India, AIR 1982 SC 1261 and Anil Kumar v. Union of India(1994) 2 Ker LT 399 where the Supreme Court has observed that the Christian spouses can also avail the benefit of the liberal provisions in the Special Marriage Act and get dissolution of their marriage on grounds provided under the Act.

38. We do not think that the above contention can be accepted as an answer to the challenge raised against the impugned provisions on the ground that they violate the fundamental rights of the petitioners. First of all, it may not be possible for all Christians to marry or register their marriage under the Special Marriage Act. Parties may marry in any manner they like. Once a marriage takes place in the Church and not under the Special Marriage Act, such marriage can thereafter be registered under the Special Marriage Act, only if both parties agree. After marriage, if parties to the marriage falls out and fight with each other, as in these cases, it may not be possible thereafter to register their marriage under the Special Marriage Act. Secondly so long as it is optional for Christians to marry either in Church or under the Special Marriage Act, it will be unreasonable and discriminatory to deny to a couple who have validly married in a Church, the same benefits which are available to a couple who have married or registered their marriage under the Special Marriage Act. It will be an unreasonable restraint on the freedom to marry in any one of the methods allowed by law to conduct a marriage. The real question to be considered is that if a marriage can be legally conducted otherwise than in accordance with the provisions contained in the Special Marriage Act, can such a wife be denied a right to get dissolution of her marriage if it is irreverisibly broken and cannot such a wife challenge the validity of the provisions which denies her such a right as violative of her fundamental rights. We think that so long as there can be no estoppel against the Constitution or waiver of fundmental rights as has been held by the Supreme Court in Olga Tellis v. Bombay Municipal Corporation AIR 1986 SC 180, paragraphs 28 and 29 the challenge of the petitioners against vires of the impugned provisions cannot be repelled on the ground that they have opted to be governed by the provisions of the Act voluntarily or that they could have either married or registered their marriage under the Special Marriage Act. As regards the decisions relied upon by the learned Central Government Pleader, we find that the Supreme Court had no occasion to consider the question arising for consideration before us in those cases. As such, the observation made in those two cases cannot be of any help in deciding the above issue. As such we reject the above contention as unsustainable in law.

39. Another contention of the learned Central Govt. Pleader was that the impguned provisions in Section 10 are codified form of personal laws of Christians in India founded on the teachings of Christ and his disciples. Such personal laws may not come within the purview of Article 13 of the

Constitution of India and as such cannot be declared as ultra vires the Constitution. Learned Counsel has in this connection relied upon the decision in The State of Bombay v. Narasu Appa Mali AIR 1952 Bom 84 where it has been held that personal laws are not covered by Article 13 of the Constitution of India. We do not find any merit in the above contention as we are in this case directly concerned with a particular provision in an enactment passed by the legislature unlike in the case which came up for consideration in Narasu Appa Mali's case. So lung as the infringed provisions are part of an Act, it must pass the test of constitutionality even if the provision is based upon religious principles. We would accordingly repel the said contention also.

40. Having thus found that the impunged provisions are violative of the provisions contained in Arts. 14, 15, and 21 of the Constitution of India, the next question to be considered is about the sustainability of the prayers made in the Original Petitions.

41. In the light of our findings that the impugned provisions are violative of the provisions in Arts. 14, 15 and 21 of the Constitution of India, normally the above provisions as a whole are liable to be declared as null and void in terms of Article 13 of the Constitution of India. However, as contended by the petitioners, a declaration to that effect and striking down of the entire provisions will really go against the interest of the petitioners and other similarly situated Christian wives inasmuch as they are provisions providing grounds, for dissolution however harsh and unreasonable they may be. To avoid such a result, the learned counsel for the petitioners as already indicated has prayed that the offending portions of the impunged provisions alone be declared severable and liable to be struck down as ultra vires leaving, the remaining portion as a valid provision allowing dissolution of marriage on grounds of adultery, desertion and cruelty. In this connection, strong reliance was placed on the decision in D.S. Nakara v. Union of India AIR 1983 SC 130 to contend that such a course is liable to be adopted in this case havi ng due regard to ultra vires nature of the impunged provisions which works out great hardship on Christian wives.

42. Elucidating the point further, the learned counsel has submitted that the words and phrases 'incestuous' and 'adultery coupled with' used in the impunged provisions in Section 10 are severable and liable to be struck down as ultra vires Articles 14, 15 and 21 of the Constitution of India. We may once again quota the relevant provision under-lining the impunged portions:

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 "10.  When husband may    petition for dissolution--
.....
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When wife may petition for dissolution--Any wife may present a petition to the District Court or to the Higrh Court, praying that her marriage may be dissolved on the ground that, since the solemenization 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 adultery coupled with such cruelty as without adultery would have entitled to her to a divorce a mensa et toro, or of adultery coupled with desertion, without reasonable excuse, for two years or upwards."

It was submitted that if the underlined words are excluded, the remaining portions of the Section would in terms provide adultery, desertion and cruelty as indicated therein as independent grounds for dissolution of marriage has irreversibly broken down as a result of desertion, cruelty and adutlery committed by the husband. By striking down the underlined portions as ultra vires, the remaining portion can by itself remain as constitutionally valid provision along with the rest of the provisions in Section 10 of the Act. The offending portion can easily be severed and cannot be treated as inextricably , connected with the remaining portion.

43. Section 10 being the only provision allowing dissolution of marriage among Christians governed by the Act, striking down of the provisions as a whole should be avoided as far as possible. As such, we should see whether the offending portion to the impunged provisions are severable and if so whether the (remaining provisions) can be allowed to remain as provisions valid in law. Having thus considered the rival contentions, we find that the underlined portions are the offending portions which makes the impugned provisions ultra vires and if such portions are severed and quashed as ultra vires, the remaining portions of the provisions can validly stand along with the other provisions in Section 10. So modified Section 10 would permit Christian wives to seek dissolution of their marriages on the grounds of adultery, desertion and cruelty also without the necessity of proving adultery. In that event, the remaining provisions will be more or less similar to the provisions contained in all other enactments in force regulating dissolution of marriages among people belonging to other religions and also the Special Marriage Act. If such a course is adopted, the provisions can be made constitutionally valid and retainable in the modified form to serve the purpose for which it was enacted in a better way avoiding the striking down of the entire provision which would have created a hiatus as feared by the Law Commission of India in its 90th report.

44. The question then to be considered is whether the offending portions are severable or not. The learned Central Govt. Pleader has strongly conteded that it is not a fit case where the principle of severability can be applied justifiable. Learned Counsel has in this connection strongly relied upon the tests laid down by the Supreme Court in R.M.D.C. v. Union of India AIR 1957 SC 628 as the tests to be applied while deciding the question. In support of his contention, the learned Govt. Pleader has made various submissions to which we have already made a brief reference in paragraph 9 of this judgment. In fact, such submissions were made mainly relying upon the tests indicated in R.M.D.C.'s case. Having bestowed our anxious consideration on the question in all relevant aspects, bearing in mind the tests indicated in R.M.D.C.'s case, we are of the firm view that none of the objections raised by the learned Central Govt. Pleader can be accepted as valid and sustain-able in law. In our view, severance of the offending portions would neither make the remaining provisions unworkable nor will it upset the scheme of the provisions in Section 10 to such an extent as to make the modified provisions totally unjust or unreasonable as contended by the learned Central Govt. Counsel. We cannot also accept the contention that the only approach available for us in the matter is "either take it or leave it." That is a contention which was specifically repelled by the Supreme Court in Nakara's case (AIR 1983 SC 130), Supreme Court has held in Nakara's case that the correct

apporach is not neither take it or leave it.", but try to remove the arbitratriness or unconstitutionality of a provision of law if it can be done by severing the offending portion and saving the beneficial portion. Going by the above principle, we are of the view that it is a fit case where we would be justified in severing and quashing the offending portion which makes the provisions contained in Section 10 of the Act arbitrary and violative of the fundamental rights, to save the beneficial portion of it. Though such a course of action will certainly result in modification of the provisions to some extent or removing the limitations and expanding the scope of the provision as it was enacted, we find that we are jusified in doing so in an attempt to avoid the striking down of the entire provisions of Section 10. The contention such a course if adopted would amount to introduction of new grounds substantially different from the existing grounds cannot also be treated as a reason sufficient to dissuade us from adopting such a course for the purpose of giving necessary reliefs to the petitioner and other similary situated Christian wives who seek dissolution of their marriage on grounds of adultery, desertion and cruelty. We may in this connection pertinently point out that such consequences are bound to happen and cannot be avoided when an offending portion is severed and quashed for making the remaining portion constitutionally valid and operative. In fact, such was the consequence in Nakara's case (AIR 1983 SC 130) where the principle was applied. By severing the eligibility qualification contained in the concerned Rules, the benefit of enhanced pension was made available even to persons to whom the legislature never wanted to confer such benefits. In R.M.D.C.'s case (AIR 1957 SC 628) also, the scheme intended was to apply the provisions of the Act and the relevant Rules to all competitions without any exception. However, the Supreme Court has upheld the provisions of the Act only in regard to competition depending upon mere chance applying the principle of severability. It cannot be said that the Supreme Court has not interfered with the scheme of the provisions or its contents at all in Nakara and R.M.D.C. cases. The fact that the impugned provisions after modification would enable the wives to get dissolution of their marriage on grounds of cruelty and desertion also whereas the husband can get dissolution only on ground of adultery cannot be a ground for holding that the provisions should not be interfered with. Such a provision which confers on the wife certain additional grounds for dissolution of marriage not available to husband can very well be justified in the light of the provisions contained in Article 15(3) of the Constitution even if the constitutionality of the same is challenged by the husband. Such a provision can legitimately be considered even as a provision made specially for the benefit of women.

45. Applying the tests indicated in R.M.D.C.'s case (AIR 1975 SC 628), if we are now, to ask ourselves the question as Venkatarama Iyyer, J, has done in that case, would Parliament have enacted the law in question if it had known that it would fail as regards the offending portions, there can be no doubt, as to what our answer would be. We do not also think that expunging of the offending portions would affect either the texture or colour of the Act in any substantial manner inasmuch as Section 10 is a provision which provides grounds for dissolution of marriages among Christians and it will continue to be so even after expugning of the offending portions. There may not also be any propriety of touching up or re-writing the law before the (sic) could be applied as valid law. The remaining portion can form a code complete in themselves alongwith the other provisions in Section 10, as a provision providing grounds for dissolution of marriages among Christians. Thus the conclusion is in escap-able that the offending portions are severable.

46. For all the above reasons we would hold that the offending portions of the provisions as already indicated are severable and they are liable to be quashed as ultra vires. We would further hold that the remaining portions of the provisions can remain as valid provisions allowing dissolution of marriage on grounds of adultery simpliciter and desertion and/or cruelty independent of adultery. Adoption of such a course, in our view, would help to avoid strikingdown of the entire provisions in Section 10 of the Act and to grant necessary reliefs to the petitioners and similary situated Christian wives seeking dissolution of their marriage which has for all intents and purposes ceased to exist in reality.

47. We would accordingly sever and quash 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.

48. Before parting with this case, we would like to observe that in spite of a positive direction issued by Thomas, J. in these two Original Petitions which were filed in the year 1988, directing the Central Government to take a final decision on the recommendation of the Law Commission in its 90th report for making amendments to Section 10 of the Act, no final decision has been taken in the matter till today. The direction issued was to take a decision within 6 months from the date of receipt of a copy of the order dated 13-12-1990. In spite of such a peremptory direction, the Central Government has not even cared to inform this Court about the decision if any taken in the matter till the fag end of the arguments in this case when the Central Government Pleader has produced the communication to which we have already referred to. It is after taking note of. if we may say so, the totally intransigent attitude adopted by the Central Government in the matter of taking a final decision regarding the amendment of the law on the point which was recommended by successive law Commissions of India at least from 1961 onwards and the various courts in India through their observations and directions including the positive direction in this case, that we have decided to consider the matter on merits and to grant the reliefs prayed for, assuming the role of the reformer to the extent legally permissible as an attempt to bridge the gap between the personal laws. We feel that we are justified in doing so in the circumstances of the case, especially in view of the weighty observation made by Chandrachud, C.J. speaking for Constitution Bench in Mohd. Ahmed Khan v. Shah Bano Begum AIR 1985 SC 945, which is to the following effect:

"Inevitable, the role of the reformer has to be assumed by the courts because, it is beyond the endurance of sensitive minds to allow injustice to be suffered when it is palpable."

49. We may also appropriately refer to what Justice V.R. Krishna Iyer, well known activist Judge and a protagonist of women's right (which according to him are human rights itself) has to say in his illuminating book "Human rights and the Law". The learned author wrote with fire:

"The sex equality clauses of our Constitution will remain frozen and be a perpetuation of ancient legal injustice unless activist judges share the new concerns and values."

and went on the make the following observations about the discriminatory nature of the provisions in the Indian Divorce Act in the same tone:

"The Indian Divorce Act, 1869 and the Churistian Marriage Act, 1872 are dated survivals with an anti-woman slant. The Divorce Act directs Free India's courts to apply English matrimonial law -- at once an affront to Indian Christian dignity and our injury to that community's women. The husband can divorce his wife on grounds of adultery by wife while the reverse is denied. Statutory discrimination against women in other areas are not uncommon, but who cares to compel laws in the books to speak the language of gender justice?"

We find considerable support in the above observations of the learned author for the view we have taken in this case and the course of action adopted by us to remedy a palpable and inexcusable gender injustice shown by a law itself to a particular group of women contrary to the constitutional guarantees and the international conventions guaranteeing human rights to which free India is a party for the past so many years.

50. 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. 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.

The Original Petitions would stand allowed as indicated above.