

CHAPTER - IX

SUMMARY AND CONCLUSION

The focus of this present study has been to understand the trends in divorce litigation and the decision making process, the socio-legal problems which have arisen as a result of the existing laws of divorce under the Hindu Marriage Act, 1955. Clearly, the thrust of the study is both on the social and legal aspects. Altogether 1346 cases including 71 divorcees personally interviewed with a structured questionnaire have been discussed in this thesis. Cases were collected for the period of 1914 to 1990 from All India Reporter alone. These cases were analysed and discussed at different stages. The total number of cases for divorce alone during this period were about 352, those that were collected from Darjeeling District Court were about 268 cases. There were about 260 maintenance cases between 1914 and 1990, about 158 cases were collected from the S.D.J.M. Court at Siliguri. About 236 cases were used as substantive reference.

The study, however, cannot be treated as exhaustive because for a single case that has been reported there are thousands of unreported ones. Besides, as already pointed out, cases from a single journal alone has been used. Such a study obviously needs an approach which pays due attention to the variegated social, socio-legal conditions not only in Siliguri sub-divisional town but all over India.

A summary of the finding is made here on each major aspect of the study discussed in the preceding chapters. In order to duly emphasise each findings and submissions, some repetition of the points already made in previous chapters could not be avoided .

Hindus of long ago called it Dharmasastra and the modern Hindu refers to it as law. In both cases, reference is made to a whole range of rules, regulations, policies and norms which are used to regulate human behaviour in society and thereby the society itself. Marriage laws are a part of such core group of laws. It is the core because marriage is the first stone laid upon the foundation that built the society. It is here that the oft repeated statement - law is made for society and not society for law finds relevance.

Period 1914-1954: Hindus in the ancient times believed in the sacramental sanctity of marriage so firmly that they adhered to indissolubility of marriage. This led to casuistry and oppression of women. That this social rigidity has led to a spontaneous unplanned social change is quite clear during the period of 1914 to 1954. There were divorce cases based on customs and others on grounds like adultery. In the beginning from 1914 to 1933, in most of the cases divorce was denied. However, from 1934 onwards a clear shift towards granting of divorce was observed. Though the number of male appellants were found to be high, at the beginning most of the decision went in favour of men, but gradually, women began to dominate the scene.

The reason why the ground of cruelty did not gain popularity during this period was chiefly because however cruel their treatment, women did not feel sufficiently that cruelty was perpetrated against them or better perhaps some amount of cruelty was treated as normal in conjugal relationship. There was a general acceptance that it was the natural fate of their lot.

Period 1955-1990: It is a general belief that in the legal world, it is very difficult to get more than one person to agree on a single thing. There is, however, one thing on which lawyers, judges, law teachers and law researchers agree upon is the fact that there is a steady and devastating rise in the number of divorce cases over the last few decades. Every half decade, every decade, have registered a steady rise in the number of cases especially after 1976.

The most popular ground used to file divorce suits were the ground of cruelty, followed by adultery and desertion in that order. In all the three cases it was found that there was rise in the number of cases after 1976.

This is significant. After the passing of the Act in 1955, the grounds of the divorce were relatively more restricted than they are today. Having universalised what was already prevalent among certain classes of Hindus, the law makers rested without paying much attention to the nitty-gritty details of each provision. During the intervening period between 1955 to 1976 a few events occurred simultaneously, (1) Divorce was no longer an Arabian Knights tale for the Indian woman, it was beginning

to be a reality of her life. (2) The efforts at generating awareness of rights and liberty paid off as women started to develop a consciousness about them. (3) The technological, economic and sociological changes began to have an effect on almost every ones life. As a result there was an urgent need to broaden and liberalise the grounds of divorce. The much needed changes to the Act occurred through the amendment of 1976. The amendment of 1976 had the offset of liberalising the provision of divorce. The increase in the number of cases in the post 1976 period, therefore, is not very surprising.

Detailed zonal study revealed that with very few exceptions like Himachal Pradesh, Goa, Manipur etc. the adjacent states have a similar cultural fabric. However, the state of Punjab and Haryana and Delhi respectively recorded the maximum number of cases.

There was a marginal difference between male and female appellants with men leading the score. In most of the decisions divorce had been decreed and those decisions had gone in favour of women. This is a complex situation. A look into the situation shows that, prima facie, the men were against the divorce decreed by the lower court and decided to seek the help of the upper forum in order to preserve their marriages, which even the upper forum had turned down.

The reality, however, is much different. Our divorce law is based upon the fault theory. The litigating spouses are required to establish the "guilt" of the other spouse before the court. So when a court decrees divorce against the claim of the man it means that the man is "guilty" of a marital offence. It is this

stigma of "guilt" the man fights against and appeals to the upper forum and not for preserving his marriage.

There is more irony involved here. Ever since 1976 amendment, the ground of cruelty has gained unprecedented popularity, due to the fact that, now anything can be termed a cruelty and is relatively easy to prove. So it has been found that men preferred the ground of cruelty as against any other ground of divorce. The irony lies in the fact that when the whole world is concerned with cruelty and crime against women and their diminishing number, it is "cruelty", on which most of the divorce is sought by men. Woman on the contrary preferred the ground of adultery and desertion, which cannot be alleged lightly and is difficult to prove. Yet, the fact is that women have still opted for them.

Calcutta High Court (1955-1990); The Calcutta High Court in the state of West Bengal presented no specific diversion from what was observed as a nation-wide trend during the 1955 to 1990 period. A slight deviation was noticed regarding the grounds used to obtain divorce. While in the former case the ground of desertion was in the third place, it was placed in the second position in the latter case. As discussed earlier the reason for this is partly geographic and partly Bengal's cultural history. Many districts of West Bengal are adjoining the Bangladesh border and illegal immigration and marital offences are common. Bengal is well known for its social custom of Kulinism. The system which is essentially based on desertion, may be still embedded in Bengal's subconscious mind.

Darjeeling District Court 1984-1990: It is difficult to get data for more than five to six years in any district court. Usually such data are classified documents and so the work had to be started with the permission of the High Court, which was done. The picture at the district level was essentially similar with those at the state or national level with some small diversions.

The rising trend continued unhindered, rather encouraged by the swift social changes. The ground of cruelty continued with its popularity. Desertion, in a similar situation at the state level and continued to occupy the second position, while adultery took the back seat.

Women were seen to be alleging cruelty more frequently than the men did. This was a direct digression from the fingering at the state and national level. The ground of adultery and desertion were less frequently used by them. The number of male petitioners were also quite large and obviously more than female petitioners. Most of decisions favoured men, and in most of the cases divorce was decreed.

The sub-divisional scenario: When the tragedies of personal life is taken before the court, the tragedies become case numbers. This has an effect of depersonalising the event. The human factor, its feelings of pathos, pain and pleasure find no recognition there. These then retreat themselves beyond a veil which separates the man from the man made court. Even if law can get embroiled in the niceties of technicality, human emotions do not. A socio-legal study therefore has to look beyond this separating veil. This

part of the study was undertaken to look beyond the court room and into human problems. Law does not take into account the minute social and cultural factors even though it is meant for all. For this reason, in order to understand the social realities, this part of the work was undertaken.

Most of the cases were filed from the social groups which were of low education and very high education group; very low income group and very high income group. Always the lower strata was followed by the upper strata. The middle group registered a relatively less number of cases.

It appears that the social misfortune of the lower class regarding their education, occupation and income has consigned them to an eternally vicious circle where low education leads to inferior occupation and hence a small salary, which in turn again affords low education and so forth. Among this group of people, frustration of life leads to cruel behaviour relating to body and mind, adultery is a recreation and desertion is the escape. So cases of separation and divorce is high among them. Among the higher class too much of everything leads to divorce. High degree of social exposure, more than sufficient money and bookish knowledge confuses them. They have an exaggerated sense of personal rights and liberty, they lack spousal companionship as each spouse is engaged in social pursuits of their own. Since money is not a problem, the cause of tension is its preservation. This loneliness and insecurity is the cause of divorce among the upper social class. Predictably, it is the middle class who are still concerned with questions of social niceties, social morals, social status etc. So the rate of divorce is less in this class. The men Fridays and girl Fridays

of these classes do not have enough time for adultery or desertion, cruelty of course is another matter. Usually it is accepted as natural and often the concept remains vague.

Most of the marriages in these cases were negotiated, social and unregistered. Few marriages were courtship marriages, but are social and unregistered, and a few were registered. There are also cases where the marriage have taken place in a temple. The belief that 'love marriages' are unstable is not borne out by this study. Those marriages which are social and unregistered sometimes run the risk of being invalid. Such institutions pose extreme difficulties as the woman is required to prove the validity of her marriage. Where she fails to do so, she is invariably left in a lurch. She loses the status of the wife on account of her marriage being null and void. She also cannot claim maintenance under Section 125 Cr. P.C. as she is not a wife. Law may be justified in asking the woman to prove the validity of her marriage, but law does not take into account the effect of doing so, namely, providing an escape route for men and social jeopardy for the woman.

Cruelty occupied the first place even at the grassroot level. Adultery was followed by desertion. Most of the women in the sample were educationally, occupationally and financially backward and in most of the cases their marriage was terminated on the ground of cruelty.

Adultery were high among the highly educated, financially better off and occupationally well placed people. Probably it was their social set up and exposure which resulted in this situation.

The middle class was found to be more susceptible to the temptations of desertion. This may be because this group has higher social ambitions and desires, and whenever they feel that the marriage is holding them back from achieving them, they opt for the shortest and the simplest route, desertion.

A surprising fact that surfaced showed that the idea of divorce in most cases was first mooted by the husband, in quite a few cases by the wife and in some cases the in laws. However, in large majority of cases it was found that it was the husband who had petitioned for divorce. In cases where the idea was mooted by the in laws, often the divorce suit was presented on mutual consent.

It is worth noting here that compared to men very few women were employed in any of the four levels of analysis. It has also been found at the sub-divisional level that the women who were educationally backward, had very poor employment range and earned relatively less than men.

In other words, even amongst the oppressed group, the women form an oppressed class by themselves. Socio-economic independence of women continues to be the goal which is yet to be achieved. Why do Indian women suffer? The answer is simple and obvious. It is a suffering brought about by fear. A suffering

due to misplaced devotion, an urge to continue in and maintain a facade of successful marriage and above all to avoid a scandal. But this ensures that their suffering multiplies in number and doubles or triples in quantity. The truth is they have no other option.

Both economic considerations and sociological pressures play a major role in keeping her a passive prisoner of emotions. Traditionally she is conditioned to accept an inferior role, she is taught that it is upon the male members of the family that her bread and butter depends. It is they who give them a social status. From birth she is conditioned to see herself as a daughter, sister, wife or mother. She begins to see herself as a helpless victim unable to change the course of events.

In such cases, more than law what is needed is to bring about attitudinal changes. Society needs to be sensitised.

The sound of silence: Both at the district and sub-divisional stages, there were a few very startling revelations, (1) majority of the cases, after their institution before the court, were either kept pending or were withdrawn or were dropped for default and non prosecution. (2) In a good many number of cases, the defendant had kept absolutely quiet regarding the case. There was no response, defence or rejoinder.

In the former where the cases were discontinued on one pretext or another, it would lead one to presume that having discontinued the case, the parties would resume a life of conjugal bliss and harmony. Unfortunately that was not true as the sub-

divisional level interviews reveal. In almost all the cases the parties continued to live in a state of defacto divorce. While this puts the parties in a sort of limbo - a kind of suspended animation, the man saves a lot of money by non payment of alimony and litigation expenses. This way of life hardly affects the man either socially or emotionally, it is the woman who bears the cross of life. At the sub-divisional level all the women who were living in a state of defacto divorce continued with the social customs like wearing mangal sutra, sindoor, conch shell bangles which were ostensibly in protection of the spouse who was responsible for their sorry state. Their husbands however did not spend a farthing for them though they enjoy the benefit of the near divorce like situation. This is a situation which the provision for divorce or the case decisions do not contemplate but a look into the society brings it into sharp focus.

In the latter case as already discussed in the previous chapters, where the cases were decided ex-parte as the defendant chose silence as the only means of his or her survival, it would appear that the spouses really were beyond caring as to what happened to the marriage. The pain and the misery of the trauma was too deep for words. In some cases the defendants, mostly women also did not know that they had a right to defend themselves. Those who knew that they did have that right, did not know how to go about doing it. The silence of the spouses successfully proclaims to the masses that the marriage is irretrievably broken and is beyond repair. Such cases of course, do not go to the upper forum in appeal for obvious reasons.

The caste factor: When data relating to social and human factor becomes the subject matter of extensive analysis, it is curiosity which leads the researcher by the nose. It was one such curiosity to discover how divorce law has affected the different castes which led to finding of the caste from which maximum number of divorce had taken place. Since the reports of cases do not mention the castes of the parties unless they are relevant to the case at hand, it was not possible to analyse cases at the national level on the basis of castes. However, at the state level with the help of the book of Lokeshwar Basu and the title of the parties, discovery of their castes and an analysis thereof was possible. It was found that, of the state level maximum number of cases were reported from the Kayastha caste. This position was reiterated at the district level also. In the sub-divisional level it was the shudras followed by the kayasthas. Though it is not surprising to note a high degree of divorce among the shudras. They practised divorce even in the days of dharmasastras. What is noteworthy is that an upper caste like the Kayasthas have caught on to the idea of divorce, the brahmins however have taken a back seat to them. Incidents of de facto divorce was also found to be more from the lower castes. The study revealed that more people from the upper castes had filed a divorce suit, which was done by very few of the lower castes. This means the lower castes who practiced divorce long before the Act came into force, and also due to the heavy litigation expenses seldom came before the court. Those who did, had achieved some degree of legal literacy and enlightenment.

Age of the parties: Law requires that a Hindu girl should not be married before the age of 18 and a Hindu boy should not contemplate marriage before completing the age of 21. That this requirement is ignored in some community is an open secret. But, as days passed, men and women, especially middle class men and women, have started to marry in their late twenties and early thirties. Regarding divorce it was found that very few divorce took place in the age group below 20 years. Maximum number of divorce took place in a age group of 25 years to 35 years. The reason for this age group being so susceptible to divorce could be due to the reason that in this age group, on one hadⁿ, the people are young and temperamental, and on the other hand marital adjustment within the first 10-15 years of marriage is not reached in all cases easily. As a result, a very serious personality clash can easily take place within this age group leading to matrimonial breakdown.

Subsistence of marriage: Marriage, which brings about a complete change in ones life style, revolves around adjustment. Though divorce after one or two days of cohabitation does not give rise to any conclusive proof regarding the grounds of divorce, the first five years are very crucial. Most of the marriages tend to breakdown within first five years of marriage. As the marriage becomes older it tends to stabilise. This fact was true of all the four levels of analysis. The first five years of marriage is like sitting on nine pins - a mixture of pain and pleasure.

Children and custody: One of the requirement of law is that in a divorce petition the presence or absence of children must be specifically mentioned. In spite of it, in very few cases this fact is specifically mentioned. Again, the divorce cases do not mention anything regarding the custody of children. The mental state of the parties to the custody suit is not fully reflected in the case reports.

At the national and the state levels very few cases mentioned the presence of children and almost none regarding their custody. At the district level many cases with children were found though nothing was stated regarding their custody. At the sub-divisional level, however, it was found that majority of the people had children and in almost 88% cases the mothers were the custodian parents. The study also revealed that very few of the divorcees women who were interviewed, received any maintenance from their erstwhile spouses even though they had the custody of the children. These two facts read together reveal the extent of the burden these women carry. Added to this situation is the fact that through his guardianship rights the husband continues his hold over the woman even after divorce.

The post divorce trauma: The law as is revealed under the Act is very inadequate on post divorce problems which ranges to innumerable problems.

Once the final decree of divorce is passed, the life must begin anew, for it cannot wait for the traumatised person to put the pieces of his/her life together. One of the prime question is where to stay. It was seen that except for a lone person who stayed in a rented accommodation due to his transferable job all the men had their own residence. Majority of women were found not to be living with their natal family. Some lived in rental accommodations and in quarters provided in their place of work.

Though majority of the men and women at the sub-divisional level affirmed that remarriage should take place after divorce and that bad marriages should be put to an end, it was discovered that most of them continued to live an unmarried person's life.

The men said that they were happy leading a bachelor's life with all its incentives, and in any case they have had enough of marriage. The women actually shuddered at the thought of marriage. One bad experience was sufficient for them. Besides they realised that their marriage was not really over even though the law said so. Their husbands continued to control their lives through their children. If they developed an intimate relationship with another person, the child would be take away from her on the ground of her being of bad character. There was also a reluctance to put the child through further emotional strain. The pre-divorce tensions, the trauma of divorce and separation and the post-divorce adjustments leaves the child bruised and battered emotionally. Very few women have the heart of subjecting the child to the anguish of seeing his/her mother marry another man, and

begin the adjustments afresh.

They (the divorced persons) said that divorce is a death of a relationship and wept uncontrollably. They said that a bad marriage should end but wept for the hurt suffered. Fathers^h crave to be called by their children, mothers shed bitter tears for them all the while stating that there was nothing else to do. They felt that law cannot do justice for them, for law does not see their hurt, law does not know the turth of their lives law is without feelings.

Maintenance: Maintenance is the abandoned women's final and desperate attempt to remain in wedlock. The rising trend in such cases was evident during 1914-1954, between 1955 and 1990 and from 1984-1990 at sub-divisional level. While almost all the petitioners were women, a large majority of appellants were male. However, most of the cases were decided in favour of the females.

This is indeed an helping hand extended towards women by the judiciary while acknowledging their socio-economic vulnerability.

However, the amount of maintenance granted were very meagre. The judges are tied down by the stipulated law and also by the most elusive thing called the maintenance payers income. However, where a lumpsum payment was made, the woman was able to end a chapter, but where the payment was in instalments the avenues of litigation were left wide open. The payment invariably stops due to the default

of the paying spouse and the woman has to start litigation again. Even the lumpsum payments are determined without a set principle or norm but depends upon the man's capacity to pay.

Due to this reason, the woman who is often burdened with children is left to fend for herself as the empirical study in the town of Siliguri indicated. Since the maintenance amount is insufficient to keep her body and soul together she must look elsewhere for sustenance. The policy behind passing the maintenance laws was prevention of vagrancy and destitution by women. How far the law is successful is obvious and does not need any explanation. The women however take up alternate means of income which often includes prostitution. If she has any other form of occupation, which can be proved, then her maintenance money stops. But the former is difficult to prove and she continues to receive the payments.

The scenario, beyond doubt, is a dismal one. Though majority of the cases were decided in favour of women, and there is a judicial recognition of the plight of the women, the maintenance law has failed to give any solace to the woman.

So long as the maintenance law remains restricted by the consideration regarding the income of the husband or the upper limit of maintenance payable or the husbands' capacity to earn the situation will not change.

It is submitted that every able bodied person, irrespective of the fact whether he has an income or not should maintain his wife and child and there should be no prescribed upper limit to such maintenance payments. Wherein order to avert human tragedies sufficient maintenance payments cannot be made, in such cases there should be welfare organisations set up by the Government or otherwise, for the purpose of supplementing the maintenance allowance, supervising its expenditure and also for helping the woman to be vocationally self reliant.

The innocent third party - the child: The entire gamut of divorce laws tend to overlook the child and his interest in his parents staying together. The law relating to the custody of the child does look to the "wishes of the child" and considers "the welfare of the child to be of paramount importance". However, the legal jargons are of little help to the child. During the divorce, the child is anguished to witness its parents engage themselves in conjugal warfare. After the war has ended, the child is asked to make the most crucial and painful choice of its life, does he/she wants to live with mummy or papa? If the choice is to live with papa, the child surely misses the tenderness offered by the mother. Absence of her soft touch and cuddly confidences can leave everlasting scar on the psyche of the child. If, however, the custody goes to the mother, as it usually does, the problem multiplies. The mother cannot provide as lavishly or exorbitantly for the child as his/her father might have seen able to. In all

the decision regarding the child's future, the mother is faced with indecision and such indecision has a telling effect upon the life and mind of the child. The indecision of the mother regarding the child are due to the fact that the guardianship of the child always remains with the father. In addition, the child misses the role model of the father, a person whom he can imitate and believe to be the best in the world.

It must be noted here that the child's interest is not represented by a lawyer in the litigation between his/her parents. The child's interest must be protected in two ways. Our legal system must have a children counselling centre to help the child to the extent required to tide over the crisis of its life. There must be licenced, welltrained children lawyers who will protect the interest of the child during the litigation. Whoever gains the custody of the child must gain his/her guardianship as well. This will enable the custodian parent to take decisions regarding the child's future. That is not to suggest that the non custodian parent cannot have any contact with the child. The non-custodian parent should have the visiting rights etc. of the child. If the custody order is reversed, then both custody and the guardianship should then to the custodian parent.

At the time of divorce the child's share of the property is not divided nor considered. As a result many children get deprived of their legitimate share in the property. Thus, if at

the time of the post divorce property settlement, the child's share is also taken into consideration and his/her share of the property is kept in trust or kept in safe custody in any other manner, then at least the child's property can be protected.

Single parenting: Most custodian parents accept single parenting with a sense of guilt. This guilt arises from the fact that the custodian parent feels guilty of separating the child from the love and affection of the other parent and thereby causing mental anguish to the child. Both the child and the parent must be aided with proper counselling to accept the realities of life gracefully and without guilt.

Disposal of property: One of the problems of the aftermath of divorce is the apportionment of property. Law allows the court to take decision regarding those properties only, which were (a) presented at or about the time of marriage and (b) which belongs to the spouses jointly. The court is not prevented by law from passing any order regarding property belonging to the husband alone or wife alone.

Neither the courts, nor the law take into consideration the fact that property may be jointly and severally earned by the spouses during coverture and built up as family assets. The woman can be an active partner in such asset building process by being employed and contributing to the family coffers or they can be passive contributors doing the house hold work and saving for the family coffers. Law should take this fact into account. After divorce, the property built up during coverture should be

equally divided between the husband, wife and if necessary the children.

To help in these matters, insurance companies can come to the aid of the spouses by opening schemes like matrimonial insurance etc.

Matrimonial home: As stated earlier, one of the problems are regarding the stay of the partners after divorce. An Indian wife should have a definite say regarding matrimonial home which she builds with her husband away from her in laws. On divorce, she must have a right to stay on in the house if she so wishes. Though lately the courts have recognised and honoured the mutual interest of the spouses involved in the making of the matrimonial homes, the post divorce situation has not been debated or discussed in detail. Law is also silent on this issue. There is a scope for a lot of judicial activism in this area. Some contractual and property safeguards are to be built up in order to protect the woman so that her divorce does not send her on the streets. It is a recognised fact in all quarters that single women, especially divorced women, find it hard to obtain accommodation for themselves. Therefore if their right in the matrimonial home is protected it will help her to a great extent.

Family breakdown and alternative life styles: One of the boons of fast social life and high social ambition is the transition of the family from the joint family to the unitary family to the nucleus family and may be in future to the atomic family.

As the natural functions of the family is replaced by commercial bodies and organisations, the family finds itself with more and more leisure time at hand. The result is that, the nucleus family becomes more self centred. This self centredness leads to its alienation from its natural kinship fabric which makes the family also insecure and tense. Such self centred, tensed insecurity of the family leads to marital breakdowns. As a result of which, new generation has arisen, who have a deep ingrained fear and aversion for marriage and matrimonial obligations. They are now increasingly opting for alternative life styles like single life, commune life and just living together relationships.

Single life is more popularly being opted for by men and women alike. They feel that their independence of status and thought, freedom of social behaviour, are too precious to be compromised. The tension of adjustment with another person who is equally rigid and set in his thoughts and behaviour is not there. As a result of this life style is fast catching on. Besides being single is the "in thing" to-day, a kind of fashion envied by many. It affords a personality to the person concerned.

Community life is radically different from the accepted norms of the society. According to many it is akin to the life in the primitive social set up. Though there are a few known communes in the western world, they are not very popular either there or here in India. Moreover in India communes are associated with drug rackets, criminal and other shady activities. Needless to

state here that commune living is a direct revolt against the established social norms and ethics.

The life style that is catching on most rapidly is the living together system. This is also a direct rebellion against the established social norms. Usually there is a kinky personal life or aberant trait in the family history which acts as a motivating factor. There is, without a doubt, a growing fear of marriage as an institution among the children of divorcees and among the divorcees themselves. It is true also among children who have witnessed and have suffered the consequences of unhappy people tend to choose either of these life styles as an escape rout. To live in or to stay in a commune is to allow a personal fear to be sublimated into a public gesture of social defiance.

In the latter two life styles, the woman runs a much higher risk than the man in a relationship which is guaranteed neither by law nor by the society and cannot therefore be contractual. Since both the arrangements keep the option of walking away from each other open, the woman again stands more vulnerable because the lack of legitimacy in her previous relationship will stand in the way of her forging exclusive relations in future. The man is on a safer ground because in India it is the bride and not the groom who has a past.

However, inspite of these disadvantages, the living together system is fast catching on. whether it is here to stay permanently is something only time can tell. However as the study

in the suburban society of Siliguri revealed, there were at least four people who had opted for this living together arrangements. All the four of them had a history of painful divorce proceedings. Divorced couples who have one failed relationship behind them often exhibit a weariness for committing themselves to another relationship even though they need the solace of companionship. This fact was also revealed by the divorcees interviewed, where they accepted remarriage as normal but refused to remarry.

In a marital relationship, either of the partners can opt out exclusively only on bearing the substantial costs involved in a divorce suit. The alimony, maintenance etc. are often sought to be reduced by resorting to all sorts of legal subterfuge including charging the claimant with impotency, adultery and loose morals. There is a trade off between a lawyers fees and the decree of the court. Live in relationships and also commune living is devoid of such parting costs and therefore is rather attractive for some especially to the payer.

The problem however begins from the day of the birth of a child, when the birth is required to be registered, child is to be admitted to schools and other interfaces with administrative authorities. In many cases the man lends its name to the child or the mother lends her name, in some cases the couples get married. While the former poses problems like legitimacy, inheritance etc.

the latter usually solves all the problems. In a feeble attempt to repair the problems thrown up by the former case, another legal solution though very feeble is invented known as "friendship agreement" or "maitri karar". This is an agreement which attempts to bind unmarried partners to certain contractual obligations. This agreement is as fool proof as marriage itself. Certain friendship agreements also do not rule out continuance in marriage by either party. In other words it operates as a legal cover for bigamy or polygamy.

Actually, the silent march of the society continues, even though religions dogma on ancient and medieval times continue to hold it down. The spontaneous unplanned social change brought about by the pre 1955 era leads to the planned social change of today. This planned social change has again triggered off spontaneous unplanned social changes in the form of single life, commune living and living together arrangements which may lead to a planned social change gradually. What is evinced here is a cycle wherein social change leads to the development of other changes. In the process the experimenting with new materials and components like faith, belief, love and trust continues, where emotion speaks better than law. So long as marriage remains as fragile and rapture prone as it is to-day the experimenting will continue.

An epilogue: The purpose of this work is not to decry divorce, nor in any manner suggest that divorce has become expendable in society. Divorce is unquestionably a social invention

necessary to persuade people to break the unwanted relation and to create harmony and peace by creation of new relation and mitigating the ill effects of an unstable marriage which are considered as suicidal for human beings and for the development of new-social concepts.

But divorce solves one problem but creates several other problems. To that end, one of the first steps that is to be taken is that the fault theory of marriage should be serapped. In its place irretrievable breakdown of marriage must be introduced with immediate effect. Introducing it through the backdoor, as the Act now does will not do. The approach must be direct yet simple.

Divorce should be a part of a system conce t. It should not be treated as isolated incidents to be solved in isolation as is being done by the advocates to-day. The stipulations laid down in the provision requires that each case should be fitted within that framework. As a result the true incidents and their consequences never sees the light of the day. The skill of the lawyer is at work at those times, and a totally new "play" is staged before the court. If irretrievable breakdown gains wide acceptance and layers are properly sensitised to the need of the society through a programme of continuing education then perhpas the situation will improve.

The system of divorce must also be accompanied and supplemented by counselling. This can also be a part of the social sensitisation programme. Of course, over counselling may lead to

a psychological and inferiority complex of a person, but if administered properly, in correct proportions, by trained personnel, then perhaps the victims of this tragedy will be able to cope better with life. So it is of utmost importance that divorce procedure should include counselling at different stages, namely (a) when the divorce is instituted, a marriage counsellor especially trained can take on counselling with a view to see if the marriage can be preserved. The reconciliation proceedings subscribed under the Act suffers from two disadvantages, firstly it is carried out by judges who are not specially trained in this field, secondly, overburdened with cases, and harassed by the day to day procedures, the reconciliation sometimes becomes mechanical. Therefore, it is advisable to have professional counsellors who will be committed and sympathetic to the cause of the marriage, (b) Post divorce counselling when the divorce has taken place in order to allow for adjustment with new life. This should extend to the child also in order to allow the parties as well as their off springs to cope with the post divorce trauma.

The magnitude of the tragedy is more amplified because the woman is in a socially vulnerable position.

Education is no good for women, unless they are made economically independent, aware of their rights and given the security that if they are in serious trouble there will be an organisation or a shelter or social support that they can fall back on. Without this economic emancipation of women, the human

tragedies perpetrated by divorce mechanisms will continue unabated and it will result in the failure of social justice.

Social justice is still not an accomplished rule of law in India. A time has now come when the goddess justice can no longer close her eyes behind black tape, a time has now come when she should have her eyes and ears open in the interest of the down-trodden. She must see their plight and hear their agonised scream, weigh the situation with an open mind and then alone the laws relating to divorce will become useful. The supreme court is the able navigator in this area. However, more radical approach is required in order to tackle the situation effectively. It may rightly be claimed that by western standards, Indian courts have forged far ahead and opened new vistas of administrative justice, poverty jurisprudence, remedial radicalism and interpretative break through and have formulated a forward looking judicial system.

Adjudication in respect of any matter concerning family, whether divorce, maintenance and alimony, custody, maintenance and education of children or trial of juvenile offenders and all other matters pertaining to family and broken marriage should not be viewed as failure of success of the legal action but as a therapeutic problem. It should not be viewed in terms of a battle won or lost cases but as a social problem.

The resolution of family problem should not be given equal status with ordinary litigation like cases of civil or criminal

jurisdiction. Each family conflict involves people in trouble, persons facing identity crisis and the law should aim at amicably helping them to find the required solution to the problems they face. In order to achieve this, as a first step the traditional adversarial fault finding procedure must be foresaken. In the present system the lawyers, the judges are all trained for this kind of litigation procedure and they treat family matters in the same manner.

It is true that the Hindu Marriage Act offers more equality between women and men than is done by many other enactments. Even then a large scope for improvement is left open. However, what is required to be achieved could be better done by social motivation and social sensitisation than can be done through legislative mobilisation. It is important to understand that every need or demand for a social change should come from within the heart of the society. If a social reform or a social legislation is imposed upon the society or if an extra-societal maneuvers are made, the society does not accept them. It is so very evident in the case of dowry evils, incidents of caste wars etc. No amount of legislation has helped. At the same time the pre 1955 period amply demonstrates that how through the spontaneous unplanned social change the legislation granting and approving divorce was brought about. Now another phenomenon like the "living together" is becoming popular day by day. These are demands which are coming from the heart of the society. Where legislation regarding dowry

has failed the "living together" phenomenon is helping young people to circumvent the problem.

It appears that the entire society is heading towards a social revolution. The constitution of India guarantees the inalienable right of the equality of women. It is an ideal and ideals often have feet of clay.

The contemporary crisis of the family law is the result of the variety of factors such as changes in social philosophy which lays emphasis on the individual. The profound transformation in the economic status of the family in the modern urbanised society and particularly in the position of married women who owns her property, builds up her career, votes in election, is the centre of attraction in movies and advertisements whose cause is campaigned in the audio visual media has made women determined not to tolerate ill treatment or torture any more. When they withdraw themselves from the familial association, they often discover to their utter disappointment and bitter peril, how vulnerable they really are.

The children too discover in their child-hood that they are individuals with their share of rights. From cradle itself they begin to partake in the rat race. Some suffer from lack of parental attention as a parents themselves are participating in the rat race. As a result of family planning and birth control programmes most of the children to-day are suffering from what is known as "little emperor syndrom" wherein they are so pampered for being the only child that they can no longer remain restricted

to a disciplined life of the proverbially obedient child.

As a result, in a nucleus family, separated as it is from the kinship network there is a constant clash of wills as each member are at logger-heads regarding their own rights, and social status. There is a tendency to flow along with the tide rather than swim against it and create a personality of ones own.

Under these circumstances divorce law should no longer concern itself with who did what and who is guilty. Rather a divorce by means of a duly executed affidavit posted to the divorce court should suffice. Then the spouses can sort out the custody and property matters in detail in the chamber of the judge or of the counsellor. The need of the hour is quick and simple remedy.

The recommendations in a nutshell are that,

1. while the rising trend of the divorce litigations cannot be checked divorce can be made less traumatic by (a) accepting the irretrievable breakdown of marriage and (b) by making the procedure painless, quick and simple. In this manner there will be lesser number of people who carry the scar for the rest of their lives. There will also be a lesser scope for falsehood and fabrication in the divorce litigations.

2. In cases of family conflicts, especially those involving intense emotional trauma, services of specially trained personnels, through voluntary organisations, non-governmental organisations (NGO) or government sponsored organisations, must be made available to the parties to the marital conflict. Such counselling should be

both pre-adjudication and post-adjudication. If pre-marital counselling is also introduced, then the possibility of marital tensions may be reduced to great extent. Such counselling may be able to help the people involved take a correct decision in such vital matters like marriage and divorce.

3. In order to make the economic aspect of the law more meaningful, the upper ceiling of the maintenance amount as fixed under Section 125 of the code of criminal procedure should be done away with. The amount of maintenance granted should be in parity with the changing times, rising rate of inflation and the redefined concept of bare necessity. Every able bodied man should have a compulsory duty to maintain his wife and children irrespective of the fact whether he possesses "sufficient means" or not. Where in the human interests sufficient amount of maintenance amount cannot be granted in such times welfare organisations whether voluntary, governmental or quasi governmental should supplement the amount and also try to make the claimant vocationally self reliant. The woman must be given not only a casting vote regarding the locus of her matrimonial home but must also be given an inalienable share in it. She must also have an equal share in the conjugal property that was built up during the subsistence of marriage. This should be in addition to her streedhan and other gifts given at or about the time of marriage. The whole process can be helped through the system of insurance etc.

4. In matters of custody, a time has now come when we must realise that the children should be treated as individuals. They

must be helped with the aid of counselling to withstand the trauma of constant bickering of their parents and their eventual separation. At the time of litigation their interest must be defended by specialised children lawyers. Their property must be put in a separate trust for them. Whoever is in custody must also possess guardianship rights regarding the child so that decision making connected with its life and future is smooth.

5. The men in our society continue to control the life of their spouses even after the divorce procedure is complete and disposed off. This is because the law relating to maintenance and custody allow ample scope for it. Law must be so arranged so that end of the litigation also signals the end of a chapter after which the spouses are in no way dependent on each other.

Perhaps in such an eventuality the Hindu woman's quest to rediscover her identity, her social status and legal rights will be translated into a reality.