

Reforms As If Women Mattered

A Critique of the Proposed Christian Marriage Bill

○ Flavia Agnes

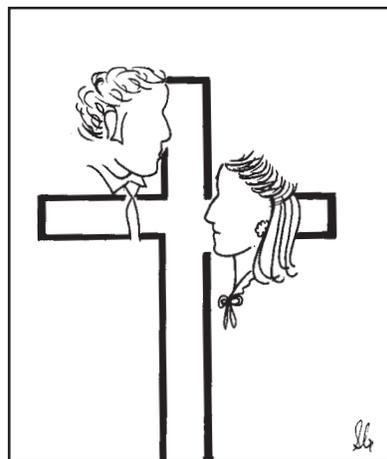
MY interest in Christian Marriage Laws stems from diverse platforms. As a woman, I was denied the right of divorce from a violent husband only on the ground that he was also simultaneously not adulterous or bigamous. As a lawyer, I have witnessed the humiliation women suffer in courtrooms when they are compelled to accept the allegation of adultery in order to escape from an incompatible marriage or to facilitate their husband's subsequent marriage. As a scholar of matrimonial law, I have been baffled at the stand taken by the Roman Catholic Church, in ardently defending a statute enacted by the Protestant dominated British Parliament and in obstructing all avenues of reform, despite the suffering of its womenfolk. When one is setting out to critique the dual power structure, that of State and Church, it is perhaps necessary to establish one's credentials right at the very start.

Since the stated objective of the reforms is to weed out the discriminations against women and to modernise the archaic statutes, the relics of Victorian morality retained in the Bill come as a surprise. The Bill is also reflective of an extremely callous approach of law makers in the country. Confined within the binaries of a communalized polity and minority

insecurities, the Bill has evoked a controversy which seems to have pushed women's concerns to the background. This article aims to foreground these concerns. But before venturing out to critique the bill, it is necessary to place the proposed reforms within a historical framework.

How It All Started

The most blatant discriminations against Christian women are contained in Section 10 of the *Indian Divorce Act*, 1869 which is applicable to Indian Christians. According to the act, while men could divorce their wives on the ground of adultery, women were required to prove an additional ground either of cruelty or desertion. The acts of cruelty or desertion did not constitute independent grounds of divorce.



SIMRAT GULATI

Christian women were thus placed under a double discrimination, against the men of their own community who could obtain a divorce on the ground of simple adultery, and against women under other personal laws who were entitled to divorce upon separate and independent grounds of adultery, cruelty or desertion.

Ironically, the Indian Divorce Act is the first Indian law to introduce the concept of statutory divorce in India. This statute was an adaptation of the English statute, the Matrimonial Causes Act of 1857 which was a revolutionary piece of legislation. Since the concept of divorce was tentative at this initial stage, the grounds of obtaining it were made stringent. But during the century that followed, the English law underwent radical changes and by 1973 it provided for 'no fault divorce' or 'divorce by mutual consent'. Some of the changes in the parent statute were incorporated in the Indian matrimonial laws applicable to Muslims, Parsees and Hindus.

Unfortunately for Christian women, their law lagged behind. Two entirely different set of factors could have contributed to this in the pre-independence and post independence period. During the colonial rule, the statute was applicable primarily to the British administrators residing in India and

courts in British India could easily incorporate the developments in English law without a formal change in the statute.

During the post independent period, while the statute remained intact, the political developments in the country drastically changed its scope. Christianity in India was no longer a religion of the colonial rulers, but was reduced to be a religion of a politically insignificant minority. The Roman Catholic Church became a significant contender for representing the values and aspirations of Indian Christians, as opposed to the liberal Protestant ideology of British India. The progressive developments in the English matrimonial law, could not be borrowed any more by the matrimonial courts of a newly independent nation. Devoid of its dynamism, the act got fossilized.

In the eighties, Christian women's groups initiated a sustained campaign to obtain community consensus for the much-needed reforms. But again, due to opposition from conservative Churches, the various bills prepared periodically were allowed to gather dust. While cruelty to wives was rendered a criminal offence in 1983, and husbands and in-laws were subjected to immediate arrest without warrant, this offence was not deemed grave enough for Christian women to dissolve their marriages under the civil law.

It is this anomaly that led to the provision being challenged before several High Courts. Initially the High Courts while holding that the stipulation requiring Christian women to prove adultery in addition to cruelty or desertion was discriminatory, left it to the Parliament to bring in the required changes. But when no legislative change was forthcoming, finally in

1995 the Full Bench of the Kerala High Court, in a path-breaking judgment, struck down the discriminatory clauses and changed the face of the Christian divorce law. During successive years, other High Courts followed suit.

Along with the judicial trends, the efforts of various groups and more particularly, the *Joint Women's Programme*, a Delhi based Christian women's organisation, to bring in the necessary changes continued. As an outcome of several consultations held with leaders of the various Christian Churches, a bill was formulated in 1993. This bill went through further changes during subsequent years and is now ready to be placed before the Parliament.

Flaws in the Bill

Making divorce law by providing for liberal grounds of divorce is the single most striking feature of the proposed Bill. Cruelty and desertion will now be independent grounds of divorce for both men and women. The Bill provides for divorce through mutual consent and eliminates the need to prove a matrimonial fault and thus reduces the trauma associated with divorce. While this amendment was long overdue, the much debated Bill ought to have been far more dynamic and in tune with modern social conditions.

While the retention of archaic provisions in a bill that has long been debated comes as a surprise, even worse are the absurd notions of equality, which are bound to have adverse implications upon women in general and Christian women in particular.

Absurd Notions of Equality

First among these, is the right to maintenance awarded to husbands, which in the present act was

confined to women. The initiators, along the way, seem to have lost sight of the basic objectives of the reform—to weed out discrimination against women. One is not aware of any demand from men as an affected category that this right be extended to them or that they have been discriminated against by being denied this right. But in their reformist zeal, the initiators are offering this right on a platter, with a profound objective of introducing gender equality.

The concept of maintenance under all matrimonial statutes stems from the financial subordinate status of women. Women are socialized into accepting being wives and mothers, as their primary role. As homemakers, women's contribution to the household economy has remained unremunerated and unaccounted for. Even when women do earn, they rarely have control over their earnings. Hence, in most cases, when women are compelled to leave their matrimonial home due to violence, alcoholism or adultery of their husband, they are rendered destitute. More often than not, children become the sole responsibility of women.

When women are not awarded an equal economic status, they cannot be saddled with the burden of equal economic responsibilities. The provision will result in defeating the entire purpose of the concept of maintenance, which is to provide economic security to the dependent wife. While children above the age of 18 are not entitled to maintenance, the premise upon which able-bodied husbands have been granted this right is difficult to comprehend.

Under the Special Marriage Act and the Muslim personal law a husband is not granted the right to claim maintenance from his wife. A

similar protective cloak was also extended even to the Christian women under the Indian Divorce Act. An injustice which had been imposed upon Hindu women by the Hindu Marriage Act of 1955 and which has caused them undue hardship, is now being extended to Christian women as well.

Damages for Adultery

As the bill advances, so does the absurdity, with both the spouses being given the right to claim damages from the adulterer/adulteress. In the last century, when adultery was the only ground of obtaining divorce, the husband had to prove the offence by initiating criminal proceedings against the offender and establish his claim over the woman's body by pressing for damages from the adulterer who supposedly had cheated him out of his right. In a statute to be enacted in the new millennium, not only has the medieval provision been retained but it now dons the garb of equality with the offensive remedy being made available to the wife as well.

It seems that the legal experts, guiding the initiators in framing the new statute are ignorant of the developments in matrimonial law and with the basic fact that it has ceased to be a vindictive litigation. Though this is difficult to achieve in practice, all legislative efforts should be directed towards this goal. Hence inclusion of a provision which will only serve to make the litigation vindictive is reflective of the extreme callousness on the part of the reformers.

The so-called adulteress, in most situations, is economically in a worse situation than the wife who is protected with the statutory armour of legal rights and social status. Further, she may not be the initiator of the imposed offence,



instead, she may be a helpless victim of undue advances. But even assuming the worst, that indeed she is the culprit, and is in a vantage position to pay damages, how will this remedy the matrimonial wrong or arrest the trend of matrimonial deceit?

Rape, Sodomy and Bestiality

In the extent of its absurdity, this surpasses the earlier two. But one can be consoled at the thought that it does not find a place in the official bill but has been specifically demanded by the Church. The demand carries with it an explanatory note that the aim of the bill is to ensure equality of sexes. Section 376 of the Indian Penal Code which deals with rape and Section 377 which deals with unnatural sex (sodomy and bestiality) are offences confined to men. Women do not come within its scope. Further these sections are hardly used in matrimonial litigations. Even in cases of homosexuality, it is more likely that the petition will be filed on the ground of cruelty, desertion or wilful non- consummation of

marriage. Hence the stipulation has only *academic* relevance than actual significance. But the demand for its inclusion with respect to wife does reflect a deep-rooted anti-women bias.

Unfair Property Settlement

The provision for the settlement of matrimonial property is extremely vague and is a mere repetition of section 27 of the Hindu Marriage Act. In the said act, property presented at or about the time of marriage is taken into consideration due to the practices in the Hindu community. It has proven far from satisfactory for Hindu women with regard to the issue of matrimonial property and right of matrimonial residence. Replicating this provision into the new Christian Marriage Bill will be a retrogressive step.

To be an effective safeguard to women's rights of matrimonial or separate property at the time of divorce litigation, the section needs to be reworded giving the court powers to look into any property purchased or secured at the time of, or during the subsistence of the

marriage. The court should also be given specific powers of injunction regarding the said property.

Poor Maintenance Provisions

The Act also stipulates that remedies of child custody and maintenance can only be claimed along with other matrimonial relief. This implies that a woman who is being neglected by her husband has to file for a matrimonial relief such as Divorce, Annulment, Restitution of Conjugal Rights, in order to claim maintenance. While Hindu women have a specific and independent right of maintenance under section 18 of the Hindu Adoption and Maintenance Act, 1955, the same does not hold true for Christian women. The only other alternative provision is under section 125 CrPC, which provides a paltry amount of Rs 500 per month. Hence, it is imperative that women be granted an independent right of maintenance during the subsistence of marriage.

There is a recommendation from the Church to delete this remedy on the ground that women's organisations are opposed to this section. The suggestion is devoid of any understanding of courtroom realities.

When a woman is deserted or thrown out of her matrimonial home, but does not wish to file for divorce, legal separation or annulment, the only way she can protect her right to the matrimonial home is through proceedings of Restitution of Conjugal Rights. Since the bill does not provide any right of maintenance to women, without filing for a matrimonial remedy (divorce, annulment, judicial separation or restitution of conjugal rights) filing for restitution becomes the only avenue left to protect crucial rights. A petition for Restitution of Conjugal Rights provide the woman with an entry point into litigation which seek

to protect her rights of child custody, maintenance and right of residence in the matrimonial home. She can also obtain interim orders that will effectively safeguard these rights and lay the ground for further negotiations and settlements. Women's groups have used this strategy in a number of cases where women have been abandoned but due to social constraints do not wish to dissolve the marriage.

Although this provision has sexist origins, its nature and implications have changed over the last century and in the present context has proved useful in strategizing for women's rights. This section can be deleted from the matrimonial statutes only when women have been granted statutory rights of matrimonial residence and property and an independent right of maintenance and child custody, which is not the case at present. Hence, deleting this section will cause more harm to women.

Procedural Tyranny

This is a procedural stipulation but causes grave hardship to every one concerned. Its rationality in the prevailing Act was that two centuries ago, the remedy of divorce was as yet tentative. The legislature approached it with caution and provided ample scope for retraction. Hence every decree passed by the court required to be confirmed through a subsequent litigation. But in the present era, when divorces can be obtained by consent, its retention is reflective of anachronistic attitudes.

During the period from the provisional decree to the final decree, marriage remains in limbo and status, rights and obligations of the parties are ambiguous. Litigants are not free of the matrimonial bonding, even after obtaining a decree through years of litigation and a full-length trial. These provisions have been challenged

before various High Courts on the ground of procedural unreasonableness. The Courts have upheld the plea and have appealed to the legislature to bring in suitable amendments. But the initiators of the reforms seem to have turned a blind eye to the judicial directions.

Inter-Faith Marriages

While the anomalies discussed above seem to be shrouded beneath a veil of silence, the issue that has evoked much public debate is the stipulation in the official Bill that a valid Christian marriage can be performed only between two Christians. The demand of the Church is that the current provision permitting marriages between a Christian and a non-Christian should continue. Even here the debate is more rhetorical, oblivious of stark court room realities.

Most inter-religious marriages arouse parental objections in our society. To appease their respective families, the parties undergo ceremonies of both sides. For example, if one of the parties is a Hindu or a Muslim and the other is a Christian the couple performs a church wedding and also a Hindu marriage or a Muslim *nikah* as the case may be. In times of matrimonial disputes, the spouses often validate their marriage as per their convenience or as per the advice of their lawyer and seldom as per their religious beliefs. This causes undue hardships to concerned parties. In case of a Christian wife and a Muslim husband, the marriage is held valid under both Muslim and Christian law. The dual ceremonies may be a convenient safety valve at the time of marriage. But, since rights and obligations of the parties vary a great deal under the two diverse laws, it results in increased ambiguity and trauma. In order to avoid this, cases of inter religious

marriages are best registered under the Special Marriages Act.

The Indian Christian Marriage Act is not a religious enactment but a purely civil law. The Act provides for secular and civil registrations, in a civil registry, devoid of any religious ceremony. So it is not surprising that it provided for inter-religious marriages. The stipulation was not based on community privileges but was more a matter of governance. Since then, the subsequent Special Marriage Act has been enacted for registering civil marriages and is better suited in providing for inter religious marriages. As a civil contract, marriage involves civil rights and any ambiguity and confusion is likely to cause a severe setback to women's rights.

The civil statute however does not interfere, nor contradict, the canonical precepts that run parallel. The canonical law deals with the spiritual aspects of marriage. As per this law, a non Christian could not be administered the sacrament of marriage, since the person has not been baptised—a primary initiation into the Roman Catholic faith and mandatory for receiving any subsequent sacrament. So, while a registration of marriage between parties one of whom is a Christian was held valid under the civil statute, the canonical law worked to restrain upon such marriages. But the canonical recognition to such marriages is a recent development and is permitted only upon the non-Christian spouse agreeing to certain specific stipulations. Hence the claim to a customary practice or community privilege cannot be substantiated.

Powers of Church Decrees

The Church has demanded legal recognition to the decrees awarded by it and the power to make its own rules with respect to these decrees.

This would be an intrusion into the domain of civil rights. The primary aim of the Matrimonial Causes Act of 1857 upon which the Indian Divorce Act is based was to divest the ecclesiastical courts of authority over *matters matrimonial*. In India the statute has remained fossilized for well over a century and a half. Now when the efforts are being made to reform it, it is indeed alarming that the Church has sought to enhance its power base by suggesting a reversion to the pre-statute state.

The demand is based on the position prevalent in Goa. But Portugal and its colonies had continued to remain under the Roman Papacy and the Church continued to exert authority over civil matters. The legislative trend in British India is marked with a clear departure from this position. Granting legal recognition to Church decrees would undermine this entire struggle and the process of reform adopted in India.

The demand is couched in legalistic terms taking recourse to provisions of conciliation, mediation and arbitration with the consent of the parties. But consent can easily be reduced to a formality of signing on the dotted lines, and

once given, will be irrevocable. Given the conservative and anti-women stand adopted by the Church, in several matters concerning the family — divorce, family planning, abortion, sexuality and sexual preferences, the stipulation does not invoke the confidence that women will be placed on a neutral terrain during the mediation.

If a settlement has to be arrived at with consent, it is best left to the courts. The consenting parties can easily approach a civil court with a petition for a divorce by mutual agreement. In such cases certain safeguards are written into the court proceedings to ensure that the rights of women and children are adequately protected. The court decrees are enforceable and provide a better protection of women's rights. Since this machinery is already in place the need for providing recognition to ecclesiastical tribunals for settlements of matrimonial disputes is entirely unwarranted. □

The author is a practising advocate in the Family Court and High Court at Mumbai and co-ordinator of *Majlis* which provides legal services to women.

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