(2) Adultery, though a ground for judicial separation (section 22) is not a ground of divorce at the wife's instance[14] (section 10). This requires to be changed.

(3) Again, cruelty, without proof of adultery, is a ground only for judicial separation (section 22), and not for divorce (section 10). This requires to be changed,[16] by amending section 10.

(4) Similarly, desertion alone is a ground for judicial separation (section 22) but not, in itself, a ground for divorce[17] (section 10). This also needs to be changed.

10. Restitution of conjugal rights

(1) The defences to an action for restitution need to be limited, as in section 9 Hindu Marriage Act, and section 22, special Marriage Act. In certain respects the Divorce Act needs to be brought in line with other acts.[18]

Secs 34 and 35: They speak of the husband claiming damages and costs from the adulteror, i.e., the person who committed adultery with his wife. Curiously no such right is given to the wife. This provision must be deleted.

11. Alimony pending the suit

Under section 36, in any suit (by husband or wife) *the wife* may apply for alimony pending the suit. The court after hearing, may order the husband to pay the wife such amount, "as the court may deem just". There is, however, a proviso which, *inter alia*, provides that "alimony pending the suit shall in no case exceed one fifth of the husband's average net income for the three years next preceeding the date of the order".

12. (a) AIR 1970 Mad. 12.
    (b) AIR 1980 Orissa, 168.
13. See point above as to grounds of divorce.
14. AIR 1917 Lower Burma 130.
15. See point relating to grounds of divorce.
16. (a) AIR 1979 Andhra Pradesh 1 (SB)
    (b) AIR 1960, Ker. 316, 319.
    (c) AIR 1970 Mad., 188-190.
17. See point relating to grounds of divorce:
18. See (1968) 1 289, 294.

Several points require consideration with reference to this section:

(a) The order can be passed only against the husband, and not against the wife. The section may need to be widened. In this respect, section 24 of the Hindu Marriage Act is wider, as has been noticed by the Punjab High Court.[19]

(b) The words "as it may deem just" in the second paragraph of the section imply that a wife who is able to maintain herself cannot get an order for alimony. In fact, the Madras High Court[20] has so held. However, this can be made clear, since the wording differs from section 24, Hindu Marriage Act—again, a point noticed by the Punjab High Court.[21] This is particularly necessary if the section is to be widened so as to make it enforceable against *the wife* also.

(c) The proviso to section 36 sets a limit of one-fifth of the husband's net income. Although this may be good as a guide, it need not be made a hard and fast rule. It would be better to re-cast the opening words of the proviso as under:—

"Provided that alimony pending the suit shall *not* ordinarily exceed one fifth of the husband's average net income, etc."

In fact, the Bombay High Court seems to have held the present regarding limit as unreasonable and irrational and as cutting at the root of the equality of the wife as a partner of the husband.[22] It disagreed with the contrary view taken by the High Courts of Himachal Pradesh, Orissa and Rajasthan.

(d) The concept of "net income" in the proviso to section 36 has led to a few other controversies. Some of the important points of controversy are noted below, by way of illustration:

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19. (1974) 76 Punjab LR 195 (DB)
20. AIR 1955 NUC (Mad.) 3940.
21. (1974) 76 Punjab, LR 195 (DB)
22. AIR 1979 Bom. 173, 174, 175.

(1) An arrangement made by the husband for liquidating his debts can be taken into account.[23]

(2) But expenses of son's education cannot be taken into account.[24]

(3) Contribution made by the husband to provident fund can be deducted.[25]

(4) Premium paid on insurance cannot be deducted unless policy is for the wife's and children's benefit as well.[26]

These points await legislative clarification.

Sec 39: It speaks of settling the property of the wife who is guilty of adultery, for the benefit of the husband or of the children. No such provision is there regarding husband's property.

12. Permanent alimony (section 37)

Power to order permanent alimony is governed by section 37. By its terms the section is confined to divorce and judicial separation. It should be extended to nullity and other decrees also. (At present,[27] courts give such relief in nullity cases by relying on section 7).

It also seems useful to provide that in a proper cause, the court may award lumpsum (instead of periodical payments). At present, one High Court[28] has made such an order by slightly stretching the language of the section, but a specific provision would be better.

13. Custody orders (section 41-43)

Section 57 deals with the question of liberty to the parties to marry again after divorce. The language of the section may be brought in line with that of section 15 Hindu Marriage Act, 1955 as amended.[29]

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23. AIR 1955 NUC (Mad.) 3940
24. (1911) 11 Ind Cas 813 (Lower Burma).
25. AIR 1958, Mad. 340, 341.
26. AIR 1955 NUC Mad. 3940
27. AIR 1949, Bom. 1, 3.
28. AIR 1976, Bom. 246, 249.
29. AIR 1973 SC 2090, 2099, 2100, 2101,

CHAPTER 3

Amendmends in the Christian Law of Succession

Preliminary

1. Introduction

The law relating to succession amongst Indian Christians is principally contained in the Indian Succession Act, 1925. This is a very lengthy enactment addressing itself to numerous facets of the subject. Having disposed of certain preliminary concepts (definitions, domicile and the like) the Act proceeds to deal with succession in cases where there is no will, followed by provisions relating to succession in cases where there is a will, and then by provisions as to the administration of estates.

In dealing with succession where there is no will ("intestate succession" as it is called in law), the Act, makes a distinction between non-Parsis and Parsis. The Chapter dealing with Parsis is not of direct relevance to Indian Christians, except for purposes of drawing comparisons. The rest of the Act is of direct relevance to Indian Christians, except that in some provisions, it is expressly enacted that the provisions will not apply to Indian Christians (e.g. section 33A). In this position, in preparing this paper, it has been considered proper to go through the entire Act. The suggestions made below are, of course, not intended to be exhaustive. For practical reasons, only points of importance have been adverted to. However, these have been selected after examing the entire Act.

2. Scope of the paper and nature of the points discussed

As already stated above,[1] suggestions to be made in this paper will confine themselves to important points calling for reform.

1. Paragraph 1, *supra*.

The focus has been mainly on provisions of peculiar importance or interest to Indian Christians. At a few places, provisions whose interest and utility can possibly transcend, Indian Christians have also been dealt with.

Even so, this paper, for obvious reasons, does not address itself to all the improvements that can possibly be called for, in the numerous provisions of this lengthy Act. In its life of half a century, the Act has raised a large number of questions, revealing lacunae, discrepancies, and deficiencies, as well as obsolete rules. A general study not *confined to the law applicable to Christians* would certainly assume a much more extensive shape than the present paper, and would find itself discussing points of considerable intricacy arising from the entire Act. Such a detailed examination of the Act would obviously be outside the scope of this paper.

3. The background of reform

The Indian Succession Act 1925, with which this paper is concerned is primarily a consolidating measure. The earlier law of succession in India was scattered over a large number of enactments, the substance of which has found place in the present Act. Since the present Act has taken over most of the provisions of earlier Acts, many of its sections are really of ancient vintage, even though they appear under the format of a law that took birth in 1925. Thus, the provisions of the Act, though modern in form, are old in substance in many respects. Attention is drawn to this aspect as accounting for some of the reforms that are needed in the Act.

Besides this, it is proper to refer to one aspect of special relevance to the approach adopted in the Act in regard to Indian Christians. For historical and social reasons, the Act has come to have a certain measure of diversity in its applicability to various classes of persons Some provisions of the Act are not applicable to Hindus, Buddhists, Sikhs and Jains, while others are applicable to them. When deciding to exclude Hindus, etc. from the scope of provisions of the first category, the legislature does not seem to have devoted intensive attention to the question whether there was need to exclude Indian Christians as well from the scope of those provisions.

In 1865 (the year when the first Succession Act came to be enacted) a sizeable percentage of the Christian population in India consisted of non-Indian Christians. Following, as they did, a westernised style of living and westernised modes of disposition of property, these Christians were presumbly regarded as constituting a group to which all provisions of the Act could be appropriately applied. It was not considered necessary to make special provisions regarding Indian Christians. For the purpose of the dichotomy between non-Hindus and Hindus, Indian Christians were implicitly grouped along with (say) Europeans and other foreigners. Not much attention was paid to the fact that, in certain respects, the cultural affinity between Europeans and Indian Christians was a very slender one. This approach however results in an anomalous position at a few places.

If this was one type of anomaly, the other type of anomaly arose from excluding Indian Christians from certain beneficial provisions (e.g. section 33A) inserted in the Act. These several anomalies now need to be rectified. After these preliminary observations, the sections that need reform may now be examined.

4. Application of the Act to Travancore-Cochin section 1 and section 29(2)

There is some controversy (and obscurity) on the question of application of the Act to the Travancore-Cochin area, now comprised in the States of Kerala and Tamil Nadu, respectively. The earlier Acts of the respective States are still in force, according to one view,[2] though a contrary view[3] has also been expressed.

It is necessary that the position in this regard should be settled beyond doubt, by expressly repealing the earlier Acts. On the merits also, there is a case for repealing the State Acts, whose provisions appear to be far behind the times, particularly in regard to the inheritance rights of women.

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2. *Kurian* v. *Devassy*, A.I,R, 1957 Trav-Co 1.
3. *Solomon* v. *Muthiah*, (1974) 1 M.L.J. 59.

The Effect of Marriage

5. Settlement of property before marriage (section 22)

Under section 22(1), the property of a minor may be settled in contemplation of marriage, provided the settlement is made by the minor—

(a) with the "approbation' of the minor's father, or

(b) if the father is dead or absent from India, with the approbation of the High Court.

It is suggested that in the case at (b) above, (father's death or absence), the mother should be given the right to approve a marriage settlement. If the mother is dead or absent or incapable of acting or unwilling to act, the High Court's power may be retained.

6. Pre-marriage contract regarding share in husband's estate (section 32, Explanation)

Devolution of the property of an intestate is governed by detailed rules. Under section 32, property devolves upon the spouse and the kindred. The Explanation to the section provides as under :

> "*Explanation*—A widow is not entitled to the provision hereby made for her, if, by a valid contract made before her marriage, she has been excluded from her distributive share of her husband's estate."

The Explanation quoted above totally debars the widow from participating in the property of her husband on his death if a settlement made before marriage so provides. It is for consideration whether this provision of the law should be allowed to continue on the statute book. At the time when the marriage is entered into, it is difficult to anticipate what will be the volume and value of the assets of the husband at the time of his death. The woman who marries cannot visualise how long the husband will live. Moreover, with the present-day pace of inflation, estimates of assets are bound to prove totally unrealistic. There is a case for deleting the explanation.

Succession Where There is no Will

7. Widow's share on intestacy (section 33)

Section 33 deals with the rules regarding distribution of the husband's estate[4]. The widow is entitled to :

(a) one-third of the husband's estate, if there are lineal descendants;

(b) one-half, if there are no lineal descedants, but there are "kindred"[5] surviving;

(c) the whole, if there are no kindred.

The situation at (b) above needs consideration. The existence of any "kindred" brings into play category (b) and the widow gets only one-half of the husband's estate. It should be pointed out that "kindred" are persons descended from a common ancestor (section 24). No particular degree of nearness is required. "Kindred" can cover not only parents of the husband, or brothers and sisters of the husband (and children of brothers and sisters) (sections 42-47), but even remote ancestors or collaterals (section 48). Thus, if a male dies leaving no children but leaving a widow and grandfather, grandmother, uncle, nephew or cousin, *however remote*, the widow gets only one-half of his property and the other relatives take the remaining one-half (sections 33, 41, 48), even though they are very remotely related.

This seems to be unrealistic, and is contrary to the presumed intentions of the parties. Rules of succession should conform, as far as possible, to the presumed wishes of the deceased. It is hardly likely that an Indian Christian dying in India would wish that his widow would get only one-half, and very remote kindred would take the rest. The widow should be given the whole of the estate of the husband, where the other claimants are all very remote kindred entitled under present section 48. Parents, brothers and sisters and their children may continue to be entitled as at present (section 41-47), but other remote

4. Same rules apply for distribution of the wife's estate (section 35).
5. See Section 24.

kindred should be excluded, if the widow has survived. She should get the whole. This suggestion can be implemented by suitably amending section 33(b) and section 33(c). Section 33(b) which allows one-half share can be narrowed down to cases to where the kindred are those mentioned in section 42 to 47 (i.e., parents, brothers, sisters, and their children). Where the kindred are not those mentioned in sections 42 to 47, the widow should get *the whole property*[6]. Section 33(c) should be suitably expanded for the purpose.

8. Minimum amount payable to the widow on succession (section 33A).

In order to protect the widow and to afford her some kind of financial security, section 33A makes a special provision guaranteeing to the widow a portion of the inheritance. The widow gets a minimum sum of rupees five thousand, where the deceased has left no lineal descendant. This minimum amount is charged on the husband's whole property and carries interest at the rate of 4 per cent per annum till payment. The protection so conferred applies only if the husband has died intestate *in respect af all* his property. That is the gist of section 33A, to state all the material points. Section 33A, on the whole, a very beneficial provision, but unfortunately its benefit is not available to Indian Christians at[7] present, because it is provided in section 33(5(a)(i) and (ii) that the section shall not apply to any Indian Christian, or to any child or grandchild of any male person who is or was at the time of his death an Indian Christian. This provision excluding Indian Christians is unjustified. Section 33A is designed to make a better provision for the widow, Indian Christian women should also get the benefit conferred by the section.

Besides extending the section to Indian Christians, (as suggested above), it is also desirable to remove a few deficiencies of the present section. The amount guaranteed to the widow should be raised from rupees five thousand to at least

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6. This is the position in England now, under the Intestates' Estate Act, 1952.
7. See *Arulai* v. *Antonimuthu*, A.I.R. 1945 Mad. 47.

rupees twenty-thousand. The section was inserted in 1926; the rupee has fallen steeply in its purchasing power since 1926. The amount, therefore, requires to be increased. The rate of interest should be increased to at least ten per cent per annum. The rate of four percent mentioned in the present section is wholly inadequate. The condition that the husband must have died intestate *in respect of all his property* should also be deleted. If the husband has made a will giving a bequest of a small sum to any person, the widow loses the protection conferred by the section, by virtue of the condition at present incorporated in the section. This seems to be unfair.

9. Illegitimate children (section 37):

Under section 37, the property of a person is, on his death, equally divided among all surviving children. The word "child" does not include an illegitimate child, according to judicial construction.[8] This position may need modification in present-day conditions.

10. Position of father and mother in succession (sections 42 to 46)

Under section 42, if the father of a person is living, he succeeds to the whole property, where there are no lineal descendants (section 41), subject to deduction of the widow's share prescribed by section 33. The mother does not have a share if the father is alive. This position needs to be altered, so as to make the father and mother *share equally*. At present, the mother succeeds only if the father has not survived. She takes a share along with brothers and sisters and their children. It is only if the father is dead and there are no brothers or sisters or their children, that the mother succeeds to the whole property (sections 43 to 46). As suggested above, the father and mother should have equal shares. Such a change would be in conformity with the general opinion in society.

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8. *In The goods of Sarah Ezra*, I.L.R. 58 Cal. 761; A.I.R. 1931 Cal. 560,

The rules of distribution are as under in order of priority

(1) Widow ½	and	Father ½	(see. 42)
(2) Widow ½	and	Mother, Brothers and Sisters ½ equally	(sec. 43)
(3) Widow ½	and	Mother, Brothers, Sisters, and Children of any deceased Brother or Sister ½ equally *per stirpes*	(sec. 44)
(4) Widow ½	and	Mother and Children of Brothers and Sisters; ½ equally *per stirpes*	(sec. 45)
(5) Widow ½	and	Mother ½	(sec. 46)
(6) Widow ½	and	Brothers and Sisters and Children of predeceased Brothers and Sisters. ½ equally *per stirpes*	(sec. 47)
(7) Widow ½	and	Remote kindred ½ (in the nearest degree).	(sec. 48)

11. Gifts made to children (section 49)

The legislature has considered it proper to provide that property which a person might have given to his children need not be brought back into the estate for distribution amongst his heirs when he dies. This was considered necessary to ensure that the contrary rule of the English law did not become applicable in India. Section 49 of the Succession Act provides as under:

> "49. *Children's advancements not brought into hotchpotch.* Where a distributive share in the property of a person who has died intestate is claimed by a child, or any descendant of a child, of such person, no money or other property which the intestate may, during his life, have paid, given or settled to, or for the advancement of, the child by whom or by whose descendant the claim is made shall be taken into account in estimating such distributive share."

This section appears in the group of sections (31 to 49) contained in the Chapter (Part V, Chapter II) which applies, (*inter alia*) to Indian Christians. It is presumed that the provision is acceptable to the community.

Succession on Will

12. Testamentary guardian (section 60)

Under section 60, a father, "whatever his age may be", may by will, appoint a guardian or guardians for his child during minority.

(This section qualifies the general provision (section 58) that a will must be by a person who is not a minor). The same facility should extend to the mother where the father is dead or of unsound mind.

13. Death in common disaster (section 105)

Where a will gives a legacy to a particular person, he takes it only if he survives the testator, as a general rule. The general rule under section 105(1) is that if the legatee does not survive the testator, the legacy lapses and forms part of the residue of the property of the testator (unless the will gives the property to some other person in case of lapse). It is further provided by section 105(2) that in order to entitle the representatives of the legatee, *it must be proved that the legatee survived the testator.* This provision creates some difficulties where persons perish at the same time in the same disaster or calamity. Such as air-crash, accident, fire, flood or earthquake. In such cases, evidence cannot be available to show who survived whom. As a result, the legacy lapses. The present position is illustrated by illustration (vi) to section 105, quoted below:

> "(vi) The testator and the legatee perished *in the same ship-wreck*. There is no evidence to show who died first. The legacy lapses."

The result is that the legatee (who may be the wife, husband or child or some other near relative does not get the legacy.)

In regard to Hindus, section 21 of the Hindu Succession Act, 1956 modifies the position. Following section 184 of the

English Law of Property Act, 1925; the Hindu Succession Act provides that where two or more persons have died in circumstances rendering it uncertain which of them survived the other, then (until the contrary is proved) the younger shall be presumed to have survived the elder. A similar presumption should be adopted and inserted in section 105 of the Indian Succession Act to regulate the succession to persons of other communities.

14. Bequest to religious or charitable uses (section 118)

Section 118, prohibits death bed bequests for religious or charitable purposes by persons having near relatives. The section applies, *inter alia*, to Indian Christians, though not to Hindus etc. It reads as under:

> "118. *Bequest to religious or charitable uses.* No man having a nephew or niece *or any near relative* shall have power to bequeath any property to religious or charitable uses, except by a will executed not less than twelve months before his death, and deposited within six months from its execution in some place provided by law for the safe custody of wills of living persons."

Two suggestions can be made on the section:

(i) Whether the section is appropriate in present-day conditions is a matter of consideration. The principle seems to be (a) that bequests for religion or charity should be made while a person is not in imminent apprehension of death and if that such bequests should be made in more solemn form by depositing the will within six months. In short, such bequests ought not to be made in haste. The section applies to all properties—moveable or immovable.[9] The bequest may be even of a part of the property.[10] It may even be a bequest subject to a life interest.[11] The section applies in all those cases.

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9. *M.A.F. Halfhyde* v. *C.A. Saldanha* A.I.R. 1949 Cal. 533.
10. *Rebello* v *Rebello* (1951) 53 Bom LR 908.
11. *Curset Bai* v *Hamabar* (1943) 45 Bom LR 598.

Administration of Estates

15. Establishing right as executor or legatees (section 213)

Under section 213(1), no right as executor or legatee can be established in any court of justice unless a competent Indian court has granted probate of the will under which the right is claimed, or has granted letters of administration with the will annexed (or with the copy of an authenticated copy of the will annexed). This section does not apply to Muslims. It does not apply to Hindus, etc. except where the will relates to property in Presidency towns. After 1962, it does not apply to Parsis also except in Presidency Town. As regards Indian Christians, the section makes no exception. However, section 370(1), proviso, allows the grant of a succession certificate to any person claiming to be entitled, to the effects of a deceased Indian Christian with respect to any debt or security. This proviso is derived from section 5 of the Native Christians Administration Act. The provision in section 213 is derived from section 331 of the Succession Act of 1865 and section 2 of the Hindu Wills Act, 1870 (as amended in 1929).

In order to give full effect to the proviso to section 370(1), and also on the merits, it is desirable that section 213 should not apply to Indian Christians. The section should be amended accordingly.

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CHAPTER 4

The Law Relating to Nullity of Marriage Amongst Christians

1. Introductory

Legal impediments to marriage, and the consequences of their breach by the parties, vary greatly from country to country or from one legal system to another. Impediments to marriage as found in various countries generally include minority, absence of guardian's consent, consent obtained by force or fraud, drunkenness, mental illness, impotence, relationship in which the parties stand, and existence of earlier marriage.

The manner in which the statute law of a country (or of a legal system) treats the impediment, also varies. In other words, the effect of violation of an impediment varies. Some legal systems treat a marriage as void if a party was impotent. Others may treat it as a voidable marriage. How the particular impediment is categorised is important. A marriage which is "voidable" remains valid until it is set aside by the court. A marriage which is "void" does not really require judicial intervention or declaration, though such a declaration is usually obtained as a matter of convenience or to establish the nullity of the marriage beyond doubt.

2. The legal framework

The present law relating to nullity of marriage amongst Christians in India is mainly contained in section 19 of the Indian Divorce Act, 1869. That section, however, does not deal exhaustively with the possible grounds of nullity. Moreover, the last part of the section, leaves entirely to the High Court the power of declaring a marriage to be null and void on the ground of force or fraud. This has the effect of throwing some doubt on the power of the district court to grant such a decla-

ration, where one of the parties alleges fraud committed by the other party before or at the time of marriage. Further, the Indian Divorce Act contemplates that the decree of nullity granted by the district court must be confirmed by the High Court, a requirement which causes serious inconvenience to the parties and delay in the disposal of cases. Some provisions are also needed regarding the status of the children born of a marriage which is void or declared to be null and void by a decree of the court.

Thus, a number of questions arising out of the topic of nullity of marriage call for consideration and there is need for having a second look at the law, both from the point of view of the welfare of the community and from the point of view of speedy and efficient administration of justice.

3. The concept of nullity

In the course of the last few centuries of evolution of matrimonial law in England (whose system is largely followed in the Indian Divorce Act), the concept of nullity of marriage has come to acquire a certain shade and character. When a suit or petition for nullity of marriage is instituted or filed, the object of the proceeding, is to obtain a decree declaring a supposed marriage null and void. The ground, of course, must be one recognised in law. The decree may be sought, for example, on the ground that one of the parties was (and is) impotent, or on the ground that the marriage is a bigamous marriage. In the case of some of the grounds available for such relief, the marriage may be valid until it is set aside, while, in the case of a few other marriages, the marriage may be void from the very beginning. Strictly speaking, the two situations are distinct from each other. However, the law has so evolved that both the situations are generally dealt with by a decree which is called "decree of nullity of marriage". So long as there are no children of the marriage, the distinction between void and voidable marriage does not matter much. But where children have been born of the marriage it becomes necessary for the law to be careful and specific as to the approach which it will adopt. For this reason, the question of the status of children born out of a marriage which is avoided judicially (that is to say, the

question whether the children will be treated as legitimate or illegitimate) has a practical importance of its own.

4. The present position

As already stated above, the grounds of nullity of marriage amongst Christians in India at present are to be found in section 19 of the Indian Divorce Act, 1869. Briefly, the grounds are :[1]

(1) Impotence of the other spouse at the time of marriage and at the time of institution of the suit.

(2) Parties standing in prohibited degrees of consanguinity (natural or legal) or affinity;

(3) Either party was a lunatic or an idiot at the time of marriage.

(4) Former spouse of either party having been alive at the time of marriage.

Besides this, section 19 of the Indian Divorce Act (last paragraph) expressly saves the jurisdiction of the High Court to grant a decree of nullity of marriage on the ground that the consent of either party to the marriage was obtained by force or fraud.

The provision in section 19 of the Divorce Act (whose gist is stated above), is broadly satisfactory, in so far as it does. However, in some respects, it is not adequate to meet the requirements of modern society.

5. Force and fraud (section 19), Indian Divorce Act

Coming to the reforms needed in the present law, the first question that needs to be considered is concerned with force or fraud. Section 19, last paragraph, Indian Divorce Act, 1869, provides that the power of the High Court to grant a decree of nullity of marriage on this ground is not affected by the section. This is a somewhat negative provision. What is required is an express and positive provision, conferring power on the appropriate court to grant such a decree on the ground that the con

1. See Paper on Reforms Needed in Divorce Law applicable to Christians, paragraph 7, in this volume.

sent of either party to the marriage was obtained by force or fraud. The jurisdiction to grant such a decree may, in the present-day conditions, be appropriately vested in the district court.

"Force" should not need much elaboration. "Fraud" may need some elaboration. In this connection, there is now available a precedent in the Hindu Marriage Act, 1955 as amended in 1971, which spells out in some detail the meaning of fraud as rendering a marriage voidable.

Under section 12 (1) (c) of the Hindu Marriage Act, a marriage is voidable and may be annulled by the court on the ground that the consent of the petitioner was obtained:

(i) by force or

(ii) by fraud as to the nature of the ceremony or as to any material fact or circumstance concerning the opposite party.

Of course, the Christian community will have to decide whether the concept of fraud as elaborated in the Hindu Marriage Act is suitable for its purposes.

6. Pre-marital pregnancy (new suggested and new ground of nullity)

Another question that needs to be considered by way of reform is the question whether the fact that the woman was, at the time of the marriage, pregnant by some person other than the husband now seeking relief should not be made a ground for nullity of marriage in proceedings instituted at the instance of the husband. The situation referred to above is one in which, in a sense, serious fraud has been committed by the woman. However, to leave this particular situation to the heading of fraud would mean making the law vague and obscure. In this connection, it may be noted that with reference to the Hindu Marriage Act, there is some obscurity on the question[2] whether the fact that the wife was not a virgin is a ground for avoiding the marriage on the basis of fraud, where there had been no

2. See (1975) Andhra Weekly Reports 243.

enquiries on the subject by the husband, at the time of marriage.

In this position, it is advisable to deal with pre-marital pregnancy by another person as a specific ground of nullity of marriage, provided the fact was not known to the petitioner husband.

7. Wilful refusal to consummate the marriage (suggested new ground of nullity)

One more ground for nullity which needs to be considered is the wilful refusal to consummate the marriage on the part of either party. In certain circumstances, such refusal may amount to cruelty and if cruelty is made a ground of divorce in itself at the instance of the other party,[3] the deficiency of the law on the subject might be largely met. Even then, in practice, it will still be necessary for the court to decide whether, in the circumstances of the case, wilful refusal in the particular case amounted to cruelty as understood in matrimonial law. It may be recalled that cruelty in matrimonial law as a ground of divorce is understood as requiring proof of some conduct which has caused, or creates a reasonable apprehension of causing, serious injury to the physical or mental health of the party which sues for divorce on the ground of cruelty. This involves in most cases the production of evidence; it also involves a debate on both sides as to the effect of the evidence so produced. To avoid all this, the better course would be to provide for wilful refusal to consummate the marriage by the opposite party as a ground for decree of nullity of marriage.

8. Non-performance of ceremonies (new point suggested new ground of nullity)

In the paper on Christian Marriage Law,[4] it has been pointed out that there is some obscurity as to the effect of omission to perform a certain part of ceremonies and having regard to cases there cited, power may be given to the appropriate court to give

3. See Paper on Reforms Needed in Divorce Law Applicable to Christians, paragraph 4, item (v).
4. Paper on Reforms Needed in the Christian Marriage Law, paragraph 15.

a declaration that the marriage has not been validly performed where the essential ceremonies have been omitted. This suggestion is relevant to the subject of nullity.[5]

9. Marriage below minimum age

One vexed question in the field of nullity of marriage relates to the effect of a violation of the minimum age requirement that may come to be inserted in the Christian Marriage Act. (Even now, to some extent, such a requirement figures in section 60 of the Indian Christian Marriage Act, 1872, which is applicable to marriage by Indian Christians by certificate.) The general understanding in the Indian legal system is that breach of the statutory minimum age requirement does not, as a matter of civil status, render the marriage void or voidable, though it may attract criminal penalties under the Child Marriage Restraint Act, 1929. Hence, even though a separate suggestion has been made for inserting a minimum age requirement in the Christian Marriage Act,[6] it is not proposed that this should be coupled with any provision as to the civil effect of the breach of the requirement relating to minimum age.

Should the fact that a party was under age, be made a ground for seeking relief? In other words, should the fact that a woman was made to enter into a marriage before she had reached the age of eighteen and that she "repudiated" the marriage before reaching that age be made a ground of relief? A provision substantially to that effect has been recently introduced in the Hindu Marriage Act, 1955. However, it is presumed that there may be no demand or need for such a provision on the part of Christians.

10. Grounds recognised in Canon Law as nullifying a marriage

The above paragraphs deal with the possible grounds of nullity in a secular legal system. There are certain other circumstances

5. See *Mt. Title Alfred Jones* A.I.R. 1934 All. 273; 277, 282 and A.I.R. 1960 Mad. 430.
6. See paper on Reforms Needed in Christian Marriage Law, paragraphs 5 and 7.

which are recognised in Canon Law as affording grounds for the relief of nullity. Some of these circumstances will probably be covered by the ground of "force or fraud" if that ground is specifically recognised as a basis for granting a decree of nullity.[7] The other circumstances constituting impediments in Canon Law are mostly relatable to spiritual or religious considerations and may not be quite suitable for inclusion in the secular legal system.

11. Status of children of the marriage

The question of the status of children of an annulled or void marriage would not be legitimate. At common law, children of void marriage would not be legitimate. By statute, this position has been changed in several legal systems.

In modern times, most statutory provisions in civil systems strongly *favour legitimations*. They deem a child to be legitimate if his parents were married at the time of his birth, as also if this marriage has been terminated by death, divorce or annulment, or was void because of an impediment to marriage and the child was born within a specified period of time thereafter. Some countries go even further and recognise the child as legitimate if his parents have married after his birth and the father has acknowledged paternity through conduct, words or payment of maintenance. Proposals have even been made to pass laws declaring as legitimate children who have been conceived as a result of artificial insemination where it is by a third party donor.[8]

In the absence of a statutory provision, the position of a child conceived as a result of artificial insemination by a third party donor must remain doubtful. In the U.S.A. one court has regarded such a child as legitimate while another has regarded it as illegitimate.[9]

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7. Paragraph 5, *supra*.
8. Section 5, Uniform Parentage Act, (proposedin 1973). See PeterHay. Introduction to American Law (1976), page 105, and Kranse, "The Uniform Parentage Act" (1974) 8 Family, L.Q. 1.
9. *People* v *Sorensen* (1968) 68 Cal. 2nd 280. 437 P2d 495. (Child held to be legitimate) *Doornbos* v *Doornbos*, (1956) 12 I 11. App. 2d 473, 139

The following suggestions as to legitimise are made, so far as Christians in India are concerned:—

(a) It should be provided that the children of a marriage which is void, shall be legitimate, where the child would have been legitimate if the marriage had been valid. This should be the position:

(i) where the marriage is declared to be null and void in a nullity suit or petition;

(ii) where the marriage is held to be null and void by the court in any other proceeding in court;

(iii) even if no suit or proceeding has been filed involving questions as to validity;

(b) Where a decree of nullity of marriage is granted in respect of a voidable marriage, any child who would have been a legitimate child of the spouse if the marriage had been dissolved on the date of decree of nullity should be deemed to be their legitimate child.

(c) As regards inheritance rights, the community will have to consider whether a child of a marriage which is null and void or annulled by the court should have rights in or to the property of *only the parents*, or whether those rights should extend to property of other persons also.

12. Artificial insemination

This point has been already dealt with.

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N.E. 2d. 814 (Child considered) to be illegimate, mother held guilty of adultery). Both the cases are cited by Peter Hay. Introduction to U.S, Law (1976), pages 105 and 125, fn, 394. For further cases, he refers the reader to Kranse. *Illegitimacy and Social Policy* (1971) pages 18-21

10. Paragraph 11, *supra*.

CHAPTER 5

Maintenance Decrees Obtained by Women

The background

Of late, the subject of maintenance of women and the question how far the legal machinery and the content of the law are properly geared to enforcement of the right of maintenance, have received considerable attention at the hands of those interested in social reforms, particularly woman's organisations. There have also been moved, from time to time, several amendments in the law, some of which have been successful in getting enacted and in finding their way to the statute book. Apart from maintenance of women who have lived their whole life in India, there is the question of women who (after their marriage) join their husbands outside India, but are deserted and have to come back to India. The question of taking appropriate legal proceedings in Indian courts is of practical importance to all such women.

The taking of legal proceedings is, of course, only the beginning of the matter. Litigation itself is a tardy process, and much more tardy is the process of getting the decree "executed", as the legal term goes. There is a well-known observation of the Privy Council that the troubles of a litigant in India begin when he obtains a decree. It is commonplace that if a decree cannot be realised, it is hardly worth more than a piece of paper.

The wife's right to maintenance

Let us first consider how *a right* to maintenance arises. On marriage, a husband is bound to maintain his wife. This legal obligation of the husband is recognised in almost all legal systems. In Hindu law, the sacred texts contain quite an ela-

borate set of provisions on the subject. Some of the texts have been construed as entitling a woman to maintenance even if a legal marriage is not proved, provided the woman and the man have been living as husband and wife. The text-based right of the Hindu married woman to be maintained by her husband has been now dealt within a specific statute—the Hindu Adoptions and Maintenance Act. Maintenance on the grant of judicial divorce is dealt with in another law—the Hindu Marriage Act. Amongst Muslims and Parsis also, the wife's right to maintenance is well-settled. As regards Christians also, this right has been established for centuries. It may be useful to note in this connection one very interesting aspect of English law. English law was tardy in recognising the right of a *child* to be maintained by his or her parent. This right came to be recognised rather late in the day. In fact, it was the non-recognition of this right in early English law that accounts for the passage of Poor Law Acts and the establishment of the institution of Poor Law Commissioners in England. But the duty of *a husband* to maintain his wife came to be recognised very early in English law. Probably, this had something to do with the Biblical injunctions to the husband to cling to his wife as "of one flesh." The rule imposing on the husband a duty to maintain his wife is obviously a sound rule of justice and the Christian husband's duty to maintain his wife in India rests on this rule of justice rather than on any direct statutory provision, so far as civil liability is concerned.

The decree

But it is not enough that the law recognises a right in a particular situation. Infringement of the right should also be provided for. A wife who is not maintained by her husband, in violation of the latter's duty to do so, can take legal proceedings in the appropriate court. Of course, legal proceedings are no panacea. They are expensive, they take years and pursuing them costs a lot of time. The expenses of litigation often deny justice, partially or completely. A plaintiff is often advised to relinquish a valid claim, because it will cost too much to sue. If the case is brought to court, neither party, no matter how successful, can count on perfect justice. A victorious plaintiff

does not always get an amount that compensates for his or her loss fully.

Still, the recognition of a right and the facility of pursuing legal proceedings for its enforcement are not shorn totally of value. They have their own utility, even if it be a limited one. The real trouble begins when the successful plaintiff obtains a decree. How is the decree to be enforced and its fruits realised ? How is the mandate given by the court in one's favour to be transformed into money ? To put it bluntly, how is the paper on which the decree of maintenance is written in solemn terms to be converted into hard, concrete, visible cash which the woman having the decree can use ? After all, a decree or any other piece of paper recognising a right is merely a symbol. At some stage, the symbol has to be converted into reality. For a woman cannot live on mere symbols; she cannot purchase bread and butter, house herself or buy clothes with a mere symbol.

The machinery of enforcement

Of great practical importance, then, is for the law to set up a network for enforcing a decree for maintenance. In essence, a decree for maintenance is a decree for money. Usally, the sum is ordered to be paid periodically and so the payment is a recurring one. Still, it is a decree which speaks in terms of money and one has, therefore, to have regard to what the law has to say concerning a decree for money.

Now, in general, for the execution of a money decree, two principal remedies are available. The holder of the decree can get, through the court, an order for arrest of the party liable under the decree. Or, he or she can get an attachment of the property of the person liable. Provisions of the law as to arrest are subject to certain elaborate limitations, safeguards and formalities. Moreover, the decree-holder who seeks arrest of the debtor has to pay for the latter's subsistence expenses in the civil prison. As a result, resort to arrest as a mode of execution has become infrequent in modern times and it is attachment of property of the debtor that remains the principal practical remedy for enforcement of a decree for maintenance or other money decree.

The attachment of earnings

It is here that the Indian law contains fairly comprehensive provisions. These are often not known to women. Also, it is often not realised by persons trained mainly in foreign legal systems that Indian law has, for a long time, provided for the attachment of earnings. These provisions are of considerable practical importance to women, and one can properly spend some time over them. As recently amended, these provisions cover the salaries of private employees as well.

Briefly, the legal position may be thus stated. Where the debtor to a money decree is not an employee of another person but a "self-employed" person (say, a businessman, a professional man or an artisan working independently), the procedure for attachment of a "debt" can be invoked, so that amounts payable to the debtor by a third person can be attached in execution of the decree, by an order of the executing court. Such an attachment calls upon the third person to pay in court the amount due to the debtor, and prohibits him from paying it to the debtor. For example, if a lawyer or a doctor, inspite of a decree passed against him in favour of his wife, does not make payment under the decree, the wife (decree-holder) may attach the fees payable from a third person to the lawyer or doctor.

This, of course, pre supposes that the wife should collect information in detail about the husband's clients. This is not an easy task. But the position of a wife whose husband is a salaried person is somewhat better. The Code of Civil Procedure has, for a long time, contained specific provisions for attachment of the salary of public officers (officers of the Government, local authorities or any public sector corporation). And now, the Code contains equally specific (though less sweeping) provisions for the attachment of the salary of private employees. It is desirable that persons who secure decrees for maintenance against a salaried person should be familiar with these provisions. Their substance has not been fully appreciated, and even their existence, has remained unknown to many men and women (except perhaps to wives of members of the armed forces). In part, this may be due to the legal rigmarole that covers the provisions. In substance, what they provide for

is (i) the witholding of the amount due under a decree from the salary of the employee and (ii) forwarding of the deducted amount to the decree-holder through the Court. This object is achieved by the executing court issuing a direction to the disbursing officer who is in charge of disbursing the salary to the employee. In the case of a Government employee, generally the Pay and Accounts Officer or the Treasury Officer is the disbursing officer. So the notice of the court goes to him. In the case of private employees, the Financial Controller (or corresponding officer) in the organisation would be the disbursing officer and the notice of the Court will be issued to him. Of course the notice can be issued only after an amount has fallen in arrears. Thus, taking the case of periodical maintenance which the husband has been ordered to pay by a decree, it is only after the *husband has failed to pay* a particular instalment that the attachment is ordered. For an instalment payable in June, an attachment cannot be ordered in May. This is because the husband must be given an opportunity to make payment to the wife in June; it is only if there is a default in June that the salary can be attached. But, subject to this important condition, the court need not wait until the salary becomes due for disbursement. Salary can be attached in advance, in the sense that once an amount has fallen in arrears, salary equivalent to that amount can be attached in advance so as to block the salary even for future months.

How much of the salary can be attached? Should not the law leave some leeway for the husband's own survival? Here also, the law has adopted an approach that favours the wife entitled to maintenance. In general, the prescribed portion of the salary of an employee is exempt from attachment. In the case of most decrees, the portion so exempt is calculated on the basis of a formula whereunder the first four hundred rupees are exempt and two-thirds of the remainder is also exempt. In the case of a decree for maintenance, however, only one-third of the salary is exempt from attachment. Thus, the law has favoured persons who hold a decree for maintenance.

Points for reform

Of course, the above discussion is not to be taken as indicating

that the law regarding enforcement of a decree for maintenance is not capable of improvement. There is scope for reform in certain directions. For example, there are cases in which the debtor deliberately defies such a decree and the conduct of the debtor is so contumacious as to justify a criminal penalty. For such cases, the Law Commission of India long ago recommended the imposition of criminal sanctions. Besides this, there is special need for provision of legal aid to assist persons suing or petitioning for maintenance. The court fees for such suits and petitions should be totally abolished. When family courts come to be established, some improvement may be expected regarding the time taken in the disposal of such proceedings also.

A more radical device worth consideration is the formation of a State Maintenance Fund, to be given a corporate status. This fund would take over the task of realisation of decrees for maintenance. The Fund would recover the amounts from the debtors. The decree-holders would be getting their payments from this Fund, and thus would be saved the trouble and expense of seeking execution of their decrees. To put it simply, the Fund would "purchase" the decrees and step into the shoes of the decree-holders. It would be socialism on a small scale in a narrow field. There would be no compulsion. But if such a Fund is started, there is no doubt that most women would choose to "assign" their decrees to the Fund, and would not mind receiving the amount from the Fund, even with a nominal deduction for establishment expenses of the Fund.

Indian law has a special provision, in the law of criminal procedure, regarding the maintenance of wives, parents and children. This section (Section 125 of the Code) has assumed considerable importance in recent years and may require separate discussion.

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