

Changes in Christian Personal Laws

**Edited by
Jyotsna Chatterji**

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JOINT WOMEN'S PROGRAMME

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Introduction

Changes in Christian Personal Laws and Uniform Civil Code

For sometime now the women in our Programme have been concerned about the specific dimensions of the legal system which buttresses their oppression as women. They have begun to question the religions, the social customs and practices and the laws that have subjugated them. They now know the contents of the social legislations that have been made to safeguard their rights and they realise that these legislations are just paper legislations. Also, some of the legislations are opposed to the prevailing social and cultural practices and prejudices and therefore society has prevented their implementation. Some others are back dated and irrelevant in the present context in which women are trying to assert their rights.

A study of the provisions made in Article 14 of the Indian Constitution, "the state shall not deny to any person equality before the law or equal protection of laws within the territory of India", and Article 15, "the state shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them", has enabled women to gain strength in their movement for equality and justice. One of the manifestations of this is that women have begun to question the "Personal Laws" related to matters of marriage, divorce and inheritance, maintenance, guardianship and custody of children, adoption and other matters affecting their personal lives. The Hindu, Muslim, Christian and Parsi personal laws discriminate against women in varying degrees and therefore contradict the provisions laid down under Article 14 and 15 of the Constitution. If the Constitutional provisions are to be taken seriously then all personal laws become irrelevant and a Uniform Civil Code becomes essential.

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The feeling among women is growing that separate personal laws are dividing them into different religious groups thus preventing them from struggling together for justice and equal rights.

The report of the Indian Council of Social Science Research on The Status of Women says, "During the British period the general policy of non-intervention in social and religious matters perpetuated multiple systems and by preventing normal adjustment to socio-economic changes led to stagnation and hardening of differences between the various religious communities and even within the sub-sections of the communities. With the strengthening of the national movement and the efforts of Gandhiji, a demand began to be put forward for bringing about major changes in law and for removing the legal inferiority of women and ending the discrimination against them. Reform of the Hindu Law was thus initiated and later achieved in a piece-meal fashion. But no changes were either discussed or initiated in the Christian and the Muslim laws."

Thus we have no uniform law regulating our personal lives. It was clearly held as early as in 1871 in *Skinner Vs Ford* case thus "while Brahmin, Buddhist, Christian, Mohammeden, Parsi and Sikh are one nation enjoying equal political rights and having perfect equality before the tribunals, they co-exist as separate and distinct communities having distinct laws affecting every relation of life. The laws of husband and wife, parent and child, the descent, devolution and disposition of property are all different, depending in each case on the body to which the individual is deemed to belong and the difference of religion pervades and governs all domestic usages and social relations." In short, the personal law of a person varies according to the community to which she belongs.

This divisive factor in our society that claims to be a secular one has hardened as the years have gone by. Unless the country takes note of this and plans to adopt a Uniform Civil Code, the goals of a secular society will remain unfulfilled.

Our programme has therefore held several meetings on the need for a uniform civil code in the urban slums, villages, towns and major cities, regionally and nationally to find out the opinion of the public in general and the women in particular.

While some religious and political leaders have said that a Uniform Civil Code will destroy the identity of the minority communities, the women have demanded registration of all marriages under the Special Marriages Act and one Uniform Civil Code, even though they came from various religious and socio-cultural backgrounds.

The women feel that in a country like India where, in ancient times, they played the role of 'Shakti' who overthrew evil, today, despite their comprising nearly 50 per cent of the total population, their voices are not heard. They look upon the refusal to have a uniform Civil Code as an attempt to sabotage the women's movement for equal rights. They fail to understand why Article 44 of the Directive Principles of the Constitution has not been implemented and why the state has not endeavoured to secure for its citizens a Uniform Civil Code unless it be to undermine the spirit of the oppressed sections.

Since its consultation on 'Women and the Law' in 1980 the Joint Women's Programme has been continuing its awareness programmes with women's groups on their legal rights. At almost every workshop the Uniform Civil Code has come as the major recommendation, while continuing this effort in the grass roots it became necessary to meet religious leaders of the minority communities so that their leadership also can play its role in the struggle for a Uniform Civil Code.

Meetings at different levels were organised with Muslim and Christian religious leaders in different places. At the Bangalore meeting as also at Hyderabad the Muslim leaders, while not unanimous on the introduction of a Uniform Civil Code said that the need of the hour was to look at the discriminatory portions of the Muslim personal laws and work towards changing them. This they felt may be the first step. At meetings with Christian religious leaders in New Delhi, Lucknow, Bangalore and Hyderabad similar opinions were expressed.

Since the Christians were more open to a dialogue on this question, the Joint Women's Programme decided to first hold special meetings with Christian leaders from various Churches in New Delhi and Bangalore. There was a qualified support in favour of one law. The consensus of opinion was towards the reframing of the Christian Marriage, Divorce and Succession

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laws in the light of human rights. The Roman Catholics while supporting the idea of one law refused to accept divorce and said that their Canon Law provision for nullity of marriage should be accepted by the state.

The meeting suggested that the *Indian Christian Marriage Act 1872* should be brought up to date. This Act was made by the British to suit their policies and was no longer relevant for the Indian Church. The Indian Church must not be governed by the rules laid down by the English law. Incidentally, the English laws have undergone a great deal of change with regard to marriage, divorce and right to property but the Indian Personal Laws remain the same. They recommended :

1. One marriage law for all Christians.
2. The Act should deal with all Christians as one community coming under the Indian Church.
3. One common procedure for the registration of marriages should be applicable to all churches in India.
4. One common register for all Christian marriages.

With regard to the *Indian Divorce Act 1869* the meetings suggested that Indian courts cannot act on the principles of the English Divorce Courts (Sec. 7) but should be guided by the facts of the case and circumstances, customs, beliefs of India, otherwise the entire provisions of the English Divorce Act must be imported and made applicable to Indian Christians and the grounds of divorce must be liberalised as in Britain.

It was further recommended that

1. A change should be made in section 10 which casts a heavy burden on Christian women as compared to Christian men. The existing section should be struck down and grounds for divorce should be common for both women and men.
2. Grounds for divorce should not be based on a fault theory.
3. Section 17 should be changed allowing for decree of divorce to be confirmed by the court where the petition has been filed. This will do away with the delay

caused in having it further confirmed at the High Court after six months.

4. Section 34, 35 and 39 that provides for the husband claiming damages in case the wife had committed adultery should also provide for the wife claiming damages from the husband when he is found guilty of adultery.

With regard to *The Indian Succession Act 1925*. It was recommended para 1.

That the Act should be changed, so that the wife had full right to the property of her husband if the husband died without making a will. It should not be shared with the lineal descendants of the deceased.

2. There should be one succession act for all Christians. This would mean that the Travancore Christian Succession Act and the Cochin Christian Succession Act should be struck down as inhuman and discriminatory. A daughter should have as much right to the property of her parents as the son and a widow should have the full right of her husband's property.

Christian Personal Law in its various aspects is outdated, irrelevant and inhuman. It does not meet the needs of the present century. In the process women suffer more as all the three acts have areas where women are treated differently from the men. The discrimination becomes more acute in the case of an ill-treated, battered woman seeking divorce.

The Joint Women's Programme has moved the Supreme Court with regard to the different standards laid down for divorce in the Indian Divorce Act 1869. They have taken up the case of a woman who is unable to get a divorce, inspite of the illtreatment she and her daughter have suffered at the hands of her husband for over seven years. The Supreme Court has therefore asked the state to show cause why such a law should not be struck down as unconstitutional.

A systematic and critical study of the Christian Personal Laws have been undertaken by the Joint Women's Programme with the help of Prof. Alice Jacob, Indian Law Institute, Mrs Anima Bose, Gandhi Peace Studies and Mr. P.M. Bakshi, formerly Member of the Law Commission. The suggestions for changes have been written by Mr. P.M. Bakshi.

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Christians in India should have a comprehensive law of marriage, divorce and succession rights that would govern the lives of all Christians. A simplified marriage law should be enacted wherein the civil authorities have the right to give legal sanction to the union of a woman and a man. Similarly, there should be less complicated laws of divorce in which one does not have to search for faults. In several parts of India groups of Christians have demanded a uniform civil law and registration of marriages under the Special Marriage Act, 1954. Demonstrations have been held, memoranda have been submitted to the Law Minister emphasising this need. The Joint Women's Programme as a women's organisation concerned about justice and equality considers changes in the personal laws as the first prerequisite towards a Uniform Civil Code.

Jyotsna Chatterji

CHAPTER 1

Reforms Needed in Christian Marriage Law

Preliminary

1. Introductory

The Indian Christian Marriage Act, 1872 is the principal enactment relating to Christian marriages in India. The Act is based on certain earlier statutes of the British Parliament and on Central Acts 8 of 1852 and 5 of 1865 and 25 of 1864 (now repealed).¹ The Act does not extend to the territories which were comprised in the (erstwhile) State of Travancore-Cochin. Nor does it apply to the States of Manipur and Jammu and Kashmir.

During its existence for more than a century, the Act has hardly been amended in matters of substance. A total revision of this Act (along with the Indian Divorce Act, 1869) was recommended more than two decades ago by the Law Commission of India in a comprehensive report forwarded to the Government.² But no legislation could be enacted, and the Act stands in dire need of revision.

The changes that are needed in the Act can be classified as:

- (a) changes of substance,
- (b) changes of structure,
- (c) changes of language and style.

Changes of substance have become desirable partly by reason of the fact that many important matters have been left

1. For history, see *Lopez*, (1885) I.L.R. 12 Cal. 766 (F.B.).

2. Law Commission of India, 15th Report (August, 1960) as supplemented by the 22nd Report.

out in the Act though they are essential to the concept of a valid marriage, and partly because some provisions are now obsolete. Changes of structure are necessary for simplifying the arrangement of the provisions of the Act. Changes of language and style are required in view of the fact that the law and its language, including the contents of the statute book and the style of legislation, have struck great advances since 1872 (when the Act was enacted). Changes of structure, language and style are not proposed to be dealt with in this paper as a rule—they can be considered at the drafting stage. The focus will be on important points of substance calling for reform.

2. Territorial extent of the Act (section 1)

The Act should be extended to the Travancore-Cochin area. At present, in the Travancore area, the law is uncodified and customary.³ The Cochin area is governed by the Cochin Act.⁴ It is understood that there would not be any serious inconvenience by such extension. However, the views of the State Government could be first ascertained to find out if there will be any serious problems likely to be caused.

3. Definition of "minor" (section 3)

The expression "minor" is defined as meaning a person who has not completed the age of twenty-one years and who is not a widower or a widow. The provision forms part of the present Act, because the present Act permits of marriages of minors. Since the minimum age of marriage is now 21 years for males and 18 years for females,⁵ the provisions of the Act relating to minority should be deleted and consequentially the definition should also be deleted.

3. Devadasan, *Christian Law in India* (1974), pages. See *Sarkar v. Mathur*, 10 T.L.R. 33 (F.B.).

4. Cochin Christian Civil Marriage Act, 1095. Malayalam era

5. See Paragraph 7 *infra*.

Who can Marry

4. Persons between whom marriages may be solemnised (section 4)

- (i) The Act provides that every marriage between persons *one or both of whom is or are a Christian or Christians* shall be solemnised in accordance with section.⁶ It is proper that the Act should now be confined to marriages between *Christians*. A marriage between a Christian and non-Christian should be left to be solemnised under the Special Marriage Act, 1954. The present provision was inserted at a time when there was no Special Marriage Act. It is a legacy of the statute 14-15 Vic. C. 40 of the British Parliament.
- (ii) An express exception should be made in the Act for saving marriages under the Special Marriage Act, 1954.
- (iii) A few other points concerning the scope of this provision of the Act have been discussed in the case law.⁷⁻⁹ These do not involve revision in points of substance.
- (iv) The questions of age and prohibited degrees are dealt with in later paragraphs.¹⁰

Essential Conditions of Validity

5. Conditions applicable to all marriages (section 3A to be inserted under new Part IA to be inserted).

It appears to be necessary, at the present day, to lay down certain conditions of marriage which should apply to all Christian Marriages. These conditions will relate to (i) non-existence of spouse by earlier marriage; (ii) parties not be within prohibited relationship, except when permitted by

6. A.I.R. 1933 All. 122, 123; I.L.R. 55 All. 185.

7. A.I.R. 1934 All. 273.

8. I.L.R. 40 Mad. 1030; 33 M.L.J. 148.

9. *Gnanamuthu v. Anthony*, A.I.R. 1960 Mad. 430.

10. Paragraphs 5-7, *infra*.

custom; (iii) neither party should be an idiot or lunatic at the time of marriage; and (iv) minimum age.

At present, only some of these matters appear in the Act, and that too only in regard to some categories of marriages. Thus, non-existence of a spouse by earlier marriage is mentioned only in section 60(2), which is applicable to Indian Christians (who are not Roman Catholic). The question of age is also dealt with only in section 60.

Prohibited degrees are not given in the Act, and have to be deducted indirectly from section 5(1) (for marriage performed by priests with episcopal ordination) and from section 88, in the marginal note, mentions "prohibited degrees",¹¹ and reads as under:

"88. Non-validation of "marriages within prohibited degrees.

Nothing in this Act shall be deemed to validate any marriage which the personal law applicable to either of the parties forbids him or her to enter into".

As stated above, it is proper that essential conditions of marriage should be set out in the Act. Therefore, a new section, somewhat on the following lines, should be inserted in the Act (under Part I-A to be newly inserted).

"3A. A marriage may be solemnised between any two Christians if the following conditions are fulfilled, namely:

- (i) neither party has a spouse living at the time of the marriage;
- (ii) the parties are not within prohibited relationship,¹² unless the custom governing each of them permits of a marriage between the two;
- (iii) neither party is an idiot or a lunatic at the time of the marriage;¹³
- "(iv) the bridegroom has completed the age of twenty-one years and the bride the age of eighteen years at the time of marriage.¹⁴"

11. Cf. A.I.R. 1945 Med. 516.

12. See paragraph 6, *infra* (Prohibited relationship)

13. Cf. section 19, Indian Divorce Act, 1869.

14. These are the minimum ages now laid down by the Child Marriage Restraint Act, as amended. See also Paragraph 7, *infra*.

6. Prohibited relationships (section 38, to be newly inserted under new Part IA)

A self-contained provision regarding prohibited relationship should be inserted in the Act, since (as proposed above),¹⁵ one of the essential conditions of all marriages under the Act should be that the parties are not within the prohibited relationship.¹⁶ Tentatively, the following list of such relationships is suggested.¹⁷

Prohibited Relationship

Part-I

1. Mother.
2. Father's widow (step-mother).
3. Mother's mother.
4. Mother's father's widow (step-grand-mother).
5. Father's mother.
6. Father's father's widow (step-grand-mother).
7. Daughter
8. Son's widow
9. Daughter's daughter.
10. Daughter's son's widow.
11. Son's daughter.
12. Son's son's widow.
13. Sister.
14. Wife's daughter (step-daughter).
15. Wife's mother.

Part II

20. Father.
21. Mother's husband (step-father).
22. Father's father.
23. Father's mother's husband (step-grand-father).
24. Mother's father.
25. Mother's mother's husband (step grand-father).
26. Son.
27. Daughter's husband.
28. Son's son.
29. Son's daughter's husband.
30. Daughter's son.
31. Daughter's daughter's husband.
32. Brother.
33. Husband's father.
34. Husband's son (step-son).

15. See paragraph 5, *supra*.

16. Cf. section 19, Indian Divorce Act, 1869.

17. This list follows the Marriage Act, 1949 (Eng.) and Special Marriage Act, 1954, taking only the entries common to both. Some entries contained in those Acts are not adopted because of the custom understood to be prevailing amongst Christians in India.

Part-I

16. Wife's son's daughter
(step-son's daughter).
17. Wife's daughter's daughter
(step-daughter's daughter).
18. Wife's father's mother.
19. Wife's mother's mother.

Explanation—For the purposes of this Part, the expression "widow" includes a divorced wife.

Part-II

35. Husband's son's son
(step-son's son).
36. Husband's daughter's son
(step-daughter's son).
37. Husband's father's father.
38. Husband's mother's father.

Explanation.—For the purposes of this Part, the expression "husband" includes a divorced husband.

There is one aspect of this question which may be elucidated. "Sister's daughter, brother's daughter, mother's sister and father's sister", and "brother's son, sister's son, mother's brother and father's brother" are not included in the list. Though marriages with those relations are not viewed with favour, and are prohibited amongst Roman Catholics, the prohibition is not absolute and is capable of being removed by a papal dispensation.

Age

The point concerning minimum age of marriage, referred to above,¹⁸ also needs some discussion. At present, only section 60 deals with the minimum age of marriage. The section is confined to marriage by certificate between Indian Christians. The Act is silent as to minimum age for other marriages. The question of age is also of practical importance and, in fact, arose before the Allahabad High Court,¹⁹ which held that there is nothing either in the Indian Divorce Act, 1869 or in the Indian Christian Marriage Act, 1872, as regards the age of consent for a Christian marriage. The High Court further held that under section 7, Divorce Act, the Indian High Courts have to act according to principles and rules of English Courts. There-

18. Paragraph 5, *supra*.

19. *Goodal v. Goodal* I.L.R. 55 All 243; A.I.R. 1933 All 135, 136.

fore, in India, the age of consent for a Christian marriage is governed by English law, according to the Allahabad High Court. This does not appear to be a satisfactory position. On this important matter the Act should be made self-contained. Even the minimum age mentioned in section 60 is out of tune with the general statutory minimum laid down in the Child Marriage Restraint Act as amended. The anomaly arising from the present position can be illustrated by taking the Allahabad case, which holds that for a Christian marriage in India the age of consent at the date of marriage would be 12 years in the case of girl, "that being the state of law in England at the time of marriage"²⁰ (It was a case of Anglo-Indians domiciled in India). It is improper, and highly inconvenient, that Indian courts should have to determine such questions by recourse to English law, particularly when the legislature has prescribed a minimum age.

It is for these reasons that the suggested provision²¹ relating to essential conditions of validity should contain a clause about age also.

8. Spouse not living

Monogamy being an essential doctrine of Christianity,²² it is proper that the section relating to essential conditions of marriage should expressly contain a provision that no spouse should have been living.²³

Ceremonies and Formalities

9. Persons by whom marriages may be solemnised (sections 5, 6, 7 and 9)

Section 5 of the Act provides for five categories of persons by whom marriage may be solemnised.²⁴ The first two are totally religious. The third category is partly religious (in respect of

20. *Goodal v. Goodal*, A.I.R. 1933 All 135, 136.

21. Paragraph 5, *supra*.

22. Compare section 19, Indian Divorce Act. All see A.I.R. 1953 Travancore-Cochin 61, 62.

23. Paragraph 5, *supra*.

24. The heading of Part II needs change.

the functionary—who must be a Minister of Religion) and partly non-religious. (The Minister must be *licensed* under the Act—section 6). The fourth category is purely secular, since the marriage is solemnised by a Marriage Registrar (section 7) and has no religious element in its formalities (sections 38-59). The fifth and last one, confined to Indian Christians, is performed by a person licensed under section 9 to grant Certificates of Marriage. The formalities are largely secular, but the functionary must be a Christian (section 9) and the formalities to be undergone include a declaration by each party to the other, in the course of which he invokes the presence of Almighty God and the name of Jesus Christ (section 60 (3)). This category is thus religious-cum-secular. It does not apply to Roman Catholics (section 65).

A few suggestions relating to the persons to be authorised to solemnise some of the categories will be offered at the appropriate place.⁵

10. Licences to Ministers of Religion (section 6)

By section 6, the State Government has been given power to grant licences to Ministers of Religion to solemnise marriages. The State Government is also given power to revoke such licences. It is desirable to provide for three improvements in this regard:

- (i) There should be a provision for the constitution of an Advisory Committee consisting of, say, five Christian members, who shall be all non-officials, to advise the State Government in the matter of grant and revocation of licences under section 6.
- (ii) There should be a provision for giving reasonable opportunity of hearing to the licensed Minister before his licence is revoked by the State Government.
- (iii) A provision in the section specifying the grounds on which revocation may be ordered is needed. It could be provided that where it appears that the Minister has

25. Paragraphs 10-11 *infra*.

been guilty of serious illegality or impropriety in the exercise of his functions, the State Government may revoke the license.

11. Licences to grant certificate of marriage between Indian Christians (section 9)

By section 9, the State Government has been given power (i) to grant a licence to any Christian (by name or office), authorising him to grant a certificate of marriage between Indian Christians, and (ii) to revoke such licences. In this section also, it is desirable to make a few amendments on the following points:

- (i) There should be a provision for constitution of an Advisory Committee consisting of, say, five Indian Christian members (all non-officials), to advise the State Government in the matter of grant or revocation of licences.
- (ii) There should be inserted a provision for giving reasonable opportunity of hearing to the licence holder, before his licence is revoked by the State Government.
- (iii) There is need for a provision specifying the grounds on which revocation can be ordered. It may be provided that the licence may be revoked where the licence-holder has committed serious illegality or impropriety in the exercise of his functions. Where the licence is issued to a person as holding an office, it may probably be convenient to provide for an additional and more elastic ground of revocation. For example, revocation may be allowed if, for any other reason to be recorded by the State Government, revocation of the licence is considered necessary or desirable in the public interest.

12. Notice of intended marriage where marriage is to be solemnised by a licensed Minister (section 12)

The notice of intended marriage to be solemnised by a licensed Minister should state the date of birth of each party and should be signed by both the parties.

13. Notice of intended marriage before Marriage Registrar (section 38)

The notice of intended marriage given to the Marriage Registrar should also :

- (i) mention the date of birth of both the parties; and
- (ii) be signed by both the parties.²⁶

On the first point (date of birth), it may be mentioned that at present, while First Schedule to the Act (form of notice of intended marriage) contemplates that the notice should mention the age, the section does not say so. As a result, it has been held²⁷ that it is not necessary to fill up the age, since the section is silent about the requirement of stating the age, and it is the section that governs the schedule. Whatever be the interpretation, it is proper that the notice should contain a statement of the date of birth, particularly since it is now proposed that the parties should not be below the minimum age of marriage (21 years for males, 18 years for females).²⁸

14. Certificate and registration (new section 65A to be inserted under new Part VIA)

There is need for inserting in the Act a comprehensive provision requiring the maintenance of a register for *all marriages* solemnised under the Act. Even now, such provisions exist for some marriages and are scattered over the relevant Chapters. However, there is need for one uniform provision. It could be somewhat on the following lines :

- (1) When the marriage has been solemnised, the Minister of the Church or the licensed Minister or the Marriage Registrar or the person authorised to solemnise a marriage between Indian Christians, as the case may be, shall enter a certificate thereof in the form specified in the Fifth Schedule in a book to be kept by him for that purpose and to be called the Marriage Certificate Book, and such certificate shall be signed by the parties to the marriage and the witnesses.

26. Cf. paragraph 12, *supra*.

27. A.I.R. 1935 Cal. 678; 39 C.W.N. 1303.

28. Paragraphs 5 and 7, *supra*.

- (2) On a certificate being entered in the Marriage Certificate Book by the Minister of a Church or the licensed Minister or the Marriage Registrar or a person authorised to perform marriages between Indian Christians, the certificate shall be deemed to be conclusive evidence of the fact that a marriage under this Act has been solemnised.
- (3) Every Minister of a Church, licensed Minister or Marriage Registrar or a person authorised to perform marriages between Indian Christians in a State shall send to the Registrar-General of that State, at such intervals and in such form as may be prescribed, a true copy of all entries made by him in the Marriage Certificate Book since the last of such intervals.

The certificate may be in the following form :

Form of Certificate of Marriage

I. *E.F.*, hereby certify that on the day of
 19 *A.B.* and *C.D.*²⁹ appeared before me and
 that the declaration required by section of the Indian
 Christian Marriage Act, 1872 was duly made, and that a
 marriage under that Act was solemnised between them in my
 presence and in the presence of two witnesses who have signed
 hereunder:

(Sd.) *E.F.*.....

*Minister of Church*³⁰

Licensed Minister

Marriage Registrar

Person authorised to solemnise
 marriages between Indian Christians.

(Sd.) *A.B.* (Bridegroom).

(Sd.) *C.D.* (Bride).

(Sd.) *G.H.*—Two witnesses.

(Sd.) *I.J.*

Dated the day of 19.....

29. To be entered.

30. Strike off what is inapplicable.

15. Marriage ceremonies : effect of non-performance (new section to be inserted as section 77A)

There is some obscurity as to the legal consequences of an omission to perform, or irregularity in the performance of, essential marriage ceremonies.³¹⁻³³ The position in this regard needs to be clarified. Following are tentative suggestions on the subject :

- (i) Power may be given to the appropriate court to give a declaration that the marriage has not been validly performed,³⁴ where the essential ceremonies have been omitted.
- (ii) It shall also be provided that the validity of a marriage solemnised under section 5(2) to 5(5) shall not be questioned only on the ground that the conditions required by *personal law* have not been satisfied.³⁵

A new section will be needed for the purpose.

Prohibition**15. Non-validation of marriages within prohibited degrees (section 88)**

Section 88 (to which reference has already been made in an earlier part of this paper,³⁶ in the context of prohibited degrees) has created a lot of trouble. The section may be quoted again in full:

“88. *Non-validation of marriages with prohibited degrees:*

Nothing in this Act shall be deemed to validate any marriage which the personal law applicable to either of the parties forbids him or her to enter into.”

31. A.I.R. 1933 All. 122.

32. A.I.R. 1934 All. 273.

33. A.I.R. 1960 Mad. 430.

34. See discussion in A.I.R. 1933 All. 122.

35. See A.I.R. 1960 Mad. 430, 433, 434, 435 (marriage performed by a Schismatic priest is valid, if ceremonies are performed as required by *wlaen vife*, canon law may not recognise it). Also A.I.R. 1918 Lower Burma 83, 85.

36. Paragraph 5, *supra*.

The expression *personal law* (as appearing in this section) has given rise to considerable controversy. Some of the questions raised and the decision given thereon, in the reported decisions on the subject are mentioned below, by way of illustration:

- (i) Is a civil marriage before a Registrar between persons professing Roman Catholicism valid in law? Or, is the marriage hit by the *personal law* mentioned in section 88? The question arose before the Bombay High Court. The answer given by the Bombay High Court was that the marriage is valid. *Personal law*, according to the Bombay High Court, does not cover the forms of marriage. It is concerned with the capacity of the parties to enter into marriage with each other.³⁷
- (ii) Is a marriage between a Roman Catholic woman and Jew male valid? The question arose before the Calcutta High Court which held that the personal law of a Roman Catholic forbids marriages between Catholics and persons who have not been baptised. Since Jews are not baptised, a marriage between a Roman Catholic woman and a Jew is void under section 88, according to the Calcutta view.³⁸
- (iii) Can a Roman Catholic husband and a Protestant wife marry in a Protestant Church before a Protestant Pastor, without a dispensation under the Canon Law of the Church of Rome? The question arose before the Madras High Court,³⁹ before which it was argued that such a marriage was not permitted by Canon Law without a church dispensation. However, the argument did not succeed. The High Court held that *personal law* in

37. *Saldanha v. Saldanha*, I.L.R. 54 Bom. 288; A.I.R. 1930 Bom. 105; 32 Bom. L.R. 17.

38. *Claudin Jude v. Lacelot Jude*, I.L.R. (1945) 2 Cal. 462; A.I.R. 1949 Cal. 563, 565. However, an earlier case holds that a divorced Jewess can marry a Christian—(1912) 15 I.C. 398, 399 (Cal.).

39. *Gnanasounda v. Nallathambi*, I.L.R. (1946) Mad. 367; A.I.R. 1945 Mad. 516, 519; (1945) 2 M.L.J. 80; 47 Cri. L.J. 421; I.L.R. (1946) Mad. 367.

section 88 applies only to that part of the personal law which relates to absolute impediments to *any marriage* at all between the parties—even a marriage according to the rites of their own churches—impediments such as prohibited degrees of consanguinity or affinity. The marriage in dispute (Roman Catholic husband and Protestant wife) was held to be valid and not hit by section 88. The husband who has entered into such a marriage cannot marry again. Further, a so-called “release” deed executed by the woman (relying on alleged “custom”) has no legal effect, according to this Madras case. The marriage still subsists. Such a customary divorce is not recognised by law, amongst Christians. The husband is, therefore, guilty of the offence of bigamy by marrying again. This Madras decision thus gives a limited meaning to *personal law* holding it to be confined to prohibited degrees.^{40,41}

In this position, section 88 should be abrogated and the concept of prohibited degrees be enacted in the proposed new section which is to govern all marriages.⁴²

Miscellaneous

17. Consequential changes

If the changes suggested above are carried out in the related sections, a few other provisions of the Act will also need consequential changes. Some simplification will also be possible, if the suggested changes are carried out.

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40. *Mrs. Chandramani Dubey v. Ram Shankar Dubey*, A.I.R. 1951 All. 529, 539; I.L.R. (1951) 2 All. 439.

41. Also A.I.R. 1951 Cal. 293.

42. Paragraphs 4-5, *supra*.

CHAPTER 2

Legals Implications of the Divorce Law Applicable to Christians

1. Introductory

The law relating to marriage and divorce amongst Christians in India and the other topics relating to the family, is at present scattered in several enactments, of which the principal ones are the following :

- (1) The Indian Divorce Act, 1869 (topics dealt with are divorce and other matrimonial causes).
- (2) The Indian Christian Marriage Act, 1872 (marriage ceremonies).
- (3) The Converts I Marriage Dissolution Act, 1866 (right of a person converted to Christianity to call upon his or her spouse to embrace Christianity and on failure to do so, to seek dissolution of the marriage).
- (4) The Indian Succession Act, 1925 (sections relating to succession on will and succession without will).

The law relating to a few matters, such as maintenance, is not codified and is therefore governed by case law. Besides the enactments mentioned above, there are some local enactments whose existence creates confusion, particularly the Travancore Christian Succession Regulation.

2. Priorities

Of the various enactments mentioned in the above paragraph, the Indian Divorce Act, 1869 is the one that is in need of urgent reform. The grounds of divorce given in the Act (section 10) are unduly restrictive and out of tune with current thinking even amongst the members of the community. Apart

from this, divorce is available on more liberal grounds to the husband than to the wife. The discrimination so made between the sexes has no rational basis and is unconstitutional, as well as unsound on the merits.

Some of the procedural provisions contained in the Indian Divorce Act are also unnecessarily cumbersome. For example, it is necessary to get a decree of divorce passed by the district court confirmed by the High Court—a position hardly in consonance with the present-day legal structure. There are several other matters also (such as the grounds of nullity of marriage as contained in section 19) which require attention. Points needing urgent reform are given below :

3. Suggestions regarding the Indian Divorce Act—grounds of divorce

The grounds of divorce as provided in section 10 of the Act.

As regards the husband, the ground is simply stated as the wife being guilty of adultery. As regards the wife, she can seek dissolution on the grounds given below :

that since the solemnization thereof, her husband has exchanged his profession of Christianity for the profession of some other religion, and gone through a form of marriage with another woman;

or has been guilty of incestuous adultery,
or of bigamy with adultery,

or of marriage with another woman with adultery,
or of rape, sodomy or bestiality,

or of adultery coupled with such cruelty as without adultery

would have entitled her to a divorce *a mensa et toro*,

or of adultery coupled with desertion, without reasonable excuse for two years or upwards.

The wife's right to seek divorce on the ground of adultery is more restricted than the husband's.

4. Grounds of divorce (section 13) further suggestions

In order to make the provisions of the Act rational and consistent with the modern thinking, it is necessary to expand the

grounds of divorce so as to include the following types of misconduct or situations amongst the grounds. The list given below is illustrative and not intended to be exhaustive and is further given here to furnish the gist of the grounds (and not the details). The grounds suggested (arranged alphabetically as far as possible are the same for both parties:

- (1) adultery;
- (2) bigamy;
- (3) cohabitation—non-resumption of, after a decree of judicial separation or restitution of conjugal rights;
- (4) conversion of the other spouse to another religion; as cruelty
- (5) cruelty, harrassment for dowry
- (6) desertion;
- (7) impotence;
- (8) incurable venereal disease from which the other spouse is suffering; not contracted from the petitioner;
- (9) insanity;
- (10) imprisonment of the other spouse for a specified period on a criminal conviction;

In course of time, it will become necessary to consider the question of simplifying the grounds so as to compress them to (a) breach of material obligation, (b) betrayal of marital fidelity, (c) impossibility of the spouse living together owing to physical or mental disease or deficiency or other similar circumstance to be precisely and concretely defined.

In regard to some of the grounds as suggested for divorce in the above enumeration, a minimum period for which the other spouse is suffering from some disease or has deserted the petitioner, etc, will have to be thought of. That is a matter of detail.

5. Principles on which the court is to act (section 7)

Section 7 of the Act required the courts (in proceeding under the Act) to act and give relief on principles and rules which are, in the opinion of the said courts, as nearly in English divorce courts for the time being act and give relief. The object underlying this section was to provide for matters which are not ex-

pressly dealt within the Act and to facilitate the development of the law along English lines. Apart from the fact that the section is out of date in the divorce law of an independent country, the section is likely to create misunderstanding in the mind of the citizen for several reasons:

- (a) The section leaves it vague how far English law is applicable. It was after a long controversy that it was settled that grounds of divorce cannot be expanded. Other points of controversy can still remain.
- (b) It is still a matter of some controversy whether English rules of evidence are to be applied or not, and whether, and to what extent, English procedural rules are to be applied.
- (c) Some courts have construed the section as enacting that the age of consent on marriage amongst Christian would depend on the state of law in England as the date of the marriage.¹ Not many lay men or women would be aware of this position.

These and other aspects illustrate the unworkability of the section, or at least its obscurity.

6. Decrees of divorce and their confirmation (sections 16-17)

The procedure at present laid down requires that (a) in the High Court the first decree shall be a decree *nisi*, to be made absolute after 6 months, and (b) district court's decree shall require confirmation by the *High Court*. The procedure for confirmation has no parallel in English law² and needs a second look, in the interest of speedy disposal.

It may be mentioned that by a U.P. Amendment the procedure for confirmation is done away with in U.P.³

1. A.I.R. 1933 All. 135, 136.

2. AIR 1936 Cal. 15.

AIR 1964 Cal. 21.

3. U.P. Act 30 for 1957

see AIR 1978 All 27, 29

7. Nullity of marriages—grounds (section 19).

The grounds of decree of nullity are enumerated in section 19, Clauses (1) to (4). Briefly, the grounds are—

- (1) impotence of the other spouse at the time of marriage and at the time of institution of the suit.
- (2) parties with prohibited degrees of consanguinity (natural or legal) or affinity, being married to each other.
- (3) either party was a lunatic or idiot at the time of marriage.
- (4) former spouse of either party having been alive at the time of marriage.

The last paragraph of the section saves the jurisdiction of the *High Court* to make decree of nullity of marriage on the ground that consent of either party was obtained by force or fraud.

Following points may be made with reference to this section:

- (1) The District Court has, at present no jurisdiction to grant a decree of nullity on the ground of force or fraud.⁴ This should be conferred.
- (2) A decree of nullity cannot be granted on the ground of minority.⁵ Whether this should be changed needs consideration but only after consultation with the community. It is not, of course, a ground for nullity under the other Acts, as a general rule.
- (3) Question whether non-consumption of marriage should not be made a ground of appropriate relief needs consideration. At present, the general view is that section 19 is exhaustive,⁶ so that even where the non-consummation is due to steadfast and persistent refusal, no relief can be granted.⁷ Even if it amounts

4. (a) AIR 1978 Kant 69, 70 (SB)

(b) ILR (1980) 1 Cut-563 (FB)

5. (1969) 13 C.W.N. 1901, 1009.

6. (a) ILR (1963) Guj 1003 (FB) majority view)

(b) AIR 1966 Mad 155, 158 (FB)

7. AIR 1967 Mad, 155 (FB)

to cruelty, that in itself is not a ground for divorce. Some High Courts find a way out by holding that persistent refusal to consummate is a ground for presuming incapacity.⁸ But there is need for a straightforward approach in the matter.

- (4) There is some obscurity on the question whether the pregnancy of the wife from some other person at the time of marriage and its non-disclosure to the husband, is a ground for relief. If there has been no enquiry by the husband (before marriage) then it does not amount to "fraud" according to the Andhra High Court.⁹ This requires consideration. Of course, the same criterion should, in theory, be applied, against the husband also who has been guilty of premarital sex relations. But it will be difficult to prove the facts in such a case, against the husband.

8. Nullity of marriage—decree for (section 20)

At present, under section 20, a decree of nullity granted by the District Court needs confirmation by the High Court.¹⁰ This section should be decided. The section has been deleted in U.P. (U.P. Act 30 of 1957.)

9. Judicial Separation (section 22)

Judicial separation is available for adultery, cruelty or desertion for 2 years, under section 22.

At present, a decree of judicial separation, even if followed by non-resumption of cohabitation does not result in divorce.¹¹ The mere lapse of time does not make judicial separation into divorce.¹² This situation requires to be remedied by allowing divorce where there is no resumption of cohabitation for, say, 2 years.¹³

8. AIR 1966 Mad. 155 (FB)

AIR 1968 Ker 129, 131.

9. (1975) And WR 243.

But see AIR 1974 Myz. 61, 63,

10. AIR 1971 Mad, 27.

11, AIR 1981 Cal. 252 (FB)