

ON February 27, 1981, a bill to amend the Hindu Marriage Act, 1955, and the Special Marriage Act, 1954, was introduced in parliament. The bill seeks to make the irretrievable breakdown of marriage a ground for divorce available to either husband or wife. The bill has faced considerable opposition and is at present under consideration by a joint committee. The law commission issued a questionnaire which received a majority of favourable replies. The commission in its 71st Report of April 1978, recommended that the bill be passed.

Manushi interviewed some women lawyers and representatives of women's organizations in Delhi, who are actively involved in the controversy that has developed around this proposed amendment. We are here presenting a summary of the law, the changes proposed, and extracts from the interviews, giving opinions both for and against the amendment, as well as suggestions for further alterations in it.

What The Law Says

Under the Hindu Marriage Act, section 13, either husband or wife may sue for divorce on the grounds that the other party has, after marriage, done any of the following:

1. had voluntary intercourse with any person other than the marriage partner;
2. has treated the petitioner with cruelty, which may be physical or mental;
3. has deserted the petitioner for a continuous period of two years or more, immediately preceding the filing of the petition. Desertion has been interpreted to mean not just physically leaving the partner but also creating conditions which make it impossible for the partner to stay on, for instance, driving her or him out of the house;
4. has ceased to be a Hindu, by conversion to any other religion;
5. has been incurably of unsound mind;
6. has been suffering from a virulent and incurable form of leprosy;
7. has been suffering from venereal disease in a communicable form;
8. has renounced the world by entering a religious order;

A Discussion On The Proposed Amendment To The Marriage And Divorce Laws

9. has not been heard of as being alive for a period of seven years or more.

In addition to any of these grounds, a wife may also seek divorce on the grounds that :

1. the husband has been guilty of rape, bestiality or sodomy ;
2. her marriage was solemnized before she attained the age of 15 years, and she repudiated the marriage when she was between the ages of 15 and 18.

Instead of divorce, parties may also seek for a judicial separation on any of the above grounds, (section 10). The difference between divorce and judicial separation is that if judicial separation is granted the petitioner no longer has any obligation to cohabit with her or his spouse, but continues to be legally married and so cannot remarry. If there is no cohabitation between the parties for a period of one year or more after the granting of judicial separation, this becomes ground for a divorce suit.

A husband or wife may also sue for restitution of conjugal rights (section 9) if the other party has withdrawn from her or his society, without reasonable excuse. However, though the court may order restitution of conjugal rights, it has no power to enforce this order. So, if the deserting spouse continues to stay away for a period of one year or more, after an order for restitution of conjugal rights has been passed, this in itself becomes sufficient ground for either party to sue for divorce.

In 1976, both the Hindu Marriage Act and the Special Marriage Act were amended to allow divorce by mutual consent. According to this both husband and wife may together present a petition to the district court, asking that their marriage be dissolved on the ground that they have been living separately for a period of one year or more, that they have not been able to live together, and that they have mutually agreed that the marriage should be dissolved. Six months later, a divorce will be granted, if the petition has not been withdrawn in the meantime.

This amendment brought about a radical change in the concept of divorce. All the other grounds of divorce are based on the premise that one of the parties has to be guilty of some fault, intentional or unintentional, before a marriage can be dissolved. The party who sues for divorce has to bring accusations against the other party. This means that even in cases where both husband and wife are equally desirous of divorce, one of them has to sue the other and bring accusations of cruelty, desertion, conversion or some such fault. If the other party also wants the divorce he or she does not refute these charges and so the divorce takes place. But the ground of mutual consent acknowledges that it is possible that two people may not wish to live together, even though neither of them has been guilty of adultery, cruelty, desertion or any such fault.

Customary Divorce

The Hindu Marriage Act specifically exempts all members of scheduled tribes from its purview. It also allows all customary forms of divorce :

“Nothing contained in this Act shall be deemed to affect any right recognized by custom or conferred by any special enactment to obtain the dissolution of a Hindu marriage.” (section 29)

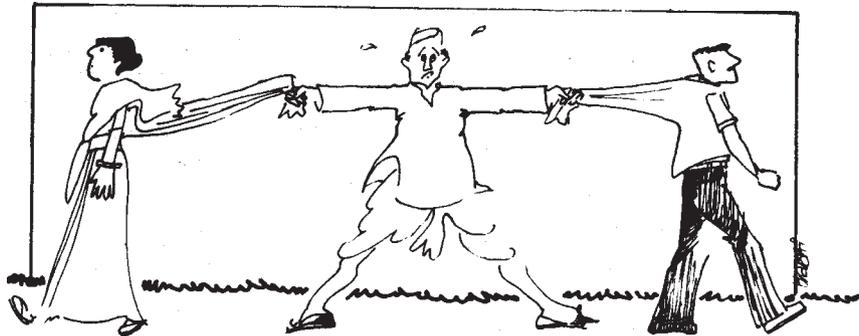
The report of the committee on the status of women in India, 1975, pointed out that several forms of customary divorce continue to be practised by a large section of Hindus of the so-called lower castes. Some of these customs such as *chuttam chutta* practised by the Barai chaurasiyas make it easier for both parties to obtain divorce by mutual consent. Such customs obtain also among castes in Bombay, Madras, Mysore, Kerala and Madhya Pradesh.

However, there are other customs which give only the man a unilateral right of divorce: “According to the custom prevailing in Manipur (Khaniaba) it has been stated that a husband can dissolve the marriage without any reason or at his pleasure. Among the Rajput Gujaratis in Khandesh and in the Pakhali community, a marriage is dissolved if the husband abandons or deserts the wife. Among the Vaishyas of Gorakhpur in UP, a husband may abandon or desert his wife, and dissolution takes place even without reference to the caste tribunal. Divorce by deed is prevalent among certain castes in South India, also in Himchal Pradesh and the Jat community. Recently, the supreme court has upheld a deed executed by the husband divorcing his wife.” (p. 117)

Any form of divorce which can be proved to be customary among Hindus in a particular community or family, is legal according to the Hindu Marriage Act.

Marriage Laws Amendment Bill 1981

This bill seeks to introduce a new clause which will provide that either husband or wife may present a petition to the district court, asking that the marriage may be dissolved on the ground



How Can We Allow A Broken Marriage To Break !

Cartoon : Manushi ; Sketch : Bharati

that the marriage has broken down irretrievably.

—The petitioner will have to prove that the two parties to the marriage have lived apart for a continuous period of three years or more, immediately preceding the presentation of the petition.

—The court will grant a divorce on this ground, unless there is other evidence to show that the marriage has not broken down irretrievably.

—If, during the period of three years, the parties stayed together for one period of less than three months’ duration, this shall not be seen as a break in the separation.

—If the husband and wife are living in the same household, they shall be considered to be living together.

—**In cases where the husband sues for divorce on this ground, the wife can oppose the divorce on the ground that divorce would cause grave financial hardship to her, and that it would, in all the circumstances, be wrong to dissolve the marriage. If the evidence shows that this is in fact the case, the court shall dismiss the petition. Or the court may stay the proceedings until satisfactory arrangements have been made to eliminate the hardship.**

—**The court will not grant a divorce unless it is satisfied that adequate provision has been made for the maintenance of all minor children born of the marriage, unmarried or widowed daughters who have not the means to support themselves, and children who,**

because of special conditions of physical or mental health, need looking after, and have not the financial resources to support themselves.

Why The Bill Was Introduced

In cases where parties are unable to live together, and both want a divorce, they can, under the existing law, get a divorce by mutual consent. However, in cases where parties are unable to live together, have not been living together for years, but only one party wants a divorce, and the other refuses to go in for a divorce by mutual consent, the party wanting divorce may be unable to get it on any other ground under existing law because: 1. he or she may not be able to prove that the other party has been guilty of adultery, desertion, cruelty or any other fault; 2. she or he may not wish to publicly state in court all the private matters of matrimonial life.

There have been cases where though husband and wife had not been living together for years, yet when one party sued for divorce, the court was unable to grant it since there was not enough evidence to prove cruelty, desertion or adultery. In one such case, *Ram Kali vs. GopalDas*, 1971, ILR, 1 Delhi 10, the full bench of Delhi High Court observed: “It would not be a practical and realistic approach, indeed it would be unreasonable and inhuman, to compel the parties to keep up the facade of marriage, even though the rift between them is complete and there are no prospects of their ever living together as husband and wife.”

This bill assumes that divorce can take place on the factual ground of a marriage having completely broken down, rather than on the ground of one party having been at fault.

Many women's organizations in Delhi have opposed the bill. Some of them had supported the introduction of the concept of divorce in the fifties, but are now opposing what seems a logical extension of divorce law. There are also several women who feel the bill is a step forward for women. We present here extracts from interviews, some of them translated from Hindi.

Chandermani Chopra (supreme court advocate)

"...All other grounds of divorce are based on the matrimonial offence theory. A party has to make allegations against the other party...Hatred begets hatred. If you are forced to come out with allegations, it will inspire more hatred between spouses, which is also bad for the children. The fact of the matter is they can't live together. And I assure you, once someone comes to the conclusion that he or she can't live together with the other person, no amount of sanctity of law can compel them to live together...

If one spouse just wants to be vindictive and says: 'I will not extend cooperation, I will spoil your life' the other spouse is helpless. In such a situation, the court can independently come to the conclusion that the parties have lived apart for three years and their marriage has irretrievably broken down...

The person who files a divorce petition on the ground of irretrievable breakdown will have to prove only that they have lived apart for three years or more. This petition will then be served on the other party (the other party will be informed in writing). If the other party does not contest it, it will go through as a divorce. But if the other party wants to contest it, he or she can do so. He or she can cite circumstances or facts to show that even though there is evidence of their having stayed apart for three years, the marriage has not in fact broken down. They are living apart for other justifiable reasons... So if the husband is



Chandermani Chopra

living away from the wife as a family arrangement, but then he gets a fancy to another woman in town, and wants to get rid of his wife, his petition will be served on the wife. She can say the marriage subsists, here are our children, during this period I conceived, these are the family functions he attended, here is our correspondence, and so on. She can bring all this in evidence to show that he is only exploiting the provision...

My feeling is that it is a very superficial reading of the bill which leads people to think it can be misused against a woman. I feel it gives sufficient protection to a woman. She can resist the divorce on the ground of financial hardship caused to her.

I certainly feel that to prevent the provision being exploited, better financial security should be given to women... I have suggested to the joint committee the following changes in the bill:

1. When the wife applies for divorce, the provision should stand as it is. But when the husband applies for divorce, his application should be accompanied by a deposit for maintenance of wife and children for six months, at the rate of two thirds of his total income if there are dependent children, and one third of his income if there are no children. No

application for divorce from a man should be accepted without this deposit.

2. He should also have to give security for the future monthly maintenance of wife and children, at the same rate. The security should be in the form of property which cannot be transferred or sold unless the liability is met. The court can refuse to give divorce unless there is sufficient security.

3. This procedure of depositing maintenance in advance should be adopted in all divorce cases, even when the ground of divorce is other than irretrievable breakdown.

4. Simultaneously, a notice should go to the wife, informing her of the income which her husband discloses. Suppose he says his income is Rs 2,000 but in fact it is Rs 5,000. The wife should have the right to produce evidence to show the actual income, and get the rate of maintenance revised accordingly. I suggest that income tax returns should not be considered as evidence at all, because of the tax evasion that is rampant. She should be able to give evidence of the way they have been living...

I think the provision will help both men and women. It is not men alone who seek divorce. Women sometimes may be more keen to have divorce to get out of an oppressive life... It is extremely unhealthy and unfair to think of woman as an object of pity, and a weakling who is to ever remain dependent on men... The only method of helping a woman is to inculcate a sense of self-respect, pride and confidence in herself, and not to look to marriage as a fortress of financial and social security. Woman should not be persuaded and compelled to live in a marriage where she is not needed any more. Many times, she overlooks all acts of cruelty and oppression by her husband because she finds the relationship so indispensable... Where the matrimonial tie has come to an end in reality, it is useless to maintain the structure... It is better that it ends, not in an acrimonious atmosphere but that the spouses are encouraged to part as friends...

I once handled a case in which the marriage had broken down because the husband had maltreated the wife. She was living away from him for many years, and was financially well off. In the meantime she got affection from another man...But when she sought divorce on grounds of cruelty, she was accused of wanting to leave her husband because he was near retirement, and because she was interested in another man. Whereas the truth was that the marriage had broken much before she had met the other man. So the divorce was not granted and she could not marry the second man, even though she is not living with her husband ...

I attended a meeting in which several women's organizations were present. I was the sole voice supporting the amendment. Finally, I said : 'All right, at least don't oppose the amendment for all times to come. Say you oppose it for the time being.' ...

It is being opposed in the name of rural women. But these women have not been asked how they feel about it. Most of them participate in production and look after their interests much better. If they want to leave a man, they do so, without going to court...

I can't say whether more men or more women seek divorce. But by and large, it is an assertion of individuality by the woman which becomes the cause of



Vimla Farooqui

divorce... I feel that instead of opposing the amendment, women's organizations should use this opportunity to demand that the maintenance laws be improved..."

Vimla Farooqui (National Federation Of Indian Women)

"...In this country, where the majority of women are helpless, illiterate and economically dependent, if divorce becomes easier, it will harm women. Men will gain, not women. We have to start from the premise that in this country the majority of women are helpless. We should not allow any further opportunity for them to be exploited..."

The government has made so many laws but to implement them, for example, to get alimony consistently, is an impossible task. No review has yet been made of the existing laws. In such a situation, why introduce a new law ?...

The bill provides that the man will have to give alimony. But money is not enough for a woman. She needs security. The common woman wants a husband. It is unfortunate, but she does want a house and she wants a man in the house. A rich man may get a divorce under this bill, may go on giving his wife money, but then he may remarry. This will cause a lot of misery. The worst suffering of this kind is among the lower middle class, urban and rural, and among the peasantry...

Women don't want to leave men. But men want to leave their wives. In this situation, we don't think divorce should be made easy. At the NFIW council in Bombay, we discussed the bill. Delegates from all the states in India were present and not one of them was in favour of the bill. When a woman comes to us and says her husband is illtreating her, we try not to move for divorce first. We first sue for alimony and return of dowry. That affects the men badly. Many of them come and take their wives back. And in many cases, when the man wants to remarry, he has no ground for divorce under the existing law, so he is compelled to have a reconciliation with his wife..."

Indira Jaisingh (supreme court advocate)

"...Those who criticize the bill

underestimate the importance of the word 'irretrievable.' People say that this law will make it very easy for a man or a woman to get a divorce. But this is not true.

Under this amendment, living apart for three years is considered to be breakdown of marriage. I think this is very logical because if a man and a woman have lived apart for three years, it is obvious the marriage has broken down, whatever be the reasons—whether it is a mother-in-law or it is dowry, or sexual incompatibility or a man trying to oppress a woman.



Indira Jaisingh

Secondly, the judge trying the case has to come to the conclusion that the breakdown is irretrievable. Just as at present, even though a woman may present evidence of cruelty, but the judge may conclude that there is no cruelty because this kind of thing is normal in every family, so also it is for the judge to decide whether the breakdown is retrievable or irretrievable. Our law operates on the assumption that marriages should not be easily broken...So under this amendment, it will be necessary to show that the living apart has been due to a desire on the part of at least one spouse to live apart...She or he has come to the conclusion that this is a relationship which does not work out for her or him...Irretrievable breakdown is more than physical separation. It means something is drastically wrong, but it is

not necessarily adultery or cruelty. It could be that two people have such different views of life that it is impossible for them to live together...

I would dispute very strongly the view that women always want to cling on to marriage while men want to make fresh alliances. In India, a woman is often forced into marriage when very young. Even those opposing the bill would not dispute that this is the commonest form of marriage. When such a woman matures, she should have the option to get out of the marriage...

The bill is called "premature" on the ground that in India it is respectable for a woman to be married so women want to be married, and we should not impose our forward looking views on the supposedly 'backward' majority of women. However, I think it is the role of the women's movement to take women forward, not keep them where they are. If it is a fact that women derive their status from being married, there is no reason why we should perpetuate this state of affairs...

I don't think any law can be judged on the basis of numbers. Any progressive idea necessarily begins with a minority. It was so even with the struggle for national independence. The bill has to be judged on its own merits. The point is: do we wish to carry a message of hope for more and more women or do we want to keep them dependent for their status on marriage?

Let us separate the issues. I can see that there is likely to be an economic problem—no man should be permitted to saddle a woman with children, and then walk out. **But we should demand that the procedure be different for a man and a woman. When a man sues for divorce, he must first prove that he has made adequate financial provision for his wife and children. Only after this will he be permitted to prove irretrievable breakdown.** Beyond this, I do not see what can be expected from a man. Can the law provide anyone with emotional or psychological security? Also, is it right for the women's movement to encourage psychological

and emotional dependence of women on men?...We should encourage a woman to believe that the possibility of life without a man exists, and there is nothing wrong in living without a man, regardless of what society may say...

It is an absolutely misleading myth to say that 90 per cent of women will not benefit from the bill. How many of this 90 per cent have ever heard of the court? I would say that 90 per cent of the 90 per cent don't bother to come to court for divorce. If they want to leave their husbands, they just leave them. There are whole sections of Indian society where the concept of court divorce is unknown. So just because there may be a small section of people who think that to be abandoned by a husband is the end of the world, should we perpetuate a backward looking value?

This whole controversy is only about those who are propertied. Those who are opposing the bill say that a man will throw his wife on the street. They mean that the woman will be left without property...

I feel this amendment is necessary because a man or a woman may unreasonably withhold consent, even though the marriage has totally broken down. I don't believe in supporting a woman or a man who refuses to give a divorce, just out of vindictiveness...

I have a criticism of the bill. It says that living in the same household will not be treated as living separately. But very often it may not be possible for a woman to leave the house. So even if they are living in the same house, they should be treated as living apart, if they have not been cohabiting for three years. The bill should also provide that maintenance should be directly deductible from the man's salary in all cases of divorce. At present, the woman has to first prove that the man is not paying the alimony and the court may then order it to be deducted from his salary...

The whole history of Hindu law has been a history of greater and greater liberalization and secularization, moving towards the concept of marriage as a contract entered into for the happiness

of both parties, rather than a sacrament, as it was in the old religious law...

I think the women's movement should utilize this opportunity firstly, to start discussion on the need for a common secular law for all sections of Indian society, and secondly, to think about how such a law could be framed so as really and truly to safeguard the interests of all women, not just Hindu women..."

Lotika Sarkar (professor, faculty of law, Delhi University)

"The first point I want to make clear is that I am not against liberalization of the divorce law. But the question is: are we ready for this kind of liberalization,



Lotika Sarkar

without the supporting machinery? The machinery needed is a family court...

Our women are economically dependent, illiterate. Their husbands migrate to towns. One fine morning, such a woman will get a letter saying that a divorce suit is pending against her because they have not lived together for three years. The bill allows a period of upto three months in between the period of three years. So the man may have gone home, lived with his wife, she may even have got pregnant, and then she suddenly wakes up to find he wants to divorce her. She does not know her rights, there is no legal aid available...

We have had maintenance laws for a

long time and we know that courts are unable to implement them. So how will they be able to ensure financial security to the woman in this case? Secondly, if the woman is in the village, looking after livestock or land, the court may decide she can look after herself, and inform her that she is divorced...

I feel very strongly that it is not enough to take only financial hardship into account. This means we are allowing a man to marry and then walk out and remarry in a most irresponsible fashion. This bill will just provide a unilateral right of divorce to men. What we are opposing in Muslim law will come into Hindu Marriage Act and Special Marriage Act. In Muslim law, the man has to say *talak talak*, here he will have to stay away for a couple of years...

I don't understand how women are going to live away from their husbands for three years. Where will they get support from? If they are living in the same house, that will not be regarded as a broken marriage...

When you get to the stage where you can really make a woman feel that she doesn't need the social status of being a wife, then I'll be with you. But at the moment, when a woman is divorced, where does she go, what does she do? As long as she is a wife, she is entitled to a certain amount of protection from her husband...

I feel family courts should be established where the two parties will not operate as adversaries, with the husband's lawyer cross-examining and bewildering the woman, but rather where there are means of finding out the actual state of affairs. The court will hear the report of the social worker about the background of the case, and then arrive at a decision keeping in mind the interest of the family. In such an atmosphere, a woman will be able to explain that the marriage has not irretrievably broken down. But this is not possible for her in the present system...

For many years, we have been asking for the introduction of family courts and matrimonial property (all property acquired after marriage to be equally divided between husband and wife in

case of a divorce, as recognition that the woman's contribution to the household is equally important). Nothing has been done about these provisions. Why then introduce this new law without those safeguards ?

It is true that the 1971 census showed more bigamous marriages among Hindu men than even Muslims but at present if the man marries again, he often has to leave the place where the first wife lives, and go elsewhere. There was one famous case where a man went abroad and sent a divorce notice to the wife. But she challenged the divorce, and also claimed alimony. We in India don't recognize



Pramila Dandavate

divorce on grounds of incompatibility so that man can't come back to India with his American wife. He can live in America with her but can't come back here...

I think this law will help a middle class woman whose husband is just being mean and refusing to give divorce even though they have lived apart for years. But it will not help a large number of women who are economically dependent and probably do not know what the law is...

It has been suggested that as a safeguard we start by giving the right of divorce on the ground of irretrievable breakdown only to the woman. I am absolutely certain the court will strike this down as being discriminatory..."

Pramila Dandavate (Mahila Dakshata

Samiti, and member, Lok Sabha)

"I definitely believe that when women got the right to divorce in 1954, it was a step forward for them. I can understand why this bill is being introduced—to prevent the washing of dirty linen in public..."

But today in our country the majority of women are not economically independent. Even today, in our society, women's mental condition is such that they feel it is the ultimate aim of their life to be married. It is an unfortunate fact that a woman is respected in our society only if she is married. If she is unmarried, widowed or divorced, she is treated very badly. Because of these conditions, she wishes to stay married. No matter what kind of a husband she has, she is at least entitled to put *sindur* in her hair, and bangles on her wrists, in his name. She thinks this is a means for her security ...

I don't think this bill can be introduced in the near future, in a country where 76 per cent of women are illiterate, and there are no avenues of employment even for qualified women... In our country, there are double standards of morality. A man can sleep with 100 women, but if anything goes wrong with a woman, even if she is raped, she becomes an outcast. As long as society has these attitudes, she needs a man. That is the protection she has. Whatever happens to her, at least she is married. When we are able to create a different feeling not only in the minds of women, but also in the society, in the minds of men, then she will be able to stay alone...

Why are women afraid ? Why do they wear *mangalsutra* ? You read the lives of women who have worked in society. They believe that the *mangalsutra* is a sign of discrimination against women. Yet they feel when they move about, it provides a kind of protection for them. When a woman is wearing it, no man can look at her because she is considered to be the property of a man. We want to change this situation, but a few women like you and I can't change conditions for millions of women in our country...

In large parts of the country, where the literacy rate is very low, men marry

young and later come to the city...Such a man sees posters of Hema Malini, he sees city girls going around wearing lipstick and rouge, and he thinks he can no longer live with his wife. This is not an excuse on his part, it is the truth for him. So he will say in court that he can no longer live with this illiterate woman, he wants to get out of the marriage.

In our country, educated and uneducated women are equally ignorant of their legal rights. Before bringing any new law, the government should first review what has been the effect on women's lives of the laws which already exist for the protection of women. I feel most social legislation, like laws against child marriage and dowry, has been totally ineffective... In fact, even under the provision for divorce by mutual consent, a woman can be forced into giving her consent...Sometimes a woman may not even know what she is signing.

Secondly, before making such a law, the government should constitute family courts where the man and woman can both present their problems in a family atmosphere... Every effort should be made to effect a reconciliation and see that the woman is settled. There should also be special cells for employment of deserted and widowed women...

This bill gives the woman the authority to contest a divorce on the ground of financial hardship caused to her. But this makes the law meaningless. This law gives with one hand what it takes away with the other...

I think this provision might help a few women. Suppose a girl of 25 feels she can't stay with the man she has married but he refuses to give her a divorce by mutual consent. The court proceedings take so long that by the time she gets a divorce she may be 35 years old, and there will be no chance for her to marry again. Such women can get divorced under this provision and immediately get married again. But such women are very few in number...

Until there are legal and institutional arrangements to prevent a woman's life from being ruined, this law should not be passed. It will only give a handle to men to exploit women. The time is not

ripe for this law...

So we have held meetings and passed resolutions opposing the bill..."

Shyamala Pappu (supreme court advocate)

"To my mind, the enlargement of the



Shyamala Pappu

grounds for divorce has always proved to be a beneficent legislation for women. Earlier, when divorce by mutual consent was sought to be introduced, there was a lot of hullabaloo, saying women would be forced to give consent. But experience has proved that this provision has helped many women who did not want to wash dirty linen in public. ...

Let us first of all see what is happening today. Today, a man who wants to discard his wife, becomes a Muslim. Very easy. He then marries again and settles down beautifully. The only difference is that the first wife still remains a spouse in the meaning of the law, and she is an heir to his property. So he then makes a will, distributing his property as he likes... On the other hand, I know of many women who have not been living with their husbands for 10, 12, and in one case, 20 years. But the husbands refuse to give divorce. A man can become a Muslim and marry again. But what can a woman do? She has to just wait, she is helpless...

When we say a law is going to harm women, we should first look at existing conditions. Law or no law, those who have power, who have money power, will do what they want. Without this law,

they become Muslims and carry on. Without this law, filmstars openly remarry, pay off the first wife, and become heroes overnight. So how can one say this law is going to harm women?

As for the large majority, the working classes, where the man and the woman are both wage earners, they have their own ways of getting divorced. There is no property or maintenance involved, they sit before the panchayat and dissolve the marriage. That form of divorce is recognized by the Hindu Marriage Act. They have no time to come to court, file petitions, and lose their wage. It is very good that they deal with their matrimonial matters in their own way. If we drive them to making divorce petitions it will be a disaster.

But even if 90 per cent of women are dependent, why deny this right to the one per cent of independent, earning women? If we have a policy to stand for the rights of women, we should stand even for the rights of the one per cent...

The economically independent spouse will do what he or she wishes to do and the other person will be at the receiving end. At the moment, women are at the receiving end. She is in no position to say whether the marriage should end or not. If the husband says cook, she cooks, if he says get out, she gets out. There is a famous lawyer who keeps his mistress in the same house with his wife and children, but his wife is forbidden to step into the room where the mistress stays. To my mind it would be far more respectable for a divorce to take place and proper maintenance to be paid to the wife, rather than she going through such humiliation though having the status of a wife...

The position I am taking before the joint committee is that to avoid a situation where women may be made victims, this clause, like so many existing clauses, should be made available only to women. Instead of opposing the bill and losing a ground which may benefit many women, why not confine it to women? It won't be discriminatory. There are other grounds of divorce such as rape, bestiality and

sodomy, which are available only to women. This bill too safeguards only women on the ground of financial hardship. How is that not discriminatory? ...

As for an ex-parte decision taking place against the woman, that can happen even now. If a man files a suit for divorce on the ground of adultery or desertion, and she, being illiterate, puts her thumbprint on the court notice and goes back to her work, there can be a decision against her in her absence. So this danger is not confined to this bill...

I fully agree that family courts and matrimonial property are vitally necessary. But merely because these have not been included in the present bill, it does not mean we should oppose this bill. Progress is made inch by inch. The Hindu code bill originally included all the clauses on marriage, divorce, succession, minority, guardianship, adoption and maintenance. Every time it came to parliament, it would fall through because different people would oppose different clauses. Then they divided it into four bills and all of them got passed. By destroying this bill, we are not going to promote the other proposals. We should take a positive approach to this bill and then agitate for those provisions also, one by one..."

The Pros And Cons

The arguments against the bill may be summed up as follows :

1. *The majority of women do not want divorce. But the majority of men are eager to get rid of their wives. Therefore this law will lead to the majority of women being abandoned and left destitute since they are ignorant and financially dependent on men. The bill will benefit only a minority of educated, professional women.*

When discussing the application of any civil law (marriage, family, inheritance, property, contract law) we are speaking essentially of the propertied sections of the population who, in our country, are in a numerical minority. So we are speaking of benefit or harm to that minority of women who have recourse to the law. It is perhaps

unfortunate but nevertheless true that the vast majority of poor and labouring people do not have recourse to the law because (a) they do not have the money and time to afford prolonged litigation; (b) they settle their matrimonial disputes within the community, by sitting before the caste tribunal and/or by customary forms of divorce which are recognized in law as legal divorces.

The second assumption that the majority of men are eager for easy divorce is doubtful since for most men marriage does not mean the same kind of loss of freedom as it does for most women. Men can combine the advantage of having an unpaid domestic worker who will provide them with legitimate heirs, with the freedom to have extra-marital affairs, keep mistresses, visit brothels. In this situation, there is no reason to believe that if divorce laws are liberalized, most men will rush to the courts.

We need to find out whether, at present, more men or more women sue for divorce. Even if the proportion of women is less than that of men, this is likely to be because, under existing law, it is much more difficult for a woman to obtain divorce than it is for a man. Since the experience of marriage tends to be much more oppressive for most women, there is good reason to believe that many more women would consider the option of getting out of a humiliating marriage, if the process of divorce were not equally humiliating, as it is at present.

At present, those men who wish to abandon their wives, or to stay with them but not contribute financially to the household, are doing so. In fact, the 1971 census showed that bigamous marriages were 5.8 per cent among Hindu men and 5.7 per cent among Muslims even though Muslim law permits bigamy and Hindu law forbids it!

If men, at present, do not leave their wives only from fear of the law, how is it that they openly violate laws against bigamy, desertion, adultery, prostitution?

On the other hand, if it is a fact that the mere introduction of this provision would lead to a majority of men seeking

divorce, are the opponents of the bill saying that a majority of marriages in this country have in fact broken down? And only the absence of a law is keeping these marriages together? In which case, what kind of treatment must women be suffering in those broken down marriages? Do we want women to cling helplessly to men who wish to get rid of them? Would it not be more dignified for women to be provided for outside such marriages?

2. *Even when courts order payment of maintenance, men often default. So under this provision, if the court arranges for the woman's financial security it is unlikely that the man will obey the order or the court will be able to enforce it.*

It is true that maintenance is usually not paid by men. But this is true in all divorce cases and therefore it is no reason to oppose this particular form of divorce. It would be equally possible to oppose divorce itself on this ground.

In fact, the irretrievable breakdown clause is the first ever clause which links the question of maintenance with divorce. For example, if a man sues his wife for divorce on grounds of adultery, desertion, insanity, or leprosy, she does not have the right to oppose the divorce on the ground that it will cause financial hardship to her. And if, as in most cases, the man is financially better off and able to hire a better lawyer, it is easier for him to win the divorce case. She then has to separately file a suit for maintenance—and this is at her expense. This bill for the first time gives a woman the right to get her financial security looked after, as part of the divorce case itself. This is an improvement on existing divorce law.

On the other hand, the bill fails to clarify what kind of financial security should be ensured to the woman. Instead of opposing the bill, this is an opportunity for us to demand alteration in maintenance law as applicable to all cases of divorce and separation, so as to adequately protect women. By opposing the bill outright, we will in no way improve existing maintenance law.

3. *There is a likelihood of an ex-parte*

decision against the woman, if a man files for divorce on the ground of irretrievable breakdown, and she is unable to come to court to contest it.

If illiteracy, poverty or other circumstances prevent a woman from going to court, with the result that a decision is taken against her will and in her absence, this possibility exists in any divorce suit. The husband can accuse her of adultery or insanity, and if she is unable to contest it, can get a favourable decision. We should try to think of ways to protect women from this danger, in all cases. But since this is in no way a peculiar danger of this bill, it is no reason to oppose it.

4. *Society does not accept a divorced woman therefore divorce should not be made easier.*

This argument, if logically applied, would mean that divorce should not be permitted on any grounds whatsoever. This would mean that we return to the idea of marriage as a lifetime binding sacrament, as under ancient Hindu law.

If this argument were to be followed, no progressive legislation would be possible. When women first fought for the right to higher education, opponents argued that society would not accept an educated woman and no man would want to marry her. Similar arguments were used against women's right to enter the legal and medical professions, to participate in politics.

When the Hindu marriage law giving women the right to divorce on certain grounds, and succession law giving women right to inherit property, were introduced, opponents said that society would never accept such changes. The new bill is only an extension of the same idea, namely, that if marriage is a contract for the benefit of both parties, they should have the right to terminate it when it ceases to benefit them, or becomes harmful to them.

It is ironical that some of those who in the fifties supported this concept of marriage and divorce, which underlies the Hindu Marriage Act and Special Marriage Act, are now using the same arguments against this new bill, which their opponents had used at that time, against those two acts.

THE RIDDLE OF MARRIAGE

Why does a crane stand on one leg? Because if it lifted this leg also, it would fall. Why does the burden of marriage fall only on woman? Because if she did not bear the burden, the institution of marriage would break down.

—Kamla Bhasin

5. *A woman gets protection and security from marriage. Therefore she needs the status of a wife, even if her husband is not fulfilling any of his duties.*

Reports of rape and assault do not show that the married status protects a woman from attack by other men. In fact, the presence of a father or husband rarely acts as a deterrent, whether in situations of mass rape by landlords and employers, or by criminals in urban areas. Married women are as often victims of abduction, kidnapping, prostitution rackets.

Secondly, in today's situation when more and more cases are coming to light of brutal violence being perpetrated on women by their own husbands and in-laws, it would appear that marriage does not provide all the protection and security a woman may need.

Liberalization For Women

At present, women who want divorce are in a more difficult position than men who want divorce. Firstly, men have more legal and social options available to them. A man can convert to Islam and then divorce his wife by saying *talak talak*, or he can marry again since as a Muslim he is permitted to have four wives. But women do not gain any such option by changing their religion.

Secondly, women face much more social and familial pressure not to seek divorce. Men's families are more likely to support them in a decision to seek divorce than are women's families.

Thirdly, since most families are patrilocal, that is, the wife shifts to her husband's home after marriage, and is isolated from her family while he has the constant support of his family, in case of a dispute it is likely that she will leave the house, not he. By leaving the house,

she loses access to much of the evidence which can be used in a divorce suit, such as correspondence, documents (which may be in his custody), articles of dowry and above all, witnesses. The witnesses of cruelty by husband to wife are likely to be his family members, relatives, neighbours, friends, and they are more likely to act as witnesses for him. So it will be easier for a man to bring evidence and witnesses to prove a case of cruelty or desertion against the wife, and more difficult for her to prove such charges against him.

The irretrievable breakdown clause will enable the wife to get a divorce just by staying away for three years. It will be easier for her to prove this than to prove charges against her husband.

In these circumstances, and considering the likelihood that men may try to misuse the new provision, it is reasonable to demand that divorce law be liberalized more for women than for men. The constitution permits such protection and favourable discrimination for women. **The bill is at present under consideration by a joint committee. Individuals and organizations can send their recommendations to the committee.**

These are some possible amendments which would protect women:

1. If a man files for divorce on any ground it shall be compulsory for him to make a deposit amounting to two thirds of his income if there are children, and one third if there are none, for six months' maintenance of wife and children, and also to provide security for their future maintenance at the same rate.

2. When a woman files for divorce on the ground of irretrievable breakdown of marriage, "living separately" shall be defined as "not cohabiting", that is, not living together as husband and wife, even though they may be living in the same household. This is because a woman may not have the means to live separately even though the marriage has broken down, but by filing for divorce and claiming maintenance, she may obtain the means to live separately.

3. The three years' separation period should be continuous without any break whatsoever. □