CHAPTER-II

EVOLUTION OF CHRISTIAN LAW IN INDIA

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

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

1. See supra chapter I, n.39-47 and the accompanying text.
to the personal laws of the Hindus and Muslims. The judicial system in the Presidency Towns was designed primarily to administer justice to the Englishmen. But with the passage of time, the Indian population of these settlements increased and, adjustments had to be made in the judicial system with a view to provide for the administration of justice to these people as well. Still it was not until 1726, that Courts having Royal authority came to be established in India. Under the Charter of 1726, the Mayor's Courts came to be established in the Presidency Towns. The Mayor's Court was to act as a court of record and thus had power to punish persons for its contempt. The Court also had testamentary jurisdiction and could thus grant probates of wills of the deceased persons. In the case of a person who died intestate, it could grant letters of administration. The Charter of 1726 was further modified by the Charter of 1753. Again, Warren Hastings' Plan of 1772 by Article XXIII provided:

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

3. Ibid. at 9.
4. Id. at 11.
5. Id. at 37.
The rule in question applied only to Hindus and Mohammedans. But, besides these two large classes, there were many other categories of persons like Parsis and Christians, who had their own peculiar laws and usages in many cases connected with their religious beliefs. It was nowhere mentioned as to what law was to be applied to such persons. The reason for the failure to prescribe any specific law for these classes was perhaps ignorance on the part of the early British administrators of the actualities of the Indian scene. The Act of settlement of 1781 laid down that the Supreme Court established at Calcutta had jurisdiction over the inhabitants of Calcutta in all matters. At the same time Hindus and Muslims were to be governed by their personal laws. No law including the one that established the Supreme Court had however, specifically provided for the laws to be applied to the other communities including the Christians. To all those who were neither Hindus nor Mohammedans, therefore English law came to be applied.

6. Id. at 420.
7. Under the provisions of the Regulating Act of 1773 a Supreme Court was established at Calcutta under a Royal Charter in 1774. But the jurisdiction of the Court over Indians was vague.
8. Section 17 of the Act of Settlement provided for this. See supra n.2 at 98.
In 1827, the Elphinstone Code of Bombay Regulations came into force. A provision was made in the Code for applying the 'customs' of the 'country' and the 'law of the defendant' which phrases were not necessarily limited to Hindus and Muslims alone but covered all the various classes of people. The adalats in the three provinces developed a uniform practice of applying their peculiar laws and customs. On the basis of justice, equity and good conscience, the Courts administered to everyone, other than Hindus and Muslims, the substantive law of the country of such person, or of his ancestors. This involved a determination of the intricate question of the pedigree of the individual concerned before the Courts could decide what law was to be applied to the facts of the case.

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

10. Supra n.2 at 454.
11. Ibid at 478.
mofussil. Serious objections were raised against the Report and the Draft of the law, and the proposal died by efflux of time.\textsuperscript{12} The Charter Act of 1853 again made provisions for the appointment of a law commission, and the Second Law Commission was appointed in 1853. The Report of the Second Law Commission was submitted on 13.12.1855. The Commission arrived at the conclusion that what India wanted was a substantive civil law, in preparing which the law of England should be used as a basis.\textsuperscript{13} The events of 1857 gave a rude shock to the authorities and the Government of India was taken over by the Crown.\textsuperscript{14} On 2.12.1861, the Third Law Commission was constituted for the purpose of preparing a body of substantive law, in preparing which the law of England should be used as a basis, but which once enacted should itself be the law of India on the subject it embraced.\textsuperscript{15}

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

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

\textsuperscript{13} Id. at 493.


\textsuperscript{15} Supra n.2 at 497.
and then by Act XXV of 1864 and then again by Act V of 1865. But running through all these pieces of legislation was the philosophy that if there was a custom existing in a particular area it should be saved. It was in consonance with that, that the Indian Christian Marriage Act, 1872 came to be enacted and enforced selectively. Obviously this Act was never made applicable to the Christians in Travancore-Cochin, Manipur, Jammu and Kashmir where customary laws have been in existence. Similar is the case of Christians in other parts of India who are governed by customary laws.

However, the Indian Divorce Act 1869 came to be applied to the Christians throughout India except the former Portuguese and French settlements and certain tribal areas. It was perhaps an accident of history that its provisions came to be applied by all the Courts throughout India without any resistance probably because of the tendency of the bar and the bench to adhere to the idea of applying the English legal concepts without much ado. Or else, because of the absence of provisions for effecting divorce in the customary law it must have got itself stealthily into the arena through the door of justice equity and good conscience. In this context it is worthwhile to inquire into the laws relating to marriage and divorce among the various denominations of Christians in different regions of India as, such an inquiry might be helpful to examine the evolution of Christian law in India.
The Indian Christian Marriage Act, 1872 extends to North-East India, except the State of Manipur. Among the Khasis, Christians and non-Christians alike still observe the Khasi customary law of consanguinity. A person cannot marry the children of his father's brother. So also, it is sin to marry father's sisters or their grand children. He cannot marry the daughter of his paternal aunt either. These prohibitions are a fairly long list. And those prohibitions are protected by Section 88 of the Indian Christian Marriage Act, 1872, and hence they are legally enforceable.

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

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

17. Ibid. at 170.
Thus, it can be seen that divorce is permitted on mutual consent when the husband and wife disagree on vital matters of life. Village elders preside over the proceedings which entail a thorough inquiry. 18

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

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

19. P. Passah, "Marriage Among the Jaintia Tribe of Meghalaya" in supra n.16 at 211.
20. Ibid. at 112.
22. Ibid. at 196.
Among the Garos, the law of monogamy is strictly adhered to by the Christians. No Christian is allowed to have two wives at the same time and can only remarry after the death of the first wife. The marriage custom and law of the Garos are strictly exogamous; the boy and the girl must belong to different sects. The marriage laws of the Garos are based on the matrilineal system, according to which the descent is always traced from the mother. Hence a Garo woman can marry from the family of her father's mother.

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

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

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

23. Id. at 121.
24. Id. at 96.
25. See Id. at 125-127.
26. "Chra" is a body of men consisting of the maternal uncles, brothers and other male relations of the girl.
Divorce can be obtained on the following grounds:

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

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

(iii) When either of the spouses is insane.

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

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

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

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

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

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

(x) Impotency.

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

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

If any man abandons his wife and children without reasonable cause and without her consent or against her wish, or wilfully neglects her and her children for more than a year, and the family suffers for want of maintenance, his wife can sue for a decree of divorce giving sufficient grounds and witnesses. To such a wife and her children the erstwhile husband shall have to pay a däi of Rs.60/- and in addition a sum of Rs.15/- has to be paid to the village. If any husband or wife, after divorce returns to the family, he or she shall have to pay a däi of Rs.15/- to the wife or the husband as the case may be, for breaking the family tie. After such a reunion between the husband and the wife, if any misunderstanding crops up again, their chra and the mahari will no longer take the responsibility of settling the case. But if the chra and mahari
of both the husband and the wife find that their lives will be in danger by their continuing to live together and separation is the only alternative, they may mutually agree to interfere and effect a separation. Under such circumstances, if divorce takes place, no dāi is to be paid by any one.

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

It is interesting to note the development of a practice evolved by the tribal genius in the place of the onerous provisions of the Indian Divorce Act, 1869. It shows the vitality, nay, the survival instinct of the customary practices to beat the modern legal norms. Among the (Garo) Christians it is almost impossible to effect a divorce under the Indian Divorce Act. At present the Garo husband and wife therefore get separated without any legal formalities, after paying the fine traditionally fixed. A man who gets separated from his wife in this manner can start living with another woman of his choice as husband and wife without much social opprobrium, because according to traditional norms (though it may fall a little bit short of the ideal) such unions are recognised provided the former marriage is socially dissolved by payment of the fine. There is a clear
cut term, "seke donga" (living as husband and wife without the proper marriage ceremony) for such unions. 28

Law of Marriage and Divorce in Goa, Daman and Diu

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

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

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


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

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

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

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

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\textsuperscript{34} This was implemented in Portugal with effect from 25.7.1940, but it was not implemented in the Colonies.
\textsuperscript{35} See Decree No.35461 dated 22.1.1946, Published in the local official Gazette No.23, Series I dated 6.6.1946.
\textsuperscript{36} See infra n.121.
\textsuperscript{37} See infra n.122-123 and the accompanying text.
\end{flushright}
"In consonance with the essential characteristics of the Catholic marriage it is deemed, after the coming into force of this Decree, by the very fact of solemnization of the canonical marriage, that the spouses shall renounce the civil right of seeking divorce, for which reason the Civil Courts shall not have the power to decree the same in relation to such a marriage."

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

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

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

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

39. It is so provided in Article 19, Paragraph 1 of Decree No.35461 of 1946. Also see The Law Commission of India's 90th Report (1983) at 7.
Tribunal can request the Civil Court for service of summons or notice to the parties, experts, witnesses, as well as doing of any act of enquiry which are deemed convenient.\textsuperscript{40} Above all, the Civil law recognises, as regards the canonical marriages of natives, the Papal privileges as well.\textsuperscript{41} But such a privilege is not allowed where the marriage is solemnised with the intervention of an official of Civil Registration or if the marriage is registered.\textsuperscript{42}

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

The grounds of divorce are given in Article 4 of the law of divorce.\textsuperscript{45} It enacts:

"The contested divorce may be obtained only on the following grounds and on no other:

(1) Adultery committed by the wife;"

\textsuperscript{40} See Article 19, Paragraph 2 and Article 30 Paragraph 1 of Decree No.35461 of 1946.

\textsuperscript{41} Under canons 1142 and 1143 of the Code of Canon Law, 1903, the Pope has the power of dissolving a marriage in favour of the faith of the party who receives baptism.

\textsuperscript{42} Article 43 of Decree No.35461 of 1946 (supra n.35).

\textsuperscript{43} It was published in the Government Gazette No.26 dated 4.11.1910 and was to take effect from 26.5.1911.

\textsuperscript{44} See supra n.38 and the accompanying text.

\textsuperscript{45} See supra n.43.
(2) Adultery committed by the husband;

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

(4) Ill-treatment or serious injuries;

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

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

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

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

(9) Chronic vice of gambling;

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

**Paragraph 1.** Divorce, on the ground provided under clause 3 may be sought only if the petitioner has not been convicted as co-accused or abetter or accomplice in the offence which resulted in the conviction of the other spouse.
Paragraph 2. Where divorce is sought on the grounds provided under clauses 3 and 7 hereof, the defendant shall be represented in the respective suit by the Public Prosecutor and the latter shall also represent in the cases coming under clauses 5 and 6, if the defendant fails to appear or to be represented on the summons being served on him as per the law.

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

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

And divorce by mutual consent is also recognised under the law. 47

It can be seen that no discrimination is made in this law on the basis of sex or on any other ground.


47. See Ibid. Articles 35 and 36 at 83-84.
Law of Marriage and Divorce in Pondicherry

Even after the merger of Pondicherry into the Indian Union, the French Civil Code continues to be in force as an "existing law" at the time of merger. Though various Central enactments were extended to Pondicherry by the Pondicherry (Extent of Laws) Act, 1960, the Indian Divorce Act, 1869 was not extended to that area. Even though the Indian Christian Marriages Act, 1872, the Converts Marriages Dissolution Act, 1866 and the Child Marriages Restraint Act, 1929 were extended to Pondicherry, they were specifically excluded from their application to the Renoncents of Pondicherry by the provisions of the Pondicherry (Extent of Laws) Act, 1960. Therefore there are three categories of Christians in Pondicherry from the legal point of view. And the French Civil Code will continue to apply to the Renoncents of Pondicherry.

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

40. See infra n.154-157 and the accompanying text.
49. See infra n.158-160 and the accompanying text.
Under the French Civil Code, 'consent' is the essential requirement for a valid marriage, and there is no marriage where there is no consent. 51 This is in conformity with the prescriptions under the canon law. The minimum age of marriage for a man is 18 years and for a woman is 15 years. 52 A son who has not attained the age of 25 years and a daughter who has not attained the age of 21 years, cannot marry without the consent of their father and mother; if they disagree, the consent of the father is sufficient though. 53 If either parent is dead, or in a condition that he/she is unable to consent—ie, under a sentence of interdiction or a lunatic—the consent of the other is sufficient. 54 But if the father and mother are dead, or if they are in such a condition that they are unable to give consent, the grandparents replace the parents. And if the grandfather and the grandmother of the same line disagree, the grandfather's consent will be sufficient. And if there is disagreement between the two lines, such disagreement has the effect of a consent. 55 Marriage is prohibited between all legitimate ascendants and descendants in the direct line and between persons connected by marriage in the line aforesaid. 56 So also marriage is prohibited in the collateral line between the legitimate or illegitimate brothers and sisters and between

51. See Article 146 of the French Civil Code.
52. See Article 144.
53. See Article 148.
54. See Article 149.
55. See Article 150.
56. See Article 161.
persons who are connected by marriage and related in the same
degree.\textsuperscript{57} A marriage is also prohibited between uncle and
niece and aunt and nephew.\textsuperscript{58} But dispensation from the prohibited
relations for a marriage can be given by the President of the
Republic, on good cause being shown, from the prohibitions
contained in Article 162 as to marriage of brothers and sisters-in-law, and those contained in Article 163 as to marriage
between uncle and niece and aunt and nephew.\textsuperscript{59} And all
marriages in Pondicherry are civil marriages in the sense that
they are to be registered.\textsuperscript{60} Nobody can claim the rights of
a husband or of a wife through a court of law without producing
a certificate of marriage from the register of civil status.\textsuperscript{61}

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

\textsuperscript{57} See Article 162.
\textsuperscript{58} See Article 163.
\textsuperscript{59} See Article 164.
\textsuperscript{60} Subash C. Jain, "French Legal System in Pondicherry: An
Introduction", 12 J.I.L.I. 573 at 595. Also see Article
165 of the French Civil Code.
\textsuperscript{61} See Article 194.
\textsuperscript{62} See Article 229.
\textsuperscript{63} See Article 230.
\textsuperscript{64} See Article 231.
cause for divorce. Divorce by mutual consent owing to incompatibility of temper was a ground under the French Civil Code. 66

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

65. See Article 232.
66. It was a ground under Article 233. But it was repealed by law on 27th July, 1884.
67. See supra n.51 and the accompanying text.
68. See Article 180.
69. See Article 184 read with Articles 144, 147, 161, 162, 163 and 188.
70. See Articles 191 and 193.
affect the civil consequences of a marriage so far as the parties thereto and their children are concerned. But, if only one of the parties to the marriage alone has acted in good faith, the legal consequences of the marriage arise only in favour of such person and the children born of the marriage. As regards the grounds of divorce and nullity of marriages, the French Civil Code as applicable in Pondicherry does not appear to be discriminatory against women.

**Christian Law of Marriage and Divorce in other parts of India**

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

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

71. See Article 201.
72. See Section 1 of the Indian Christian Marriage Act, 1872 as amended upto date.
73. As regards the implications of the application of the Indian Divorce Act, 1869 in the Travancore-Cochin areas of the State of Kerala, see detailed discussions in chapters 3 and 4.
74. See Section 2 of the Indian Divorce Act, 1869.
other local laws hold sway in their respective areas. At any rate, subject to such exceptions, as discussed earlier, generally speaking, the Indian Divorce Act, 1869 is the law of divorce for Christians in India. But the survival of different systems of laws on marriage, divorce and succession in Goa, Pondicherry, North-East Indian States, Travancore and Cochin has brought about a peculiar situation in the field of law. Further, inspite of the application of the aforesaid enactments, Christians, like others, can opt to be subject to the Special Marriage Act, 1954. Once an option is exercised by the husband and the wife, the law of marriage, divorce and succession are regulated by the provisions of that Act and related enactments.

The Law of Succession

It has to be pointed out that in the first instance, the third law commission appointed on 2.12.1861 directed its attention to the preparation of the draft of the law of succession and inheritance generally applicable to all classes of persons other than the Hindus and the Muslims. The first report containing a draft of such laws was submitted on June 23, 1863. The Bill was enacted into law in India by the Governor-General in Council, with little variations under the title of the Indian Succession Act, 1865.75

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

75. Supra n.2 at 498.
the Succession Bill (on 23.6.1863), the Privy Council delivered its celebrated judgment on the law applicable to Christians in India on 13.6.1863. In that case it was held that a convert to Christianity could still choose to be governed by the law of the community to which he had earlier belonged. Subsequent to the passing of the Act the Privy Council got another opportunity to re-consider the question of law of succession applicable to communities other than Hindus and Muslims in India. It was held that it was not for a court to enter upon an examination of the conduct of the intestate so as to prevent the Indian Law of intestate succession getting its full and proper application. It held that the Act was applicable to Christians. In 1925, the Act of 1865 was revised and the Indian Succession Act, 1925 was enacted. Some amendments had been made in the Act since 1925, but the process has been rather slow and hence not perceptible. Neither the Indian Succession Act of 1865, nor the Act of 1925 was to apply to Christians in the whole of India. Section 332 of the Act of 1865 contained a provision which empowered the State Governments to exempt any

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


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

79. See Gazette of India dated 25.7.1868 page 1094, Foreign
Department, Judicial, 23.7.1868 No.204. Also see Alicia
alias Alice v. Percival Felix Pinto. 1967(2) Mys.L.J 210
(D.B).
80. Gazette of India 1877 at 512.
82. David Annoussamy, "Pondicherry: Babel of Personal Laws".
(1972) J.I.L.I, 420 at 422.
83. See supra n.21 at 135.
84. See Constitution of India. Articles 13(3), 366(10), 244 and
the 6th Schedule. Also see 1954 C.W.N. 14.
The position of law that emerges from the above analysis is that unless a customary law is proved in a suit as a law in force within the meaning of Article 13 of the Constitution of India, the law of succession for Christians in India, is the Indian Succession Act, 1925. This is so, because, Section 29(2) of the Indian Succession Act, 1925, saves "any other law for the time being in force". Therefore, it is possible for a party to prove a custom contrary to the provisions of the Indian Succession Act, 1925 to establish that it does not apply to any particular group. Except in such situations, the law of succession for Christians in India, other than those specified above, is the Indian Succession Act, 1925.

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

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

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

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

Law of Succession relating to Christians in North-East India

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

87. See supra n.18 at 248, 226, 170, 169, 167 and 100.
this distinction. Soon after the implementation of the Government of India Act, 1919, the Khasi leaders felt the need for a Durbar. The Khasi National Durbar came to be established and it was this body which codified the traditional law on property of the Khasis. 89 The position of the 25 Khasi States at the time of Independence was similar to that of all Princely States. 90 The Federation of Khasi States joined the Indian Union by signing the Standstill Agreement and the Instrument of accession. 91 And when the Constitution of India was inaugurated in 1950, special provisions were made in Article 244 and 275 and in the 5th and 6th Schedules to the Constitution for tribal autonomy in these states. The matters of succession, marriage and divorce were made over to the legislative jurisdiction of the District Councils and Regional Councils.

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

89. Dr. O. L. Snaitang, "Christianity and Social Change in North East India" (1993) Calcutta, at 53-54.
90. Ibid. at 55.
91. Id. at 56.
92. Id. at 127.
The main divisions of the Khasi Tribes are
1. The Khasis, 2. The Syntong or Pnar, 3. The War, 4. The Bhol and 5. The Lynngam.

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

95 Mary Pristilla Rina Lyngdoh, "The Festivals in the History and Culture of the Khasi", (1991) New Delhi, at 98.
96 Supra n. 93 at 129.
is built for her and her husband. There is clear segregation of the wealth and property of the father and the mother. There cannot be any indiscriminate mixing up and application of the incomes from the two sources. The property in the hands of Khasis can be classified as follows:

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

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

97. See supra n.93 at 121-136.
1. The General Law

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

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

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

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

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

98. "Kur" means Clan, ie maternal relations descending from a common ancestress.
by any other male member chosen by the family. If the income from such property be substantial then remuneration shall be given to such male member.

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

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

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

Persons prohibited from or deprived of deriving a share in the ancestral property as provided above, shall be completely cut off in inheritance or in any participation in regard to property from their Kur.
In the case of a male who cultivates or makes use of Kur-land for the benefit of his family he is liable to pay rent for the use of the Kur-land.

II. The Supplementary laws

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

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

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

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

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

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

6. A man's children do not have right over landed property belonging to the man's Kur just because the family enjoyed the income therefrom during the father's life time.
7. The self-acquired property of a man, from the time he stayed with his wife and children, and which he wholly applies towards the welfare of his children belongs to his children. His Kur cannot have any right to such property.

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

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

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

11. If a man acquires property for his Kur out of his own earnings, after marriage and after staying with his children, the family can have no claim over such property after his death.
12. If the wife commits adultery, then separation is automatic and complete. The husband has the right to take away the whole of the property generated by his labour. He may leave a portion for his children, though they do not have any claim.

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

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

III. Special Usage and Practices

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

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

   b) In the matter of ancestral property the apportionment is done in the presence of all those who have a right to the property.
c) After apportionment, in the case of movable properties, they are identified and symbolically handed over to the person to whom it should belong after the death of the mother.

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

e) Apportionments are made only in favour of female members.

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

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

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

2. Gifts:

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

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

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

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

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

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

100. Supra n.93 at 130-134.

101. N.K. Das, "Descent, Filiation and Affinity among the Matrilinea Tribes of Khasi and Garo Hills of North East India" in supra n.16 at 364.
fast rule about the division of the household at the time of divorce.\textsuperscript{102} The self-acquired property of a man before his marriage belongs to his mother.\textsuperscript{103}

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

**The Garo Law of Succession**

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

The Garo Society follows the matrilineal system.\textsuperscript{108} The inheritance is through mother and restricted to the female line.

\textsuperscript{102} Ib. Id. at 368.
\textsuperscript{103} Supra n.87 at 140.
\textsuperscript{104} See supra n.89 at 128.
\textsuperscript{105} Ib. Id. at 127.
\textsuperscript{106} See supra n.83 and 84 and the accompanying text.
\textsuperscript{107} Supra n.18 at 237.
\textsuperscript{108} See supra n.21 at 135.
Men do not inherit property. Male children cannot receive or claim any part of the property even if it is acquired by their own efforts. The property acquired after the marriage by the husband becomes the property of his wife though.\(^{109}\)

The law relating to succession among the Garos can be summarised as follows:\(^{110}\)

1. In any family where parents have no daughters to inherit the property, the *chra*\(^{111}\) and the *mahari*\(^{112}\) shall have to search for an adopted daughter from the same motherhood (Ma1 ganda-Noganda) and keep her to look after the adopting parents and to inherit the property. If the adopted daughter brought by the *chra* and the *mahari*, marries the own nephew (Gritang-sokchi) as A'Kim, she shall have the rights to inherit the property of the adopting parents.

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

3. A substitute wife or an adopted daughter shall

\(^{109}\) Julius L.R. Marak, "The Garo Customary Laws of Inheritance" in supra n.16 at 269.

\(^{110}\) See supra n.21 at 142-156.

\(^{111}\) See supra n.26.

\(^{112}\) See supra n.27.
have no right to inherit the property of the common ancestors. They shall inherit only those ancestral and other properties which have been promised to them by the chra and the mahari at the time of negotiation (sing'a).

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

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

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

7. If an heiress dies without a daughter, her sister if any, or the daughter of the sister shall inherit the property or as is decided by the chra and the mahari. But if the widower marries one of his deceased wife's sisters, she will be heiress to the entire property.
It is interesting to see how the provision came to be enforced by the Assam High Court. In a case, a husband died and was survived by his wife and two daughters. The widow remarried and her estate was then held in the name of the second husband. She also died. The Mahari gave the elder of her two daughters by the first husband as successor wife to the surviving widower, and from this wedlock they had a daughter who inherited the estate. The younger of the said two daughters claimed the estate against her elder sister. The Assam High Court held that her mother, the elder sister of the claimant, stepped into the shoes of her mother and inherited the property and that, after her death, the property devolved on her daughter. It was also held that the condition necessary for inheriting the property was that she should have been nominated by her chra and mahari as heir to the mother.

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

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

113. See Assam High Court's decision in S.K. No. 77/57 (Un reported)
another clan, then one of his sisters-in-law becomes the guardian of his children and property until the question of heiress is settled.

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

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

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

13. If a woman is supported by her son, she may, with the consent of the chra and mahari give some portion of her property to him. Such property can be utilised by him during his life time. After his death, all the properties given by his mother will revert to his motherhood.
14. If a barren woman adopts an orphan girl without the prior consent of her chra and the mahari, such an adopted child has no right to property.

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

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

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

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

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

114. Adoption of a girl is permissible, but it is subject to the approval of the chra and the mahari.
that case, he would then retain a life interest in the property.

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

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

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

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

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

115. See supra n.21 at 149.

116. Ibid. at 156.
passed by the Garo Hills District Council, and these incorporate mostly the customary law of the Garos. It is interesting to note that Christianity which has been a great force of change in other spheres of Garo life, has contributed very little in changing Garo family or their customary law.

Law of Succession in Goa, Daman and Diu

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

117. Milton S. Sangma, "Administration of Justice in Garo Hills" in supra n.16 at 287.
118. See supra n.28 at 305.
119. See supra n.14 at 328-329.
or creed. After the liberation of Goa on 19.12.1961, the Indian Parliament enacted the Goa, Daman and Diu (Administration) Act, 1962. It provided:

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

As the Portuguese Civil Code contains references to "Portuguese Citizens" it became necessary to issue a Citizenship Order122 in 1962 and also the Goa, Daman and Diu (Administration) Removal of Difficulties Order, 1962. It has been provided:

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


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

123. See Order No.175/2/M.G. Published in the Government Gazette of Goa, Daman and Diu, Series I No.22 dated 7.6.1962.
Therefore, the Portuguese Civil Code of 1867 still remains in force in Goa, Daman and Diu. It may be noted that, in Portugal, the Civil Code of 1867 was repealed and a new Code was enacted in 1966.

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

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

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

124. See Article 1108 of the Portuguese Civil Code, 1867.
As regards succession, there are two ways, one under a will and the other known as legal succession. Any person who is of sound mind and is not a minor of less than 14 years of age can execute a valid will. A blind person or those who cannot read or write are not allowed to make a closed will. Wills in favour of guardian, instructors or school masters or any person who exercise control over the person making the will, at the time of making of the will are prohibited. Thus a patient is not allowed to make a will in favour of the physician, nor can a will be made in favour of confessors, or the Notary Public. An adulterous spouse cannot make a will in favour of the accomplice.

Where a married person has descendants or ascendants, he is debarred from disposing by will his entire estate in favour of strangers. He can dispose of half of his estate and the remaining half is called the indispensible portion or legitime, which passes to the legal heirs as a matter of right. The restriction applies also to dispositions by way of gift. Even in respect of the disposable share, the spouses are not allowed to dispose of specific assets since there is no specific right for either of them in the conjugal estate.

125. See Ibid., Article 1735.
126. See Id. Article 1764.
127. See Id. Article 1767.
128. See Id. Article 1768.
129. See Id. Article 1769.
130. See Id. Article 1772.
131. See Id. Article 1771.
132. See Id. Articles 1774 and 1784.
133. See Id. Article 1766.
The testator can appoint one or more person or persons as executor or executors of the will. But minors cannot be appointed as executors. A married woman cannot be appointed as executrix without authorisation from her husband, except where she is judicially separated of person and properties. When no time limit has been fixed by the will for its execution, normally, the executor has to carry it out within one year from the date on which he has taken charge as an executor. If he does not intend to act as executor, he has to give it up within three days from the date of knowledge of the will, before the authority competent to register it, failing which he shall be liable for damages. The periods of dispute regarding the validity of the will is excluded for calculation of the period of limitation. The executors are liable to render accounts of their management to the heirs or to their legal representatives. The expenses incurred by the executor for carrying out the will shall be satisfied from the estate of the deceased. The executor, who in the performance of his obligations, has acted in bad faith, shall be liable for compensation for damage and may be removed by an order of the Court, at the instance of the parties. It is of interest to note that no probate is required under the Portuguese Civil Code.

134. See Id. Article 1885.
135. See Id. Article 1886.
136. See Id. Article 1887.
137. See Id. Article 1903.
138. See Id. Article 1890.
139. See Id. Article 1903.
140. See Id. Article 1905.
141. See Id. Article 1908.
142. See Id. Article 1909.
In fact the question of succession arises only in respect of the "legitime" or when there is intestacy, or in the event of a will being annulled, revoked or lapses.

Under the Civil Code such a succession is termed as legal succession. The legal succession shall devolve in the following order:

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

143. See supra n.132 and the accompanying text.
144. See Article 1968 in supra n.125.
146. Article 1236 enacts: "Where the re-married spouse remains with the properties of the issues of any marriage inherited from their deceased father or mother or of ascendants of the latter, and there being full blood brothers/sisters of the deceased issue or descendants of the deceased full blood brothers/sisters, then the ownership of the said properties will belong to the latter and the father or mother will only have the usufruct thereof."
The relatives closer in degree shall exclude, within each group, the more remote. And the relatives, who are in the same degree, shall inherit per capita, or in equal proportion, subject to the provisions of article 1983.

In reckoning degree, each generation is taken as a degree, and in the direct line, the degrees are counted by the number of generations, excluding the Progenitor. As for legal succession, the persons incapable of acquiring property by will shall not acquire by legal succession also.

Law of Succession in Pondicherry

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

147. See supra n. 125, Article 1970.
149. Article 1983 provides: "The representatives shall only inherit, as such, what the person represented would have inherited, if living."
150. See supra n. 125, Article 1973.
152. See Id. Article 1978.
it was provided that people of Indian origin would continue to be governed by their laws and customs. This position continued under the French Constitution of 1946 and 1958. Thus, Christians continued to be governed by the Hindu law, but in matters of marriage and divorce and allied matters, they were brought under the French Civil Code. The Treaty of Cession brought Pondicherry into the Indian Union. Then the people of Pondicherry were given an option to declare themselves as Renoncants and still continue to be governed by the French law, that is, the French Civil Code. It appears that only a few Christians have opted for it. The subsequent legislation also provided for the continuance in force of the existing laws. Even under the Pondicherry (Extension of Laws) Act, 1968 neither the Indian Divorce Act, 1869, nor the Indian Succession Act, 1925 was extended to Pondicherry. Though the Indian Christian Marriage Act, 1872 was extended to Pondicherry, it was made specifically inapplicable to Renoncants. But it is not correct to assume that the French Civil Code applies to

154. See supra n. 82 at 421.

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

156. See supra n. 85 at 18.

all Christians in all matters in Pondicherry. Even
Christians who are not Renoncents are governed by Hindu
customary law and they continue to be governed by the old
Hindu law. Thus the Christians of Pondicherry can be
classified into three categories, viz,
1) The Christian Renoncents who are French Nationals and
to whom the French Civil Code as amended from time to
time in France, applies.
2) The Indian Christian Renoncents to whom the French Civil
Code applies as it stood on 16th of August, 1962.
3) The Indian Christians to whom the Indian Christian
Marriage Act, 1872 is made applicable by the Pondicherry

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

Article 718 of the Code provides:

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

158. See supra n.60 at 601.
159. See supra n.155 and 157.
160. It is interesting to note that those Indian Christians
in Pondicherry do not have a statutory law for divorce
or succession.
But the concept of Civil death is no more recognised by law. 161 In the event of simultaneous death of several persons, the male is presumed to have survived the female for purposes of succession. 162 But the relatives of the paternal and maternal line are equally and simultaneously entitled to succeed to the property of the deceased. 163 It is only when there are no relatives up to the twelfth degree that the wife is made entitled to succeed. In other cases she has only a life interest 164 over a share of the property. But the position of the husband is also the same. 165 As regards sons and daughters, they inherit equally. 166 Where the intestate has left no lineal descendants, the father and mother inherit half of the property and they share it equally. 167

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

162. See Ibid. Article 722.
163. See Ibid. Article 733.
164. See supra n. 161 at 112.
165. See Ibid. Article 767.
166. See Ibid. Article 745.
167. See Ibid. Article 748.
168. See supra n. 85 at 160.
169. See supra n. 50 at 284.
vivos or by will if he leaves a legitimate child. If he leaves two children he can dispose of only one third of his property and if there are three or more than three children, he can dispose of only a quarter of his property.\textsuperscript{170} Even an illegitimate child is entitled to a share in the "la reserve".\textsuperscript{171}

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

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

\begin{quote}
\textsuperscript{170} See Article 913 of the French Civil Code.
\textsuperscript{171} The part of a man's property which he is unable to dispose of by law is called "la reserve" i.e., the portion reserved by law for the relatives.
\textsuperscript{172} See supra n.53 and the accompanying text.
\textsuperscript{173} See supra n.162 and the accompanying text.
\end{quote}
position is not that different in Goa either. Male domination is explicit as a married woman can not be appointed executrix without authorisation from her husband. In the North East India as already discussed elaborately, the customary law is heavily loaded against man. The discrimination against women in the matter of succession so far as the Christians in Kerala is concerned, the matter is discussed in detail in Chapter V in the context of Mary Roy's Case.

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

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

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