

Kerala High Court

Mathew Varghese vs Rosamma Varghese on 9 July, 2003

Equivalent citations: 2003 131 TAXMAN 646 Ker

Author: L G Jawahar

ORDER Jawahar Lal Gupta, CJ.

Is a Christian father under an obligation to maintain his minor child? More than three decades back, a Full Bench of this court had considered this question in CIT v. P.M. Paily Pillai (1972) KLT 24 (FB) (Ker). Following an earlier decision of a division bench in Chacko Daniel v. Daniel Joshua 1952 KLT 595 (Ker), it was held that the duty of the father was an imperfect obligation. It was not an actionable wrong. Thus, it was concluded that "there is no legal obligation on the part of the Christian father to maintain his minor child." Accordingly, the question was answered in the negative. The correctness of this view was questioned in these two cases. It was pointed out that discordant notes had been struck after the decision in P.M. Paily Pillai's case (supra). The issue was referred to a full bench. Initially, the matter was listed before a bench of three judges. However, in view of the fact that a full bench had already considered the matter, the case was placed before this bench.

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3. On 29-4-1979, Ms. Rosamma and Mr. Mathew Varghese were married. After having stayed together for a few days, the wife had left for her place of work in Germany. The husband had visited Germany. On 13-10-1980, a son Mathew alias Tishan was prematurely delivered. In course of time, the relationship between the husband and wife had got strained. Even the paternity of the child appears to have become the cause of conflict between the parties.

3. On 29-4-1979, Ms. Rosamma and Mr. Mathew Varghese were married. After having stayed together for a few days, the wife had left for her place of work in Germany. The husband had visited Germany. On 13-10-1980, a son Mathew alias Tishan was prematurely delivered. In course of time, the relationship between the husband and wife had got strained. Even the paternity of the child appears to have become the cause of conflict between the parties.

4. In the year 1987, Mrs. Rosamma along with her minor son and father (who was described as the next friend of the minor) filed a suit against her husband, Mr. Mathew Varghese. She alleged that at the time of the settlement of marriage, an amount of Rs. 25,000 had been paid to the defendant by way of Streedhan. Thereafter, at the marriage, ornaments worth Rs. 25,000 were also given. Subsequently, she had sent cheques for a total of Rs. 35,757.81 ps. to him for being kept in fixed deposit. The defendant had admitted vide his letter dated 23-4-1981 that he had kept Rs. 29,399.81 ps. in the bank and that it would be refunded on dissolution of the marriage. She further claimed that the defendant was bound to support and look after the needs of the minor son. Thus, she made a claim for a total sum of Rs. 86,639.00. This included a sum of Rs. 14,400 on account of maintenance of the minor child for a period of 36 months preceding the filing of the suit.

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1. Whether Rs. 25,000 was not received by defendant from 2nd plaintiff for 1st plaintiff?

2. Whether any amount was not transferred from the account of 1st plaintiff in the bank to the name of defendant and kept by him and misappropriated by him, if so, what is the amount and whether defendant is not liable to return amount to defendant?

3. Is defendant not liable to support the 3rd minor plaintiff. What is the amount of arrears of maintenance of 3rd plaintiff due to 1st plaintiff?

4. Whether 1st plaintiff is not entitled to get interest claimed at 12 percent per annum?

5. Is suit barred by limitation?

6. Relief and Costs.

7. Issue Nos. 1, 2 and 5 were considered together. Issue No. 1 was found against the plaintiff. Issue Nos. 2 and 5 were decided in her favour. The claim for the amount of Rs. 29,399 was held to be within limitation. She was held entitled to recover the amount. Similarly, even Issue No. 4 was decided in her favour. She was held entitled to get the amount of Rs. 17,840 by way of interest on the amount of Rs. 29,399 for a period of five years.

7. Issue Nos. 1, 2 and 5 were considered together. Issue No. 1 was found against the plaintiff. Issue Nos. 2 and 5 were decided in her favour. The claim for the amount of Rs. 29,399 was held to be within limitation. She was held entitled to recover the amount. Similarly, even Issue No. 4 was decided in her favour. She was held entitled to get the amount of Rs. 17,840 by way of interest on the amount of Rs. 29,399 for a period of five years.

8. Regarding Issue No. 3, which was crucial, it was held that the documents produced on record showed that the defendant had no complaint about the immoral life or of the legitimacy of the child. Thus, the allegation that the 3rd plaintiff was not the son of the defendant was decided against him. However, relying on the Division Bench decision of the court in Chacko Daniel's case (supra), it was held that the defendant was not liable to pay the amount of Rs. 14,400 on account of maintenance of the child, as claimed by the plaintiffs.

8. Regarding Issue No. 3, which was crucial, it was held that the documents produced on record showed that the defendant had no complaint about the immoral life or of the legitimacy of the child. Thus, the allegation that the 3rd plaintiff was not the son of the defendant was decided against him. However, relying on the Division Bench decision of the court in Chacko Daniel's case (supra), it was held that the defendant was not liable to pay the amount of Rs. 14,400 on account of maintenance of the child, as claimed by the plaintiffs.

9. On the basis of these findings, the trial court decreed the suit for an amount of Rs. 47,239 along with interest at 12 percent per annum from the date of institution till the date of realization.

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10. Aggrieved by the judgment, the defendant filed an appeal viz., A.S. No. 167 of 1992. A cross appeal was filed by the plaintiffs. In the cross appeal, the claim for the amount of Rs. 25,000 paid on 22-4-1979 and Rs. 14,400 on account of maintenance of the minor son, was reiterated. It was also claimed that the defendant in the suit was liable to pay interest.

10. Aggrieved by the judgment, the defendant filed an appeal viz., A.S. No. 167 of 1992. A cross appeal was filed by the plaintiffs. In the cross appeal, the claim for the amount of Rs. 25,000 paid on 22-4-1979 and Rs. 14,400 on account of maintenance of the minor son, was reiterated. It was also claimed that the defendant in the suit was liable to pay interest.

11. The matter was placed before a learned Single Judge of this court. On behalf of the plaintiff-respondents, reliance was placed on the decision in Joy v. Usha AIR 1996 Kerala 191, wherein the claim of a Christian wife against her husband was sustained. The Bench had also referred to the decision of a learned Single Judge in Sachariah Varghese v. Mariakutty 1991 (2) KLT 71 wherein the claim of a son for maintenance against a Christian father had been upheld. The learned Judge felt that the Full Bench decision in P.M Paily Pillai's case (supra) had not been brought to the notice of the learned Single Judge in its correct perspective. Thus, the correctness of the view had to be considered. The case was, accordingly, referred to a Division Bench.

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12. While the above matter was pending, Civil Revision Petition No. 3287 of 2001 was posted for hearing before a Division Bench of this court. The Bench considered the matter at some length. The decisions delivered by different benches were noticed. In view of the "sharp cleavage" in judicial opinion, the matter was referred to a Full Bench. Ultimately, these cases were placed before this Bench.

12. While the above matter was pending, Civil Revision Petition No. 3287 of 2001 was posted for hearing before a Division Bench of this court. The Bench considered the matter at some length. The decisions delivered by different benches were noticed. In view of the "sharp cleavage" in judicial opinion, the matter was referred to a Full Bench. Ultimately, these cases were placed before this Bench.

13. On behalf of the appellant/petitioner, the arguments were addressed by Roy Chacko and K.B. Gangesh. It was contended by the learned counsel that the obligation of a husband to maintain his wife or that of a father to maintain his child is only moral. It is not founded upon any provision of law. A moral obligation cannot be converted into a legal liability. Learned counsel maintained that in the absence of a positive provision in the Personal Law governing the Christians, the general principles of equity, justice and good conscience could not be invoked. The lacuna, if any, in Personal Law cannot be filled-up by the courts. It was further contended that the Canon law, applied by the Ecclesiastical courts, could not be treated as the Personal Law governing the Christians in India. The provisions cannot be invoked or enforced by the civil courts.

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15. Keeping in view the importance of the issue, the Bench had considered it appropriate to request V. Giri, Radhakrishnan. B. Thotthathil, K.M. Joseph and Dr. Sebastian Champappilly, Advocates to assist the court as amicus curiae. Ms. Sathyashree Priya had also appeared. The counsel were liberal with their time and effort. They assisted the court. We record our appreciation and gratitude for the valuable assistance rendered by them.

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16. Mr. V. Giri submitted that a child has a basic right to be looked after by his father. The courts and the state are the ultimate guardians of every person who is non sui juris. The court has the jurisdiction to ensure that the person and property of any one, who is not in a position to look after himself, are duly protected. The obligation of a parent to look after the child has been customarily accepted. Since father is recognized as the guardian, he is under a duty to maintain and protect the child. The counsel further contended that section 125 of the Code of Criminal Procedure does not confer any right. In fact, it really placed a restriction, which has since been removed.

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17. Mr. Radhakrishnan B. Thotthathil submitted that every child irrespective of his race, caste or religion has a remedy by way of a suit under section 9 and order 32A of the Code of Civil Procedure. Sections 41 to 44 of the Indian Divorce Act, 1869 recognize and regulate the right to maintenance. He further submitted that section 23(2) of the Hindu Adoptions and Maintenance Act, 1956 provides a good measure of guidance to the courts. The counsel contended that the right to life is guaranteed under article 21 of the Constitution. Any custom or law, absolving a father of an obligation to maintain the minor child, would be violative of article 21. It would be liable to be declared void under the Constitution.

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18. Mr. K.M. Joseph submitted that the matter is partially governed by the provisions of the Travancore Special Marriage and Succession Act, 1119 (equal to 1944). The decisions in Chacko Daniel's case (supra) and P.M. Paily Pillai's case (supra) are per incuriam. He further submitted that principles of justice, equity and good conscience are fully applicable. The right of children and grandchildren for maintenance has been recognized for a long time. The Catholics are bound by the Canon law. Even in England, the wrong has been recognized and rectified. The courts in India must shake off the 'subtle alien bondage'. We have no reason to draw upon the English Common Law. The right of a child to be maintained is basic. It must be recognized as an enforceable right.

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19. Dr. Sebastian Champappilly pointed out that the Indian decisions had basically drawn upon the English Jurisprudence. However, in England, the Parliament had enacted the Child Support Act, 1995. The right of a child has been recognized in the Conventions, which had been ratified by the Government of India on 20-11-1989. Thus, the state is under an obligation to pass and enforce laws for the protection and maintenance of children. It was also pointed out that the limitation of Rs. 500 imposed by section 125 of the Code of Criminal Procedure had been removed by the Parliament while passing Act No. 50 of 2001.

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20. Ms. Sathyashree Priya submitted that the UN Convention on the Rights of the Child was adopted by the General Assembly on 20-11-1989. Article 18 recognises the primary responsibility of the parents to maintain their children. India had acceded to the Convention on 11-12-1992. Since the Treaties and Conventions are binding on the parties, no Indian-Christian, Hindu or Muslim, can be permitted to neglect the child.

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22. Man is the highest product of his own history. He has been described as "the glory and the scandal of the universe." He reasons. But he is not always reasonable. He can be abject. Also august. He is 'limited in his nature, infinite in his desires.' Man can behave like a beast. He can be mean and petty. He can also be like an angel. At once, grant and glorious.

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23. Just as the raw metal ore has to pass through fire to acquire the requisite purity, the man has gone through a gradual process of evolution. Thus, the man has moved from the primitive to the modern. From the barbaric to the civilized and cultured. The true test of man's progress is not the census, nor the size of cities, nor the size of crops. We cannot judge man by what is on him. We have to see what is in him. To judge an individual, we have to look at his learning. Not his ledger. His ability to give and not merely to get.

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24. And then, man is not born like the partridge in the woods. Nor is he like the ostrich in the desert. He is not left alone to be lonely. He is not at the mercy of the wild winds. He is 'reared day by day in the first of churches, the family.'

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25. According to the Dictionary of Law (L.B. Curzon, 4th Edn) the "family is a social unit, usually consisting of a male and female adult living in one household and caring for their children." The husband and wife are bound together in honour and influence. The children provide a common bond to the couple. Children are God's apostles. They are "the darling buds of spring." The old saying is-"To Adam paradise was home. To the good among his descendants, home is paradise." It is true even today.

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26. "Next to God, thy parents," says the poet. God could not be every-where. So, He made parents. They give birth, tend the baby in infancy, train in youth and prepare him to face life when he is grown up. They are 'heaven's lieutenants on earth. There is a divine sacredness in the parental care and concern. The wholesome warmth of a parent's care, concern and love is essential to make the child's blood circulate. A parent is a guardian. He has to guard. He has to protect the helpless. After all, the child, a helpless being is the product of his own flesh and blood.

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27. It is true that there are men who are misers. They hope to grow rich by acting poor. They are the slaves of their servant. They live the life of a wretch in the vain hope of dying rich. They 'groan under gold, yet weep for want of bread.' Instead of serving, they starve their offspring. They inflict injury on the innocent. Generally, they mistake gold for good and make it their God.

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28. Long back, Bacon had said, "The illiberality of parents, in allowance toward their children, is a harmful error, and makes them base; acquaints them with shifts; makes them sort with mean company; and makes them surfeit more when they come to plenty; and therefore, the proof is best when men keep their authority toward their children, but not their purse." The statement is true even today. A suspicious parent makes an artful child. Children do not merely keep up the race. God sends them to enlarge our hearts. There is a concealed comfort in love. It is a necessity of life. This is



the rule of the world. It lies at the foundation of human existence. It makes us less selfish. We have to remember that boys have to become men. Girls shall be women. Neglect shall only give us a 'race of hermaphrodites.'

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"545. Sons(1) A father is under a personal obligation to maintain his minor sons,. therefore, he is bound to maintain them even out of his separate or self-acquired property. However, he is under no such obligation to his adult sons; therefore, he is not bound to maintain them out of property which belongs exclusively to him. If the father and sons are members of a joint family governed by the Mitakshara law, and there is joint family property, the sons, even if adult, are entitled to maintenance out of the joint property. The reason is that under the Mitakshara law, sons take a vested interest in joint family property by birth. The liability to maintain an adult son is not limited to the income of what would have been his share on a partition of the joint family property.

However, the sons do not, in cases governed by the Dayabhaga law, acquire any interest by birth in ancestral property (273, 274). A father therefore, under the Bengal School, is not bound to maintain his adult sons either out of his separate or out of ancestral property.

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(2) A son who is entitled to sue for partition can sue for maintenance. Where he cannot sue for partition, without the consent of certain coparceners, as in Bombay, he is entitled to maintenance out of the joint family property.

(3) section 20 of the Hindu Adoptions and Maintenance Act, 1956, now provides that a Hindu father or mother is bound, during his or her lifetime, to maintain his or her legitimate or illegitimate children and that a legitimate or illegitimate child can claim maintenance from his or her father or mother so long as the child is a minor. Reference may be made to the notes under the section." (Emphasis here italicised in print supplied) A similar comment appears in Mullas Commentary on Mohammedan Law in para 370 at page 300.

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33. Still further, as submitted by Mr. Thothathil, the right to life is fundamental. The Constitution guarantees it. Every other provision of law, personal, public or private, has to conform to the constitutional mandate. It must be interpreted in a manner that would fulfil and promote the constitutional mandate.

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34. The right to life as embodied in article 21 does not mean a mere animal existence. It is not merely a right to subsist or survive. Life is not just 'a vale of tears.' It must mean more. The provision plainly embodies the right to lead an honorable life. It means the right to have a dignified, meaningful and purposive life. Clothing, facilities for reading, writing, food, shelter and water are just the basic human necessities. These have to be provided. The duty, under Art. .21, is undoubtedly directed towards the state. But the whole society cannot be just a silent spectator. Life is a gift from God, Man cannot destroy it either by his act or neglect. Each individual has to persevere for its preservation. There can be difficulties. But these must strengthen the mind. In the same way as labour helps the body to become stronger.

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35. It is true that the Constitution also guarantees freedom to profess any faith or religion. The Christians are entitled to have their freedom. In the same measure as anyone else professing any other faith or religion. They may even be a religious minority. Yet, the issue is-Is a Christian father something special? Can he be absolved of the duty to maintain his minor child? Is there any law, which relieves him of the liability to take care of his offspring? Can he ignore the creature while professing to go by the dictate of the Creator? Can he neglect the child without earning the wrath of law?

35. It is true that the Constitution also guarantees freedom to profess any faith or religion. The Christians are entitled to have their freedom. In the same measure as anyone else professing any other faith or religion. They may even be a religious minority. Yet, the issue is-Is a Christian father something special? Can he be absolved of the duty to maintain his minor child? Is there any law, which relieves him of the liability to take care of his offspring? Can he ignore the creature while professing to go by the dictate of the Creator? Can he neglect the child without earning the wrath of law?

36. Firstly, who is a Christian under the Indian law? The expression 'Indian Christian' is defined in section 2(a) of the Indian Succession Act, 1925. It provides as under :

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'(d) "Indian Christian" means a native of India who is, or in good faith claims to be, of unmixed Asiatic descent and who professes any form of the Christian religion.'

37. A perusal of the above provision shows that the person must be a native of India. He must be of unmixed Asiatic descent. He should be professing the Christian faith and religion. But does the law make a Christian parent different from the rest either legally or morally?

37. A perusal of the above provision shows that the person must be a native of India. He must be of unmixed Asiatic descent. He should be professing the Christian faith and religion. But does the law make a Christian parent different from the rest either legally or morally?

38. First, a word about the spiritual sanctions. The Canon Law, which we were informed by Mr. K.M. Joseph, governs the Catholics provides that the "Parents have the most grave obligation..." to look after their progeny. Then, the holy Bible says

38. First, a word about the spiritual sanctions. The Canon Law, which we were informed by Mr. K.M. Joseph, governs the Catholics provides that the "Parents have the most grave obligation..." to look after their progeny. Then, the holy Bible says Psalms (Chapter 103, Verse 13) "As a father pities to his children, so the God pities those who fear him."

Epistle of St. Paul to Thimothios (First Timothy, Chapter 5, Verse 8) "If anyone does not take care of his relatives especially the members of his own family, he has denied the faith and is worse than an unbeliever.

Holy Gospel According to St. Mathew (Chapter 7, Verse 11) "You know how to give good things to your children. Even bad people like you are doing it. How much more then will your Father in Heaven give good things to those who ask Him."

39. Does not the morality of the Bible embody the safety of the society? It lays down the way a Christian should lead his life. It is the 'Alpha and Omega, the beginning and the ending' of a good and humane existence. "Let the little children to come unto me, and forbid them not; for of such is the kingdom of God," is the Christian canon. Service to the creature is the best way to serve the Creator.. This is the Christian faith. Can a Christian still ignore his child?

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40. History records that, 'Christ forgot himself and provided for his mother amid the agonies of crucifixion.' It has been said, "The only way to realize that we are God's children is to let Christ lead us to out, Father." Still further, "The Christian faith reposes in a person than a creed. Christ is the personal living center of theology, Christ is the personal source of the individual Christian life; the personal head of the whole Christian Church; the personal sovereign of the kingdom of grace."

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41. The Christian religion teaches us to face evil and to overcome it. To cleanse the society. It does not teach us to neglect the needy. In fact, a person who does not take care of his relatives especially the members of his own family, is branded as 'worse than an unbeliever.' A father has to take care of his children so that God takes care of him. The command of the holy Bible is clear and categorical. Man can neglect it only at his own peril. The fact that he is a Christian is of no consequence. It makes no difference.

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42. There is another aspect of the matter. The caste, faith or religion provide no rational basis for determining the parental duties of any person. No scripture says that a living being shall not take care of its young ones. Care and concern for the needy are the command of the Creator. Man can ignore it only at his own peril. Love is a beautiful necessity of life. For everyone. Irrespective of the race or religion. It means all abandonment. Love enlarges our heart. It teaches us to sacrifice. Without it, life shall not be worth living.

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43. In India, the Constitution, which is the primary law of the land, provides in the Preamble that we shall be a "Secular Democratic Republic." It promises Justice. In Articles 15 and 16, it prohibits discrimination on grounds 'only of religion, race. . . .' It is true that the constitutional prohibition is directed towards the state. Yet, if the state cannot provide for differential treatment even by law, the individual cannot be permitted to perpetrate it by his action,

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individual cannot be permitted to perpetrate it by his action,

44. The counsel contended that in the absence of a positive provision in the Personal Law governing the Christians, the general principles of equity, justice and good conscience cannot be enforced or even invoked. Is it so?

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45. Equity is nothing but a compilation of the rules 'of righteousness.' These must be observed between man and man. Equity and law stand together like faith and religion. The guarantee of a good social order lies in a strict adherence to the rules of equity and good conscience. Justice is the pronounced policy of a civil society.

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46. W. Friedman, says-"Law is embodied in the Themistes which the Kings receive from Zeus as the divine source of all earthly justice and which are based on custom and tradition." Again, it is said 'Law is meant to regulate the most personal relations, the emotions of infants, conduct and marriage, and divorce, no less than the types of funerals or the scale of earnings in different occupations.' It is the "embodiment of 'right reasoning'." According to Julius Stone, law is a compilation of "social rules" or "means of social control." It has to be a "means towards justice."

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47. Not only the Statute but also even Custom and Judicial interpretation are the known sources of law. The duty of a man towards his fellow being has been recognized since the hoary past. In Manusmriti, Chapter Eight, it has been said that "it is not proper for a man to desert his mother, father, wife or son." In case, he does so, the "King shall punish him with a fine of 600 panas." Mulla on "Principles of Hindu Law", Volume-I, records that "A father is under a personal obligation to maintain his minor sons." Similarly, "a son who is entitled to sue for partition, can sue for maintenance." section 20 of the Hindu Adoptions and Maintenance Act, 1956 now imposes a statutory obligation on the parents to maintain their legitimate or illegitimate children. What was interpreted as being an 'imperfect obligation' under the common law has been recognized as an enforceable duty in the Indian jurisprudence. Should we still prefer the Westminster vintage values'

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48. The concern for young ones is universal. The duty to take care of the children has been duly recognized as an enforceable obligation in the entire civilized society. It appears that even in UK, the position is not different. There has been a gradual change from a mere promise to actual performance. From words to action.

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49. Dr. Sebastian Champappilly pointed out that the history of Child Support in the U.K. is available on the website. Learned counsel provided the print out. It has been recorded that "for at least four centuries, it has been the responsibility of fathers in various circumstances, to provide maintenance for their children." In 1601, the "Acte for the Reliefe of the Poore" was enacted. It was inter alia provided that "the Father and Grandfather, and the Mother and grandmother, and the Children of every poor, old, blind, lame and impotent Person or other poor Person not able to work, being of a sufficient Ability, shall, at their own Charges, relieve and maintain every such poor person in that Manner, and according to that Rate, as by the Justices of peace of that Country where such sufficient Persons dwell, or the greater Number of them, at their General Quarter Sessions shall be assessed; upon Pain that every one of them shall forfeit twenty shillings for every Month, which they shall fail therein." thus, it appears that maintenance of the poor has been recognized as a social imperative. One could neglect the needy only on the pain of being penalized.

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50. No doubt, we live in a world of changing values. Materialism has overtaken the man. Gold has become our God. Even matrimony has become a matter of money. Marriage is no longer a sacrament. It has become a contract. It is easily announced, denounced and renounced. It commences like the morning but perishes like a drop of dew. In some cases, romance ceases with marriage. History commences. In this situation, the fate of children 'caught in the maelstrom of marital conflict' is a matter for concern. It cannot be "subordinated to the outcome of the marital legal battle." The "Morton Commission of 1956 was able to secure further legislative reform. This allows orders to be made as to the children even if no decree is made; and directs that the court must normally be satisfied, before making absolute a divorce, nullity or separation decree, that the best possible arrangements have been made for the care and upbringing of each child under 16." The Matrimonial Proceedings (Children) Act, 1958, was also enacted by the Parliament in England. Thus, the archaic and old concept of 'imperfect duty' is no longer tenable.

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51. In fact, the law shows special concern for the 'dependants, defectives and delinquents.' It provides for their protection. A child is not his own master. He lacks the legal capacity to act for himself. He cannot manage his own affairs. He is non sui juris. Thus, a "concern for children as deficient in capacity for self-provision and self-protection and self-guidance is manifest at many points in modern law : for instance, in the prohibition of child labour; the principle in adoption and matrimonial proceedings of paramountcy of the welfare of the child."

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52. So far as India is concerned, it has been observed as under :

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"Tradition indicates rather acceptance of inherited lot, the permanence of existing social arrangements, the reliance on the family rather than on officials for social and economic security, the making do with subsistence rather than a struggle for abundance."

53. The above observations are symbolic of the Indian tradition of care, concern and contentment. We have a system of joint family. It is not based on race or religion. It permeates the whole social order, Under the system, everyone contributes his bit. The head of the family takes care of all. The children and the adults depend on the 'karta' for their material needs. And these are met. The system imbues a sense of security in everyone. Its efficacy has been acknowledged even in the West. We should not abandon it.

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54. Mr. Giri contended that the custom recognizes father as a natural guardian. He is entitled to the custody of the minor's person and property. The right necessarily carries with it a corresponding duty. He has to take care of the minor. The father is entitled to deal with the property. This right is certainly subject to the provisions of the Guardian and Wards Act, 1890. Yet, he can alienate the property. The right imposes a corresponding duty. He is under an obligation to maintain the minor. The counsel also referred to the obligation of the State as 'Parens Patriae'.

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55. The counsel appears to be wholly right in his submission. The obligation of a father springs from his status as a guardian. The right to custody carries a duty to take care. The right to deal with the person and property places the parent under an obligation to protect the child against any kind of want. The right of the child is basic. It has been customarily recognized. The guardian is under a duty to guard the child. The child has a right to be maintained.

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56. The matter can be viewed in another way. The concept of *Parens Patriae* originates from the English common law where the King had a royal prerogative to act as guardian to persons with legal disabilities such as infants.' Literally, the expression means 'parent of the country. Traditionally, it refers to the "role of state as sovereign and guardian of persons under legal disability, such as juveniles or the insane ... and in child custody determinations, when acting on behalf of the state of protect the interests of the child. It is the principle that the state must care for those who cannot take care of themselves, such as minors who lack proper care and custody from their parents."

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57. In India the principle has been recognized. In *Bhopal Gas Tragedy Charan Lal Sahu v. Union of India* (1990) (1) SCC 613, the Central Government had assumed the jurisdiction to prosecute the suits on behalf of the victims who were unable to defend themselves. A Full Bench of this court in *Marggarate Maria v. Dr. Chacko* (1969) KLT 174 had duly recognized this position of law even before the Bhopal Gas tragedy.

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58. If the state as a fictional parent is tinder a duty to take care of the infant and the invalid, the real parent cannot be absolved of his responsibility. It is a duty. It is not an imperfect obligation. It arises out of his position as a guardian. He must, not be allowed to abandon the weak and leave him alone and lonely to face the world.

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59. And then, there cannot be a wrong without a remedy. For every legal injury, there should be a way to repair the loss. The law cannot leave the helpless without help. In any case, the courts can ever raise their hands in despair. They are under a duty to find a way. In case of need, they have to make one. What is the position in the present case?

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60. Mr. Radhakrishnan B. Thotthathil pointed out, and we think rightly, that section 9 of the Code of Civil Procedure provides a remedy for the enforcement of the civil rights byway of a civil suit. Order 32A specifically contemplates a suit for maintenance. The remedy is available to everyone, an infant or adult, irrespective of the race or religion. Still further, even when the parents are fighting, sections 41 to 44 of the Indian Divorce Act, 1869, clearly regulate the exercise of jurisdiction by the court regarding the custody and care of the children. In case of a minor, the law provides for the appointment of the next friend. The obvious purpose is to ensure that the interest of the minor is duly protected. The fate of the children 'caught in the maelstrom of marital conflict' is a matter of concern, It has not to be "subordinated to the outcome of the marital legal battle." The law contained in sections 41 to 44 of the 1869 Act, takes care of it. In view of these provisions, it cannot be said that the law does not impose a legally enforceable duty.

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61. And then, let us assume that there is a custom that a father is riot obliged to maintain a child. Such a custom shall be law within the meaning of Article 13 of the Constitution. Would it not be violative of the right to life guaranteed under Article 21? The answer has to be in the affirmative. In fact, such a custom shall be contrary to the constitutional scheme as embodied in Article 21, 23 to 27 and 39. Still further, the Constitution makes India a Secular State. We talk of a uniform civil code Smt. Sarla Mudgal v. Union of India AIR 1995 S.C. 1531; Consumer Education and Research Centre v. Union of India AIR 1995 S.C. 922 and Darshan Singh v. Ram Pal AIR 1991 S.C. 1654. Still, the litigants seek to distinguish the rights and duties on the basis of only religion. It is not permissible.

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62. Mr. Roy Chacko referred to the observations in 'Salmond on Jurisprudence that the right to maintenance is an imperfect right. Thus, it cannot be enforced.

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1. Perfect and imperfect rights. A perfect right is one which corresponds to a perfect duty; and a perfect duty is one which is not merely recognized by the law, but enforced. A duty is enforceable when an action or other legal proceeding, civil or criminal, will lie for the breach of it, and when judgment will be executed against the defendant, if need be, through the physical force of the state. In all ordinary cases, if the law will recognize a right at all, it will enforce it. In all fully developed legal systems, however, there are rights and duties which, though undoubtedly recognised by the law, yet fall short of this typical and perfect form (v).

'(v) In ethics the term "Imperfect duty" is sometimes used to describe a duty of such a nature that it is not fit for enforcement, but ought properly to be left to the free will of him whose duty it is. A perfect duty, on the other hand, is one which a man not merely ought to perform, but may be justly compelled to perform. The duty to give alms to the poor is imperfect; that of paying one's debts is perfect. Perfect duties pertain to the sphere of justice; imperfect to that of benevolence."

64. Possibly, it is this concept of perfect right and imperfect duty that had led the English courts to take the view that the child had a right to be looked after by the parent. However, the law did not provide any remedy. A right without a remedy only imposed an 'imperfect obligation.' It was noticed "So authoritative a text-book as Halsbury's Laws of England,' Hailsham Edition expresses the emphatic opinion that the father of an illegitimate child, so long as it remains illegitimate, is not recognized by the law of England for civil purposes.... Even a legitimate child has no right under the English common law to claim maintenance from its father." Chagla J had, thereafter, followed it in Philomena Mendoza v. Dara Nusserwanji Mistry AIR 1943 Bombay 338. Later on the Full Bench of this court was also persuaded to take a similar view in P.M. Paily Pillais case (supra). The

correctness of this view is the core of the controversy in these cases.

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65. As already observed, the right to live and lead a life of dignity is a fundamental right in India. The child being non sui juris the state and the courts are bound to protect him. The father is a natural guardian. He is under a duty to maintain the child. The scriptures and the statutes recognize the right and the duty. The courts in India, as submitted by Mr. K.M. Joseph, must shake off the 'subtle alien bondage.' We must go by the 'native' rather than the 'Westminster vintage values.'

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66. In India, the law does not permit cruelty to even animals. How can a civilized man be cruel to his own child and neglect his needs? And that too in case of a minor. Man must treat his own progeny at least as well as his pets. He cannot have a different yardstick for his own offspring. And then, under the law, the son is an heir. He succeeds to the property after the death of the father. There appears to be no reason to debar him from the available benefits during his formative years as a child.

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67. The counsel for the appellants placed firm reliance on the decision in Pillai's case. What was the position?

67. The counsel for the appellants placed firm reliance on the decision in Pillai's case. What was the position?

68. The court was considering a reference under section 256(1) of the Income Tax Act, 1961. The assessee had executed a gift deed in favour of his minor son. In this gift deed it was inter alia provided that "the income from the property shall hereafter also be utilized for the purpose of the education of yourself (the donee) who is at present studying in King George's School, Bangalore" it was further provided that the gift of the "property and building" was being made "in consideration of my love and affection to you..." The adjudicatory authority had taken the view that the gift deed "was executed in pursuance of the legal duty and obligation cast upon the assessee to maintain and educate his minor children and in fulfilment of that duty and obligation." It was further held that "such a transaction has to be considered as one supported by consideration."

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69. The revenue challenged the order before the High Court. It was submitted that the father had no obligation "enforceable in the civil courts to maintain his minor child." The Bench noticed the decision of the Travancore-Cochin High Court in Chacko Daniel's case (supra). It also noticed the English commentaries, Halsbury's Laws of England and various other decisions. It came to the conclusion that "the assumption made in S. Viswasom v. CIT (1963) 50 ITR 503 (Ker) that there is a legal obligation on the part of the Christian father to support his minor son is wrong." Thus, it was held that the gift deed was devoid of consideration. The correctness of this view has been questioned.

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71. Higginbotham in "The Work House and Poor Laws "points out that the emphasis of the 'poor laws was that the "parishes would rescue destitute people, then could claim from relatives." As already noticed, in the year 1601 an 'Acte for the Reliefe of Poore' was enacted. In 1733 a putative father was made responsible for maintaining his illegitimate child. The statutes were periodically amended during the period from 1753 to 1845. In the year 1857 the Matrimonial Cases Act, 1857, was enacted. A court for Divorce in matrimonial cases was introduced to replace the parliamentary divorces. The Act "took over the jurisdiction for matrimonial affairs from the church courts and was empowered to deal with child custody, maintenance and alimony." The Divorce Act contained express provisions of ensure that the divorced wife should not be left in a state of destitution. However, all other obligations regarding the maintenance of children arose under the poor law legislation. There were periodic amendments in various enactments. In the year 1908 the Children Act was enacted. Sections 82 provided as under :

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"(1) Where a court orders that child to be sent to a certified Day Industrial School, the court shall also order the parents of the child, or other person liable to maintain him, to contribute to his industrial training and meals in the school such sum as is named in the order, not exceeding such sum as may be declared by order in consent to represent approximately the average cost of industrial training and meals in Day Industrial Schools."

72. The First World War had caused long separations. Resultantly, in the post war era there was a surge of divorces. By the Married Woman (Maintenance) Act, 1920 the wife was entitled to apply "separately for children under 16 unto 10 shillings a week." Then there was the scourge of the Second World War. After the war there was again a surge of divorces. The National Assistance Act, 1948 was enacted. Section 42 provided that "a man shall be liable to maintain his wife and his children." Similarly, it was also provided that "a woman shall be liable to maintain her husband and her children." Various other provisions were also made. In the year 1991 the Child Support Act was promulgated. The Act was amended in the year 1995. The duty of a parent to maintain the child was duly recognized. The 1995 Act was enacted "to make provision with respect of child support maintenance and other maintenance bonus." section 28E was added to the 1991 Act to inter alia provide that "parents should be responsible for maintaining their children whenever they can afford to do so." It was further provided that 'where a parent has more than one child, his obligation to

maintain any one of them should be no less of an obligation than his obligation to maintain any other of them." Thus, there was a statutory recognition of the child's right and the parent's obligation. The machinery for enforcement of the provision was also provided.

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73. The peep into the past shows that the legislation in England has clearly leaned in favour of the child and progressively provided for his care and comfort. Thus, the Christians in England are obliged to maintain their children. In India, we draw upon rare instances in English cases to justify avoidance of the responsibility. It is not permissible. The view taken by the Full Bench it difficult to accept.

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74. And then, the child's right has been recognized not only in England. In fact, the whole world has moved in this direction. The Convention on the Rights of the Child was adopted by the U.N. General Assembly on 20-11-1989. In the Preamble it was said that a family is "the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community." It was noticed that "the need to extend particular care to the child has been stated in the Geneva declaration and the declaration of the rights of the child adopted by the General Assembly on 20-11-1959..." Keeping in view the fact that "the child by reason of his physical and mental maturity need special safeguards and care including appropriate legal protection, before as well as afterbirth," the status is accorded to "respect and ensure the rights set forth in the.... Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parents' or legal guardian's race, colour, sex, language,



religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status". Still further, in Articles 3, 4, 6, 9, 10, 14 and 18 it was inter alia provided as under :

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#### Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States parties undertake to ensure the child such protection and care as is necessary for his or her well being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Article 4 States parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, states parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

#### Article 6

1. States parties recognize that every child has the inherent right to life.

2. States parties shall ensure to the maximum extent possible the survival and development of the child.

#### Article 9

1. States parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

4. Where such separation results from any action initiated by a state party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the state) of one or both parents or of the child, that state party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

#### Article 10

1. In accordance with the obligation of states parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a state party for the purpose of family reunification shall be dealt with by states parties in a positive, humane and expeditious manner. States parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

2. A child whose parents reside in different states shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of states parties under article 9, paragraph 1, states parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order, public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present convention.

## Article 14

1. States parties shall respect the right of the child to freedom of thought, conscience and religion.
2. States parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

## Article 18

1. States parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.
2. For the purpose of guaranteeing and promoting the rights set forth in the present convention, states parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.
3. States parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.

75. A perusal of the above provisions shows that the parties to the convention have recognized the child's inherent right to live. They had undertaken to ensure and make maximum possible efforts for "the survival and development of the child"-Various steps, which the states have to undertake, were delineated in different Articles. The Government of India had ratified the convention on 20-11-1989. Thus, it had of the faith undertaken to pass and enforce laws for the protection and maintenance of children. All the children had to be treated alike irrespective of the faith or religion professed by the parents.

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76. Mr. Roy Chacko referred to the decision of the Division Bench of this court in Chacko Daniels case (supra). The Bench had taken the view that "the personal law relating to Christians in Travancore-Cochin does not make a father legally liable to maintain his children whether they be legitimate or illegitimate." For this conclusion, the Bench had placed reliance on Stephen's Commentaries on the Laws of England (19th Edition). It had also referred to the Halsburys Laws of England (Hailsham Edition) Vol-II Page 579.

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77. Mr. Joseph submitted that the decision is per incuriam. The matter is partly governed by the Travancore Special Marriage and Succession Act, 1119 (1944 of the Christian era). He appears to be right. Still more, the counsel referred to the provisions of the Kerala Children Act, 1972. The statute undoubtedly embodies the provisions, which show a recognition of the rights of the children.

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78. The counsel for the parties also referred to various other decisions. On behalf of the appellants, reliance was primarily placed on the decision of the Bombay High Court in Philomina Mendozas case (supra). The petitioner was an illegitimate child. She claimed maintenance from her father who was a Parsi. Dealing with the issue the learned Judge, as briefly noticed earlier had observed as under :

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".... The respondent is a Parsi. There is no code of law which governs the Parsis in this country, and except for the statutory law they are governed by the common law of England. Therefore, the question that arises is whether under the English common law there is any obligation upon a putative father to maintain his illegitimate child. So authoritative a textbook as Halsburys 'Laws of England, "Hailsham Edition Vol. II, at p. 579 expresses the emphatic opinion that the father of an illegitimate child, so long as it remains illegitimate, is not recognized by the law of England for civil purposes. Therefore, he is under no obligation to provide for the child in the absence of any affiliation order. Even a legitimate child has no right under the English common law to claim

maintenance from its father. As pointed out by Halsbury in his Hailsham Edition, Vol. XVII, p. 671, except under the operation of the poor law, there is no actual legal obligation on a father or mother to maintain a child, unless the neglect to do so would bring the case within the criminal law. The only duty of a father to maintain his infant children is merely a moral obligation or a duty of imperfect obligation. It is true that the court of Chancery in England has in certain cases enforced this moral duty whenever it could do so. The only instance to which my attention has been drawn by Mr. Menezes is a case in (1828) 5 Rus, 154, where the father was adjudicated a lunatic and a committee was appointed for the management of his affairs. The father had four illegitimate children and they applied to the court to be paid maintenance out of his estate, and the court granted that application. It has to be remembered in this case that the father was adjudged a lunatic by a court that his estate was under the control of the court and that the father being under a moral obligation to maintain his infant children, the court enforced that moral obligation by paying to them out of the funds under its control their maintenance....

Mr. Menezes has appealed to me to take a sympathetic view of the case and to hold that on principles of justice, equity and good conscience a putative father is bound to maintain his illegitimate child. The principles of equity and good conscience which our courts administer are those principles which have been embodied in the common law of England and to which the English Courts have given effect. I am not aware of any principles of justice, equity and good conscience which are contrary to or not recognized by the common law of England. If according to the common law of England an illegitimate son is not entitled to claim maintenance from his putative father, it is very difficult for me to hold that, apart from the common law which applies to the respondent in this case, on general principles of justice, equity and good conscience he is liable to pay maintenance to his illegitimate child...." (p. 339)

79. The Division Bench in Chacko Daniels case (supra) and the Full Bench in PM Paily Pillai's case (supra) had followed this decision. The decision in Chacko Daniels case (supra) was noticed by a Full Bench of this court in Cherria Varkey v. Ouseph Thresia (1955) KLT 429. After consideration of the matter it was inter alia observed as under :

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"In matters not governed by statute or customary law it is the principles of justice, equity and good conscience that should apply and it is supposed that those principles are to be found in the Common Law of England. Under the Common Law of England, the obligation of the husband to maintain his wife is not a mere moral obligation but is a legal obligation which could be enforced in law although not by direct action by the wife. Therefore, according to the personal law of the Christians in the state the husband has a legal obligation to maintain his wife. In this respect, the law governing Christians is in no way different from that applicable to Hindus. Both under the Hindu Law and the Christian Law, marriage creates a status with certain obligations attached to it. One of such obligation is that of the husband to maintain his wife so long as the wife is willing to discharge her

own marital obligations. (The observations in paras 10 and 14 have been noticed in the head note)."

80. Thus, the wife's right to claim maintenance was upheld. However, the claim for the maintenance of children, which had been sustained by the trial court, was not pressed in view of the decision in Chacko Daniels case (supra).

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81. The Full Bench decision in PM. Paily Pillai's case (supra) was considered by a learned Single Judge in Sachariah Varghese's case (supra). The learned Judge noticed the observations of various courts regarding the "indiscrete and indiscriminate application of precedents." So far as Chacko Daniel's case (supra) is concerned, it was observed as under :

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"The ratio of the PM. Paily Pillai's case (supra), as I said earlier, should be understood in the special setting in which it was stated by the Full Bench and I feel that it cannot be pressed into service in plain case where a father claims and argues immunity from an obligation to pay any amount as maintenance for his child, who is being taken care of exclusively by the separated wife on the tenuous and ethereal ground that he professes Christian religion though an Indian citizen. On the face of it, I feel that it. is an argument built on vaporous ground.

It may be true that there is no specific statutory provision mandating a Christian father or a Christian husband to maintain his children and his wife. Of course, Indian Divorce Act provides for certain provisions for alimony and maintenance to the wife and children. Since there are provisions in the Indian Divorce Act, can it be said that only when a claim for separation initiated under that statute a decree can be granted for maintenance or alimony for the wife and children.

In a considered judgment reported in AIR 1955 Travancore-Cochin 255 Cheriya Varies case (supra), Joseph Vithayathil, J. observed thus :

'In matters not governed by statute or customary law, it is the principles of 'justice, equity and good conscience' that should apply, and it is supposed that those principles are to be found in the Common Law of England. Under the law, the obligation of the husband to maintain his wife is not a mere moral obligation but is a legal obligation, which could be enforced in law although not by direct action by the wife. Therefore, according to the personal law of the Christians in the Travancore-Cochin State, the husband has a legal obligation to maintain his wife. The wife is entitled to claim separate maintenance only if there is justifiable cause for her refusal to live with him. The question whether the wife has justifiable cause for refusing to live with her husband will

depend upon the facts of each case. Desertion by the husband and habitual cruelty are recognized as justifiable causes.' Same principle is applicable in the case of a claim for maintenance against a father by his child/children. In Stephen's Commentaries on the Laws of England, he said : 'A father is said to be bound to maintain, to protect, and to educate his children.' In the Law of Husband and Wile 'Montague Lush said : 'One of the first duties which the husband undertakes towards his wife is to maintain and support her, so long as the marriage relation continues and so long as the wife remains faithful to him : though she may divest herself of her right to be maintained and supported by him if she leaves him without his consent. English Law says that under the common law of England, the obligation of the husband to maintain his wife is not a mere moral obligation, but is a legal obligation which should be enforced in law although not by direct action by the wife. A learned author on domestic relations says that 'The husband, as head of the house-hold, is under an obligation to support and maintain his wife and children in which latter term are included the children of which he has been adjudged to be putative father.' Of course, the author has said that the obligation is rather moral than legal. It only means that there was no method to enforce that right. This was on account of the peculiar position, which the wife occupied in relation to her husband under the English Common Law. The Orthodox view was that by marriage, the husband and wife are one person and therefore, the wife could not sue the husband. This is clear from what is described by Blackstone : 'By marriage, the husband and wife are one person in law : That is, the very being or legal existence of the women is suspended during the marriage, or at least is incorporated and consolidated into that of the husband : under whose wing, protection, and cover she performs every thing; and it therefore called in our law-frech a feme-covert, foemina virro co-operta; is said to be covert-baron or under the protection and influence of her husband, her baron, or lord; and her condition during her marriage is called the coverture.

I do not think that the position in India is as what is known and followed in England. Here, there is no difficulty to say that a wife has got a separate status and that she has got right in property even after the marriage. At any rate, to me, it appears obnoxious when a criminal liability is imposed by a statute to maintain the children, to say that a father has no liability to maintain his children only on account of the fact that he professes Christian religion."

82. It is true that a Single Judge and a Division Bench are bound by the view expressed by a larger Bench. Judicial discipline demands that the rule is scrupulously observed. However, on consideration of the matter, we are of the opinion that the above observations contain an accurate and apt enunciation of the principle and the law. We, therefore, uphold this view.

82. It is true that a Single Judge and a Division Bench are bound by the view expressed by a larger Bench. Judicial discipline demands that the rule is scrupulously observed. However, on consideration of the matter, we are of the opinion that the above observations contain an accurate and apt enunciation of the principle and the law. We, therefore, uphold this view.

83. Lastly, a word about the legal and moral aspects of an individual's actions.

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84. It is true that the Moralist and the Legislator may have a difference of opinion. But they are not strangers to each other. As observed by Jerry Bentham in the Theory of legislation (xii page 36)"in a word legislation has the same center with morals, but it has not the same circumference." The author has further observed"Morality in general is the art of directing the actions of men in such a way as to produce the greatest possible sum of good. Legislation ought to have precisely the same object."

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85. Broadly speaking, whatever is morally wrong should not be legally right. A law, which does not protect morality, cannot last for too long. It would be immoral and unfair for a father to neglect his child. He should not be permitted to do so by invoking the technicalities of law.

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86. In view of the above, it is held that :

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1. The right to life is fundamental. The Constitution guarantees it. Every other provision of law, personal, public or private, has to conform to the constitutional mandate. It must be interpreted in a manner that would fulfil and promote the constitutional promise.

2. The caste, faith or religion provides no rational basis for determining the parental duties of any person. No scripture says that a man shall not take care of his young ones. Care and concern for the needy are the command of the Creator. Man can ignore it only at his own peril.

3. The duty to take care of the children has now been duly recognized as an enforceable obligation in the entire civilized society. It appears that even in UK the position has not been different. The duty has been recognized since long.

4. The obligation of a father springs from his status as a guardian. The right to custody carries a duty to take care. The right to deal with the person and property places the parent under an obligation to protect the child against any kind of want. The right of the child is basic. It has been customarily recognized. The guardian is under a duty to guard the child. The child has a right to be maintained. The child being non sui jurist the state and the courts are bound to protect him. The father is a natural guardian. He is under a duty to maintain the child. The scriptures and the statutes recognize



the right and the duty. The courts in India must shake off the 'subtle alien bondage.' We must go by the 'native' rather than the 'Westminster vintage values.'

5. The concept of *Parents Patriae* originates from the English common law where the King had a royal prerogative to act as guardian to persons with legal disabilities such as infants.' Literally, the expression means parent of the country. Traditionally, it refers to the "role of state as sovereign and guardian of persons under legal disability, such as juveniles or the insane... and in child custody determinations, when acting on behalf of the state to protect the interests of the child. It is the principle that the state must care for those who cannot take care of themselves, such as minors who lack proper care and custody from their parents." In India the principle has been recognized. If the state as a fictional parent is under a duty to take care of the infant and the invalid, the real parent cannot be absolved of his responsibility. It is a duty. It is not an imperfect obligation. It arises out of his position as a guardian. He must not be allowed to abandon the weak and leave him alone and lonely to face the world.

6. In India, the law does not permit cruelty to even animals. A civilized man cannot be cruel to his own child and neglect his needs. And that too in case of a minor. Man must treat his own progeny at least as well as his pets. He cannot have a different yardstick for his own offspring. And then, under the law, the son is an heir. He succeeds to the property after the death of the father. There appears to be no reason to debar him from the available benefits during his formative years as a child.

7. The Moralist and the legislator may have a difference of opinion. But they are not strangers to each other. Broadly speaking, whatever is morally wrong should not be legally right. A law, which does not protect morality, cannot last for long. It would be immoral and unfair for a father to neglect his child. He cannot be permitted to do so by invoking the technicalities of law.

8. The International Conventions provide a good guidance in the examination of vexed questions of law. The convention on the Rights of the child was adopted by the UN General Assembly on 20-11-1989. In the Preamble it was noticed that a family is "the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community." It was noticed that "the need to extend particular care to the child has been stated in the Geneva declaration and the declaration of the rights of the Child adopted by the General Assembly on 20-11-1959..." Keeping in view the fact that "the child by reason of his physical and mental maturity need special safeguards and care including appropriate legal protection, before as well as after birth," the status is accorded to "respect and ensure the rights set forth in the... Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parents' or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status." The Government of India had ratified the convention on 20-11-1989. Thus, it had undertaken to pass and enforce laws for the protection and maintenance of children. All the children had to be treated alike irrespective of the faith or religion professed by the parents.

9. The decisions in P.M. Paily Pillai's case (supra) and Chacko Daniels case (supra) do not lay down the correct position of law. Thus, these are overruled. The view as expressed in Sachariah Varghese's case (supra), is upheld.

The question as posed at the outset is, thus, answered in the affirmative. It is held that a Christian father is under an obligation to maintain his minor son. The appeal and the revision petition are remanded for decision on merits.

We have pronounced the order of the Full Bench today. It has been held that a Christian father is under an obligation to maintain his minor child. We have overruled the earlier Full Bench decision in P.M. Paily Pillai's case (supra) and the Division Bench judgment in Chacko Daniels case (supra).

Mr. Roy Chacko submits that he may be granted leave to appeal to the Supreme Court. Learned counsel for the respondents have no objection.

In view of the importance of the issue, the matter has been considered by a Full Bench of this court. The case raises a substantial question of law. The leave as prayed for is granted.