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Indian Christian Personal Laws: A Critique

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The Christian Personal laws of India, governing the religious minority, have witnessed a marginal number of changes as compared to their counterparts the Hindu personal laws. The blatant disregard by the Government to amend the said minority's laws has created multiple issues across the country. Specifically, the ironical propagation of discrimination in a secular and diverse country like India. The primary objective of this paper is to analyze and provide a critique concerning the Christian Personal Laws of India, by referring to the recommendations of the law commission reports, multiple case judgments ranging from lower courts to the Supreme Court of India, and a variety of statutes like the Prohibition of child marriage act, 2006 (PCMA), the Indian Christian Marriage Act, 1872 (ICMA), the Code of Canon Law, 1983 (CCL) and the Indian Divorce Act (IDA).

Keywords: *episcopal ordination, age of consent, marriage, divorce, ecclesiastical law, discrimination, gender-biased statutes.*

INTRODUCTION

With the rise of societal multipolarity, it is pivotal for the legal fraternity to acquire adequate knowledge concerning the personal laws followed by different communities. The lack of knowledge regarding personal laws can lead to distasteful state affairs. Considering India is a pluralistic and secular country, personal law knowledge becomes a necessity. However, there are issues regarding the efficiency of the Indian legal fraternity in understanding complex

personal laws and providing attention to them. The Christian Personal Laws are one such example of the lack of efficient drafting of a competent and uniform statute.

WHO IS A CHRISTIAN? - THE INDIAN CHRISTIAN DIASPORA

The Bible states that a person whose behavior and heart reflect Jesus Christ is a Christian. And a textbook definition of a Christian is that the followers of Christianity or Jesus Christ are known as Christians. When identifying as a Christian, denominations play a pivotal role. But in a country like India, there are a multiplicity of denominations. For instance, 37% of Indian Christians identify as Catholics (making up the majority), 13% as Baptists, and other denominations amount to 36%.[1]

Although Christianity makes up just about 2.4% of India's population, they happen to run in the millions. South India houses half the Christian population of the country and is also spread sparsely across Northeast India in the form of tribal communities. According to reports by institutions and think tanks like the Pew Research Centre, Indian Christians identify with the lower castes which amounts to about 74%. Similarly, 0.4% of Christianity are Hindu converts mostly located in the South and the East. It is pivotal to note that most of these converts happen to belong to lower castes like SC, ST, and Other Backward Classes. The diversity in the Christian community of India has led to the performance and profession of multiple rituals, practices, and beliefs within the same religion, that is, Christianity. The lack of acknowledgment of such diversity by the legislature has indeed led to a range of issues on the provisions in statutes governing the said religion.

CHURCH COURTS - CURRENT STATUS IN INDIA

For instance, Christians in India are governed by the Indian Christian Marriage Act (ICMA), 1872, and the Indian Divorce Act (IDA), 1869. However, the Catholic denominations are governed by a Code of Laws known as the Canon which essentially governs marriages and the

[1] Neha Sahgal et al., 'Religious Identity: tolerance and segregation' (*Pew Research Center*, 29 June 2021) <https://www.pewresearch.org/religion/2021/06/29/religious-identity-2/#many-hindus-muslims-buddhists-do-not-identify-with-a-sect> accessed 19 May 2023

nullity of the marriage, of people professing Catholicism. Therefore, Courts deciding upon matters concerning Catholics are known as Church or Ecclesiastical courts, which are governed by the 1983 Code of Canon Law.[2] However, India being a common law country follows an adversarial system which is completely different from what these Church courts follow, that is a Civil Law or an inquisitorial system. The differences in systems being in direct contradiction to the statutory laws in place like the IDA, which never recognized the jurisdiction of said Ecclesiastical laws, was later found to be adjudicated by invalidating the legal authority of decrees passed by these courts.

In 2001, the Supreme Court of India held that decrees passed by Church courts do not have any legal standing[3] and cannot be binding on the courts which have been recognized under the provisions of the IDA.[4] Thereby, a second marriage after obtaining a nullity decree from a Church court is considered to be bigamous and attracts a penal punishment under section 494 of the IPC. As one progresses throughout this essay, it will become clear how Personal Catholic Laws like the Canon are applied or rather applied based on convenience.

With that being said, the static nature of these laws is contradicting in nature to the general principle of changeability via amendments. The primary example for the abovementioned line is that, both these statutes were subject to amendments only in the early 2000s. Considering there are issues ranging from the varying ages of consent to gender-based discrimination, both the Christian personal laws comprising of the marriage act and the divorce act facilitate the need for Parliamentarian reformative action. One such issue which can be identified while facilitating comparative analysis of different statutes is the varying age of consent.

II.THE ICMA AND THE CODE OF CANON LAWS - A CONTRADICTION

AGE OF CONSENT AND THE OVERRIDING POWERS OF THE PCMA: The ambiguity surrounding the age of consent has paved the way for child marriages to take place. Even though child marriage is regarded as a custom in some parts of India, the Prohibition of Child Marriage

[2] Code of Cannon Law 1983
[3] *Clarence Pais & Ors v Union of India* (2001) SC 1151
[4] *George Sebastian v Molly Joseph I* (2000) DMC 716

Act, 2006 (PCMA) strictly prohibits such marriages and deems them voidable at the option of the child. The minimum age has also been established to be 21 for both males and females (after the 2021 amendment of the ICMA). However, when section 5(1) of the Indian Christian Marriage Act, 1872 (ICMA) [5]is examined, it is clear that the Canon Laws which are the Laws laid down by the Catholic Church, are to be followed. But, it is important to note that the 2021 amendment specifically states that the PCMA would override any other law, custom, usage, or practice[6]. With that being said, section 5(1) provides a leeway for child marriages to take place, by obtaining the consent of a parent or a guardian.

EPISCOPAL MARRIAGES AND CONSENT UNDER SECTION 5(1) OF THE ICMA: Section 5(1) of the ICMA states that "*Persons by whom marriages may be solemnized. – Marriages may be solemnized in India - by any person who has received episcopal ordination, provided that the marriage be solemnized according to the rules, rites, ceremonies, and customs of the Church of which he is a Minister*"[7]. Episcopal ordination essentially means "*A sacramental rite of the church by which God gives authority and the grace of the Holy Spirit through prayer and the laying on of hands by bishops to those being made bishops, priests, and deacons. The three distinct orders of bishops, priests, and deacons have been characteristic of Christ's Holy Catholic Church*"[8]. Considering that child marriage is recognized as a custom and practice, and that the ICMA is a statutory law, the PCMA, as per the 2021 amendment, has an overriding power.

THE INTRICACIES OF THE DIFFERENT SECTIONS OF THE ICMA AND SECTION 5(1) MARRIAGES – TRICKY APPLICATION OF THE PCMA

But, when different sections of the ICMA are read concerning marriages performed by a person who has obtained Episcopal ordination, application of the PCMA becomes tricky. For example, **section 19** of the ICMA states that "*the father, if living, of any minor, or, if the father is dead, the guardian of the person of such minor, and, in case there be no such guardian, then the mother of such*

[5] Indian Christian Marriage Act 1872, s 5(1)
[6] The Prohibition of Child Marriage (Amendment) Bill 2021
[7] Indian Christian Marriage Act 1872, s 5(1)
[8] Don S Armentrout and Robert Boak Slocum, *An Episcopal Dictionary of the Church: A User-Friendly Reference for Episcopalians* (Church Publishing 2000)

minor, may give consent to the minor's marriage, and such consent is hereby required for the same marriage unless no person authorized to give such consent be resident in India"[9]. By analyzing section 19 along with section 5(1), it is evident that a minor can be married off, if the consent of his or her guardian or parent is obtained. This is opposed to the general objective of the PCMA which aims to prevent and eliminate child marriages.

In relation, **section 60(1)** of the ICMA states that "*On what conditions marriages of 1[Indian] Christians may be certified. – Every marriage between 1[Indian] Christians applying for a certificate, shall, without the preliminary notice required under Part III, be certified under this Part, if the following conditions be fulfilled, and not otherwise: – the age of the man intending to be married 2[shall not be under 3[twenty-one years]], and the age of the woman intending to be married 4[shall not be under 5[eighteen years]];*"[10].Ultimately, the lack of stringent application of a bill like the PCMA paves the way for gender-biased statutes like the ICMA and outdated personal laws like the Canon Code to dictate social conventions in an old-fashioned manner which is repugnant to the present concept of freedom and rights.

UNCLEAR GUIDELINES - FACILITATION OF CHILD MARRIAGES

The lack of clarity and the differences over the age of consent, specifically concerning marriages performed by a person who has obtained an episcopal ordination, has thus, paved the way for the facilitation of child marriages. For instance, in the 1972 case[11], the Supreme Court stated that section 19 of the ICMA is not applicable, if and when a marriage is performed by a person who has obtained an Episcopal ordination. In this case, Lakshmi was a minor, whose consent was granted by her father to be married to Sanchit. Considering both the parties were Roman Catholics, the Code of Canon Laws was to be applied.

The Canon Law 1058 states that "*all can contract marriage who are not prohibited by law*"[12]. Read with Canon Law 1095 which states "*The following are incapable of contracting marriage:* ***1)*** *those who*

[9] Indian Christian Marriage Act 1872, s 19
[10] Indian Christian Marriage Act 1872, s 60(1)
[11] *Lakshmi Sanyal v Sanchit Kumar Dhar* (1972) AIR SC 2667
[12] *Code of Cannon Laws* (Theological Publication of India)

lack sufficient use of reason; **2)** *those who suffer from a grave lack of discretion of judgment concerning the essential matrimonial rights and obligations to be mutually given and accepted; and 3) those who because of a psychological nature, are unable to assume the essential obligations of marriage*"[13]. Concerning the Code, it is evident that the mental capacity of the parties to provide assent is necessary and that, prohibited persons cannot contract marriage. But, in this context, the frequent question is, does a minor have the mental capacity to provide consent to matters that are considered to be a lifelong partnership by society and the Canon Code governing Christians throughout the world?

The consensus that should be derived is that a minor does not have the mental capacity to contract marriage but must have the right to provide consent. And in relation, society at large needs to understand that capacity to contract and consent are two essential and different elements. A minor will always be under the influence of the dominant power of his or her parent or guardian. Which in a way, incapacitates a minor to contract or provide consent freely. However, every person must be given the opportunity to provide their free consent based on their inherent ability to decide for themselves regardless of whether they are a major or a minor. The only difference is that the ability to provide free consent is not to be decided based on a framework of conditions, like the present case of a contract of marriage. The key takeaway is that an opportunity to voice out one's thoughts freely and the power to negate one is to be given and not assumed.

EPISCOPAL ORDINATIONS IN RELATION TO THE LAKSHMI SANYAL CASE

Delving more, it was found that the Supreme Court, in the Lakshmi Sanyal case (ibid 11), failed to analyze that the dispensation was provided by the church to marry a person within the prohibited degrees of relationship only and not age. The very fact that the Canon laws subject the rights of a minority person to the dominant power of a guardian or a parent, is repugnant to the provisions of the Canon Code which has set the age of majority at the completion of twenty-

[13] *Ibid*

one.[14]Likewise, the statutory facilitation (ICMA- S.19) of automatic transfer of the right to consent of a minor to his or her guardian or parent, is contradicting in nature to that of the provisions of the PCMA, and in general, the basic structure of a person's human right.

INCONSISTENT USAGE OF THE DIFFERENT MARRIAGE LAWS - SPECIFICALLY THE APPLICABILITY OF THE CANON CODE

The lack of clarity over the overriding power of different statutes has also created the need for change in the framework of Christian Personal laws. For instance, "*under the Canon Law where Roman Catholic parties are married by Schismatic Priest, that marriage will not be recognized by the Catholic Church. They would look upon such a union as willing more than "concubinage" and the offspring would be described as illegitimate*" [15].

However, in 1930, "*the Bombay High Court had to deal with a civil marriage underwent by persons professing the Roman Catholic faith, and which marriage is not valid under the Canon Law. It was held that a civil marriage contracted before a Registrar in accordance with the provisions of the Indian Christian Marriage Act 1872, by persons professing Roman Catholic faith is valid and legal, however repugnant it may be to the Canon Law of the Church of Rome and that the Act deals with the forms of solemnization of marriages of all Christians in India, including Roman Catholics and that the prohibition contemplated by section 88[16] of the Act would not extend to a prohibition as to the form of marriage*"[17]. This ultimately, goes against the rule of thumb that 'the Code of Canon laws needs to apply when two Roman/Latin Catholics get married'.

USAGE OF THE WORD INDIAN - PERSISTENCE OF DISCRIMINATION

Another aspect that needs to be amended is the usage of "**Indian**" Christians. The basic objective behind the usage of the word Indian was to describe and provide a cohesive framework of laws

[14] Thomas O Martin, 'Minors in Canon Law' (1965) 49(1) Marquette Law Review <https://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=2567&context=mulr> accessed 18 May 2023

[15] Dr. Sebastian Champappilly, *Christian Law on Marriage, Adoption & Guardianship And Canon Law on Marriage* (Southern Law Publishers 2003)

[16] Indian Christian Marriage Act 1872, s 88

[17] *Saldhana v Saldhana* (1930) ILR 54 Bom 288

for Native Christians. Considering that **a)**the Indian Judiciary has made the effort to generalize the description of Christians (without discriminating based on the usage of the term Indian), and**)** the terminology of the statute happens to be of that of the 1870s, the legislature needs to take cognizance and rectify the term used to describe Christians. Essentially, making the usage of the term redundant, thereby, evolving with the changing legal environment.

THE EVOLUTION OF THE INDIAN DIVORCE ACT, 1869 (IDA)

DISCRIMINATORY PROVISIONS

Section 10: Section 10 of the statute states that "when husband may petition for dissolution - *any husband may present a petition to the District Court or to the High Court, praying that his marriage may be dissolved on the ground that his wife has, since the solemnization thereof, been guilty of adultery.*

When wife may petition for dissolution - *Any wife may present a petition to the District Court or to the High Court, praying that her marriage may be dissolved on the ground 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.*

Contents of petition - *Every such petition shall state, as distinctly as the nature of the case permits, the facts on which the claim to have such marriage dissolved is founded*" [18].

The Hundred and Sixty-Fourth Law Commission report discussed the discrepancy regarding the abovementioned provision and stated that "*section 10 makes clear and invidious discrimination against women.* While a man seeking dissolution needs to prove only adultery on the part of his wife, a wife is required to prove some other marital offense in addition to adultery to be able to

[18] Indian Divorce Act 1869, s 22

obtain dissolution"[19].Before the amendment, the provision allowed the party to claim damages from the alleged adulterer, but it was later repealed.

Further, discriminatory provisions like: a)section 11(which came into existence by the 2001 amendment) that makes the adulterer or adulteress a co-respondent; and **b)** section 17 which requires a full bench (three-judge bench) of a High Court to confirm the dissolution decree passed by the district court; when read with section 10 of the Indian Divorce act, still stand to exist. The Parliament's continuous refusal or ignorance to amend the statute, specifically section 10, has placed many Christian wives at a disadvantage.

SECTION 10A - DIVORCE BY MUTUAL CONSENT

Section 10A of the Indian Divorce Act, of 1869 states "*(1) Subject to the provisions of this Act and the rules made thereunder, a petition for dissolution of marriage may be presented to the District Court by both the parties to a marriage together, whether such marriage was solemnized before or after the commencement of the Indian Divorce (Amendment) Act, 2001 (51 of 2001), on the ground that they have been living separately for a period of two years or more, that they have not been able to live together and they have mutually agreed that the marriage should be dissolved*". [20]

However, when compared to other personal laws like S.32B of the Parsi Marriage and Divorce Act (PMDA), S.28 of the Special Marriage Act (SMA), and S.13B of the Hindu Marriage Act, all of which deal with the concept of the mutual concept, the waiting period is 1 year instead of 2 years. The constitutional validity of section 10A was contested in the Kerela High under articles 21 and 14. In the 2010 case, the lower court rejected the couple's mutual divorce application on the grounds that they weren't separated for the stipulated time frame under the IDA, 1869 (which was 2 years). A Division bench comprising Justice Shoba Annamma Eapen and Justice A. Muhamed Mustque, of the Kerela HC read down the provision, substituting the two-year time period for one year. And the court held that the section is in violation of Article 21 and the

[19] Law Commission, *Transfer of Land* (Law Com No 164, 1988) cl 14
[20] Indian Divorce Act 1869, s 10A

difference in separation periods concerning other religions was "*patently arbitrary and violative of Articles 14 & 15*."[21]

MENSA ET TORA OR JUDICIAL SEPARATION- AN ALTERNATIVE

S.22 of the IDA states that "*No decree shall hereafter be made for a divorce a mensa et toro, but the husband or wife may obtain a decree of judicial separation, on the ground of adultery, or cruelty, or desertion [1] *** for two years or upwards, and such decree shall have the effect of a divorce a mensa et toro under the existing law, and such other legal effect as hereinafter mentioned*."[22] Essentially, Mensa Et Tora grants the parties a decree of judicial separation on the three specified grounds, thereby, eliminating the need to dissolve the marriage bond.

CONCLUSION

As discussed earlier, the fact that outdated statutes like the IDA do not recognize Church courts that specifically govern matters concerning Catholics only has solidified the fact that the Code of Canon Laws is applied based on convenience and not based on uniformity. Considering that nearly half the Christian population in India profess Catholicism and that the jurisdiction of the Canon Code is recognized by the ICMA for both marriage and nullity, should be sufficient to confer power or legal authority over Church decrees. Yet, the legal authority of Church courts stands to be invalid and there is no competent and uniform statute to compensate for. This has ultimately, created another instance of hostility towards the religious minority.

The Supreme Court of India failed to consider the floodgate of criminal prosecution petitions on the grounds of bigamy by invalidating the declaration of nullity of marriage, by the Church or Ecclesiastical Courts. The change in name of the statute from the **Indian Divorce Act** to the **Divorce Act** was and is considered to be unsolicited. The removal of the word Indian from one statute and the retention of the same word under the ICMA proves that there is a lack of

[21] *Saumya Ann Thomas v The UOI* (2010) KLT 869
[22] Indian Divorce Act 1869, s 22

uniformity in amending the statutes. Ultimately, violating one's fundamental rights while promoting discrimination.

It is evident that statutes like the Divorce Act, specifically section 10, require Parliamentarian reform, which has been blatantly ignored by the Government as Christianity is a religious minority in the Indian sub-continent. The Government's bias towards the Hindu and Parsi communities is evident when it failed to make appropriate changes to other personal laws, specifically retaining archaic provisions of outdated Christian statutes. In doing so, the Government has failed to recognize the extent to which people of such religious minorities could go. For instance, collusion between parties to create false allegations of adultery, which later would be an Ex-parte adjudication, or the falsity of insanity to declare the marriage null and void. To shatter matrimonial bondage, dishonesty would arise, thereby, unleashing havoc in society.

Similarly, the very fact that statutes like the ICMA and Code of Canon Laws facilitate child marriages does not take into consideration the changed and ever-changing notions of society, the inter-generational trauma, and effects that child marriages can leave, and most of all, the blatant disregard of a child's mental and physical safety. The unclear overlap between statutes has blurred the lines of applicability. The Legislature's incompetence to take cognizance and correct such fallacies has created a sense of disregard within the Christian community and has thus, left Christian women to face the wrath of discrimination.