

Anna Drwal\*

## **The Formation of Christian Personal Law in British India from 1865 to 1872.**

### **Streszczenie:**

Celem artykułu jest zaprezentowanie początków tworzenia się tzw. Christian personal law w Indiach Brytyjskich w latach 1865 – 1872. W tym czasie zostały uchwalone cztery akty prawne, które do dnia dzisiejszego stanowią podstawę dla tego zagadnienia. Zostało w nich uregulowane przede wszystkim dziedziczenie, zawieranie małżeństw oraz uzyskiwanie rozvodu przez poddanych Brytyjczyków, którzy byli indyjskimi chrześcijanami. Główną przyczyną powstania Christian personal law było to, iż muzułmanie, hindusi oraz parsowie zamieszkujący Indie Brytyjskie posiadali już swoje własne prawne regulacje dotyczące wymienionych powyżej zagadnień. W konsekwencji powstało pytanie, które przepisy powinny być stosowane do konwertytów indyjskich, którzy przeszli na chrześcijaństwo. W artykule zostaną pokrótce omówione cztery ustawy uchwalone w drugiej połowie XIX wieku oraz to jaki miały efekt.

**Słowa kluczowe:** Christian personal law, Indie Brytyjskie, Indie, chrześcijanie, Convert's Marriage Dissolution Act, Indian Christian Marriage Act, Indian Divorce Act

### **1. Introduction**

British dominance on the Indian Peninsula had without a doubt an immense impact on today's legal system in India. This is why it is crucial to explore this period of Indian history, especially that many of the laws enacted by the British are still in force in India. In my article I

---

\*MA in law at the Faculty of Law and BA in comparative studies in civilizations at the Faculty of Philosophy at Jagiellonian University. Currently a PhD student in legal sociology at Jagiellonian University and an advocate trainee.

am going to focus on the law which was created mainly to clarify the legal position of Indian Christians in matters such as marriage, divorce and inheritance. Four acts will be described which are collectively referred to as Christian personal law and were enacted between 1865 and 1872.

What is then personal law? It is a law which determines which laws should be applied to a the person with a particular religious identity. Indigenous inhabitants of the Indian Peninsula were not governed by one legal system during the British dominance but instead they could refer to their own traditions, customs and laws in certain matters. In nowadays India the situation is quite similar. There are five personal law systems for five different religious groups: Hindu personal law, Muslim personal law, Christian personal law, Parsis personal law and Jewish personal law. There is basically no option to be an atheist.

Under the scope of personal law there are matters such as inheritance, marriage, divorce and adoption, which in European countries are usually governed by civil law and, to be more precise, by family law and inheritance law. However, there is no one uniform civil code in India (even though it is written in the Indian constitution that it should be enacted<sup>1</sup>) but instead people are governed by the personal laws of the religious group to which they belong.

The British had a great impact on the formation of the contemporary system of legal pluralism in India, but it was not British invention. In the days of Mughal Empire people living in the Indian Peninsula could follow their own customs and practices (or it would be better to say the customs of the community to which they belonged) in the matters which today are reserved for personal law<sup>2</sup>. Those forms of behaviour were not homogeneous among the believers of the same religion, which is why personal law was originally more connected to the specific community and not to the whole religion<sup>3</sup>. However, with time this law was made uniform in the way it is organised today (only five personal law systems).

Without a doubt, the Hindu personal law and the Muslim personal law are the most important and attracting the most attention. It is due to the large number of the followers of Hinduism and Islam on the Indian Peninsula. For a long time only those two religious groups could follow their own religious law, according to the special protection granted by the acts of

---

<sup>1</sup>Art. 44 “*The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India*”, *The Constitution of India, 1949*, [26<sup>th</sup> of November, 1949].

<sup>2</sup>N. Chavan, Q. J. Kidwai, *Personal Law Reform and Gender Empowerment: A Debate on Uniform Civil Code*, New Delhi 2006, p. 199-201.

<sup>3</sup>P. Bilimoria, *Muslim Personal Law in India: Colonial Legacy and Current Debate* [access: 22<sup>nd</sup> of July 2014, <<https://www.law.emory.edu/ifl/cases/India.htm>>].

British, due to their policy of non-interference.<sup>4</sup>

The beginnings of that policy could be found in the Charter of Charles II for the English East India Company from 1683 which was said to “*decide according to equity and good conscience and according to the law and custom of merchants*”<sup>5</sup>. In the Charter of George II from 1753 the right to obtain an exemption from the Mayor's Courts and to resolve their cases by applying their religious laws were granted to Hindus and Muslims<sup>6</sup>. This policy was afterwards developed in British India and resulted in lack of codification of substantive civil law into one act applied to all the British subjects on the Indian subcontinent while eg. the of Civil Procedure (1859) was then in force. The Penal Code (1860) and the Code of Criminal Procedure (1861) which were applied to everyone irrespective of their religious affiliation<sup>7</sup>.

While the Indian subcontinent has been a mosaic of cultures, religions, traditions, languages and ethnicities, Muslim personal law and Hindu personal law were not sufficient enough to cover all the people living in British India. Therefore the courts often recognized the customs and traditions of other groups such as Buddhists, Sikhs, Parsis, Jews, Christians and many more. For some of these groups their rules were gathered and codified into written acts like in the cases of Parsis and Christians.

## ***2. Christian personal law***

The situation of the Christians and their laws in British India was quite complicated in the 19<sup>th</sup> century. First of all, it was not determined what kind of legal rules should be applied to them and their children. They were mostly converts from Islam or Hinduism and the courts could no longer apply to them the laws and customs of their previous religions. What is more, they also were not British so it was impossible to apply English law in the matters of marriage, inheritance etc. Moreover there is no Christian religious law in the same sense as we understand Hindu religious law or Muslim religious law, which made the situation of converts incredibly uncertain<sup>8</sup>. Because of that, Indian Christians found themselves in a legal vacuum which resulted in the need of finding a solution.

The idea appeared that in matters of inheritance the Christian converts should be

---

<sup>4</sup> G.C. Rankin, *The Personal Law in British India*, Journal of the Royal Society of Arts, vol. 89, 1941, p. 427.

<sup>5</sup>*Ibidem*, p. 433.

<sup>6</sup>A.A.A. Fyzee, *Muhammadan Law in India*, Comparative Studies in Society and History, vol. 5, no. 4, 1963, p. 412.

<sup>7</sup>G.J. Larson, *Introduction: The Secular State in a Religious society*, [in]: *Religion and personal law in secular India: a call to judgment*, Ed. G.J. Larson, Bloomington 2001, p. 4.

<sup>8</sup>M.F.P. Herchenroder, *Study of the law applicable to native Christians in the French Dependencies and in India*, Journal of Comparative Legislation and International Law, vol. 18, no. 4, 1936, p. 186.

governed by the personal law which was applied to them before the conversion. It was due to the fact that there are no Christian legal rules concerning the issue of succession. However, it was not uncommon that the family had a negative attitude towards the converts to Christianity and refused them any right to inherit their share in the familial property.<sup>9</sup>

Even though, in theory the previous law of inheritance could be applied to the converts, it was completely impossible in the matters such as marriages and divorces because the old rules would often contradict the spirit of the Christian religion<sup>10</sup>. For example, bigamy, which was legal for both Hindus and Muslims in British India, was unacceptable for Christians.

Application of the English law also would not help, because it was not sufficient to resolve all the problems encountered by the Christian Indians. The Indian reality was simply too complex and complicated. Christians wanted to prove their otherness and to get their own personal law system, but they also wanted to show that they still were Muslims or Hindus to be entitled to inherit after the member of their family.<sup>11</sup>

Therefore, the British faced the need to regulate the legal situation of Indian Christians. It resulted in the enactment of several acts between 1865 and 1872, which will be presented below.

### 2.1. Indian Succession Act

This act adopted in 1865 was not actually created as a special law for Christians. Its aim was to provide a uniform law of inheritance for all the Indians. However, the goal of unification was not achieved. Muslims, Hindus, Buddhists and Parsis (but only partially) rejected the application of the law to them on the grounds of having their own inheritance rules and eventually they were granted an exemption from this act. In consequence, the ones who were governed by the legal rules contained in the Indian Succession Act were Christian converts.<sup>12</sup>

The Indian Succession Act provided legal rules for intestate and testamentary succession based on English law with some changes had been introduced<sup>13</sup>. The act incorporated provisions from private international law according to which moveable property was governed by *lex*

---

<sup>9</sup>N. Chatterjee, *Religious change, social conflict and legal competition: the emergence of Christian personal law in colonial India, Modern Asian Studies*, vol. 44, 2010, p. 1149 – 1150.

<sup>10</sup>M.F.P. Herchenroder, *op. cit.*, p. 187.

<sup>11</sup>N. Chatterjee, *op. cit.*, p. 1181 – 1153.

<sup>12</sup>*Ibidem*, p. 1179-1180.

<sup>13</sup>W. Stokes, *The Indian Succession Act, 1865 (Act X of 1865): With a Commentary, and the Parsee Succession Act, 1865, Acts XII and XIII of 1855, and the Acts Relating to the Administrator General, with Notes*, Calcutta 1865, preface.

*domicilii* of a deceased and immovable by *lex loci rei sitae*<sup>14</sup>. Because of that, the act included the provisions considering the determination of someone's domicile - when and how it changes. For example, the domicile of origin of a legitimate child was the father's domicile in the time of the birth of a child while the domicile of the illegitimate child was the domicile of the mother, irrespective of where the child was born<sup>15</sup>. The woman's domicile was the same as her husband's with two exceptions that the wife's domicile did not follow anymore the domicile of her husband if the Court formed the judgement of their separation or if the husband was sentenced to transportation.<sup>16</sup>

The interesting rule was enclosed in article 4 of the act. It applied to the marriages solemnised after 1<sup>st</sup> January 1866 and said that “[n]o person shall be marriage, acquire any interest in the property of the person whom he or she marries, nor become incapable of doing any act in respect of his or her own property, which he or she could have done if unmarried”.<sup>17</sup> Without a doubt, this provision strengthened the position of a woman and rejected the right of a husband to all the woman's possessions.

The Indian Successions Act also regulated how to create a valid will. According to these legal rules all the wills had to be registered, which made the oral wills invalid. This was one of the reasons why Muslims rejected this act, because, according to the Quran, it is possible to make an oral will. The situation was different with regard to Parsis who actually accepted the part of the Indian Succession Act which dealt with the creation of wills, even though they were working on that time on their own personal law that time. For Hindus the government passed in 1870 the Hindu Wills Act, which extended one of the sections of the Indian Succession Act to them. However, because of external pressure from the Hindu community, the government added some privileges which only Hindus could use.<sup>18</sup>

Because of that, in practical terms, Christians were the only group governed entirely by this law in the matters of inheritance and hence, it could be said that this act became a part of their personal law. However, the Christians were not content with the enactment which actually denied their rights to the Hindu inheritance law. They were entitled to it only for a few years because of the Caste Disabilities Removal Act, enacted in 1850.<sup>19</sup>

---

<sup>14</sup>T.S. Rama Rao, *Conflict of laws in India*, *Zeitschrift für ausländisches und internationales Privatrecht*, vol. 23, 1958, p. 272-273.

<sup>15</sup>W. Stokes, *op. cit.*, p. 7.

<sup>16</sup>*Ibidem*, p. 12.

<sup>17</sup>*Ibidem*, p. 3.

<sup>18</sup>N. Chatterjee, *op. cit.*, p. 1179-1180.

<sup>19</sup>*Ibidem*, p. 1180-81.

The Indian Successions Act shows that the British did not oppose the idea of legal pluralism. Even though they created a law with the intention to apply it to all the Indians, they also granted the exemptions to the groups with their own personal laws. It led to the situation in which the Indian Successions Act was applied only to a small minority of people living in British India.

At the end, it should be noted that the Indian Succession Act of 1865 was amended and consolidated by the Indian Succession Act of 1925.<sup>20</sup>

## 2.2. Convert's Marriage Dissolution Act

After determining the legal rules of inheritance applicable to Indian Christians it was time to address the issue of marriage, because Christians encountered many problems in this area. That is why, in 1866 the Native Converts Marriage Dissolution Act was enacted.

It all started at the beginning of the 19<sup>th</sup> century when Christian missionaries encountered more and more often the situation in which only one person from the married couple (mostly a man) converted to Christianity while the other did not. In such cases the spouse, who did not convert, quite often did not want to live anymore with her/his spouse or consummate (when betrothed in infancy) the marriage. What is important, under the Hindu law the baptism of the spouse did not dissolve his Hindu marriage, while the spouse who remained Hindu was granted a right to marry one more time in case of such situation. It placed converts in a difficult position. Polygamy is strictly forbidden in Christianity so they could not marry again, because officially they were still married to the Hindu spouse.<sup>21</sup> The converts from Islam were not in a better situation, even if it seemed at the beginning, which will be explained later.

Such situation created a difficult situation for Indian Christians. Especially it harmed male converts because they were the only category of Indian men (except Parsis after 1865) for whom polygamy was prohibited<sup>22</sup>. Due to the lack of other legal regulations, Indian Christians were either forced to live in sin according to their new religion or to live alone till their previous spouses who did not convert and left the one who did died,.

As a consequence, the government received an enormous amount of petitions with the

---

<sup>20</sup>A. Mishra, "Breaking Silence – Christian Women's Inheritance Rights Under Indian Succession Act, 1925", Chotanagpur Law Journal, vol.9, no. 9, 2014-15, p. 2.

<sup>21</sup>J.D.M. Derrett, *The Native Converts' Marriage Dissolution Act, 1886: Should it be abolished?*, [in]: J.D.M. Derrett, *Essays in Classical and Modern Hindu Law: Current Problems and the Legacy of the Past*, Netherlands, 1978, p. 53-54.

<sup>22</sup>N. Chatterjee, *op. cit.*, p. 1188.

requests to enact the law which would make it possible for Indian converts to Christianity to dissolve their non-existing marriages solemnised under a different religion<sup>23</sup>. These requests had been finally answered in 1866 with the enactment of the Native Converts Marriage Dissolution Act which provision 4 says as follows:

*“If a husband changes his religion for Christianity, and if in consequence of such change his wife, for the space of six continuous months, desert or repudiate him, he may sue her for conjugal society”*<sup>24</sup> (in the provision 5 was provided the reverse situation when the wife converted and the husband deserted her because of that).

If the spouse who did not convert would refuse in front of the court to cohabit with the Christian spouse because of the change of religion, the court would order the spouse to come back in 12 months. If after that time the respondent was still refused to remain in a marriage with a petitioner, the court had the right to dissolve a marriage.<sup>25</sup>

What is interesting is that the Indian Christians who were Muslims or Jews before the conversion were excluded from that law. Muslims were exempted on the ground that under the Muslim personal law the marriage was automatically dissolved if one of the spouses commit apostasy so there was no need to apply the act to converts from Islam. However, when I describe the case of Zabardast Khan it will be clear that this was not actually true.<sup>26</sup>

One more issue was the fact that the act did not give any solution to the situation when the spouse who did not convert was impossible to find (which was actually happening). Unfortunately, without the presence of both spouses in the court the dissolution of marriage could not be obtained because the whole process of questioning and convincing to reconcile could not be omitted.<sup>27</sup>

### 2.3. Indian Divorce Act

The Indian Divorce Act was passed in 1869 to supplement the Native Converts Marriage Dissolution Act which, as was noted already, did not resolve all the problems of the lack of the law for Indian Christians. It was mainly based on the Matrimonial Causes Act from 1857, which applied to the territories of England and Wales<sup>28</sup>.

As the title suggests, the Indian Divorce Act provided legal rules for ending the marriage.

---

<sup>23</sup>*Ibidem*.

<sup>24</sup>*Convert's Marriage Dissolution Act, 1866, Act No. 21 of 1866, [2<sup>nd</sup> of April, 1866].*

<sup>25</sup>*Convert's Marriage Dissolution Act.*

<sup>26</sup>N. Chatterjee, *op. cit.*, p. 1190-1191.

<sup>27</sup>*Ibidem*.

<sup>28</sup>*Ibidem*, p. 1191.

Therefore, there were provisions containing grounds for dissolution of marriage, for its nullity, for judicial separation, custody of children etc.<sup>29</sup>

To get a divorce under the Indian Divorce Act it was sufficient for a husband to prove that his wife was guilty of adultery. In the reverse situation wife could seek for divorce if besides adultery she could establish cruelty, bigamy, desertion or incest committed by her husband<sup>30</sup>. In the act it was also provided that if the husband would convert from Christianity to another religion and marry another woman his Christian wife may petition for a dissolution<sup>31</sup>. Although there was no such possibility provided for the husband under the Indian Divorce Act, however if the Christian wife would decide to change the religion and re-marry with a different man her behaviour would be recognised by the court as adultery and hence her husband could obtain a divorce<sup>32</sup>. The positions of the spouses were not equal according to that act, since the husband could commit adultery without any consequences for him and without a possibility for the wife to seek divorce only on this ground.

Coming back to the converts from Islam, I would like to describe the case *Zaburdust Khan versus his wife*, because it clearly shows how difficult the legal situation of converts to Christianity was. Zaburdust Khan filed for divorce in 1870 under the Indian Divorce Act. The reasons for which he was demanding a divorce were adultery and desertion committed by his wife. It was a Muslim couple who, after getting married according to Muslim rites, converted to Christianity. Some time later, the wife decided to reconvert to Islam and in consequence marry another man who was Muslim. In this situation, Khan decided to return his wife her *mahr*, which under the Muslim law signifies the end of their relationship, and apply for a divorce under the Indian Divorce Act. The case was brought to the High Court whose judges stated that they could not apply the Indian Divorce Act to that case because it is only applicable to marriages between Christians and not to polygamous contracts like the ones concluded under Muslim personal law. Of course, under Muslim Personal Law Khan and his wife were separated because by committing apostasy he was considered to be socially dead. However, during the time of the trial he was Christian so the judges could not apply Muslim Personal Law to him. That is why Khan lost his case and till the death of his ex-wife it was impossible for him to marry again since bigamy among Christians was forbidden and recognised as a criminal offence. What is more, the Native Converts Dissolution Act did not apply to him either because of the

---

<sup>29</sup> *Indian Divorce Act, 1869, Act No. 4 of 1869, [26<sup>th</sup> of February, 1869].*

<sup>30</sup> *Indian Divorce Act.*

<sup>31</sup> *Indian Divorce Act.*

<sup>32</sup> N. Chatterjee, *loc. cit.*

fact that he was Muslim before he converted to Christianity. The situation of Christian Indians changed a bit in 1912, when the Calcutta High Court held that if at the time of the suit the plaintiff was Christian then the court would be allowed to apply Indian Divorce Act.<sup>33</sup>

Under the Indian Divorce Act both husband and wife had a right to present a petition to the court for declaration that the marriage was null and void. The grounds for such petition were: impotency, the prohibited degrees of consanguinity or affinity between wife and husband, the fact that the spouse was lunatic or idiot at the time of the marriage, when at the moment of solemnising a marriage the former spouse of one party was still alive and the former marriage was still in force and when the consent of one party was obtained by force or fraud.<sup>34</sup>

What is interesting, under the Indian Divorce Act the husband whose wife committed adultery had a possibility to claim damages from his wife's lover. Moreover, the court could also order the adulterer to pay all the costs of the proceedings started by the husband. However, he did not have to pay the costs if the wife was living apart from her husband at the time of the adultery and was living the life of a prostitute or when at the time of adultery the lover had no reasons to believe that the woman was married.<sup>35</sup>

#### 2.4. Indian Christian Marriage Act

The last act is the Indian Christian Marriage Act from 1872. As is stated in the preamble, it was enacted to:

*“consolidate and amend the law relating to the solemnisation in India  
of the marriages of persons professing the Christian religion<sup>36</sup>.”*

The main goal of the act was to simplify the existing law by codifying all the legal rules concerning the solemnisation of the valid marriage. Before then the rules concerning this subject could be found in two British acts and in two acts of the Indian Legislature.<sup>37</sup>

The Indian Christian Marriage Act specified many technical details concerning the solemnisation of a valid marriage in which both parties were Christians or only one party was Christian. It is because the act also applied to interfaith marriages.<sup>38</sup>

First of all, there were provided two forms of marriage in the Indian Christian Marriage

---

<sup>33</sup>*Ibidem*, p.1147-1149 and 1192.

<sup>34</sup>*Indian Divorce Act.*

<sup>35</sup>*Indian Divorce Act.*

<sup>36</sup> **Indian Christian Marriage Act, 1872, Act No. 15 of 1872, [18<sup>th</sup> of July, 1872].**

<sup>37</sup>*Indian Christian Marriage Act.*

<sup>38</sup> **Indian Christian Marriage Act.**

Act: civil marriage and sacramental marriage. The sacramental one was of course performed by a priest of one of the Christian denominations or a Minister of Religion, while the civil marriage was solemnised by a Marriage Register appointed under the Indian Christian Marriage Act.<sup>39</sup>

The law also determined such issues as the place of a marriage, obligation to register, the consent of the father, mother or guardian to contract a marriage of a minor (less than 21 years old and not a widow or a widower) or even such details as the time of a marriage (between 6 in the morning and 7 in the evening), however derogations were provided.<sup>40</sup>

### 3. *Summary*

The British encountered many challenges during their attempt to provide legal rules for the Christians inhabiting the Indian subcontinent and many of them were not successfully resolved by the four described acts. One of the reasons for this is the difficulty to understand the cultural and religious diversity of Indian society by the Europeans. The matter of personal law, the legitimacy of its existence, the advantages and disadvantages which the system brings are the issues vividly discussed in modern India on a daily basis. This is mostly due to the undying idea of the creation of the uniform civil code for the whole of India and for all their citizens irrespective of their religious affiliation. Without a doubt, the shape of the system and the way it works nowadays developed largely during the period of the British dominance and because of their policy of non-interference. That is why, to understand it correctly, it is important to analyse how it all began.

The case of Christian personal law is interesting because it was created solely by the British while it was different for Muslims, Hindus and Parsis. These groups could refer to their long lasting traditions, practices, customs and religious texts, while in the case of converted Christians the situation was much different.

Christianity was mainly brought by Europeans to the Indian Peninsula during the colonial period<sup>41</sup> together with European legal solutions. The Indian Christians, could only accept the legislation given by the British. What is more, it could be imagined that because the British were Christians, they could not think of a different legal solution apart from their own. As a consequence, many legal provisions were incorporated from English law into Christian personal law. Sometimes it was done without any reflection whether it would match the Indian

---

<sup>39</sup> *Indian Christian Marriage Act.*

<sup>40</sup> *Indian Christian Marriage Act.*

<sup>41</sup> However, it should be noted that Christianity was known on this land before but on the smaller scale.

reality. That is particularly noticeable in the case of the conditions for obtaining a divorce for Indian Christians. Contrary, the legal rules applicable to Hindus and Muslims were based mainly on their indigenous customs and holy texts.

Without a doubt, at some point Christians found themselves in a legal vacuum which had to be resolved. The British decided to allow Indian subjects to remain loyal to their traditions and did not enact one uniform civil code, which caused the lack of legal regulations for converted Christians. It could be said that the policy of non-interference actually resulted in the need for interference by the British in the matter of the personal law system of the Indian Christians.

\*\*\*

### **The Formation of Christian Personal Law in British India from 1865 to 1872.**

**Summary:** *The goal of this article is to present the beginnings of Christian personal law in British India between 1865 and 1872. During this period of time four acts were enacted which till today constitute the basis for that issue. The matters regulated by this act are: succession, marriage and divorce which were applied only to the British subjects who were Indian Christians. This was due to the fact that Muslims, Hindus, Parsis and others already had their own legal regulations in those matters which resulted in the uncertainty which legal provisions should be applied to Christian converts. This article will present what kind of legal solutions were adopted and the effect they had.*

**Keywords:** Christian personal law, British India, India, Christians, Convert's Marriage Dissolution Act, Indian Christian Marriage Act, Indian Divorce Act