Christian Law of Succession and Mary Roy's Case

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Intestate succession among Travancore-Cochin Christians has been a subject of public debate ever since the decision of the Supreme Court in Mary Roy case. It appears that the decision has created considerable confusion not only among the members of the Christian community in Kerala, but also among the lawyers. Till the aforesaid decision of the Hon'ble Supreme Court, the Travancore Christians were governed by the provisions of the Travancore Christian Succession Act, 1916 and the Cochin Christians were governed by the provisions of the Cochin Christian Succession Act, 1921. Christians in other parts of India were governed by the provisions of the Indian Succession Act, 1925 with such exceptions as provided in the Act. It was in this settled 'state of affairs' that the Supreme Court rendered the decision in Mary Roy.

Mary Roy and Its Reasoning

The question that arose, before the Hon'ble Supreme Court, for consideration was whether the provisions of the Travancore Christian Succession Act were ultra vires the Constitution. Another related question that was raised before the Court was as to the impact of the Part B States (Laws) Act, 1951, on the Travancore Act. The Court decided the case holding that the Part B States (Laws) Act excluded the operation of the Travancore Act and thereby obviated the need for examining the first question of the constitutionality of the Act. It took the view that by virtue of Section 62 of the Part B States (Laws) Act, 1951 and the inclusion of the Indian Succession Act, 1925 in the schedule to that Act, the Travancore Christian Succession Act stood repealed from the appointed day under the Part B States (Laws) Act, i.e. April 1, 1951. Hence, it reasoned, the law applicable to intestate succession among Christians of Travancore area of the State of Kerala is the Indian Succession Act, 1925, from April 1, 1951. Following this decision, the High Court of Kerala ruled that the Cochin Christian Succession Act, 1921 also stood repealed by Part B States (Laws) Act, 1951. Though these courts did not expressly give retrospective effect to the judgments, the mere declaration that the Travancore and Cochin Acts stood repealed on April 1, 1951, gave these judgments retrospective effect overturning the then existing law and practice among the Travancore-Cochin Christians.

The Christians of Travancore and Cochin conducted their property transactions in the belief that they were governed by the provisions of the Acts of 1916 and 1921, respectively. The Travancore-Cochin High Court in 1951 and Madras High Court in 1978S affirmed and reaffirmed that the Travancore Act still remained in force, in spite of the Part B States (Laws) Act, 1951. When the Hon'ble Supreme Court declared in 1986 that that was not the law, the property transactions of Christians in both testamentary and intestate happen to be illegal.

These decisions have had another impact. Under the Travancore-Cochin Acts probating of wills was not mandatorily applicable to the Travancore-Cochin Christians. But under Section 213 of the Indian Succession Act it is mandatory for the Christians to get their wills probated. Therefore, as a consequence of the decision family settlement deeds based on wills that were not probated have suddenly become invalid in view of the application of Section 213 with effect from April 1, 1951. In the case of intestate succession, partitions or family settlements made in accordance with the provisions of the Travancore Act also became defective. Such documents, now, cannot be used as securities for financial transactions, and further, daughters (sisters) who were excluded from the share (under the provisions of the Travancore or Cochin Acts) can now reopen the matter both for genuine and mala fide reasons. In short, many a title deed in the hands of Christians remain defective and this would adversely affect the stability and progress of the community as all the settled property relations may have to be unsettled and resettled.

An argument has been advanced that there are not many cases arising in the matter of Christian intestate succession consequent on the decision of the Supreme Court, and that the law of limitation would put an end to all surviving claims and the matter is only to be ignored, as now the Christian community is not opposed to giving equal share to women in the matter of intestate succession. This complacent conclusion is not sustainable as evidenced by case-law. The High Court of Kerala recently upheld the claim of the woman for share in the property of her father, though she was married in the year 1950 and intestacy occurred in the year 1944. The matter came up for consideration before the High Court in 1988. In yet another case, the High Court upheld the right of the woman for streedhanam alone. There seems to be no inconsistency in the approach of the court in these matters. The problems created by Mary Roy have thus still alive. There are instances of misuse too. In a recent case, a brother who excluded his sister from the sharing of property, pledged the document relating to his property as security for a loan. On default of payment, the bank instituted a suit and the property was sold in execution. When delivery of the property was to be effected, the sister, apparently at the instance of her brother, filed a suit claiming her right in the property and moved for stay of delivery of the property. In short, there are difficulties arising out of the decision in Mary Roy, as limitation cannot be effectively established in many cases.

In this context, in order to have a better appreciation, it may be appropriate to look into the historical background of the development of the law of succession among Christians of the former Princely States of Travancore and Cochin. The native Christians of Travancore and Cochin followed the Hindu law in matters of succession. Christian women...
whether married or not, were excluded from inheritance, even if they had no brothers. Thus, the parent's property passed over to males belonging to a very remote degree of consanguinity and even in the transverse line. This is evident from the decrees of the Synod of Diamper, 159911. The Synod by its 20th decree, declared this mode of succession to be contrary to natural equity and wholly unlawful and decreed that the property must be equally distributed among sons and daughters12. Disobedience to this decree was declared to be a sin and whoever refused to observe this law or to make restitution was to be excommunicated beyond all hope of absolution, until he obeyed the decree and made restitution13. The mode of succession was one of the chief customs which the Synod tried to change. The letters written by Francis Roz, the first Latin Bishop of the native Christians, to his religious superior in Aquaviva, recount that it was not possible to get the native Christians to observe the decrees of the Synod which related to ancestral customs. Thus in spite of a threat of the highest form of religious punishment, the native Christians of Travancore and Cochin could not be compelled to change their customs relating to succession to property and the community continued to follow their own customs in matters of succession.

While so, in 1906, the Travancore High Court had an occasion to consider the customary law of succession among Christians14. In this case the widow of a Syrian Christian, who died intestate without issue, claimed to be the sole heir to his estate. The mother also claimed to be the sole heir and the court found that there was no specific rule to resolve the dispute. Therefore, the court decided the matter by applying the provisions of the Indian Succession Act, 1865. In the very same year in another case15, a Full Bench of the Travancore High Court held that in matters of succession, the principles of the Indian Succession Act would apply. This was followed in another decision16 in the year 1907 also. By now, the courts have had occasions to consider the questions of succession relating to almost all Christian denominations and the final position of law as established by precedent was that though there was no enacted legislation, as a matter of applying the principles of justice, equity and good conscience, the principles embodied in the Indian Succession Act, 1865 would apply to the Christians in matters of succession.

Codification of the law

It was in these circumstances that the law was codified in Travancore by the Travancore Christian Succession Act, 1916 and in Cochin, by the Cochin Christian Succession Act, 1921. Obviously the Legislature had in mind the earlier decisions rendered by the Court and codified the law in accordance with the customs prevailing in the Christian communities. This is evident from the preamble to the Act, which categorically declared that it was being enacted to consolidate and amend the rules of law applicable to intestate succession among Indian Christians17. These enactments could thus be deemed to have been made after considering the customary law as well as the decisions rendered by the Courts, applying Indian Succession Act, 1865 wherever relevant to the Christians. Therefore it could be concluded that by the time these provincial enactments consolidating the then existing law and practice came into force, the Indian Succession Act, 1865 was not to be applicable to the Travancore-Cochin Christians.

In this context it is worthwhile to examine the circumstances under which the Indian Succession Act, 1865 came to be enacted. When the British settled down to govern India, they found that there was no ascertainable law in the matter of succession for communities other than Hindus and Muslims. This vacuum came to be noticed as a result of the decision of the Privy Council to the effect that a Hindu renouncing his religion and becoming a convert to Christianity could still choose to be governed by Hindu law in matters of succession18. It was to fill this gap that the Indian Succession Act of 1865 was enacted. It provided inter alia for intestate succession of the Christians of India (and also of Parsis). It may be pertinent to note at this juncture that the Travancore Christian Succession Act, 1916 and Cochin Christian Succession Act, 1921 were enacted when the Indian Succession Act, 1865 was in operation. In other words, these acts consolidated the position in the context of the 1865 Act as applied to Christians in Travancore and Cochin.

The Indian Succession Act, 1865 was repealed and the Indian Succession Act, 1925 was enacted, consolidating various other enactments in the matter of testate and testamentary succession. This Act was not to be applied to the Christians in the whole of India. It contained many a provision signifying its restrictive and cautious application. This Act does not contain an “extend clause”. Further, Section 3 empowered the State Government to exempt any race, sect or tribe or any part of such race, sect or tribe from the operation of the Act, by way of a notification. Again, by Section 29(2), existing law (law for the time being in force) was saved. So far as its application to the Christians in Travancore and Cochin, it may be noted that these were Princely States over which the British had no sovereignty or law-making authority. Thus neither did the Act apply directly to the Christians in these Princely States nor was it specifically made applicable to them. In fact by virtue of Section 29(2) it could be argued that the Indian Succession Act did not apply to the Christians in the Travancore and Cochin areas. The above conclusion was reinforced by the decisions of the Travancore-Cochin High Court4 and the Madras High5 Court as discussed below.

When India became independent in 1947, the Travancore and Cochin States continued to be Princely States. These States became part of the Indian Union when the respective Maharajas signed the Instruments of Accession in 1949, making them Part B State of Travancore-Cochin. Thereafter, Parliament enacted the Part B States (Laws) Act, 1951. Section 3 of the Act provided for extending the enactments mentioned in the Schedule thereto, to the Part B States. And Section 6, provided that any law in force in these States corresponding to any of the Acts extended to Part B States, would stand repealed. It was in this context, the question whether the Travancore Christian Succession Act stood repealed was raised. The Travancore-Cochin High Court where it was raised for the first time4 held in 1956 that the
Travancore Christian Succession Act was not repealed and it was the law applicable to Christians. Again the same question came up for decision in the Madras High Court in 197419, wherein it was held that the Travancore Christian Succession Act stood repealed. But a Division Bench of the Madras High Court held otherwise5 in 1977. Thus, it could be said that the position of law settled by the decisions of the Full Bench of the Travancore-Cochin High Court and the Division Bench of the Madras High Court was also to the effect that the Indian Succession Act, 1925 was not applicable to the Travancore-Cochin Christians. The decision of the Hon'ble Supreme Court in Mary Roy must be viewed in the light of the above position.

It may be appropriate here to examine the constitutional, procedural and jurisdictional issues involved in Mary Roy case1. The petition in Mary Roy was filed under Article 32 of the Constitution of India. Article 32 is a fundamental right to enforce a fundamental right or to avert a threat to a fundamental right. That being so, Article 32 cannot be pressed into service for determining the validity of an enactment, unless that enactment infringes the fundamental rights. This has been the consistent view of the Supreme Court20. The Hon'ble Supreme Court reiterated its view in Khierbari Tea Co. case21, thus:

"In dealing with a petition under Article 32, this Court naturally confine the petitioners to the provisions of the impugned Act by which their fundamental rights are either affected or threatened."

A petition under Article 32 is thus maintainable only if it causes restriction on the enjoyment of fundamental rights. If a right is not a fundamental right conferred by Part III of the Constitution, it is outside the purview of Article 32 for enforcement. In such cases, the petitioner may not invoke Article 32. It is open to the petitioner to approach the High Court under Article 226 of the Constitution.

Therefore, the mere declaratory judgment of the Supreme Court in Mary Roy, was passed ignoring the procedural and jurisdictional limitations of the Court. This was contrary to the practice of the Court. The only course open to the Court was to examine the validity of the Travancore Act on the touchstone of the Constitution, and the impact of its judgments would then naturally have been prospective.

That apart, the Supreme Court had not looked into the constitutional provisions relating to existing law and its continued applicability after the commencement of the Constitution. Article 372(1) declares:

"... 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." (emphasis supplied)

And the President of India was given the power to make such adaptation or modification of the law in force so as to bring them in conformity with the provisions of the Constitution. This could be done before the first day of November 1957 as is provided under Article 372-A of the Constitution. Further Article 13(1) provides that all laws in force in the territory of India immediately before the commencement of the Constitution, insofar as they are inconsistent with the provisions of Part III of the Constitution, shall to the extent of such inconsistency, be void. Obviously these provisions relating to the law in force have been enacted to make the law in tune with the principles of International Law and Public Law. For example, according to the principles of State Succession under the International Law, though the people change their allegiance, their relation to their ancient sovereign is dissolved, their relation to each other, and their rights of property remain undisturbed.22

Also it is a general rule of public law, that whenever political jurisdiction and legislative power over any territory are transferred from one nation or sovereign to another, the municipal laws of the country continue in force until abrogated or changed by the new sovereign.23 When such is the position in International Law and the Constitution of India has contemplated the situation and provided for meeting such a contingency by Articles 372 and 13, the failure of the Hon'ble Supreme Court in not adverting to the constitutional provisions in deciding the case on hand was unfortunate.

Laws with regard to touchy issues like succession etc. should reflect customs and practices for their acceptance and sustenance. In this sense the Travancore Act was a well balanced legislation inasmuch as its Sections 24, 28 and 29 were explicitly made inapplicable to certain sections of Christians living in certain Taluks. Indeed, the Indian Succession Act, 1925 also contains safety valves in its Sections 3 and 29(2) to make it relevant in the society. It is obvious that it was with a view to make it workable in the society that these provisions were included.

Now by the judgment in Mary Roy the Indian Succession Act, 1925 in toto is made applicable to the Travancore area on the ground that it is expressly mentioned in the Schedule to Part B States (Laws) Act, 1951. While doing so, the Court repudiated the strong argument that if the Act is wholly applicable its Section 29(2) saving the existing laws (including the Travancore Act) should also be applicable.24 Going by the precedents of the Supreme Court itself25, Section 29(2) should have been held applicable, thereby saving the Travancore Christian Succession Act, 1916. It could therefore be argued that, what the Supreme Court did was not interpretation in the true sense of the word, but a policy choice, which is the realm of the Legislature or the Executive. In short the reasoning and the decision of the Court cannot be sustained on any ground. Had the Court examined the issue in the constitutional context retrospective operation of the decision...
would have been avoided. On the other hand, if Section 29(2) of the Act was to be given effect, Travancore Act would have been saved. In both cases the present difficulties could have been avoided.

The decision however had a positive impact on the community. Christians in Kerala, by and large, welcome the decision of the Supreme Court with certain reservations. Now the majority of Christians do not seem to be opposed to giving equal share to women in the matter of intestate succession.26 The consensus of opinion emerging at various seminars and discussions on the subject is that it is a welcome decision, if prospective effect is given to it.27

Some suggestions

As the problems are still alive, it has become necessary to look for some solutions, in the constitutional context. As "intestacy and succession" is a subject included in the Concurrent List (Entry 5 of List III of the Seventh Schedule) of the Constitution, the State Legislature is competent under Article 246, to exercise its legislative power and it can perhaps enact a validating Act, whereby the transactions arising out of testamentary and intestate succession in accordance with the provisions of the Travancore and Cochin Acts, made by Christians, from April 1, 1951 to February 24, 1986, could be validated. This view finds support in the decision of the Supreme Court in Hari Singh28, wherein the Court held that the Legislature has power to validate actions under an earlier Act and that the Legislature is competent to enact a legislation with full retrospective operation. Such a course of action would not be an affront on the judicial power. This is so, because there is distinction between legislative and judicial functions. In I.N. Saksena29, the Supreme Court held: (SCC p. 756, para 22)

"While in view of this distinction between legislative and judicial functions, the legislature cannot by a bare declaration, without more, directly overrule, reverse or override a judicial decision, it may, at any time in exercise of the plenary powers conferred on it by Articles 245 and 246 of the Constitution render a judicial decision ineffective by enacting a valid law on a topic within its legislative field fundamentally altering or changing with retrospective, curative or neutralising effect the conditions on which such decision is based. As pointed out by Ray, C.J. in Indira Nehru Gandhi v. Raj Narain30, the rendering ineffective of judgments or orders of competent courts and tribunals by changing their basis by legislative enactment is a well-known pattern of all validating Acts. Such validating legislation which removes the causes for ineffectiveness or invalidity of actions or proceedings is not an encroachment on judicial power."

Therefore a validating Act for the aforesaid purpose would be legal. When such a validating Act is enacted, the interests of those persons who would otherwise be entitled to institute a suit for partition or for claiming streedhanom can also be protected. They can be given a grace period by the provisions of the validating Act itself, within which period, they can institute the suit31. Thus bona fide transactions made by Christians and even others can be legalised and those aggrieved could be given an opportunity to redress their grievances.

Yet another option for the State Legislature is to enact a State Amendment to the Indian Succession Act, 1925. Whether it is a validating Act or a State Amendment, it must receive the assent of the President of India, for its validity, as is provided under Article 254(2) of the Constitution. If the President assents to a State law which has been reserved for his assent (under Article 200), the State law will prevail over an earlier law of the Union, notwithstanding its repugnancy to the Union Law,32 if both the laws deal with a concurrent subject33. The result of obtaining the assent of the President to a State Act is that it would prevail in that State and it will have overriding effect on the provisions of the Central Act.34 Therefore, there may not be any legal infirmity for such a course of action.

The State Government has yet another option open to it. It can issue a notification exercising its powers conferred under Section 3 of the Indian Succession Act, 1925 to serve the purpose. At any rate it is only just and proper that either the State Government/State Legislature or Parliament should resort to appropriate legislation to solve the problems created by the decision of the Supreme Court in Mary Roy 1.

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- Section 6 lays down : "Repeals and savings - If immediately before the appointed day, there is in force in any Part B State any law corresponding to any of the Acts or Ordinances now extended to that State, that law shall, save as otherwise expressly provided in the Act, stand repealed." Return to Text
- Kurian Augusthy v. Devassy Aley, AIR 1957 TC 1: 1956 Ker LT 559 Return to Text
- D. Chelliah v. G. Lalitha Bai, AIR 1978 Mad 66 Return to Text
- For a detailed discussion see Sebastian Champappilly : "Christian Succession and Probate of Wills - Need for Change", 1993 (2) KLT (Journal) 32 Return to Text
- Joseph v. Mary, 1988 (2) KLT 27 (DB). This case is a classic example as to how the settled property relations can be unsettled even after so many years. Return to Text