

WOMEN'S RIGHT TO DIVORCE UNDER CHRISTIAN LAW*By*

**—J. KUSUMAVATHI, B.Sc., L.L.M.
ADVOCATE, Hyderabad**

In August 2001, Parliament passed a bill amending the archaic Indian Divorce Act, 1869. It took nearly one and half centuries, from 1825 to 2001 to remove the indescribable gender injustices and patriarchal favour from the Christian personal law.

The Christian Marriage Act of 1825 and the Indian Divorce Act of 1869, received as tokens of colonial heritage stood for one and half centuries. Paradoxically the analogous English Laws were thoroughly changed from time to time since then. The Law Commission of India in its 15th, 22nd and 90th reports recommended for the expansion of grounds of divorce.

The Courts pointed out the pre-existing anomaly under Section 10 of the Indian Divorce Act, which discriminates women seeking divorce, and it was a matter for judicial concern to rectify the same.

One of the first instances when the blatantly discriminatory provision of Section 10 of the IDA was challenged was in 1953. The women concerned, *Dwarakabai*, challenged the constitutional validity of the Indian Divorce Act before the Madras High Court and pleaded that the stipulation violates the Constitutional guarantee of equality under Article 14. It is interesting to note the justification of the Court while upholding the validity of this section. The Court declared that the discrimination is based on sensible and reasonable classification after taking into consideration the ability of men and women and the results of their acts of adultery, and not merely based on sex. "Adultery by a man is different from adultery by wife. A husband cannot bear a child and make it legitimate to be maintained

by the wife. But if the wife bears a child, the husband is bound to maintain it. A strange logic indeed in *Dwarakabai v. Nariman*, AIR 1953 Mad 188.

Later judgments departed from this extremely sexist premise, but the Courts refrained from striking down the offensive provisions as unconstitutional. In 1968, the Madras High Court held that the Indian Divorce Act is wholly out of date *S.D. Seharaj v. C. Mary*, (1968) 1 MLJ 289, in 1989 a special bench of the Calcutta High Court in *Swan Ghosh v. Sadananda Ghosh* ruled that the offensive provision smacks of sex-discrimination. The judgment also quoted with approval the recommendations of the Law Commission and observed that if Parliament does not amend the offensive provision, the Courts will be compelled to strike it down as unconstitutional, but stopped short of striking down the section as unconstitutional.

In 1990, in an interim application, in *Mary Sonia Zachariah's* case (1990) 1 KLT 131 the Kerala High Court set a time limit and directed the Government of India to give effect to the recommendations of the law Commission within six months of the order. But the Government ignored these directions. Finally, in February 1995, in a landmark judgment, the Full Bench of Kerala High Court struck down the offensive provisions as arbitrary and violative of Articles 14 and 21 of Constitution (*Ammuni v. Union of India*, AIR 1995 Ker. 252).

The Court held, "the legal effects of the provisions of Section 10 of the Indian Divorce Act is to compel the wife who is deserted or cruelly treated to continue a life as the wife

of a man she hates. Such a life will be a sub-human life without dignity and personal liberty. It will be humiliating and oppressive without the freedom to remarry and enjoy life in the normal course.

Such a life is one imposed by tyrannical or authoritarian law on a helpless deserted or cruelly treated Christian wife quite against her will and will be a life without dignity and liberty ensured by the Constitution. Hence the provisions which require the Christian wives to prove adultery along with desertion and cruelty are violative of Article 21 of the Constitution of India.”

Since it was a High Court ruling, its effects were confined only to the State of Kerala. So in the years 1995-96 Christian women filed similar petitions in the Bombay High Court and by a judgment of the Full Bench delivered in April, 1997, the Bombay High Court also struck down the discriminatory provisions (*Pragati Verghese v. Cyril George Verghese*, 1997 (3) All M.R. 504). The Andhra Pradesh High Court struck down the offensive provisions in *Saradasan v. Alexander*, AIR 1998 AP 157.

While these judgments brought some respite to Christian women in these three states, Christian women in other states could not avail of these progressive measures since none of the cases reached the Supreme Court. And though the Court rulings brought in the much-needed respite for a section of women in these states, there were several other lacunae, which needed to be addressed.

One such example is the remedy of divorce by mutual consent. A Christian couple was denied this right, while couples belonging to all other communities could avail it. In order to beat the law, the consenting couple had to take the circuitous route of first re-registering their marriage under the provisions of the Special Marriage Act and then filing a joint petition for divorce by mutual consent under that Act. The other shorter and more

commonly adopted route was to collude and fabricate a false ground of adultery. Usually the husband would accuse the wife of adultery and in the hope of a decent settlement of wife would consent. In this absurd farce played out in courtrooms on oath, the couple, their lawyers and the Judges were all willing players. While for the husband this would be a convenient escape route, it would mar all future prospects for the wife, as very few men would marry a woman who has been divorced on the ground of adultery. And few would understand absurdity was a technical legal requirement.

In *Mathew v. Union of India*, AIR 1999 Ker. 345, the Kerala High Court held that the confirmation procedure under Section 17 of the Indian Divorce Act prolongs agony and such provision requires no continuation especially when other family laws do have such provision. However, the Court did not strike down the provision as it treated that personal law is not a law under Article 13 of the Constitution.

Ultimately the Law Commission in its 164th Report recommended that the Parliament may enact a comprehensive law governing marriage and divorce and other allied aspects of the Christian in India. The Commission took notice of the judicial observations.

The Changes — The Indian Divorce (Amendment) Act, 2001 (Act No.51 of 2001) received the President's assent on 24th September 2001 and came into force on 3rd October 2001 when it was notified through gazette. Nearly 32 changes have been made to the principal Act. The following are the major changes.

- (1) In the title of the Indian Divorce Act the word “Indian” is omitted.
- (2) Section 3(6) and (7) which explain the terms ‘incestuous adultery’ and ‘bigamy

with adultery' are omitted, as these expressions do not occur in the amended Act in the changed Section 10.

- (3) Section 7 which required that the "Courts to act on principles of English Divorce Court" is omitted.
- (4) A new Section 10 is substituted for the old section, which had created dissensions. The discriminatory aspects of divorce are removed. The grounds of divorce are expanded on the similar lines as that of Special Marriage Act and Hindu Marriage Act. Same grounds of divorce are recognized for husband and wife. Adultery, conversion, unsound mind, virulent and incurable leprosy, suffering from venereal disease in a communicable form, not heard for seven years, wilful refusal to consummate the marriage, failure to comply with the decree of restitution of conjugal rights, desertion and cruelty are recognized as the grounds of divorce. Wife is given one more ground for the dissolution of marriage on the ground that the husband is guilty of rape, sodomy and bestiality. Consequential changes that are necessary in view of insertion of new Section 10 are made else where in the amended Act.
- (5) Section 10-A has been added providing for divorce by mutual consent.
- (6) As a sequel to remove gender discrimination Section 11 has been recasted to implead adulterer or adulteress as co-respondents as against the provision of impleading only adulterer in the pre-existing section.
- (7) Another major change that has been introduced is to remove the old Section 17 which provided for confirmation by the High Court the

decree for dissolution of marriage passed by the District Judge. Instead a new Section 17 is introduced conferring power on the High Court concerned to remove certain suits from the district Courts on suspicion that there is collusion between the parties.

- (8) Section 17-A, which was a colonial, hang over providing for the appointment of officer to exercise duties of King's proctor - is omitted.
- (9) Section 34, which facilitates husband to claim damages from the adulterer, is omitted.
- (10) Section 52 is made equitable by including wife also to give evidence as to cruelty. It may be noted that the Marriage Laws (Amendment) Act, 2001 has made amendment to Sections 36 and 41 as under:

In Section 36:—

- (a) For the words "the wife may present the petition for alimony pending the suit"; the words "the wife may present the petition for expenses of the proceedings and alimony pending the suit" are substituted.
- (b) For the words "for payment to the wife of alimony pending the suit", the words "for payment to the wife of the expenses of the proceedings and alimony pending the suit" are substituted.
- (c) After the proviso the following proviso is inserted:

"Provided further that the petition for expenses of the proceedings and alimony pending the suit, shall, as far as possible, be disposed of within sixty days of service of such petition on the husband.

In Section 41 of the Divorce Act the following proviso is added:

“Provided that the application with respect to the maintenance and education of the minor children pending the suit, shall, as far as possible, be disposed of within sixty days from the date of service of notice on the respondent.”

The above provisions were introduced in order to mitigate the delay in the procedure. It may be noted that these amendments do not refer to Judicial separation. The period of non-compliance of restitution decree under the amended Act is two years unlike other personal laws where it is only one year. Under the amended Act only the party is whose favour the decree is given is entitled to seek divorce for non-compliance. Section 21, which provides only partial legitimacy, is not change;

The most significant aspect of the amendment was to extend to all Christian women in India the gains secured for Christian women in the States of Kerala, Maharashtra and Andhra Pradesh - of making cruelty, adultery and desertion independent grounds

of divorce. The amendments were also beneficial to men as they could also avail of the ground! Is of desertion and cruelty to obtain a divorce from their wives. The amendment also introduced the remedy of mutual consent divorce. Finally a consenting couple could obtain an honest and straightforward divorce with consent without the necessity of fabricating false grounds or having to wash dirty linen in public.

Another significant aspect of the amendment was to remove the ceiling set upon maintenance. The stipulation under the earlier statute was that the maintenance to the wife should not exceed one-fifth of the husband's income. While women from other communities could avail of maintenance to the extent of one-third of the husband's income, the maintenance awarded to Christian women was extremely meager and highly inadequate.

Christian women finally succeeded both of legal battles within the Courts as well as in their negotiations with the church and the state, to ward of the shackles under which they had been burdened for well over a century.

PROCEDURAL ASPECT OF THE POLICE SYSTEM WITH REGARD TO CRIMINAL INVESTIGATION

By

—Dr. SARFARAZUNNISA,
Principal Anwar-ul-loom College of Law
for 12 years,
Worked as Professor of Law Asmara
University, Eritrea for 2 years,
Presently working as Advocate and
Part-time Lecturer

Developments affecting the system during British period :

Among the problems which the Britishers had to face with regard to the system of

criminal justice were the large scale participation of Muslim law officers in the process of justice, and the application of Muslim Criminal Law. Replacement of those two at various levels in various matters was