Andhra High Court
Youth Welfare Federation Rep. By ... vs Union Of India (Uoi) Rep. By Its ... on 9 October, 1996
Equivalent citations: 1996 (4) ALT 1138
Author: L Rath
Bench: L Rath, S Nayak, B Somasekhara
JUDGMENT Lingaraja Rath, J.

1. Questions of deep significance, some of which in many respects are perplexing in nature have teen referred to this Bench in the context of consideration of the vires of Sections 10 and 22 of the Indian Divorce Act, 1869 (hereinafter referred to as "the Act.").

2. W.P. No. 9717 of 1983 was filed as public interest litigation raising the question of vires of the Sections. During the hearing of the case the learned single Judge felt the matter should be appropriately heard by a Division Bench as "this case raises very important questions touching the personal law of the Christians as contained in 1 he Indian Divorce Act." The learned Judge also felt that it is appropriate for the Court to hear representations of organisations of the Christian community including of women which should be vitally interested in the matter. Notices were issued to seven organisations whose names were ascertained from the Bar and permission was also allowed to any other person, organisation or institution to intervene in the matter either for or against the contentions raised in the writ petition. In pursuance of the direction a press-note was issued by the Registrar of the High Court. Seven Christian organisations in Andhra Pradesh, the Andhra Pradesh High Court Women Lawyers Association and two individuals filed intervention applications. When the case along with another Writ Petition No. 8160 of 1984 which has since been dismissed as not pressed came up for hearing, representation was made by the learned Counsel Smt. Jayasree Sarathy that certain other organisations and individuals were to file separate writ petitions. Writ Petition Nos. 5106, 5585 and 5702 of 1994 were filed by two individuals and young Women Christian Association respectively questioning the validity of Sections 10, 17, 22 and 55 of the Act. Even so, at the time of hearing the learned Counsel confined the challenge only to Sections 10 and 22 of the Act. The Division Bench before which the matter came, besides hearing the learned Counsel appearing, also obtained the services of Sri K.G. Kannabhiran, Senior Advocate to argue the case as amicus curiae. After detailed hearing the Bench however felt the cases as projecting substantial questions deserving considerations by a Full Bench for which it made the present reference. The considerations that weighed with the Division Bench were whether the vires of any personal law is available to be tested on the anvil of Part III of the Constitution of India and whether those could be treated as laws in force and as to the effect of the adoption of the Universal Declaration of Human rights and the two International Covenants by the Union of India on 10-4-1979. The four questions framed by the Division Bench were as follows:

"1. Whether the expression 'laws in force' in Article 13 of the Constitution of India encompasses personal laws?

2. Whether the provisions of Part III of the Constitution of India have no application in testing the legality of any personal law?

3. If the answer is in the negative that personal laws do not enjoy any immunity, whether Sections 10 and 22 of the Indian Divorce Act are violative of Articles 14, 15(1) and 21 of the Constitution of India?

4. What is the effect of the Declaration made by the Union of India dated 10-4-1979 accepting the Universal Declaration of Human Rights and the two International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights?"

The two provisions of the statute to which challenge was made by the learned Counsel are Sections 10 and 22 which may be extracted:

"10. When husband may present petition for dissolution:-Any husband may present a petition to the District Court or to the High Court, praying that his marriage may be dissolved on the ground that his wife has, since the solemnization thereof, been guilty of adultery.

When wife may present petition for dissolution:- Any wife may present a petition to the District Courts or to the High Court praying that her marriage may be dissolved on the ground that, since the solemnization thereof, her husband has exchanged his profession of Christianity for the profession of some other religion, and gone through a form of marriage with another woman;

or has been guilty of incestuous adultery, or of bigamy with adultery, or of marriage with another woman with adultery, or of rape, sodomy or beastiality.

or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce a mensa et thoro, or of adultery coupled with desertion, without reasonable excuse for two years or upwards.

Contents of Petition:- Every such petition shall state, as distinctly as the nature of the case permits, the facts on which the claim to have such marriage dissolved is founded."

22. Bar to decree for divorce a mensa et thoro: but judicial separation obtainable by husband or wife:- No decree shall hereafter be made for a divorce a mensa et thoro, but the husband or wife may obtain a decree of judicial separation, on the ground of adultery, or cruelty, or desertion without reasonable excuse for two years or upwards, and such decree shall have the effect of a divorce a mensa et thoro under the existing law, and such other legal effect as hereinafter mentioned."

3. Mr. V.L.N.G.K. Murthy who has advanced the main submissions, and I must say with great clarity, analysis and erudition, has confined the attack only to Section 10 of the Act as providing for gender discrimination by requiring the wife to establish far more difficult and onerous grounds to obtain divorce than the husband who becomes entitled to divorce if he only proves the wife to have been guilty of adultery. He has also urged the Section to be violative of Article 21 as the wife is, as the effect of the provisions, compelled to lead a life of drudgery and continuous oppression of being tied to the bond of marriage even where the marriage has, without a chance of any repair, unmistakably lapsed into a coma and an euthanasia of it would be the more healthy operation. The Act was

enacted more than 125 years back which has been left unamended ever since then even though great strides have been made in the context of emancipation and liberation of women, even though the law in England, on which the statute was based, has itself undergone vast improvements. Questions have been urged on the basis of Article 13(1) of the Constitution of India that because of the discrimination practised by the statute it became void on the introduction of the Constitution. The provisions of Section 22 of the Act have also been challenged as ultra vires of Article 21 of the Constitution on the same grounds. Mrs. Jayasree Sarathy has also laid attack on Section 22 of the Act and Mr. C.P. Sarathy, learned counsel appearing in W.P. No. 5106 of 1994 has addressed in a general way. Mr. K.G. Karinabhiran has also rendered able assistance to the Court of which grateful acknowledgment was also recorded by the Division Bench. Argument has also been advanced that because of India being a party to the Universal Declaration of Human Rights and it having adopted the Covenants on 10-4-1979, the provisions of the statute are to be so interpreted as to further the objective and purpose of the declaration and covenants which should be the approach of the Courts. Counter arguments have been advanced that personal laws are outside the ambit of Part III of the Constitution and hence are unaffected by Articles 14, 15 and 21 of the Constitution.

4. Of the questions raised those relating to the meaning of "all laws in force" in Article 13(1) and whether personal law is beyond the purview of the jurisdiction of the constitutional courts so as to adjudicate upon their validity are necessary to be first tackled since the proposition as advanced presents a shut-door which unless is opened, access to the other questions is not obtained.

5. It is not necessary to dwell at length on the question what personal law is, except in the passing, as undoubtedly the Act is one relating to the Personal Law of Marriage of Christians in India. In Saldanha v. Saldanha, AIR 1930 Bombay 105 the expression was explained as being often used by jurists to denote either lex dpmicilli or law of a person's nationality. The Court quoted the passages in Westlake's Private International Law, Edn.7:

"Was anciently the lex domicilli, and to a great extent is so still, but the modern tendency is to substitute political nationality for domicil as the test of personal law so far as possible."

"Whenever the operation of a personal law is admitted in England, the domicile of the person in question and not his political nationality, is considered to determine such personal law."

Later on, Blackwell, J. observed:

"I think that the expression "personal law" in that Section would include any personal law, apart from any personal law as to the form of marriage, which forbade either of the parties to enter into a contract of marriage with one another."

The expressions 'domicile' and 'personal law' were considered in Pradeep Jain v. Union of India, (paragraph 7) observing:

"The word 'domicile' is to identify the personal law by which an individual is governed in respect of various matters such as the essential validity of a marriage, the effect of marriage on the proprietary

rights of husband and wife, jurisdiction in divorce and nullity of marriage, illegitimacy, legitimation and adoption and testamentary and intestate succession to moveables. 'Domicile' as pointed out in Halsbury's Laws of England (Fourth Edition) Volume 8, paragraph 421, "is the legal relationship between an individual and a territory with a distinctive legal system which invokes that system as his personal law." It is well settled that the domicile of a person is in that country in which he either has or is deemed by law to have his permanent home."

6. It is however the argument, placing reliance on the observations in The State of Bombay v. Narasu Appa, and Krishna Singh v. Mathura Ahir, AIR 1980 SC 707 that all personal laws as a class are beyond the grip of Article 13(1) of the Constitution to dwell upon their validity or invalidity on the touch-stone of Part III of the Constitution, for which reason the petitions must fail. Question Nos. 1 and 2 of the referring order precisely relate to those submissions.

7. In Narasu Appa's case, the Court considered the validity of the Bombay Prevention of Hindu Bigamous Marriages Act (Act 25 of 1946). One of the arguments that substantially engaged the discussion of the Court was that the impugned Act discriminated against Hindus in applying it to them as Muslim personal law, which permits polygamy, had become void at the commencement of the Constitution being inconsistent to Article 15(1) of the Constitution inasmuch as a Muslim male is permitted to have more than one wife whereas a Muslim woman is restricted to one husband and that this discrimination is one exclusively based upon sex. Even though the Muslim personal law of polygamy had thus become void, yet the impugned Act singled out only the Hindu community for a discriminatory treatment. Chief Justice Chagla held personal law to be outside the ambit of Article 13(1) of the Constitution on the reasons that the Constitution of India is modelled upon the Government of India Act, 1915 of which Section 112, dealing with the law to be administered by the High Courts provided that the High Courts shall, in matters of inheritence and succession to lands, rents and goods, and in matters of contract and dealing between party and party, when both parties are subject to the same personal law or custom having the force of law, decide according to that personal law or custom and where the parties are subject to different personal laws or customs, according to the law or custom to which the defendant is subject. The Section made a clear distinction between personal law and custom having the force of law, but though the 1915 Act was the model before the Constituent Assembly, yet In defining "law" in Article 13 only "custom or usage" was included in it but "personal law" was omitted, which is a clear pointer to the intention of the Constitution making body to exclude personal law from the purview of Article 13. The learned Judge held that custom or usage is deviation from personal law and not personal law itself and that difference between the two is clear and unambiguous for which reason, even if custom or usage is hit by Article 13(1), yet personal laws being distinct and separate from custom or usage are beyond the ambit of Article 13(1). The other reasons assigned by Justice Chagla to reach the conclusion were that if Hindu personal law had become void at the commencement of the Constitution by reason of Article 13, it was unnecessary to specifically provide in Articles 17 and 25(2) (b) for certain aspects of Hindu personal law viz., abolishing untouchability and throwing open Hindu religious institutions of public character to all classes or Sections of Hindus. Article 44 of the Constitution providing for States endeavour to bring in uniform civil code throughout the country itself shows the Constitution to have recognised the existence of separate personal laws and Entry 5 of the Concurrent List also given the power to the legislature to pass laws affecting personal law. The learned Judge as a

corrollary held, negativing the contention that personal laws are continued under Article 372(1) of the Constitution, that it is clear that the Constitution has dealt with personal laws only in certain respects and that the scheme is to leave personal law unaffected except where specific provision is made with regard to it and leave it to the legislatures in future to modify and improve it and ultimately to put on the statute book a common and uniform code. Personal law could not be said to have been continued under Article 372(1) as Article 372(2) entitles the President to make adaptations and modifications to the law in force by way of repeal and amendment and surely it could not be contended that it was intended by that provision to authorise the President to make alterations or adaptations in the personal law of any community. Justice Gajendragadkar, as he then was, was the other Judge of the Division Bench and concurred with the conclusion of personal law being outside the ambit of Article 13(2) though for reasons separately discussed. The learned Judge pointed out that the foundational sources of both the Hindu and Mohammedan laws are their respective scriptural texts which, so far Hindu law is concerned, are the Srutis and Smritis, which, in course of developments spreading over several centuries, were followed by several other texts and commentaries and that it had been the business of the Court, as was pointed out by the Privy Council in Collector of Madura v. Moottoo Kamalinga Sathapathy, 12 Moore's Indian Appeals 397 not so much to inquire whether the disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it had been received by the particular school which governs the district with which it has to deal. The same was also true of Mohammedan law for which reason both the personal laws cannot be said to have been passed or made by a legislature or other competent authority and do not fall within the purview of the expression "laws in force". Dwelling upon the definitions "law" and "laws in force" in Article 13(3) he held that while Article 13(2) is dearly prospective and mandates the State to refrain from making any law if it takes away or abridges the rights conferred by Part III, yet "personal law" cannot be deemed to be included in the expression "laws in force" on the ground that whatever is included in the word "laws" in Article 13(3) (a) must automatically be held to be included in the expression "laws in force" in Article 13(3) (b). The learned Judge referred to the same reasoning of Justice Chagla regarding Article 17 i.e., untouchability which owed its origin to custom and usage and said that making a separate provision for its abolition in Article 17 goes to show that custom or usage is not included in the expression "laws in force". While saying so, the view was expressed that even if the view so taken is wrong, yet it would not follow that personal laws are included in the expression "laws in force" as neither Hindu law nor Mohammedan law is based upon custom or usage having the force of law though undoubtedly in both these laws custom is a source of law. But save except for the departures from the general rules of Hindu law which are permitted on the ground of custom, the remaining field of Hindu law is covered by the scriptural texts and so it would not be possible to hold that either the Hindu law or the Mohammedan law is solely or even principally based upon custom or usage having the force of law and hence neither of those laws are laws in force within the meaning of Article 13(1). According to the learned Judge, personal laws are in force in a general sense; they are in fact administered by the Courts in India in matters falling within their purview. But the expression "laws in force" in Article 13(1) is not used in that general sense and the expression refers to what may compendiously be described, as statutory laws. There is no doubt that the laws which are included in the expression must have been passed or made by the legislature or other competent authority and unless this test is satisfied it would not be legitimate to include in this expression the personal laws merely on the ground that they are administered by the Courts in India.

8. Custom is undoubtedly a source of law as was pointed out by Justice Gajendragadkar. So far Hindu law is concerned, it is pointed out by Mulla in the 16th Edition, Page 3 that approved usage is a source of the law and it was obligatory on the part of the King not only to enforce the sacred law of the text but to make authoritative the customary laws of the subjects as they were stated to be. These included customs of countries, districts, castes and families: So also of traders, guilds, herdsmen, money lenders and artisans, for their respective class. In the same book it was pointed out in Page 57:

"In a long series of cases decided by the Privy Council and Courts in India, the rule has been accepted that custom can override any text of smriti law. In Collector of Madura v. Moottoo Ramalinga (supra), the Judicial Committee of the Privy Council observed: "Under the Hindu system of law, clear proof of usage will outweigh the written text of law. It has been repeatedly stated that a custom may be in derogation of smriti law and where proved to exist may supersede that law. The tenacity of family customs even under the strain of migration has been repeatedly recognised in decisions of the Courts. It may, however, be observed that though local and family custom, if proved to exist, will supersede the general law, the general law will in other respects govern the relations of the parties outside that custom."

In discussing in Chapter 2 - Sources of Hindu Law, the learned author says, the three main sources of Hindu Dharma or law are (1) the Sruti (2) the Smriti and (3) the Custom. The question of personal law being outside the rigours of Part III of the Constitution was pronounced in Krishna Singh's case (4 supra). The Court said that in its opinion the High Court had failed to appreciate that Part III of the Constitution does not touch upon the personal laws of the parties and that the Hindu law to be enforced is as is derived from the recognised authoritative sources of the law i.e., Smritis and the commentaries referred to, as interpreted in the judgments of various High Courts, except where such law is altered by common usage or custom or is modified or abrogated by the statute. The validity of Madras Hindu (Bigamy Prevention and Divorce) Act, 1949 (Act 6 of 1949) was discussed by the Madras High Court in Srinivasa Aiyar v. Saraswathi Ammal, in the context of its being ultra vires as making a distinction between Hindus and Muslims and held that Entry 5 of List 3 of Schedule 7 of the Constitution of India itself conferred legislative power to enact laws, amend or alter or repeal parts or whole of the personal law. But while the legislature has the authority, yet it did not empower it to abrogate the fundamental rights in Part III of the Constitution. Thus the legislative authority to legislate upon personal laws was upheld. This Court upheld the powers of the legislature to modify or amend the personal laws in the Full Bench decision in G. Sambireddy v. G. Jayamma, (F.B.). Sections 11 and 17 of the Hindu Marriage Act were challenged as discriminatory in imposing monogamous marriages on Hindus while the right to polygamy of Muslims was left unaffected and thereby exposing Hindus marrying in contravention of the Act to prosecution under Section 494 I.P.C. The Court relied upon Narasu Appa's case (supra) and Saraswathi Animal's case (6 supra) and held that the Hindu Marriage Act is an Act amending the body of personal law known as Hindu law. Non-adherence to religion but subjection to a certain personal law is the basis of the classification made by the Hindu Marriage Act and that it cannot be said therefore that a classification is based on religion only.

9. The learned referring Judges observed that it appeared from the observations of Sen. J. in Krishna Singh's case (supra) that uncodified personal laws, not altered by usage or custom, are outside the purview of Part III of the Constitution and that only if they are modified or abrogated by statute, their constitutional validity could be tested with reference to the Part III of the constitution, but that the decision was not noticed in the two later decisions - Saroj Rani v. Sudarshan Kumar, and Partap Singh v. Union of India, in which respectively the constitutionality of certain provisions of Hindu Marriage Act and Hindu Succession Act, and the constitutional validity of Section 14(1) of the Hindu Marriage Act, was considered. But the question of personal laws being outside or not of the ambit of Part III of the Constitution did not arise in the two cases.

10. The controversy arises out of Article 13 itself. While Article 13(1) invalidates all laws in force in the territory of India immediately prior to the commencement of the Constitution in so far as they are inconsistent with Part III, Article 13(2) commands an absolute prohibition for any law to be made in contravention of the Part. "Law" and "law in force" are explained in Article 13(3) (a) and (b) respectively by way of inclusive definition. Since laws in force have been defined by an inclusive definition it has been argued that the words must receive their natural meaning as meaning all laws, statutory, personal, customary or otherwise and hence whatever be the nature of the pre-constitutional law, such of it to have become void at the promulgation of the Constitution which is contrary to the provisions of Part III, The view has proponents both by way of judicial interpretations as well as authors. In In Re Amina, a single Judge of the Court adopted the view and differing from the decision in the State of Bombay v. Narasu Appa (supra), made a reference for constitution of a larger Bench of three Judges to decide the questions raised. It is not known, Bar has not placed any material before us, whether any Larger Bench of the Court has since dealt with the questions and has taken a different view. I must hence proceed on the basis that Narasu Appa's case (supra) still holds the field so far as State of Bombay is concerned.

11. H.M. Seervai in his well known work 'Constitutional Law of India' propounds the view at Page 676 of the 4th Edition (Para 9.392) that there is no difference in the expression "existing law" and "law in force" and consequently, personal law would be "existing law" and "law in force" and that this conclusion is strengthened by the consideration that custom, usage and statutory law are so inextricably mixed up in personal law that it would be difficult to ascertain the residue of personal law as existing outside them: it was, therefore, necessary to treat the whole of personal law as existing law or law in force under Article 372 and to continue it subject to the provisions of the Constitution and subject to the legislative power of the appropriate legislature. Identical view has been advanced, on a critical approach, in the Book "Muslim Law and the Constitution" by Justice A.M. Bhattacharjee, the second edition of which has been placed before us.

12. In interpreting Article 13 of the Constitution the view that the definition of "law" in Article 13(3) (a) must pertain to only Article 13(2) and the definition of the words "laws in force" in Article 13(3) (b) is in reference to Article 13(1) alone has long since been abandoned, such argument advanced by the Solicitor General in the State of Bombay v. Narasu Appa (supra) was repelled by Chief Justice Chagla as accepting the contention would render the words "custom" or "usage" superfluous as the State cannot make any custom or usage. The matter was set at rest in Sant Ram v. Labh Singh, , a Constitutional Bench decision. The Court ruled, rejecting the contention, that the second definition,

i.e., "laws in force" does not in any way restrict the ambit of word "law" in the first clause as extended by the definition of that word. The second definition merely seeks to amplify the first one by including something which but for it, would not be included in the first definition. Thus for such reason, the Court held custom and usage having in the territory of India the force of law to be contemplated by the words "all laws in force" and hence to be affected by the fundamental rights. The Court thus held that the word "laws" in the second definition has also the meaning of "law" as defined in the first definition. Even earlier, custom or usage having the force of law at the commencement of the Constitution has been held as yielding to Part III of the Constitution if they are in any way inconsistent to it. It was so ruled in Dasaratha Rama Rao v. State of Andhra Pradesh, and Bhau Ram v. Baij Nath, . But even if it is so, yet the question still remains as to whether the expression "laws in force" would literally mean all the laws in force in the territory of India, even if they were uncodified, non-statutory, are not custom or usage having the force of Jaw in the territory of India. The expression "law in force" is also used in Article 372 of the Constitution as also in Article 371-F(k). Article 372 provides, notwithstanding the repeal of the enactments referred to in Article 395, for continuance of existing laws and their adaptation saying that all the law in force in the territory of India immediately before the commencement of the Constitution shall continue in force therein until altered or repealed or amended by a competent legislature or other competent authority. In Explanation 1 to the Article, the expression "law in force" is given an inclusive definition similar to the definition in Article 13(3) (b). In Article 372 the President is authorised to make adaptations or modifications, either by way of repeal or amendment, to bring the provisions of any law in force in the territory of India in accord with the provisions of the Constitution. The word "existing law" is not defined in Article 372 even though the marginal heading of the Article refers to the words. Those words are defined in Article 366, Clause 10 as an exclusive definition to say:-

"existing law" means any law, ordinance, order, bye-law, rule or regulation passed or made before the commencement of this Constitution by any Legislature, authority or person having power to make such a law, ordinance, order, bye-law, rule or regulation."

This definition differs from the definition of 'law' in Article 13(3) (a) inasmuch as the latter is an inclusive definition and refers to "notification" and "custom or usage" having in the territory of India the force of law, whereas those words are absent in the former. The continuance in force of laws under Article 372 is intended to meet the situation arising out of repeal of the enactments specified in Article 395. That Article repealed the Indian Independence Act, 1947, the Government of India Act, 1935, together with all enactments amending or supplementing the latter Act but not including the abolition of Privy Council Jurisdiction Act, 1949. Since by repeal of such Acts, enactments enacted and saved under the authority of those Acts faced the prospect of being also repealed, the provision of Article 372 was necessary to continue in operation those laws. What Article 372 says was thus the enacted or framed laws i.e., laws which were defined as existing laws in Article 366(10) and hence it cannot be said that either any personal law or any custom or usage having the force of law in the territory of India prior to the commencement of the Constitution was saved under Article 372 to continue in force after the commencement of the Constitution. That the expression "All the laws in force" and "existing laws" in Article 366(10) have no different meaning, has been variously accepted in judicial opinions and by commentators as also sanctified by the Supreme Court. The question was exhaustively discussed by Chief Justice Chagla in State of Bombay v. Heman Santlal,

where he pointed out that even though ordinary and normal canon of construction requires that when in a statute or in a Constitution two different expressions are used, as far as possible, two different meanings must be given to the two expressions because it must be assumed that the legislature and the Constituent Assembly did not use two different expressions without intending to convey two different meanings, yet instances are not unknown where two different expressions have been used to convey the same meaning. Tracing the development of the Constitution from the Government of India Act, 1935, and referring to Sections 292 and 293 of that Act to which Article 372 corresponds and the statute passed by the British Parliament on 18th February, 1937 in 1 Geo. VI C.9 explaining the expression "law in force" in Sections 292 and 293 of the Government of India Act and pointing out the definition of "existing Indian law" used in Sections 293 and 311, both the expressions were shown to have the same meaning as in Article 366(10). While explaining as to when marginal notes to Sections in statutes may be looked into for construing a Section, he held that when the words are ambiguous there should be no objection to looking at the marginal note in order to understand the drift of the Section and that it should also be borne in mind that at one time marginal notes did not appear in the statute by authority of Parliament, but that was no longer true as every part of the statute including marginal notes appears in the statute by authority of Parliament. In reaching the conclusion reliance was also placed in Keshavan Madhava Menon v. The State of Bombay, 1951 (2) SCR 228 in which Justice Das used "existing laws" and "law in force" as interchangeable terms. Seervai in his very same work also concurs with the view at Page 407 in para 8.17:

"It is submitted that the conclusion is correct, and the following historical account given by Chagla C.J. in Alreja's case supports that conclusion. Sections 292 and 293 of the G.I. Act 35 (which correspond to Article 372), used the expression "law in force", but the marginal note to Section 292 was "existing law of India to continue in force", and Section 293 was "adaptation of existing Indian laws etc." Before the G.I. Act, 35, came into force on April 1, 1937, it was realised that the use of the expression "law inforce" might create difficulties in carrying out the intention of the British Parliament. For, though "existing law" would include all law whether it was in actual operation or was capable of being brought into operation under the powers conferred by such law, "laws in force" might be taken to mean only that part of the law which was actually in operation and not that part which was capable of being brought into operation, for, a law cannot be said to be in force when it is not brought into operation at all. Realising this difficulty, the Br. Parliament enacted on February 18, 1937, the India and Burma (Existing Laws) Act, 1937, being an Act "to explain and amend Sections 292 and 293 of the G.I. Act, 35". Thus, the Br. Parliament was not content to leave Sees. 292 and 293 to be interpreted in the light of the marginal notes which spoke of "existing law", but indicated in the body of the amending Act itself, and in its title, that those Sections dealt with "existing law". In view of this history, the Br. Parliament did not repeat the mistake when it enacted Section 18, Indian Independence Act, 1947. That Section made "provisions as to existing law" and sub-clause (3) provided: "Save as otherwise expressly provided in this Act, the law of Br. India and the several parts thereof existing immediately before the appointed day shall, so far as applicable and with the necessary adaptations continue as the law of each of the new Dominions and the several parts thereof..." (italics supplied). This history of English Parliamentary legislation was overlooked, and the phraseology of Sections 292 and 293, as amended in 1937, and the marginal notes thereto, were stereotyped in Article 372 and the explanation to that Article was also used in

Article 13(3') (b). It is submitted that the above legislative history clearly shows that the expression "law in force" was used in the previous Constitution Acts to mean "existing law", and is used in the same sense in our Constitution."

The matter was clinched by the Apex Court in Edward Mills Co. v. State of Ajmer, , a Constitutional Bench decision saying:

"The first point does not impress us much and we do not think that there is any material difference between "an existing law" and "a law in force". Quite apart from Article 366(10) of the Constitution, the expression "Indian law" has itself been defined in Section 3(29) of the General Clauses Act as meaning any Act, ordinance, regulation, rule, order, or bye-law which before the commencement of the Constitution had the force of law in any province of India or part thereof. In our opinion, the words "law in force" as used in Article 372 are wide enough to include not merely a legislative enactment but also any regulation or order which has the force of law."

The meaning of the expression "law in force" is thus understood in the context of Article 366(10). It would be rational to adopt the same meaning so far as the words "laws in force" in Article 13 is concerned except to the extent the definition in Article 13(3) (b) denotes a wider meaning, i.e., to include also customs or usages having the force of law.

13. A combined reading of Articles 13,366(10) and 372 of the Constitution of India reveals the true iritention of the use of the words in Articles 13 and 372. It would thus be correct to say that the expression "laws in force" or "law in force" in Articles 13 and 372 have the same meaning as "existing law" in Article 366(10) except that the words stand extended in Article 13 to also include customs or usages having the force of law because Article 13(3) (b) is to be read with Article 13(3) (a). Thus understood, the existing laws which are continued under Article 372 would continue to operate subject to the provisions of Article 13(1) i.e., if they are not void because of being inconsistent with the provisions of Part III of the Constitution. The definitions of "laws in force" or "law in force" being inclusive in nature, would naturally mean that the expressions are intended to be extended ones i.e., while law or laws in force would have to be understood in their natural sense as whatever law continuing to be in force, the definitions make it clear that all laws which were made by legislature or competent authorities prior to the commencement of the Constitution, has not been repealed even if such law or any part of it was not in operation, would be regarded as laws in force and continue to be operative unless it is void because of Article 13(1). But this would, applying the clue available in Article 366(10), be the mandate only in respect of enacted or framed laws but not those which are not enacted by any legislative body or other competent authority but are nonetheless laws which are applied by the Courts as administering the relations between the parties, say as relating to marriage, inheritance, etc. Those include the foundational sources of the personal laws of the different communities applied to them by the Courts administering the law in the land and hence view was correctly taken in the State of Bombay v. Narasu Appa (supra) that while such laws are also laws in force in general way, yet they are not laws in force in the sense it is used in Articles 13(1) or 372. Those scriptural texts and foundational sources of personal laws of different communities at the same time transcend the legislative authorities inasmuch as they are not enacted by them and are also subjected to its authority being liable to be amended, anulled or

modified because of the legislative competence conferred upon the legislative bodies in Entry 5 of the concurrent list, as the Constitution of India is the paramount law which the people of the country have given unto themselves and subjecting all laws, in whatever shape they may be, to its overriding authority. Judged in that context the continuance of the non- statutory personal laws is not due to the provisions in Article 372 which only, as is clear from the Explanation 1 to the Article and Article 366(10), continues in operation only a law passed or made by a legislature or other competent authority, the non-statutory personal laws are neither passed nor made by such authorities.

14. Justice Gajendragadkar referred in Narasu Appa's case (supra) to In re Kahanda's Na 'rranda's, ILR 5 Bombay 154 when Justice West had come to the conclusion that the general rule was that the private law of a community is not affected by a change of Rulers and the provisions in question there had to be construed in the light of that general rule. In Mayor of Lyons v. East India Company, 1 Moore's Indian Appeals 175 it was pointed out by Lord Brougham:

"It is agreed, on all hands, that a foreign settlement, obtained in an inhabited country, by conquest, or by cession from another power, stands in a different relation to the present question, from a settlement made by colonizing, that is, peopling an uninhabited country.

In the latter case, it is said, that the subjects of the Crown carry with them the laws of England, there being, of course, no lex loci. In the former case, it is allowed, that the law of the country continues until the Crown, or the legislature, change it."

Kahanda's Na 'rranda's (supra) referred to the decision in The Advocate General of Bengal v. Ranee Surnomoye Dossee, 9 Moore's Indian Appeals 391 wherein the question was the prerogative of the Crown to forfeit the personal property of person a committing suicide in Calcutta. It was held that the English law of forfeiture of the goods and chatties of a/do dese did not extend to a native Hindu though he was committing suicide at Calcutta and distinction was pointed out where Englishmen establish themselves in an uninhabited or barbarous country in which case they carry with them not only the laws but also the sovereignty of their own and those who live among them and become members of their community are subject to the same laws, but that the general rule did not apply to early settlement of the English in India and the permission to the settlors to use their own laws within their factories did not extend those laws to natives associated with them within the same limits. The decision was acknowledged by the Supreme Court in Shiv Bahadur Singh v. State of Vindhya Pradesh, in para 16 saying that when various component States became the United State of Vindhya Pradesh on 18-3-1948, in the normal course and in the absence of any attempts to introduce uniform legislation throughout the State, the pre-existing laws of the various component States would continue to be in force on the well-accepted principle laid down by the Privy Council in Mayor of Lyons v. East India Company, 1 Moore's Indian Appeals 175. In Promod Chandra v. State of Orissa, the Supreme Court observed: "It may be that the presumption is that the pre-existing laws of the newly acquired territory continue, and that according to ordinary principles of International Law private property of the citizens is respected by the new sovereign, but Municipal Courts have no jurisdiction to enforce such international obligations." But that is a different matter and that even if there is a change of Rulers, yet the private law of the different communities do not change. It is apt

to make a reference to the observations of the Supreme Court, though in a different context, in Umaji v. Radhikaba, :

"The historical evidence and earlier legislations referred to above, the political, legal and constitutional position accepted and acknowledged by the Constituent Assembly itself when considering the Draft Constitution and in enacting it, and the observations of Shah, J. in Vora Fiddali's Case falsify the assumption made and the conclusion reached by the Full Bench that the Constitution made a total break with the past and set up new institutions. On the contrary, what is established by the above data is that not only was there no break with the past but the Constitution was the culmination of the aspirations of the people of India to be independent and to be governed by their own elected representatives and that the existing institutions, including the High Courts, as also the laws in force which were in existence at the commencement of the Constitution, were preserved and continued by the Constitution. What the Constitution did was to put its imprimatur upon them and upon their continuance."

Thus the personal law of different communities continue in operation unaffected by any change of Rulers. Such law would continue to operate unabated until because of social necessity of reformation or for any other reason the competent authority changes the law. Once the law is so changed and made into an enactment, ordinance, bye-law, order or otherwise it would, in the context of the Indian Constitution, be subject to the provisions of Part III and has to satisfy the test and the Courts may declare it void. It would follow that when such enactment, etc. of the personal laws is but a reiteration or reaffirmation without any modification or change of the scriptural texts, it cannot become void only because a subsequent legislative affirmation of it has come in. But, ushering in of a new Constitution does not mark a change of rulers and as such the position of continuance of personal laws, even when rulers are changed, could not be worse on the promulgation of the Constitution. The question was considered in State of Gujarat v. Vora Fiddali, wherein Justice Shah observed in para 139:

"It has also to be remembered that promulgation of the Constitution did not result in transfer of sovereignty from the Dominion of India to the Union. It was merely change in the form of Government. By the Constitution, the authority of the British Crown ever the Dominion was extinguished, and the sovereignty which was till then rooted in the Crown was since the Constitution came into force derived from the people of India. It is true that whatever vestige of authority which the British Crown had over the Dominion of India, since the Indian Independence Act was thereby extinguished, but there was no cession, conquest, occupation or transfer of territory. The new governmental set up was the final step in the process of evolution towards self-government. The fact that it did not owe its authority to an outside agency but was taken by the representatives of the people made no difference in its true character. The continuance of the governmental machinery and of the laws of the Dominion, give a lie to any theory of transmission of sovereignty or of the extinction of the sovereignty of the Dominion, and from its ashes, the springing up of another sovereign as suggested in which I will presently examine."

15. In view of the discussions, the proposition of invalidity of personal laws which are inconsistent to Part III would only be partially correct i.e., that the statutory personal laws and customs or usages

having the force "of laws only are subject to the paramountcy of the fundamental rights but it has to be held, by necessary interpretation, that non-statutory personal laws at the commencement of the Constitution transcend the fundamental rights. This interpretation of Articles 13(1) and 372 would be logical and wholesome as interpretation of the Constitution differs from interpretation of ordinary statutes and the maxims of statutory interpretation do not always apply to the interpretation of Constitution. The Constitution is a living and organic document embodying not only the hopes and aspirations of the people to which it belongs but is also capable of suitably adapting itself to the growing and changing needs of the society. It is a document always having its root in the present and sprouting its branches to the future. The difference between interpretation of ordinary statutes and of the Constitution was stressed by the Apex Court in Supreme Court Advocates on Record Association v. Union of India, AIR 1993 SC 268 with Justice Pandian observing:

"So it falls upon the superior Courts in a large measure the responsibility of exploring the ability and potential capacity of the Constitution with a proper diagnostic insight of a new legal concept and making this flexible instrument serve the needs of the people of this great nation without sacrificing its essential features and basic principles which lie at the root of Indian democracy. However, in this process, our main objective should be to make the Constitution quite understandable by stripping away the mystique and enigma that permeates and surrounds it and by clearly focussing on the reality of the working of the constitutional system and scheme so as to make the justice delivery system more effective and resilient."

Justice Kuldip Singh in the same case observed:

"It is not enough merely to interpret the constitutional text. It must be interpreted so as to advance the policy and purpose underlying its provisions. A purposeful meaning, which may have become necessary by passage of time and process of experience, has to be given. The Courts must face the facts and meet the needs and aspirations of the times. Interpretation of the Constitution is a continual process.

x x x x x x x x x x x The constitutional provisions cannot be cut down by technical construction rather it has to be given liberal and meaningful interpretation. The ordinary rules and presumptions, brought in aid to interpret the statutes, cannot be made applicable while interpreting the provisions of the Constitution."

Justice Ahmadi, as he then was, also observed while issuing a warning that where the words are unambiguous, effect must be given to them, as that was the constituent body's intent:

"It is well settled that a Constitution is an ever evolving organic document which cannot be read in a narrow, pedantic or syllogistic way but must receive abroad interpretation. Constitution being a growing document its provisions can never remain static and the Court's endeavour should be to interpret its phraseology broadly so that it may be able to meet the requirements of an ever-changing society. But while it may be permissible to give an enlarged or expanded meaning to the phraseology used by the Constitution-makers, while it may be permissible to mould the

provisions to serve the needs of the society, while it may even be permissible in certain extreme situations to stretch the meaning and, if necessary, bend it forward, it would certainly be impermissible to break it or in the guise of interpretation to replace the provisions or rewrite them."

In another case, R.C. Poudyal v. Union of India, , the majority observed:

"In the interpretation of a constitutional document," words are but the frame work of concepts and concepts may change more than words themselves." The significance of the change of the concepts themselves is vital and the constitutional issues are not solved by a mere appeal to the meaning of the words without an acceptance of the line of their growth."

It is hence to be found as to what was the real intention of the Constitution when it said that all laws in force in the territory of India immediately before the commencement of the Constitution shall be void to the extent they are inconsistent with Part III. It is indeed very difficult to conceive that the framers of the Constitution did ever visualise that on one day, when the Constitution is introduced, all laws of all communities would be ironed out of all their differences by application of the fundamental rights and the differences of religious perception, custom, practice, nay, of the very way of livings of this vastly heterodox multitudes of communities would be deprived of their individuality in the matters of religion ad religious practices. The enormity of the resultant situation would have prevented any such contemplation to have been ever made and indeed no such precipitative action could ever have been intended as is clear from Article 44 which put the introduction of a uniform civil code not in Part HI but in Part IV, as a goal to be achieved in good time when situation conducive to it prevails. If by mere force of Article 13 the object of the uniformity would have been stood achieved, there would have been no necessity for placing Article 44 on the body of the Constitution. Another reason for which the non-statutory personal laws must be held to be outside the purview of Article 13(1) is that customs or usages having force of law were specifically included as being law for he purpose of that Article as otherwise there would have been room to contend that they were not laws within its meaning. Custom and usages having the force of law are non-statutory having not been framed by anybody and hence when their inclusion was thought necessary, those were specifically specified as being laws for the purpose of the Article. If it would have been the intention of the Constituent body to include non-statutory personal laws as well, that would have been made clear by specific inclusion. Those cannot be brought within the ambit of the Article merely because they were laws applied by the Courts of India as similarly customs or usages having the force of law were also being applied by the Courts of India in the administration of justice but yet were specifically included and there was no reason why non-statutory personal laws could not have been likewise included.

16. Argument has been advanced drawing sustenance from the book 'Muslim Law and the Constitution' by Justice A.M. Bhattacharji that even if it is assumed that the power under Article 372(2) to adopt and modify laws in force was not intended to be used in respect of non-statutory personal laws, even though there is no inherent limitation in the Article in that regard, that question would be relevant only in considering the propriety or vires of the adaptation order, if any, made in respect of such personal laws, if at all. Such a challenge even if could be made in the teeth of the words in Article 372 that the adaptation order is not challengeable in any Court of Law, yet there is

no reason why the propriety under Article 372(2) should be projected for interpretation of Article 372(1) when the expression "laws in force" appears to be absolutely unqualified and the manifest intention appears to be to continue "all the laws in force in the territory of India." Adopting the argument, reference has been made to the Nine Judge Bench decision in State of W.B. v. Corporation of Calcutta, which purported to approve the observations in Director of R & D v. Corporation of Calcutta, and V.S.R. & Oil Mills v. State of AP., that "laws in force" includes not only enactments of the Indian legislatures but also the common law of the land which was being administered by the Courts. The question that faced their Lordships in State of W.B. v. Corporation of Calcutta, was whether a canon of interpretation was substantive law adopted by the Courts of India and hence was the law of the land. The Court held to the contrary and differentiated to say that the canon of construction was not "law in force" which only could be amended by legislation. Referring to Article 372(1) it was pointed out that the Court had earlier held in Director of R & D v. Corporation of Calcutta, that the expression "law in force" includes not only enactments of the Indian legislatures but also common law of the land which was being administered by the Courts in India. In the relevant paragraph, paragraph 10 of Director of R& D v. Corporation of Calcutta, , it was observed: "If we compare the provisions of Article 366(10) which defines 'existing law' it has reference to law made by a legislative agency in contra-distinction to "laws in force" which includes not only statutory law, but also custom or usage having the force of law, it must be interpreted as including the common law of England which was adopted as the law in this country before the Constitution came into force." Thus, Director of R & D's case, was speaking of those common laws of England which had been adopted, before the Constitution came into force, as law of this country. Their Lordships held in the very same decision - State of W.B. v. Corporation of Calcutta, in paragraph 21:

"To sum up: some of the doctrines of common law of England were administered as the law in the Presidency Towns of Calcutta, Bombay and Madras. The Common Law of England was not adopted in the rest of India. Doubtless some of its principles were embodied in the statute law of our country. That apart, in the Muffasil, some principles of common Law were invoked by Courts on the ground of justice, equity and good conscience. It is, therefore, a question of fact in each case whether any particular branch of the Common Law became a part of the law of India or in any particular part thereof."

It would hence be seen that Director of R& D's case (27 supra) which was being referred to in State of W.B. v. Corporation of Calcutta (supra),in thecontextonlysaid that common Law of England which had been adopted as the law of this country before the Constitution came into force was also law in force for the purpose of Articles 13(1) and 372. But as was itself acknowledged in State of W.B. v. Corporation of Calcutta (26 supra), there is nothing to show that such common laws of England were adopted as the body of law for this country though some of its principles had been embodied in the statute law of this country and some of the principles of the common law of England was being applied as law only in the original side of the High Courts of Calcutta, Bombay and Madras, and in the Mufasil, some principles of common law were invoked by Courts on the ground of justice, equity and good conscience. What was being said in State of W.B. v. Corporation of Calcutta (26 supra) was that the expression "laws in force" also includes the common law of England which had been so adopted and was being administered by the Courts in India. V.S.R. & Oil Mills v. State of A.P. (28

supra), though referred to Director of R & D's case(supra), but did not specifically deal with this question. It is from this to be considered whether all non-statutory laws applied and administered by the Courts in India prior to the commencement of the Constitution, including the personal laws, not only owe their continuance, after the commencement of the Constitution, to Article 372 but also become subject to the disqualification under Article 13(1). In Krishna Singh's case (4 supra) the view expressed was that Part III of the Constitution does not touch upon the personal laws of tine parties. As has been seen, some other Courts have also taken the same view. Of course, in Krishna Singh's case (4 supra), the detailed reasons for taking the view are not there,- yet it must be taken that in rendering the decision the Court was conscious of the decision in State of W.B. v. Corporation of Calcutta (26 supra). But considering the matter as a whole, I would venture to observe that in the earlier decision the Supreme Court did not lay down as a general proposition that even all non-statutory laws which were being administered by Courts in India before coming into force of the Constitution, were ipso facto law in force within the meaning of Article 372 of the Constitution or laws in force within the meaning of Article 13(1), and that the observation was confined to only those common laws of England which were being administered by the courts in India of which some had been adopted in the Indian statutes also. As is well known, many of the common law principles of England were also not adopted and were deviated in its application to India, discussion on which is not necessary to prevent this judgment becoming over-burdened. For a fuller exposition, reference may be made to "The Common Law of India" - The Hamlyn Lectures by M.C. Setalvad - reprint edition published in 1970 by N.M. Tripathi Pvt. Ltd.

17. I need only one other decision - United Provinces v. Atiqa Begum, AIR 1941 Federal Court 16 to explain. As regards the observation made in that case at page 31 that Section 292 of the Government of India Act, 1935 applied not only to statutory enactments then in force but to all laws, including even personal laws, customary laws and common laws, it can only be said that the effect of Section 292 was not considered in the context of Section 311 of that Act which interpreted different expressions including "Existing Indian Law", and the marginal note of Section 292 which was "Existing law of India to continue in force". "Existing Indian law" and "Existing law of India" would have the same meaning. But the observation made in the decision was without any discussion or consideration as engaged the Apex Court at later point of time interpreting the provisions of the Constitution of India. It has to be remembered however that even without the benefit of Section 292 of the Government of India Act, 1935 or Article 372 of the Constitution of India, all other laws which were non-statutory but yet were having force in the territory of India prior to the commencement of either the Government of India Act, 1935 or the Constitution of India were to continue in force ipso facto and could have been only altered in pursuance of the legislative authority conferred on the Legislatures or by any other competent authority.

18. For all such reasons, I would agree with the view expressed in the referring order that uncodified personal laws not altered by usage or custom are outside the purview of Part III of the Constitution. But if such personal laws have been modified or abrogated by statute, or varied by custom or usages having the force of law, their constitutional validity is liable to be tested, as the case may be, on the anvil of Article 13(1) and 13(2) of the Constitution of India.

19. In view of the conclusion, objection taken by the respondents to the vulnerability of the Act has to be negatived. The Act, being the statute law, has to conform to the test of Article 13(1) to survive.

20. With the deck so cleared, I would now proceed to examine the questions raised relating to the vires of the provisions of the Act.

21. In the intervention applications filed by the organisations who have appeared in response to the notice and the press note, as also in the affidavits in W.P. Nos. 5106 and 5585 of 1994 and 9717 of 1983, the uniform stand of the. provisions of the Act being discriminatory has been taken.

22. In W.P.M.P. No. 4511 of 1991 filed by Young Women Christian Association for intervention in W.P. No. 9717 of 1983 it is stated that a seminar on uniform civil code was arranged on 16-2-1991, which was participated by numerous members of the Association as also by lawyers belonging to Christian Community. The affidavit states the view to have been taken in the seminar that Christians have been discriminated against in respect of family laws, particularly relating to divorce, as Section 10 of the Act framed in 19th century by Englishmen is quite anachronistic, the English people have since changed their own matrimonial laws but that the Indian Christians are the victims of the continuation of the anachronistic Act. The accompanying resolution inter alia presses for deletion of Section 10 and to be substituted by the provisions of divorce under the Hindu Marriage Act, 1955 or any other law and also presses for doing away with the confirmation of the decree by the High Court under Section 17 of the Act.

23. W.P.M.P. Nos. 4512, 5042, 5066 of 1991, 19289, 19290, 19291, 19292, 19293 and 19550 of 1989 have been respectively filed by the Telugu Baptist Churches, Jangaon Field; Australian Baptist World Aid and Support A Orphan and 18 others; Smt. R. Priya Kumar; Trust Association of Convention of Baptist Churches of Northern circars, which convention has control over seven districts viz., Srikakulam, Visakhapatnam, Vizainagararn, East Godavari, West Godavari, Krishna and Guntur with 200 churches under their control; Telugu Baptist Churches, Nalgonda, G.B. Coles Centennial Telugu Baptist Churches, Kurnool; J. Alexander; Sarnavesham of Telugu Baptist Churches, Nellore and A.P. High Court Women Lawyers Association substantially on similar grounds. The intervenor-petitioner in W.P.M.P. No. 4511 of 1991 has filed independent W.P. No. 5702 of 1994 along with another Smt. Pathima Mary challenging the vires of Sections 10, 17, 22 and 55 of the Act. The Petitioner in W.P.M.P. No. 19292 of 1989 has independently filed W.P. No. 5106 of 1994 questioning the validity of Sections 10 and 22 of the Act claiming the provisions to be discriminatory as he was unable to get divorce from his wife because of such provisions. All the voluntary organsations claim to be working in the social field and particularly for Christians and Christian women and object to the continuance of the archaic law governing divorce and stress the need for its reformation. An affidavit has also been filed in W.P. No. 9717 of 1983 by Rev. Dr. P. Victor Premsagar, Moderator, Church of South India, Madras and the Bishop in Medak, Church of South India, Medak, referring to the Bible, old testament and new testament stressing upon the sacred nature of marriages, of there being no room for divorce in the teaching of Jesus with the concession in Matthew 19:7 when there is a case of adultery, and finally expressing the opinion that the conditions stipulated for divorce for husband and wife may be revised so that both of them have the same requirements for divorce under the law and that in view of the stress of the modern society

and the difficulties faced in families especially in relation to dowry etc., which is prohibited in the Christian Church, it may be necessary to consider other grounds than adultery, which may make it difficult for the husband and wife and the children to live together in strained relationship.

It is also seen from the decision in Ammini E.J. v. Union of India, , a Special Bench case, which I shall have occasion to refer later on, that Union Government, Ministry of Law, Justice and Company Affairs wrote a letter on 30-12-1994 to the Central Government Pleader of Kerala High Court that it had received, through efforts of the Joint Women's Programme, a voluntary women's organisation, comprehensive proposals in the form of draft bills for changes in the personal laws of the Christian Community from the Christian Churches. Those Bills include the draft Christian Marriage Bill, 1994 which seeks to consolidate, amend and codify the law relating to marriage and matrimonial causes of persons professing Christian religion and to repeal the Indian Divorce Act, 1869 and Indian Christian Marriage Act, 18.72 among other things. The grounds for divorce proposed in the aforesaid Bill are more liberal in nature in tune with the changed social-economic conditions of the community and the prevailing law relating to marriage and divorce available under the Special Marriage Act, 1954. The grounds for divorce include desertion of the petitioner by the other spouse for a continuous period of not less than two years immediately preceding the presentation of the petition. It was stated in the letter that Bill had the support of the Catholic Bishops' Conference of India (CBCI) and 27 Member Churches of the National Council of Churches in India (NCCI) and some other independent churches and that since the Christian Churches have now come forward with necessary legislative proposal, the Government are actively considering the same with a view to bringing in necessary legislation as early as possible and the proposals are being studied and examined.

24. Section 10 of the Act provides the grounds for dissolution of marriage. A husband may file a petition for dissolution of the marriage if the wife has been guilty of adultery since the solemnization of marriage, but so far as the wife is concerned, the grounds are, apart from change of religion of the husband and going through a form of marriage with another woman, of he having been guilty, of adultery which must be incestuous or coupled with bigamy or of adultery with marriage with another woman, or of such cruelty as without adultery would have entitled her to a divorce a mensa et thoro, or of adultery coupled with desertion, without reasonable excuse, for two years or upwards. The other grounds for divorce are rape, sodomy or beastiality. It is easy to perceive that so far as the ground of adultery is concerned, the husband can maintain a petition only on the ground of plain adultery of the wife but so far as she is concerned she can present such petition only if the adultery is of a particular nature or is associated with other conducts of the husband as specified. That this is discriminatory does not require much persuasion to conclude as the different treatment appears on the very face of the provision itself. Indeed the view has been taken not only by Courts from time to time but also by the Law Commission and by research and statistical studies. Section 22 of the Act though provides for a decree of judicial separation does not make any provision for ripening of the decree to one of divorce as a result of which parties to the decree would have no liberty to marry again since the bond of marriage between them continues to subsist. Not only the Law Commission has also recommended a comprehensive legislation conferring equal rights on men and women professing the Christian faith relating to marriage and divorce, but also the Universal Declaration of Human Rights, 1948 adopted in Article 16 thereof that men and women of full age irrespective of

their nationality or religion are entitled to equal rights as to marriage, during marriage and at its dissolution. The two international covenants which came into existence for the purpose of giving effect to the Universal Declaration were adopted by the United Nations, and India has also accepted both the covenants. Much more than a century back the Act had been modelled upon the then British Law - the Matrimonial Causes Act, 1857, but though the law in that country has far advanced doing away with the archaic provisions and instead adopted equality between men and women in matters of marriage and divorce, yet the law in India has remained static throughout all these years and has failed to take note of contemporary development throughout the world. The grounds for divorce in the English law under the Matrimonial Causes Act, 1965 are listed in Latey on Divorce, 15th Edition in Para 2.90 in Chapter 3 of which the first is "adultery of the other spouse during the marriage". After the Matrimonial Causes Act, 1857 came the Matrimonial Causes Act, 1923, which was passed on July, 17 and equalised the rights of husband and wife to obtain divorce on the ground of adultery. Under the 1857 Act and prior to it, a wife could not obtain a divorce on the ground of her husband's adultery only, unless it was incestuous or bigamous or by way of rape; she had to establish an additional ground of either cruelty or desertion for at least two years. Since 1923, the rights of the parties of divorce were equalised and such rights were maintained in the Judicature Act, 1925, Matrimonial Causes Act, 1950 and thereafter Matrimonial Causes Act, 1965. An article published in 52 Law Quarterly Review in 1897 gives a discussion as to the development of law relating to divorce upto 1857. The Catholic Canon Law which was being dealt with by Ecclesiastical Courts regarded that marriages are indissoluble and would not grant divorce a vinculo. The reliefs that were granted were either a declaration of nullity of the marriage or a decree of separation a mensa et thoro. In Reformatio legum Ecclesiasticarum, serious attempt was made by the reformers for decree of divorce a vinculo to be authorised on grounds of adultery, malicious desertion, mortal enimities and several ill-treatment and the wife to be placed on equal footing with men. The reform failed to receive the sanction of the Parliament. But Parliament at a later period of time, as has also been done by the ecclesiastical authorities in the Catholic ages, were exercising power to remedy the state of things which they recognised as being injurious to the Society on a case to case basis. Then came the law of 1857 which has since undergone the changes. In contrast it is seen from American Jurisprudence, Volume 17, that the grounds for divorce in the statutes of the different States of the federation very greatly and that in most States the statutes lead to causes for absolute divorce, which are sometimes classified as those existing at the time of marriage and those arising after it. The first classification includes fraud, duress, impotency, bigamy and insanity or mental incapacity. After the marriage, the grounds include adultery, cruelty or cruel and inhuman treatment and the like, desertion, separation, the commission of, and conviction for, crime, drunkenness and intemperance and non-support or failure to provide a home. Some other statutes also provide for some other grounds. As regards adultery as a ground, it is found that as a general rule adultery of either party to a marriage is a ground for divorce, either from bed and board or from the bond of matrimony or both. As regards the distinction between adultery of husband and that of a wife it is stated," In this country, a distinction between the adultery of the wife and of the husband has been made in the statutes of some of the States. But, as a general rule, in the divorce statutes of the several States no such distinction is made; under most statutes either spouse is given the right to an absolute divorce for the adultery of the other. While it may be true that the consequences of the wife's adultery may be more serious to the family relation by reason of the risk of introducing spurious offspring, nevertheless the statutes generally recognise no distinction between the husband and the wife in

respect of the gravity of marital offences when considered as grounds for divorce; both parties stand alike before the law." The development of rights of women for absolute divorce on the basis of equality with men have been similar in France and Germany. It is seen from the New Schaff - Herzog, Encyclopaedia of Religious knowledge edited by Samuel Macauley Jackson, D.D., L.L.d. Vol. 3,1953, that during the 17th century, almost simultaneously in Holland and America the foundation of modern divorce law was laid. The law of 1792 in France, instituting civil divorce practically sanctioned free dissolution of wedlock at the pleasure of the parties. The Code Napolion in 1803 substituted a more conservative provision allowing absolute divorce for five causes. That was abrogated in 1816 and civil divorce was restored only in 1884. But the liberal policy of France, as expressed in the Code Napolion, undoubtedly had a powerful influence on the extension of civil divorce throughout Europe. The Act of 1884 sanctioned absolute divorce, on the petition of either spouse, for adultery, cruelty and condemnation to infamous penalty, if at the same time the penalty be corporal; while separation from bed and board is still permitted. In Germany, by the Imperial Code of 1900, absolute divorce was sanctioned for five causes:(l) adultery; (2) attempt on the life of either spouse by the other; (3) malicious desertion; (4) when either spouse has been guilty of grave violation of the obligations based on the marriage or of so deeply disturbing the marital relation through dishonourable or immoral behaviour that the continuance of the marriage cannot be expected from the other, and (5) insanity of three years standing.

25. Article 16 of the Universal Declaration of Human Rights, 1948 adopted by the General Assembly of the United Nations, to which India was a party, is: "Men and Women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution."

In the 1965 session the Commission on the Status of Women considered a report by the Secretary General on the dissolution of marriage, annulment of marriage and judicial separation, based on information supplied by 44 Governments in reply to a questionnaire. The purpose of the report was to enable the Commission to determine to what extent Article 16 of the Universal Declaration had been taken into account in national legislation. The Economic and Social Council, on the basis of the Commission's recommendation unanimously adopted on the 16th July, 1965 a resolution recommending the United Nations Member Governments to take all possible measures to ensure equality of rights between men and women in the event of dissolution of marriage, annulment of marriage and judicial separation and recommended inter alia that both spouses should have the same rights and should have available the same legal grounds and legal defences in proceedings for divorce, annulment and judicial separation. The Commission on the Status of Women in its session from 21st February to 11th March, 1966 prepared a Draft Declaration on the Elimination of Discrimination against Women. On 26th July, 1966, the Economic and Social Council, acting on the recommendation of the Commission unanimously adopted resolution transmitting the draft declaration to the General Assembly and on 16th December, 1966 the General Assembly unanimously adopted the resolution requesting the Commission on the Status for Women to review the draft declaration bearing in mind the amendments which have been submitted and taking into account the observations of the Governments and relevant discussions. To that text adopted by the General Assembly, India was a party. It had been elected as a member of the Economic and Social Council on 15-12- 1965 for a period of two years ending on 31-12-1967. The Commission prepared a

draft declaration adopting the new text unanimously on 2nd March, 1967. The recommendation of the Commission was unanimously approved by the Economic and Social Council on 29th May, 1967. The text so prepared by the Commission was considered by the General Assembly, which unanimously approved it on 7th November, 1967 as the Declaration on the Elimination of Discrimination against Women. Clause 2 of Article 6 of the Declaration was as follows:

"All appropriate measures shall be taken to ensure the principle of equality of status of the husband and wife, and in particular;

Women shall have equal rights with men during marrige and at its dissolution;"

India also accepted the Universal Declaration on Human Rights on 10-4-1979 as also the two international covenants on civil and political rights and on economic, social and cultural rights - with regard to "equality"of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution" (Article 23 of the Covenant on Civil and Political Rights). It has been the argument that since India is a party to the declaration and the Covenants, it is binding upon it and that the Indian law must be brought at par to conform to the international standard. As regards the stand of the Law Commission of India, we have been referred by Mr. V.L.N.G.K. Murthy to the Special Bench decision of Ammini E.J. v. Union of India (30 supra) wherein their Lordships have referred to the recommendations. Paragraph 18 of the judgment is as follows:

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

Accordingly the Commission after ascertaining public opinion submitted the 22nd Report reiterating its earlier stand. Though on receipt of the 22nd report, the Christian Marriage and Matrimonial Causes Bill was introduced in the Parliament the same lapsed on the dissolution of the Parliament."

As to the volume of the demand for change of the law an insight can be had from the report of the Committee on the Status of Women in India titled "Towards Equality" published by the Government of India, Dept. of Social Welfare, Ministry of Education and Social Welfare in December, 1974 wherein at pages 418 and 419 appears Tables IV. 1 and 1 .A. The Tables show the percentage distribution of the responses to the question "We would like to have your views on some issues concerning marriage. Please tell us if you agree, partially agree/ disagree, or partially disagree with what we now ask you." The respective Tables are as follows:

"Table-IV.1 Percentage distribution of responses on views on issues concerning marriage.

Question: We would like to have your views on some issues concerning marriage. Please tell us if you agree, partialy agree/disagree, or partialy disagree with what we now ask you.

Statements	Agree	Partially agree	Disagree	No response	Total
15. Grounds of divorce should be the same for both husband and wife.	74.00	4.80	15.46	5.74	100.00

Table-IV.1.A- Percentage distribution on responses on views on issues concerning marriage by male/female respondents.

Statements	Agree		Partially Disagree		Disagree	
	M	F	M	F	M	F
15. Grounds of divorce should be the same for both husband and wife.	72.99	74.37	4.70	4.84	17.61	14.72

The gaping and the heavily filled inequality in the provisions of Section 10 of the Act is telltale on the face of it. Henderson v. Henderson, was a case where the wife sought a decree for divorce on the facts that soon after the marriage the husband resorted to perverse cruelty, brought drunken young men to the house and attempted to induce or force her to submit to their indecent overtures, beat her and also starved her to compel her to live the life of a prostitute. Because she resisted, she was forced out of the house for compelling her to live with her parents, and after she left he had been leading a bad immoral life, consorting with lewd women. The Court refused to confirm the decree of divorce granted by the District Judge as though cruelty in the extreme nature had been proved, yet it was insufficient to grant a decree as the law specifically stated that "the petitioner must prove adultery coupled with cruelty, or if another relevant section is to be resorted to, "adultery coupled with desertion without reasonable excuse for two years or more." In the same year, the same Special Bench had earlier decided the case T.M. Bashiam v. M. Victor, . The Court had observed:

"Before parting with the case, we may observe that the provisions of Act 4 of 1869 appear to be highly antiquated, and that they have not kept pace with the provisions of similar enactments relating to marriage in other communities, which are of a far more progressive character. This anomaly was noted by Alagiriswami J. in S.D. Selvaraj v. Maty, 1968-1 Mad L.J. 289 at 294 and he contrasted this Act with the English Matrimonial Causes Act which amended the earlier laws in England, and "put the husband and wife on equal footing."".....

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

the Act governs a large body of persons in this country to see that its provisions are rendered humane and up-to- date. Hence, with respect, we entirely concur in the observations of Alagiriswami, J. in the decision referred to. But the Courts have to administer the law as it stands, and as the law is to-day, there can be no decree nisi in this case in favour of the wife."

In Mary Soniz Zachariah v. Union of India, 1990 (1) KLT 130 the learned single Judge noticed the recommendations made by the Law Commission from time to time as also the response of the Government which had introduced a Bill in Parliament in 1962, but it got lapsed and even thereafter in 1983 even though some attempts were made for revival of the action by introduction of Marriage Laws (Amendment) Bill, yet for some technical snag it did not proceed. The Union of India in its counter affidavit had stated that the Law Commission had made recommendation in its 90th report for making changes in Section 10 of the Indian Divorce Act, but that the Government had not taken any decision about the recommendation. The Court directed the Union of India to take decision, within six months from the date of receipt of copy of the order, on the recommendation of the Law Commission in its 90th report. Apparently, no action has been taken on the direction. The dissatisfactory position of law was also noticed by a Special Bench of this Court in R. Hemalatha v. R. Satyanandam, saying that it was somewhat strange that in the second half of the 20th century a Christian wife is not in a position to get a decree for dissolution of marriage on the ground of cruelty only or adultery only. The Indian Divorce Act, 1869 has not advanced along with the amendments to the English law made from time to time and even the law relating to the divorce of Hindus has also undergone considerable change. The court observed:

"It appears to us to be incongruous to allow such discriminatory provisions to remain in the Statute book after the coming into force of the Indian Constitution guaranteeing equal protection of laws to every citizen and prohibiting discrimination on the ground of sex. It is high time that suitable amendments are made in the Indian Divorce Act which will bring it in line with enactments like the Hindu Marriage Act. Even though a suggestion was made as far back as 1968 in S. D. Selvaraj v. C. Mary, (1968) 1 Mad L.J. 289 and the same was reiterated in 1970 in T.M.. Bashiam v. M. Victor, (SB) (32 supra) it is surprising that no attempts have been made by the Legislature to make any suitable amendments to the Indian Divorce Act."

Yet, no effort has been made by the Union of India to change the law. Another Special Bench of the Calcutta High Court expressed the same anguish in Swapna Ghosh v. Sadananda Ghosh, observing:

"I do not propose to decide these questions, which are otherwise of very great importance, as this case can be disposed of even without determining those questions and one of our well-settled self-imposed restraint is not to decide any Constitutional question unless we cannot but. My only endeavour is to draw the attention of our concerned Legislature to this anachronistic incongruities and the provisions of Article 15 of the Constitution forbidding all discrimination on the ground of Religion or Sex and also to Article 44 staring at our face four decades with its solemn directive to frame a Uniform Civil Code."

Justice S.K. Mookherjee felt that the in-depth consideration by the Parliament or appropriate State legislature of the procedural provisions of the Indian Divorce Act for introduction of amending

provisions is necessary though he did not want to express any opinion on the other questions. Justice Ajit Kumar Nayak considered the provisions of Section 17 of the Act to be a mid Victorian vintage and observed that time has also come for a reappraisal and reconsideration of the other anachronistic incongruities fundamental and discriminatory in nature manifest not only in procedure but in substantial core provisions of the Act. The same Special Bench in the same year in Ratnish Francis Toppo v. Violet Francis Toppo, made reference to the decision of Justice Aligiriswami in S.D. Selvaraj v. C. Mary, 1968-1 Mad L.J. 289 (sic. (1968) IMad.L.J. 289) expressing similar views. The judicial anxiety in the matter of removing inequality between men and women was expressed by Justice Chinnappa Reddy in Reynold Rajamani v. Union of India, 1968-1 Mad L.J. 289 saying:

"My brother Pathak, J. has pointed out that the history of matrimonial legislation has been towards liberalisation of the grounds for divorce.

Inevitably so. The history of matrimony itself, in the recent past, has been a movement from ritual and sacrament to reality and contract even as the history of the relationship of the sexes has been from male dominance to equality between the sexes. But the world is still a man's world and the laws are man-made laws, very much so. We have just heard that in an advanced country like the United States of America, the Equal Rights for Women Amendment could not be successfully pushed through for failure to obtain the support of the necessary number of States. Our Constitution- makers and our Parliament have certainly done better. We have constitutional and legal equality for the sexes. But even so, economic and social equality between the sexes appears to be a very distant goal, x x x x x x x x x x x x x x x x x x x But, the march towards equality and economic and social justice is still a 'long march' and meanwhile, what of divorce by mutual consent? Yes, I agree with Miss Lily Thomas that divorce by mutual consent should be available to every married couple, whatever religion they may profess and however, they were married. Let no law compel the union of man and woman who have agreed on separation. If they desire to be two, why should the law insist that they be one?"

Again in Ms. Jorden Diengdeh v. S.S. Chopra, he observed:

"It is thus seen that the law relating to judicial separation, divorce and nullity of marriage is far, far from uniform, Surely the time has now come for a complete reform of the law of marriage and make a uniform law applicable to all people irrespective of religion or caste. It appears to be necessary to introduce irretrievable breakdown of marriage and mutual consent as grounds of divorce in all cases. The case before us is an illustration of a case where the parties are bound together by a marital tie which is better united. There is no point or purpose to be served by the continuance of a marriage which has so completely and signally broken down. We suggest that the time has come for the intervention of the legislature in these matters to provide for a uniform code of marriage and divorce and to provide by law for a way out of the unhappy situations in which couples like the present have found themselves. We direct that a copy of this order may be forwarded to the Ministry of Law and Justice for such action as they may deem fit to take. In the meanwhile, let notice go to the respondents."

The Constitutional validity of Section 10 of the Act was examined at length by a Special Bench of the Kerala High Court in Ammini's case (30 supra) from a variety of aspects and found the Section to be ultra vires of Articles 14, 15 and 21. The learned Judges observed:

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

xxxx xxxx xxxx "We are also inclined to take the view that the impugned provisions in so far as they compel a deserted or cruelly treated Christian wife to live perpetually tied down to a marriage which has for all intents and purposes ceased to exist as a result of desertion and cruelty shown by the husband concerned are highly harsh and oppressive and as such arbitrary and violative of Article 14 of the Constitution of India. For, even without a detailed discussion, it can safely be stated without fear of any contradiction that no purpose whatsoever will be served by continuing the relationship of marriage which is irretrievably broken down as a result of desertion by the husband for a continuously long period and cruelty meted out which would justify an order for judicial separation."

I have no hesitation to endorse these views.

26. Marriage, though undoubtedly, is a personal event in the life of two individuals, yet has been throughout the progress of civilisation is regarded also as a social event and a matter of concern to the society since the community exists only because of the interaction of the individuals who belong to it and out of which interaction the peculiar trades, culture, ethnicity of the society emerges. For fulfilment of a man's or woman's successful and purposeful existence in the society success of the marriage is a predominant factor and reverse of it if comes to existence would not only lead to discord and lack of growth and flourishing of the individuals but likewise affect the society and contribute to its chaos and discord. As has been often said, man is essentially a social animal and it would be futile to expect a healthy society to exist composed of unhealthy individuals in their body or mind. As has been emphasised by the Apex Court, human existence presupposes existence with dignity as human, but such dignity would be absent if the very psyche of the human is destroyed. It is true that no doubt marriages should be enduring and frequent break-up may be itself a social evil

but where the marriage has conspicuously failed, when the two persons are not compatible and there is no retrieval situation. Where the continued association of the psyche of the two persons only result in continued repugnancy and marriage is obviously seen having irretrievably broken down, the tyranny of the law to see such of them to be continuously tied to the bond of marriage is worst than the physical torture. The person, may be man or woman who is compelled to undergo the endurance, may see and end of the meaning of life and living would mean nothing more than physical survival only. If marriages are made in heaven their continuance must be heavenly and must not become a veritable hell indeed. The daily roasting in such a hell, at the instance of law which was enacted 125 years back, for whatever reason can never be taken as being consistent to Article 21 of the Constitution of India and it would be rightfully the function of the Courts to declare it so.

27. It was said by Rainer Maria Rilke that "a good marriage is that in which each appoints the other the guardian of his solitude", and in the words of George Santyana in "The Life of Reason" that "It takes patience to appreciate domestic bliss; volatile spirits prefer unhappiness". Mutual respect, love and care are the foundations of a successful marriage where both the parties care and love each other. But where these foundations disappear the marriage remains only a legal bond and nothing more. Tennyson, in his Princess, said:

"The woman's cause is man; they rise or sink together". But when that mutualness is lost there should be no law only by the society or the State to continue it and condemn the parties to unending drudgery. Likewise, I have also no hesitation to hold the section to be inconsistent with Article 14. There appears to be no justification to differentiate between the husband and the wife to subject her to more onerous grounds to obtain divorce than the husband. The opinion of the world body has been to declare and affirm the equality of men and women in marriage, during marriage and at its dissolution. The member nations including this country have also affirmed the covenants made in pursuance of the declaration. As to how far these declarations and covenants become law of the land I shall deal with a little later, but there is no difficulty in holding that the discrimination in Section 10 of the Act between husband and wife is patent without any reasonable basis of classification. Besides, the discrimination is also based upon sex alone discriminating women against men and hence the Section is also hit by Article 15 of the Constitution. Much prior to the Universal Declaration of Human Rights it was stated in 1848 in the Declaration of Sentiment in the First Woman's Rights Convention by Elizabeth Cady Stanton: "We hold these truths to be self-evident, that all men and women are created equal."

28. A decision had been advanced, to save the provision, differentiating between adultery committed by a man and by a woman. A single Judge of the Madras High Court took the view in Dr. Dwaraka Bai v. Prof. Nainan, of the Section being not discriminatory as adultery by wife may lead to the consequences of a spurious offspring being sprung upon the husband whereas adultery committed by the husband would have no such consequences. With respect I am unable to support the view and instead find myself in complete agreement with the contrary view taken in Swapna Ghosh's case (35 supra) and Ammini's case (30 supra). Both the decisions have taken the view that even if such a basis for making a distinction between the husband and wife could have been available, yet it would be differentiation based upon sex alone which is prohibited under Article 15 of the Constitution.

Justice Bhattacharjee in the Calcutta case (35 supra) rightly referred to C.B. Muthamma v. Union of India, AIR 1979 SC 1868 wherein a provision of the Indian Foreign Service (Conduct and Discipline) Rules, 1961 providing that no married woman shall be entitled to be appointed to the service and that any time after the marriage a woman member may be required to resign from the service, if the Government is satisfied that her family and domestic commitments are likely to come in the way of the due and efficient discharge of her duties, were held to be discriminatory not on the ground of sex only but also on the ground of consequential impairment of their usual capacity as a result of marital life.

29. An argument was advanced by Mr. L. Ravichander appearing for the respondents, relying on Anil Kumar Mahsi v. Union of India, that having married under the Indian Act and accepted its discipline the parties cannot be heard to complain against its rigours. In the case the Supreme Court was examining the contention advanced by a husband of the provisions of Section 10 of the Act being discriminatory as besides adultery two other grounds are made available to the wife for divorce though such grounds are not available to a husband. The Court observed, in the context, that there was no discrimination as taking into consideration the muscularly weaker physique of the woman, her general vulnerable physical and social condition and her defensive and non- aggressive nature and role particularly in this country, the legislature cannot be faulted to have made available two more grounds to her for divorce. The observation of the Court that the rigours of the Section cannot be complained of, having married under the Act, was only made in that context and is not a general proposition that the provisions of the Act cannot be declared ultra vires if they are actually found to be so. It is well known that fundamental rights cannot be waived .Mr. Kannabhiran, has rightly invited our notice in the context to Olga Tellis v. Bombay Municipal Corporation, (paras 28 & 29). It has also been rightly pointed out in the Kerala decision (paragraph 38) (30 supra) while repelling the argument, that it may not be possible for all Christians to marry or register their marriage under the Special Marriage Act and that if the parties marry in the Church, the registration thereafter under the Special Marriage Act can be only done through consent of the parties.

30. Mrs. Sarathy has also advanced the argument of Section 22 of the Act being discriminatory as the decree for judicial separation never matures to a decree of divorce. Under the Section a decree for judicial separation is available to either of the parties on the only ground of adultery or cruelty or desertion, whereas a decree for dissolution under Section 10 of the Act is possible, so far as the wife is concerned, only if the cruelty or desertion is coupled with adultery. A decree for judicial separation is perpetual in continuance disentitling the parties to sever the marriage bond and become independent or seek solace in fresh alliance. The further fallacy in the section is that whereas the husband can get either a decree of dissolution or judicial separation on the ground of adultery of the wife, she is entitled only to judicial separation for the adultery of the husband. To bring home the point, reliance has been placed on the observation of Justice Chinnappa Reddy in Reynold Rajamani's case (37 supra) and R. Hemalatha's case (34 supra).

31. Mr. Sarathy has also addressed on the question reiterating the same points and also contended, in a general way, the provisions of Sections 10 and 22 of the Act to be ultra vires.

32. Mr. Kannabhiran, while maintaining the provisions of the Act to be ultra vires, has contended the decision of Madras High Court in Swamidoss Joseph v. Miss Edward, to be not correct to hold that by virtue of Section 7 of the Act, the contemporary law in England regarding divorce are available to be applied by the Indian Courts and that Section 7 of the Act is no longer in the statute book. It is also true, as has been noticed earlier, that the present law of divorce in England permits desertion by the other spouse for a period of at least three years immediately preceding the presentation of the petition and also cruelty as grounds for divorce. Under the law so framed in 1965, it is only reenactment of the provisions of the Matrimonial Causes Act, 1950. Hence, since at least 1950 the law in England has adopted the two grounds also as grounds for divorce. But even though the law of England has become as such, yet it does not become ipso facto the law of this land. An attempt by different Courts of the country to incorporate the contemporary law of England into India by virtue of Section 7 of the Act was emphatically negatived in Reynold Rajamani's case (37 supra). Section 7 of the Act provide that subject to the provisions of the Act, the High Courts and District Courts shall, in all suits, act and give relief on principles and rules which in the opinion of the said Courts are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief. The Supreme Court negatived the argument that Section 7 of the Act authorises incorporation of the provisions of Section l(2)(b) of the Matrimonial Causes Act, 1973 of England to Indian cases. Justice Chinnappa Reddy who delivered a separate Judgment, concurring with Justice Pathak and Baharul Iglam, observed: (Reynold Rajamani's case) "I agree with my brother Pathak, J. that 'mutual consent' is not a ground for divorce under the Indian Divorce Act and that the provisions of Section 1(2)(d) of the British Matrimonial Causes Act, 1973 cannot be read into the Indian Divorce Act merely because of Section 7. It is unthinkable that legislation whenever made by the Parliament of a foreign State may automatically become part of the law of another sovereign State. Legislation by incorporation can never go so far. Whatever interpretation of Section 7 was permissible before August 15, 1947 when the British Parliament had plenary powers of legislation over Indian Territory, no interpretation is now permissible which would incorporate post - 1947 British laws into Indian law."

Yet, there is no denying of the fact that absolute denial of dissolution of marriage in spite of adultery, cruelty or desertion amounts to compulsion of force, sub- human existence because of relentless injunction of the statute, a perpetual bar to men and women professing the Christian faith, to continue with ordeal of matrimony even though the marriage itself has failed and a decree for judicial separation has been passed either for adultery or desertion or cruelty. It is indeed substitution of statutory cruelty for individual cruelty. Section 26 of the Act empowers either the husband or the wife to present petition to the Court to seek reversal of the decree on the ground that it was obtained in his or her absence and that there was reasonable excuse for the desertion, where the decree has been obtained on the ground of desertion. Thus, where the decree is on the basis of desertion, the wife or the husband has to remain under the constant apprehension that at any time a petition may be made to reverse the decree as there is no time limit set in the section. It is the consistent view taken that where no period of time is fixed in the statute for some action to be taken, the action must be taken within a reasonable period. It may hence be held that a petition for reversal of the decree for judicial separation, when it lies, has to be presented within a reasonable period only. There is, because of these considerations, no escape from the conclusion that the provision of

Section 22 insofar as it does not provide to make the decree absolute is counter to the scheme of Article 21 of the Constitution.

33. The Special Bench of Kerala High Court in Ammini's case (30 supra) considered the question of Section 22 of the Act and took the view that as the spouses belonging to all other religions governed by Hindu Marriage Act, 1936 (sic. 1955), Parsi Marriage and Divorce Act, 1936, Muslim Wives under the Dissolution of Muslim Marriage Act, 1939, Special Marriage Act, 1934 and Foreign Marriage Act, 1969 are entitled to get dissolution of their marriage on the ground of cruelty or desertion for the periods fixed by the respective Acts, denial of such ground metes out a discriminatory treatment to Christian spouses. The Court held the absence of suitable provisions recognising cruelty and desertion for a reasonable period as grounds for dissolution of marriage in the Act to be discrimination based solely on religion and as such violative of Article 15 of the Constitution. I find myself also in concurrence with the views.

34. As regards the vires of Section 10 of the Act, we have already found the provisions of the Section, so far as it discriminates the wife, to be ultra vires of Articles 14, 15 and 21 of the Constitution. It is the submission of Mr. L. Ravichander that the Court is not to declare the provisions ultra vires but that it can only recommend, as had been done in T.M. Bashiam v. M. Victor (32 supra), R. Hemalatha v. R. Satyanandam (34 supra), Swapna Ghosh v. Sadananda Ghosh (35 supra) and in Ramesh Francis Toppo v. Violet Francis Toppo (36 supra), to the legislature to take appropriate measures to remedy the situation. I have no hesitation to reject his submission outright. It is too late, after the development of the Constitutional Jurisprudence for nearly, half a century, to contend that Courts are powerless to strike down a statutory provision if it is found to be ultra vires. Article 13(1) of the Constitution itself mandates the Courts to declare all existing laws as ultra vires if they are inconsistent to Part III and that is precisely what I have found Section 10 to be. Even otherwise, as was noticed by the Kerala High Court in the Special Bench case (30 supra), direction had been issued by that Court on 13-12-1990 to the Central Government to take a final decision on the recommendations of the Law Commission in its 90th report for making amendments to Section 10 of the Act. Successive decisions also emphasised the fact of no action having been taken. Instead, the communication which had been issued by the Union Government on 30-12- 1994 to the Central Government Pleader again stating that the Government was examining the question of bringing in a comprehensive legislation was produced before their Lordships during hearing of the case. A provision in the statute which is otherwise ultra vires cannot be left to be in the statute without it being so declared and indeed if the Court accedes to such submission it would be failing in its duty as the Constitutional Court.

35. Having held so, it has to be considered how far Section 10 of the Act can be held to be ultra vires. I find myself in complete agreement with their Lordships of the Kerala High Court, for the reasons stated by them that the entire Section cannot be struck down as it will result in more harm than good and that it is also not necessary to do so. Repetition of the same considerations is not warranted here. The offending portions of the Section are clearly severable and the view must rightly be taken that the words and the phrases "incestuous" and "adultery coupled with" as used in Section 10 of the Act are only to be struck down. The remaining portion of the Section remains perfectly workable with the discrimination against wives removed and enabling them to present petitions for

divorce stating either of the grounds of the adultery of the husband or cruelty practised by him or desertion by him for two years or upwards.

36. As regards the fourth question referred, the position of law has been well settled by the decisions of the Apex Court. In Jolly George Varghese v. Bank of Cochin, , the question that arose before the Court was whether a contractual liability could be enforced by imprisoning a debtor in the teeth of Article 11 of the International Covenant on Civil and Political Rights which provides that no one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation. Justice Krishna Iyer speaking for the Court said that though Article 51(c) of the Constitution obligates the State to "foster respect for international law and treaty obligations in the dealings of organised peoples with one another", yet until the municipal law is changed to accommodate the covenant what binds the Court is the former and not the latter and observed:

"The positive commitment of the States parties ignites legislative action at home but does not automatically make the covenant an enforceable part of the corpus juris of India".

In a later case, a Larger Bench of the Supreme Court in Gramophone Co. of India Ltd. v. Birendra Bahadur Pandey, interpreted that the rule of international law is to be taken as incorporated in the municipal law if there is no conflict between the two. Justice Chinnappa Reddy speaking for the Court observed:

"There can be no question that nations must march with the international community and the Municipal law must respect rules of International law even as nations respect international opinion. The comity of Nations requires that Rules of International Law may be accommodated in the Municipal Law even without express legislative sanction provided they do not run into conflict with Acts of Parliament. But when they do run into such conflict, the sovereignty and the integrity of the Republic and the supremacy of the constituted legislatures in making the laws may not be subjected to external rules except to the extent legitimately accepted by the constituted legislatures themselves. The doctrine of incorporation also recognises the position that the rules of international law are incorporated into national law and considered to be part of the national law, unless they are in conflict with an Act of Parliament. Comity of nations or no Municipal Law must prevail in case of conflict. National Courts cannot say "yes" if Parliament has said no to a principle of international law. National Courts will endorse international law but not if it conflicts with national law."

In saying so, reliance was also placed on an earlier case of the Supreme Court in V/O. Tractoro-Export v. Tarapore & Co., . Mr. Bubic Kariusz v. Union of India, (para 10) cited by the respondents do not lay down any different proposition. While the position of law is thus clear, yet in view of the decision reached regarding vires of the Sections of the Act the question of any conflict between the declaration of human rights and two international covenants do not arise.

37. In the result, the petitions are allowed to the extent indicated. No costs.

ORDER S.R. Nayak and Lingaraja Rath, JJ.

38. I have had the advantage of reading the draft judgment prepared by my learned Brother, Lingaraja Rath, J. in this batch of Writ Petitions. While concurring with the findings recorded by Lingaraja Rath, J. on the questions referred to us by the Division Bench and the reliefs granted, I wish to add a brief note: In Krishna Singh v. Mathura Ahir (4 supra), a two Judge Bench of the Supreme Court has ruled that Part III of the Constitution of India does not touch upon the personal laws of the parties and that in applying the personal laws of the parties, the Judge could not introduce his own concepts of the modern times, but should have enforced the law as derived from recognised and authoritative sources of Hindu Law, i.e., Smritis and Commentaries referred to, as interpreted in the Judgments of various High Courts, except where such law is altered by any usage or custom, or is modified or abrogated by statute. Lingaraja Rath, J. in substantial terms, has declared the law to the same effect having dealt with questions 1 and 2 referred to the Full Bench. But, his Lordship's conclusions/declarations are preceded by, if I may say so, an elaborate and in-depth treatment of theoretical writings, precepts and Judge- made law touching upon those questions. I suppose, my Learned Brother, has undertaken this juristic exploration in the context of a submission that the Apex Court's declaration of law in para 17 of the judgment in Krishna Singh's case is not supported by reasons. It is trite to state that we are obviously bound by the declaration of law by the Apex Court, not only because of the mandate of Article 141 of the Constitution but also because of the "authority of precedents". The declaration of law by the Supreme Court, whether reasoned or not, is always binding on us by force of Article 141 of the Constitution. I, therefore, do not find any necessity to give additional reasons in support of the findings recorded on questions 1 and 2.

39. Resolution of questions such as what is "law"; whether non-statutory, non-customary, non-judge-made personal law is a "law" in modern jurisprudential sense of the term and whether anything appreciable could remain as residue in any personal law if the statutory portion, the customary portion and the case-law portion of such personal law are attracted by the expressions "all the law in force" in Article 372 (1) and "all laws in force" in Article 13(1) of the Constitution is not necessary for the purpose of deciding the constitutional validity of Section 10 of the Indian Divorce Act. The Apex Court itself may consider these questions if there is any request for reconsideration of the observations of the learned Judges of the Supreme Court in para 17 of the Judgment in Krishna Singh's case (4 supra), but we cannot do that because of propriety. Section 10 of the Indian Divorce Act being a statute law, its constitutionality can be determined on the touchstone of Part III of the Constitution as held by the Supreme Court in Krishna Singh's case (4 supra) and in this batch of Writ Petitions we are not called upon to pronounce our judgment upon constitutional validity of any non-statutory or non-customary or non- Judge made personal law of the Christians.

40. I, therefore, rest my concurrence with the findings recorded by Lingaraja Rath, J. on questions 1 and 2 referred to us by the Division Bench only on the basis of declaration of law by the Supreme Court in para 17 of the Judgment in Krishna Singh's case and I shall not be understood to have concurred with the other reasons given by my learned Brother in support of the findings recorded by him on questions 1 and 2. Except to the extent indicated above, I am in agreement with learned Brother, Lingaraja Rath, J. in all other respects.

ORDER B.K. Somasekhara, J.

41. The final decision of both of my learned Brothers in their separate judgments cannot but command acceptance. The erudite and scholarly exploration of learned brother Justice Rath is beyond the scope for improvement. That such treatment of the questions involved in view of the Precedent of the Hon. Supreme Court as opined by the learned brother Justice Nayak to be unnecessary may not be correct in the nature of the seriousness of the questions involved requiring an in-depth analysis to fortify judicial reasoning supplementing the inner res in the precedent. Any sensitive and complex issue involves perambulatory and circumventive reasoning process. Injudicial reasoning nothing is unnecessary. The law of precedents has the solid foundation in reasoning. The strength of the ratio decidendi depends only on the strength of reasoning. The quality of reasoning is directly proportionate to the quality and quantity of reasons. What brother Justice Rath has done is very much within the jurisprudential concept of precedents which commands total approval by this Full Bench perhaps to supplement it with these additional reasons of my own.

42. The whole approach of the matter testing Section 10 of the Indian Divorce Act 1869 (Act 4 of 1869), (in short the Act) on the anvil of the touchstone of Ch.III and in particular Articles 13 and 14 of the Constitution of India, in these cases may be different from those involving the questions whether customary law or personal law is beyond the pale of constitutional challenge. Because the question is not whether the Act is such but whether it is "the Law" and has the force of law whether it was the law in force when the Constitution came into force. If one or all of them answers the description, the Act cannot sustain its existence within the constitutional challenge. The test is also not in the sensitive area of common civil code for the country. To do anything beyond the scope of the Lis would be an exercise in futility. The plethora of precedents are by themselves may not serve the real purpose of the probe.

Article 13 of the Constitution of India to be luxuriously recorded herein reads:

"Article 13: Laws inconsistent with or in derogation of the fundamental rights: (1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

(3) In this article, unless the context otherwise requires-

(a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;

(b) "laws in force" includes laws passed or made by a legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas;

(4) Nothing in this article shall apply to any amendment of this Constitution made under Article 368."

Similarly Article 14 reads:

"14. Equality before law: The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India".

Since Section 10 of the Act is in challenge the repetition inevitably to read:

"10. When husband may petition for dissolution:- Any husband may present a petition to the District Court or to the High Court, praying that his marriage may be dissolved on the ground that his wife has, since the solemnization thereof, been guilty of adultery. When wife may petition for dissolution:- Any wife may present a petition to the District Court or to the High Court, praying that her marriage may be dissolved on the ground that, since the solemnization thereof, her husband has exchanged his profession of Christianity for the profession of some other religion, and gone through a form of marriage with another woman;

or has been guilty of incestuous adultery, or of bigamy with adultery, or of marriage with another woman with adultery, or of rape, sodomy or bestiality, or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce a mensa et thoro, or of adultery coupled with desertion, without reasonable excuse, for two years or upwards."

43. To superimpose the Act in the expressions in Articles 13 and 14 of the Constitution of India so stressed above viz., "all laws in force", "law to include", and "laws in force" will conclusively determine the vires of the provision in challenge. So the question is whether the Act is one of them viz., (a) law, (b) anything included in law as such and (c) the law in force. Strictly speaking law is not defined in the Constitution, except repeated copiously and liberally in various Articles and explained in Article 13. (to illustrate the use of such expressions is in the Articles 2 to 4, 10, 11, 13, 14, 19 to 23, 25, 26, 30, 31(A), 31(B), 31(C), 32 to 35, 37, 44, 72, 73, 84, 97, 102, 104, 110, 114, 116, 119, 123 to 125, 132 to 143, 145, 147, 148, 158, 161, 164, 165, 169, 172, 186, 187, 189 to 191, 194, 195, 200, 202, 204, 206, 209, 210, 213(2), 217, 221, 222, 225, 226, 228 to 231, 235 etc). Even in the preamble of the Constitution being the aspirations of the people of India, there is no such expression but the expression "justice" to mean that all such expressions in the Articles relating to law should be read within the meaning of "justice". So whatever meaning is imported to the expression "law" or such expressions to come within "law" should subserve the intendment of "justice" in the preamble. Even assuming that 'law' is defined in Article 13 of the Constitution of India it is said to be a wide and inclusive definition not necessarily a law enacted by the legislature. It is also said to be an extended definition in order to forestall a possible contention that law can only mean law enacted by legislature (Kesavananda v. State of Kerala, AIR 1972 SC1461) and page 237 and 238 in Constitutional Law of India by H.M. Seervai 3rd Edition of 1983, Vol. No.I). The expression in Sub-clause 3 of Article 13 "unless the context otherwise requires" is also an indication of not excluding any other meaning of "law" as is generally understood by one and all including the lawman and layman within the jurisprudential concepts. The emphasis is thus in the context is only

to realise the import of the implications of such expressions which are the subject matter dealt with in the science of law i.e., jurisprudence.

44. The legal theory attempts to answer the question "what is law", as a need to provide a definition of law which springs from the necessity of clarifying the most basic of all legal concepts, the concept of law itself. A legal concept including the concept of law is nevertheless the basic concept of jurisprudence. Although the majority of the legal problems may not have reference to the concept of law it does not mean that the concept is entirely without practical significance, as the law has itself a practical legal use as it is one high in emotive content. Despite the definition of law consuming so much of time and energy its practical utility cannot be lost sight of (page 9 to 12 Ch.I. in Salmond on Jurisprudence, 12th Edition of 1966 reprinted in 1995). As a part of imperative theory of law of Austin, it is the command of the sovereign, the main and the real source of law (page 25 of Salmond on Jurisprudence supra). As a positive law being the expression of the will of the State through the medium of legislature the Austinian thinkers as legal realists look the law as the command of the sovereign which need not be the Parliament but any form of sovereign including the Courts (page 35 of Salmond on Jurisprudence supra). The whole theory lies in the legal realism in the concept of positive law as the real source of law. The classified legal sources are thus four innumber viz., (1) enacted law, having its source in legislation, (2) case law having its source in precedent, (3) customary law having its source in custom and (4) conventional law having its source in agreement, (pages 113 and 114 of Salmond on Jurisprudence supra). Inevitably the expression "law" in Article 13 of the Constitution of India and in other Articles unless the context otherwise means, should sprout from one of the sources supra. Legislation is that source of law which consists in the declaration of legal rules by a competent authority. The term is sometimes used in a wide sense to include all methods of law making. To legislate is to make new law in any fashion. In this sense any act done with the effect of adding to or altering the law is the act of legislative authority and soused legislation includes all the sources of law and not merely one of them. (Austin on Jurisprudence 3rd edition page 555). In this sense every act of Parliament is an incident of legislation, irrespective altogether of its purpose and effect (page 115 of Salmond on Jurisprudence supra). An Act of Parliament or any legislature by means of an enactment is styled as "statutory law". It is also being popularly called "enacted law" having its embodiment in authoritative formulae - the littera scripta - to constitute a part of the law itself, the legal authority therein possessed by the letter no less than by the spirit of the enactment, (pages 131 and 132 of Salmond on Jurisprudence). The emphasis herein is to merge all other sources into the first source of enacted law when once they are attributed the sovereign seal by a competent legislature. The enacted law would be thus synonymus to statutory law or legislative law. In that sense the Constitutional law is also an enacted law. The doctrine of vires or non-vires by interpretation applies only to such law and for no other law. Perhaps that may be one of the tests for determining whether a law is statutory law or not. No law without legal sanction is law from the point of view of imperative theory and rightly too and it is the statutory law or enacted law which fits into such a concept (the earliest definition of law thus emerges as 'that which is laid down, ordained or established. A rule or method according to which phenomena or action co-exist or follow each other. That which must be obeyed and followed by citizens subject to sanctions or legal consequences is a "law" (L.C. page 1028 in Black's Law Dictionary 4th edition of 1951). It is also a rule or enactment promulgated by the legislative authority of the State (L.C. page 1876 Bouviers's Law Dictionary 3rd revised edition of 1914 Vol.2). A statutory law, in short, is also

called 'statute' which is a law established by the act of legislative power, an act of the legislature the written will of the legislature necessary to constitute it the law of the State (this expression was used for the first time in an Act of 55 Henry III; 21 Law L Mag. & Rev. 310 (R.C. 3129 Bouvier's dictionary Vol.2 supra). The word 'statute' is used to designate the written law in contra distinction to the unwritten law. Anything beyond all this can never be the law in the true sense of the term unless the context otherwise requires to be understood as mentioned in Article 13 to enlarge the scope with the aid of the explanation in sub-cl.(b) and (c). In other words, the law as a first measure would be the enacted law or statutory law and all other laws from different sources when once enacted, becomes statutory law. The combined effect of Articles 13 Sub-Clause 1, 13(3)(b), Article 372 Expln.I, Article 366, Article 366(10) and Article 19(2) to (6) when they use the expressions "law in force", 'existing law", "any law", mean one and the only legal concept, that is "law", (page 238 Constitutional Law of India of Seerwai supra). In Edward Mills Company Limited v. Ajinail, , the Supreme Court held that there was no material difference between the two expressions "existing law" and "law in force". Equally so by virtue of the inclusive definition of "law" in Article 13(b), custom or usage having the force of law is held to be "law" in Dasaratharama Rao v. State of A.P., AIR 1961 SC 560 (Appears to be same as foot note 12) and Baijnath v. Ram Nath and Ors, .

45. There appears to be an inhibited allergy to treat customary law or personal law within the expression of "law" for the reasons best known to the users. But the law in the true sense of the term has no such inhibitions. The law will declare any law as "law" uninhibited of the consequences except to maintain the rule of law. Both jurisprudentially and constitutionally, custom being the source of law is "the law" called "customary law". Strictly speaking the personal law has no separate classification except to come within "customary law" of particular group or individuals to distinguish from territorial laws within the concept of "Lex loci" (Jaw of the place to this lex loci docimili may be added R.C. page 1056 Black's Law Dictionary Supra) and "lex fori" (law of the forum or the Court i.e., the positive law of the State, Country or system, the Court where the suit is brought or remedy sought is an integral part - page 1055 L.C. Black's Dictionary supra). The former annexes the subject the right to carry his law wherever he goes and the latter not and that is the test or personal law being capable of moving with the person. The concept is also the product of territorial and extra-territorial law. The law in a territory capable of carrying by a subject extra territorially may become personal law and in that sense the customary law of an individual or a group intra-territory capable of extra-territorial legal sanction may be styled as "personal law". Whether codified or not, such a law as personal law may be an extra territorial law. That is how in a limited sense, such a law can be personal law for a definitive purpose and not for legal sanction. "The proposition that a system of law belongs to a definite territory means that it applies to all persons, things, acts and events within that territory" and "in other words to say that a legal system belongs to a defined territory means partly that its rules do not purport to apply extra territorially to apply and enforce them do not regard them as applying them extra territorially and partly that other States do not so regard it". The proposition that a system of law apply only to persons, things, acts and events within a defined territory is not a self evident truth: it is merely a generalisation from the practice of States. Also it is a very rough and imperfect generalisation. (page 77 of Salmond on Jurisprudence supra). Such a concept may not be alien to Indian personal laws also. It may be added that in India personal systems of law survive even at the present day, though they are gradually being superseded by legislation which either unifies the law of two or more races (particularly of course Hindus and

Muslims) or applies to the country on a territorial basis. Conflicts of personal law still causes difficulties for which there are no satisfactory rules (A. Gledhill in Whither Indian Law) (School of Orintal African Studies, University of London, 1956 - Quoted on page 82 of Salmond supra).

46. Although custom is an important source of law in early times, its importance continuously diminishes as legal system grows. As an instrument of the development of law, it has now almost ceased to operate, partly because it has to a large extent been superseded by legislation and precedent and partly because of the stringest limitations imposed by law upon its law creating efficacy. Law was either the written statue law or unwritten common or customary law. Judicial precedent was not conceived as being itself as legal source at all for all it was meant to operate as evidence for which the common law proceeds. Lex et consuet udo Amgliae was the familiar title of the legal system. The common law of the world and the common law custom of the world were synonymous expressions, (page 189 of Salmond supra). Blackstone appears to have concluded the custom as a source leading to the codified law to seek legal sanction viz., "the municipal law.....may with sufficient propriety be divided into two kinds; the Lex Non-scripta, the unwritten or common law or lex scripta the written or written law. The written law, includes not only general systems or the common law so called but also certain parts of the kingdom and likewise those particular laws that are observed only in certain Courts and jurisdictions" (Hale-History of the Common law Ch.II; Blackstone Commentaries I page 63). The defence of customary law to be a source of law and to have the force of law can be rationalised. Custom is frequently the embodiment of such principles (pages 190 to 192 of Salmond).

47. Among the two kinds of customs viz., legal and conventional, the former is one whose legal authority is absolute-which is absolute and possesses the force of law. Legal custom itself is of two kinds being either local custom prevalent and having the force of law In a particular locality only or the general custom of the world in force as law throughout a country. A legal custom with or without codification having legal sanction presumably will have force of law and therefore can be fitted into 'law' pure and simple and that appears to be the constitutional intent in Article 13(3)(a).

48. With the backdrop of the concept and the legal implications supra, we are to test in the first instance what kind of law the Indian Divorce Act (the Act) is. That it is a 'law' of any category cannot be but beyond the pale of doubt whether to bring it within the definitive law in jurisprudence or the law within the Articles of the Constitution of India. If it is out of either one or the both, the challenge or otherwise for the benefit or no benefit of the persons governed by it becomes totally redundant. Then the whole exercise even to consider it for any purpose in a lis is a futility. Without being an integral part of the Indian legal system, the Act has no utility to anybody and the Courts cannot even think about it. The existence of law being a question of fact under Section 57(l) of the Evidence Act, the Act fundamentally should exist for testing vires or otherwise of the Constitution. In order that the persons governed by the Act to seek the relief from Indian Courts under the Constitution of India should fundamentally concede the Act to be the law within the Articles of the Constitution to be administered with the justice of the country. So the first question whether the Act is 'the law' of the country under the Constitution of India requires to be answered. The Gazette of Calcutta 1863 at page 173 published the objects and reasons of the Act and the select committee published this report in Gazette of India 1869 page 192, Calcutta Gazette in Supplement of 1862 page 463 ibid 1863 and in

Gazette of India 1869 supp. page 291 wherein it was disclosed that the Council wanted to bring in a law relating to the Divorce of persons professing the Christian religion in India and to confer upon certain Courts jurisdiction in matters matrimonial and Indian Divorce Bill 1869 was passed into Act4 of 1869 (vide Gazette of India 1869 Supp. page 291) with the name and style 'The Indian Divorce Act 1869' (Act 4 of 1869). Being not exhaustive in the matter it was intended to amend the law relating to divorce and matrimonial causes of persons professing the Chritstian religion in India. The object of it was incorporated in the preamble; "Preamble: Whereas it is expedient to amend the law relating to the divorce of persons professing the Christian religion, and to confer upon certain Courts jurisdiction in matters matrimonial.....However the extent of power to grant relief generally on the Courts was incorporated in Section 2 by the Act 25 of 1926 and by the Act 30 of 1927 in Section 2 as follows:

"Extent of power to grant relief generally:- Nothing hereinafter contained shall authorise any Court to grantany relief under this Act except that the petitioner or respondent professes a Christian religion....."

xxxx xxxx xxxx xxxx xxxx xxxx With so much of emphatic expression the provision confined the applicability of the Act to give relief only to the petitioner or respondent professing the Christian religion and no other person belonging to any other religion. It is also apparent that it was intended for the benefit of the persons professing the Christian religion in India and not elsewhere. Undoubtedly the law in relation to the divorce and the matrimonial matters of the persons professing Christian religion was codified under the Act and for no other persons: It was enacted by a competent legislature or the law making body viz., the Council, to make it an enactment or a statute within the meaning of codified law or statutory law. No provision of the Act speaks of custom, convention, usage, practice etc., to be codified therein much less no such source of law is saved therein. It came into force on 1-4-1869. So the act which was applicable to such persons in India from 1-4-1869 was a pure and simple statutory law, within the meaning of Kesavananda's case (48 supra) nothing to do with their custom etc., to be governed by the provisions of the Act as long as they professed the Christian religion. A petitioner or a respondent approaching the Court for relief under the Act was in the first instance to plead and prove that he/she professed the Christian religion as a matter of fact. Prima facie the law is a territorial law for such persons within the territory of India and in that sense it was the personal law of such persons as it related to divorce and matrimonial matters. But still it was a law simpliciter within the Austinian command of the sovereign school of law. To attribute the complexes of customary law or personal law to such a matter would be an antethesis of the science of law or the jurisprudence, much less the Constitutional Law or Administrative Law. There is nothing to indicate in the entire enactment to attribute such a texture. It underwent number of amendments by the Act 30 of 1927, Act of 1948, Act of 1950, Act 10 of 1912, Act 25 of 1926, and ultimately Act 3 of 1951 after the Constitution came into force. Except the Act 25 of 1926 and Act 30 of 1927 in relation to Section 2 in relation to the applicability of the Act only to the persons professing the Christian religion emphatically, the provisions of the Act have not undergone substantial changes in so far as such implications are concerned. In that situation either to call it a customary law or a personal law within the sensitive syndrome politicalised would be totally beyond the legal conceptions. The Act was never a foreign law as the very title 'The Indian Divorce Act' connotes. It was intended to be intra- territorial a Lex

Loci for a particular religious subject. The myth in view of Section 7 of the Act that Indian Courts apply Section 1(2)(d) of the English Matrimonial Causes Act is blasted by Supreme Court in Renold Rajamani v. Union of India (37 supra). It was held therein that 'Section 7 directs the Court to' act and give relief on principles and rules conformable to 'principles and rules' on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief. But the expression 'principles and rules' does not mean the ground on which a suit or proceeding may be instituted. The stage contemplated by Section 7 relates to the norms by which the Court exercises the jurisdiction for the purpose of disposing of the suit or the proceeding pending before it...". So when the Constitution came into force the Act a pure and simple Indian Law in force and continued thereafter became Law within the territory of India within the meaning of Article 372 and Article 13 of the Constitution to stand the test of Constitutionality. Therefore no amount of judicial interpretations in some context of a litigation can alter the true and the real legal and constitutional consequences.

49. Undisputedly or as a legal consequence, the Act continued to exist till and when the Constitution of India came to inforce on 1-1-1951. It cannot be forgotten that Government of India Act 1915 was in force and adopted the Act as the law to be in force in India at the relevant time till the Act of 1915 was repealed by Government of India Act of 1935 whereby by virtue of Section 292 of that Act the existing laws were continued and in effect the Indian Divorce Act of 1869 was also continued to be in force till Indian Independence Act, 1947 came into force on 14/15-8-1947. Section 18 of the Indian Independence Act 1947 continued existing laws in the dominion of India which includes the Act in question. Notwithstanding the repeal by Article 395 of the Indian Independence Act, 1947 and Government of India Act 1935 under Article 395 of the Constitution of India, by virtue of Article 372(1), all the existing laws as on that day were continued to be in force. The Act of 1869 being one of such laws ought to be taken as the 'existing law' within the meaning of Article 372(1) of the Constitution to call it a 'law' in force in the territory of India immediately before the commencement of the Constitution to continue in force mandatorily until altered or repealed or amended by a competent legislature or other competent authority. When the Government of India Act 1935 introduced a federal, in place of unitary constitution, Section 293 of the Act conferred on His Majesty the power to adopt existing laws by Orders in Council. Similarly Article 372(2) and (3) gives the President power to make adaptations and modifications of existing laws in order to bring them into accord with the provisions of the Constitution and such adaptations under Article 372 has been made beyond challenge in any Court as spelt out by the Supreme Court in M.P.V. Sundararamier & Co. v. The State of Andhra Pradesh and Anr., Explanations I and II of Article 372(3) of the Constitution has clarified the meaning of 'law in force' and 'any law' and to read:

Explanation I: The expression 'law in force' in this article shall include a law passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that it or parts of it may not be then in operation either at all or in particular areas.

Explanation II: Any law passed or made by a Legislature or other competent authority in the territory of India which immediately before the commencement of this Constitution had extra-territorial effect as well as effect in the territory of India, shall subject to any such adaptations

and modifications as aforesaid, continue to have such extra-territorial effect."

50. A combined reading of the two explanations should bring the Act in question to be 'the law in force' and 'any law' to continue inforce as existing law and to be adopted after the Constitution came into force whether it was intra-territorial or extra-territorial. These implications ought to remove all the inhibitions imported into such a law in spite of Constitutional preservation of such law and the operations for the benefit of the persons professing Christian religion. The phantom of customary law or personal law attached to the Act thus an unpalatable concept and an unconstitutional legal myth. Perhaps only to remove it the makers of the Constitution added definitive and explanatory intent in Article 13(2)(a) to include custom in the territory of India the force of law within "Law" to make it void under sub-clause (1) if it is inconsistent with Chapter in. The continuance of any law or anything having force of law when the Constitution came into force was subject to its conforming to the constitutionality and not otherwise. Thinking to the contrary would be presumable absurdity that the constitution makers contemplated to save something into constitution which be ultra vires of itself. That is how the Supreme Court in Dasaratha Rama Rao v. State of A.P., AIR 1961SC 546. (Appears to be same as foot note 12) and Vaijyanath v. Ramanath (supra) had to strike down customs and laws which were found to be inconsistent with Chapter III and the present Act cannot be made an exception. While referring to Narsuappa Mali's case of Bombay (3 supra) and Srinivasa Iyer's case of Madras (6 supra) to think that personal law is not the law under Article 13(3)(a), one of the constitutional experts of the country dissented justifiably in his strong reasoned expressions:-

" We have seen mat there is no difference between the expressions 'existing law' and 'law in force'. This conclusion is strengthened by the consideration that custom, usage and statutory law are so inextricably mixed up in personal law that it will be difficult to ascertain the residue of personal law outside that; it was, therefore, necessary to treat the whole of personal law as existing law or law in force under Article 372 and to continue it subject to the provisions of the Constitution and subject to the legislative power of the appropriate legislature. In Narasu Appa's case (3 supra), both the Judges said that Article 17 indicated that personal law was not included in the expression 'law' or 'law in force', for otherwise, mat Article would be wholly unnecessary, since untouchability would have become void (presumably as violating equality). It is submitted that the argument based on Article 17 is not correct. First, but for Article 17 it could have been argued that untouchability was a part of religion (Deuaru's case, AIR 1958 SCR 895) and the freedom to practise religion guaranteed by Article 25 involved the enforcement of the disabilities attached to untouchability. The throwing open of public temples to 'untouchables', which is expressly provided for by Article 25 did not mean that as a part of religious practice other disabilities could not be enforced. Secondly, the object of Article 17 was not merely to abolish untouchability, but to implement such abolition by imposing an obligation on Parliament to make the enforcement of disabilities attaching to untouchability punishable by law. Thirdly, it is not uncommon in a Constitution to make express provision for matters to which its makers attach great importance, instead of leaving them to the dilatory and hazardous process of litigation. Finally, entry 5. List III. Schedule 7 clearly recognises personal law as 'law' which Parliament and State Legislatures can make, enact or repeal. For all these reasons it is submitted that a personal law of the community is "law" or "law in force" or "existing law" within the meaning of the Constitution, pages 401 and 402 of Seervai on Constitutional Law - (Vol.1)".

As no precedent as on to-day dealt with such a question, the ratio decidendi therein cannot be but to save the binding force due to per incuriam. Therefore even assuming that the Act has the structure or the texture of a customary law or personal law should be 'the law' within the meaning of Article 13(3)(a). When the Supreme Court in Krishna Singh v. Mathum Ahir (4 supra) while dealing with a question of a particular sect among Hindus were incapable of entering the Sanyasi had to state that Part III of the Constitution does not touch upon the personal laws of the parties and the Courts could not introduce its own concepts of modern times but should have enforced the law as derived from recognised and authoritative sources of Hindu Law i.e., Smruthis and Commentaries referred to, as interpreted in the judgments of various High Courts except where such law is altered by any usage or custom or is modified or aboraged by statute, (para 17 of the precedent). There was no occasion therein to deal with the implications of other Articles of the Constitution as above to lay down the law in general that Part III of the Constitution excludes personal law. There was also no occasion therein to deal with the effect of Article 372 to have a bearing on such personal law whether codified or not to be the law in force when the Constitution came into force to continue till altered by legislation and therefore it is difficult to think that the Bombay and Madras view has been approved therein to lay down the law as such. Moreover in view of a larger Five Judge Constitution Bench of the Supreme Court declaring the implication of Article 372, in South India Corporation Pvt. Ltd. v. Secretary, Board of Revetiue, that the expression subject to other provisions of the Constitution means that if there is conflict between the pre-existing law and the provisions of the Constitution, latter will prevail, it must be understood that the Supreme Court meant that notwithstanding any law in force when the Constitution came into force including the customary law or personal law conflicting with the Constitution as such, it is the Constitutional safeguards including Chapter III which should prevail and not any such law in any form offending such protection. The summary of the expressions of the Supreme Court in paras 13 to 15 in this regard has been noted by the editors of AIR rightly to read;-

"The object of Article 372 is to maintain the continuity of the pre-existing laws after the Constitution came into force till they were repealed, altered or amended by a competent authority. Without the aid of such an Article there would be better confusion in the field of law. The assumption underlying the Article is that the State laws may or may not be within the legislative competence of the appropriate authority under the Constitution. The Article would become ineffective and purposeless if it was held that pre-Constitution laws should be such as could be made by the appropriate authority under the Constitution. The words "subject to the other provisions of the Constitution" should, therefore, be given a reasonable interpretation, an interpretation which would carry out the intention of the makers of the Constitution and also which is in accord with the constitutional practice in such matters. The Article posits the continuation of the pre-existing laws made by a competent authority notwithstanding the repeal of Article 395; and the expression "other" in the Article can only apply to provisions other than those dealing with legislative competence. A pre-Constitution law made by a competent authority, though it has lost its legislative competency under the Constitution, shall continue in force, provided the law does not contravene the "other provisions" of the Constitution. The words "subject to other provisions of the Constitution" mean that if there is an irreconcilable conflict between the pre-existing law and a provision or provisions of the Constitution, the latter shall prevail to the extent of that inconsistency. An Article of the Constitution by its express terms may come into conflict with a pre-Constitution law wholly or in

part; the said Article or Articles may also, by necessary implication, come into direct conflict with the pre-existing law. It may also be that the combined operation of a series of Articles may bring about a situation making the existence of the pre-existing law incongruous in that situation. Whatever it may be, the inconsistency must be spelled out from the other provisions of the Constitution and cannot be built up on the supposed political philosophy underlying the Constitution."

In that view of the matter the question whether the Act and the provisions therein is 'the law' or 'the law in force' or anything 'having force of law' within the meaning of Article 13(1) and Sub-clause 12(a) can no longer be res integra and should be subject to the test of vires under the Constitution and in particular Ch.III and Articles 13 and 14 read with Article 372.

51. A serious doubt is likely to be raised in view of the two pronouncements of the Supreme Court in Reynold Rajanumi v. Union of India (37 supra) and Anil Kumar Mahishi v. Union of India (41 supra). In R. Rajamani's case (37 surpa), the question involved was whether the parties having not registered their marriage under the Special Marriage Act 1954 which they could, can now take advantage of it by seeking the divorce on consent and it was held in the negative in addition to clarifying the scope of Section 7 of the Act and Section 1(2)(d) of English Matrimonial Causes Act 1973. It had nothing to do with the vires of Section 10 for any reason as in the present case in addition to the question of the Act being the law to test the vires under Ch.III of the Constitution within the implication of Article 372. Truly, Anil Kumar Mahishi's case (41 supra) the question of Section 10 being violative of Article 14 on the alleged ground of the provision being discriminary against the husband was involved. In the first place, the husband being in a favourable position as against the wife did not make the provision assailable. Secondly, with the reasoning that the individuals not willing to submit to the Indian Divorce Act or any other personal law are not obliged to marry exclusively under that law as having freedom to marry under the Special Marriage Act 1954 and having married under the Divorce Act and accepted the discipline, they were held to be not to be heard to complain of its rigours. On that ground the husband's complaint of Section 10 being ultra vires of Article 14 was not entertained. On the other hand, it was categorically held therein that in so far as the grounds of divorce are concerned under Section 10 of the Act, to that extent undoubtedly it is the wife who is discriminated against. However, there was no occasion for the Supreme Court to test the vires of the provision under Ch.III on such a ground as in the present case. It must be taken that the Supreme Court has already impliedly disapproved the vires of Section 10 of the Act in regard to Christian wife with reference to Ch.III of the Constitution. In that view of the matter, and in addition to Full Bench ruling of the Kerala High Court in A mini's case (30 surpa) which is in tune with all the legal implications as laid down by the Supreme Court as above, this Court is totally justified in striking down that portion of the law in the provision which is inconsistent with Chill of the Constitution.

52. In all public interest litigations like the present one, both complimentary and condemnatory consequences have become inevitable. The executive pusillanimity to avoid legitimate legislation process in spite of suggestions by Courts as in the present case and public demand by the aggrieved, compels the judiciary to act constitutionally to render justice in the process to make 'the law' by declaration of law through interpretation undeterred by the reactions complimentary or

condemnatory of judicial activism implying the normal prepassivism. This is one such instance for our intervention to remove discrimination based on sex among persons professing Christian religion by striking down that portion of Section 10 of the Act to the extent inconsistent with Ch.III of the Constitution. It is worth complimented or commented of activism to render justice than to allow the subjects to suffer the passivism of other agencies under the Constitution and that is what we have done.

53. In the result, the writ petitions are allowed to the extent indicated. There is no order as to costs.