

## CHAPTER - I

### INTRODUCTION

With the wider understanding of the sociology of law, there has been a great interest generated in the nature of dispute settlement. Lawyers, anthropologists and sociologists have made significant contribution in this field. As a result, a multidisciplinary approach has grown which is called the socio-legal studies or studies on Law and Society. This has cultivated a new learning towards law which seeks explanation, rather than justification, about the decision-making. It emphasises the process rather than the rules of the decision making. It tries to appreciate the distinctiveness of law against the background of a larger social pattern.

As a result of this approach, the divergence of legal norms and social practice has become very apparent. It has also shown that deliberate legal changes do not ordinarily produce the desired result. In actuality the effects they produce are quite unexpected ones. The effect of legal control and regulation is largely dependent not only upon the impelenting authorities but also on the consumers and users of law and their differential capabilities of using it. Law as a system of symbol is very much different from law as a system of control<sup>1</sup>. It is here that the difference between law as it is and law as it ought to be becomes clear.

---

1. Marc Gallanter, Law And Society In Modern India, pp. 296-303, oxford University Press (1989)

The law is unique and majestic. It is the power of the State to control the existing political and social organisation that permits the civilisation to exist. But one can get around any law. The law can be twisted out of shape to serve a wicked civilisation. The rich can escape the law and occasionally the poor get lucky. Some lawyers treat law contemptuously. Judges, if they so desire, may sell the law, the courts may betray it, but the truth remains that there is no better instrument which works to ensure social contract between fellow human beings, and between the governed and the governors. Therefore law remains the sole instrument for social control and social change.

This work aims at investigating this relationship of law in the arena of divorce laws. It must be mentioned here that the Sastras<sup>2</sup> were only a part of the Indian laws in many matters. Indians were regulated by less formal norms known as the customary laws. Customary laws alone, however, were not sufficient and a gap was there between the sastric laws and customary laws. The need to fill the gap led to development of statutory codification.

The extension and consolidation of the modern features of a legal system is most apparent in the basic institution of the Hindu society, namely, the family. If the Constitutional principles were sincerely implemented, then India would have been in the possession of an Uniform Civil Code<sup>3</sup>. Had that been so, there would not have

---

2. Scriptures. Hindu Scriptures relating to law is known as Sastras or Dharmasastras.

3. The Constitution of India, Part IV, Directive Principles of State Policy, Article 44.

been any personal laws in India. However, the truth is that instead of enacting an Uniform Civil Code, different personal laws were enacted in India. To that extent the Indian laws could not regulate the Indian social scene effectively. As a result, a series of enactments took place for the Hindu Community. The enactments of the Hindu laws have brought about a lot of changes and reforms in the Sastric Hindu laws. The Sastras became the recipients of a new status known as the source of Hindu laws. The sastric notion of indissolubility of marriage stands totally abandoned. By recognising divorce, individualism was also recognised. As a result new concept of nuclear family emerged. Hithertofore the Hindus looked to the Sastras for the regulation of family relationships, but now, with the enactments under the Hindu law, they began to look towards the Parliament.

The laudable result of this development is that for the first time all the Hindus irrespective of their sects, caste, groups, class or sect began to be governed by a single set of laws, and as such they became capable of bringing changes in their social arrangements. Thus a degree of uniformity has been achieved within the Hindu Community, but unfortunately not within the Indian society.

The question now arises as to what role does the modern Hindu law play in the modern Indian legal system and to what extent it promotes changes in the social system. The precepts of the Dharmasastra is completely obliterated. While it is considered as

a source of various rules in the Hindu personal laws<sup>4</sup>, it is no longer a living source of Hindu law; customary components of Hindu law also form a source of Hindu laws but are no longer the living source of the present laws<sup>5</sup>. Now statutory law has supplanted both custom and Dharmasastra.

Unfortunately, demise of traditional laws do not mean the demise of the traditional society. Traditional notions of legality and methods of change still persists at the sub-legal level. The modern legal system tries to provide new possibilities for operating within the traditional society. A circular process is created. Official laws are used to evade traditional restrictions and yet the same laws are used to create and enforce those same very restrictions. In this manner newer social concepts like the concept of nuclear family have also emerged. The nuclear family concept is new because traditionally Hindus lived in Joint families or Hindu Undivided families. The concept of divorce is also new to the traditional Conservative Hindu beliefs as they never believed in Divorce prior to the statutory enactment. Traditional interest and groupings now

- 
4. The Hindu law has its foundation in the ancient scriptures like the Srutis, Smritis, Digests and Commentaries etc. certain rules like the provision for maintenance of wife, children and parents, finds their origin in the Hindu scriptures. However, the modern developments, amendments and changes are not rooted in the scriptures but are based on the needs of the society.
  5. India is a vast country comprising of diverse communities with unique customs of their own. They also form a source of the Hindu law. The modern enactments under the Hindu law gives them the overriding importance. Like the Sastras they no longer form the source of the modern Hindu laws.

finds expression in litigations, pressure group activity and through voluntary organisations<sup>6</sup>.

Most lawyers are atomistic in nature. The lawyer addresses the problem in isolation with the situation of the client. There is very little planning or preventive work. The relation between the client and the lawyer tend to be episodic and thus the range of service is narrow. In this manner, to a lawyer, divorce is not a part of a system concept, but as an isolated incident. There is little specialisation or professional collaboration. They are only interested in mobilising the clientele. As a result, the events of the actual life has to be dressed to fit the notion of law and justice. There is a chasm between what goes before the court and what takes place in the real life. The consequence is the gap between the law and the society.

The social scientists of the 20th century have developed the ideas and notions of divorce which were announced long before and proposed in various forms by thinkers who lacked training, tools or the persistence to work out and arrange their ideas systematically and scientifically. Most of these ideas existed in the form of hunches, dreams, discoveries and strong sense of decency and propriety. The social scientists and engineers have turned these critical ideas into dominant theories.

---

6. Organisations like the Vishva Hindu Parishad, Bajrangdal etc.

The study is undertaken in two stages, namely, (1) The analysis of divorce cases taken from the (a) Supreme Court (b) High Courts (c) District Courts and (2) analysis of Maintenance cases at the Supreme Court, High Court and Sub-divisional Courts. Some of the questions that arise in the first stage are:

1. The economic and educational background of the people taking advantage of the provisions of divorce under the Hindu Marriage Act, 1955.
2. Whether the divorce law is being abused.
3. If the right to divorce in any way has affected the status of the Hindu women in society.
4. If divorce law is equally administered between men and women.
5. Whether the incidents of divorce is on the rise since 1955.

Law is a tool for social engineering. This is true of the diffused customary law where the process of social engineering is spontaneous. It is also true of the Statute law which is relatively rigid in nature and the process of social engineering is more deliberate. Because of the deliberate nature of the latter, it sets off a chain of social reactions<sup>7</sup>. It is an interesting fact that the institution of marriage, sans divorce is a dominant social instrument

---

7. At the time of enacting the Hindu Code Bill, the Hindu orthodox society was in a traumatic shock because Bill introduced monogamy and divorce which was considered as alien to the Hindu scriptures.

of oppression fem. The institution of marriage with the right to divorce has led to the continuously rising divorce cases in the courts. The number is bewildering and the variety is untold. Analysis of this social behaviour is an object of this study.

The fundamental question is whether divorce law is being abused and also whether it is administered equally to men and women. It is a well known fact that women in India do not have a socio-economic independence, our divorce law is a long drawn process in which the parties are expected to prove the "fault" of the other. In doing so they have to fit the events of the real life to provision of law and justice. Then there are grounds like cruelty, which is so wide in its ambit that any human behaviour can effectively termed a cruelty. In this prevailing scenario and in the absence of irretrievable breakdown of marriage, divorce law in India is more of an oppression than a relief. It is also true that divorce is necessary to regulate the institution of marriage.

There is a recognition of this fact among the judicial echelon. Their awareness has led to granting of the relief in favour of women, while more men come to court because of their economic independence and social clout.

Some of the questions that arise in the second stage are:

1. How has the provision for maintenance or alimony helped the Hindu women.
2. Whether the foregoing provisions afford some sort of economic independence to the Hindu woman.
3. Problem of the children of the estranged marriage.

4. Problem of the divorced women who receive maintenance forming a socially oppressed class.
5. Influence of divorce on the family structure in India.
6. Whether remarriage after divorce is a popular event.
7. Whether any alternative to marriage is emerging.

Law can be regulative, restrictive or restitutive. The Hindu Marriage Act, 1955 is basically a restitutive law. Before granting divorce, it tries to restore the family<sup>8</sup> and after granting divorce it tries to restore the normal social relationship of the divorced individual<sup>9</sup>.

But the question for evaluation is whether the Act has been successful in its restitutive attempt. When there is a crack in the family relationship the parties come to court. Just as the law cannot prevent the factual breakdown of marriage, the law cannot factually join a broken marriage. Similarly law can only make provisions for restoring the status quo of the persons but cannot actually restore the same. Law cannot, and is not expected to go to the length of such actuality. Therefore there is a gap between what the law aims to achieve and what is actually achieved by it.

- 
8. Provisions of restitution of conjugal rights under Section 9, the provision for reconciliation attempt under Section 23(2), (3); the six months time gap before taking up a petition under Section 13B for mutual consent are all indicative of this fact.
  9. The Act makes provision for alimony (Section 25) custody and maintenance of children (Section 26). Disposal of property (Section 27) remarriage of the parties (Section 15). All with a view to restore the social normalcy of the divorced individual.

In order to transform the objective of the social achievement of the law, society must accept it and implement it in that spirit. The western society has fully reconciled to divorce as a social reality. Today, it is not a major social tragedy for a couple to be divorced. Divorce there causes very little impression on the mind of the child, for right from the cradle, so to say the child learns that divorce is a part of life, a social reality. Not so in India. In India divorce is a major event, a family aberration. The weaker party to the divorce suffers a social stigma and the child of the divorced parents are some how not considered normal in India. What has been easy in the west has not been so easy in the Indian society. The reason is the eclectic canons of the church did not have or rather could not hold the western society in such a vicious hold as did the Dharmasastra in the Indian society. Besides the west has been more successful in rising above their religious and scriptural shackles than India. So long as the gap remains between the intended achievement of the law and the actual acceptance and implementation by the society the chasm between law and society will continue to widen.

Law is made for society, society was not made for law. Therefore, it is imperative to tune law in such a manner that is able to recognise and feel the social pulse before bringing about a social change and then too it must act keeping in view the system concept of the change.

It is a lamentable fact of most of the families in India that chiefly because the husband has the financial clout or rather because he is the lord, he controls the wife inside wedlock and

also outside the wedlock. Take for example the requirement that if, after the divorce the wife does not remain faithful to her husband or if she is guilty of adultery then she forfeits her maintenance and often the custody of her child. In this manner the husband continues to exercise direct control over her even when the marriage is dissolved and also when she is his wife. Like the imperial lord that control the masses, the husband controls the wife in most of the families. Therefore maintenance provisions, provisions of alimony afford no economic independence to the woman .

The children, though it is implied under the Hindu marriage act form the innocent third party to the divorce, in reality they get a property like treatment under it. Parents fight over the children's custody with little regard for their strain and trauma. The children are not represented by a lawyer like their parents are. Their property is not put in a trust for them till they attain the age of majority. The provision for maintenance, education and custody of children to that extent are divorced from the social reality.

The Hindu Marriage Act, 1955 does make provision for remarriage of the divorced parties. In reality very few persons marry a divorcee. An unmarried maiden gains precedence over a divorcee, more so, if that divorcee is a woman with children. Even today, even if the society does not stigmatise her, she is very conscious and depressed about her divorce status. In many other cases there is a social stigma.

The family itself is both at the receiving and at the contributing end. On one hand due to friction between the family members in the case of a joint or unitary family or due to the singular

stress and strain of the nuclear family divorce take place on the other hand the family itself is in jeopardy. One special feature of the Indian family system is that people tend to confine themselves in their extended kinship circle. So if the family in question is one that is deeply rooted in the social mores then divorce is a major disaster for all concerned.

### Methodology:

When a complicated but an indepth study is conducted involving two disciplines, in this case law and sociology, methodology is the only link joining the two. Methodology is an approach, a method to look into the operation of law in the context of the social realities, also a way to control the social vicissitudes and to assess law as a variable in a social process.

The methodology adopted for this work rests on the following approaches:

1. Collection and study of about three hundred and more cases in the Supreme Court and the High Courts of India during the period 1914-1954 and 1955-1990. All the cases are collected from the All India Reporter alone. This is so because All India Reporter has a continuous publication from 1914 onwards.

The period from 1914 to 1954 is taken for evaluating the unplanned social change and the period from 1955 to 1990 is taken in order to study the planned social change.

2. Collection and study of about two hundred and more divorce cases filed at the Darjeeling District Court during the year 1984 to 1990.

In order to obtain a continuity of study, few available cases of Calcutta High Court reported in the AIR was studied. This forms a link between the trend at the national level and district level. All the three trends at the National, State and District level were analysed at length.

3. An indepth study of about forty six cases of matrimonial causes has been undertaken. For this purpose, these persons were interviewed, various aspects of their life covered.
4. Maintenance cases were collected from the All India Reporter during the period 1914 to 1954 and 1955 to 1990. As with the divorce cases, the planned and unplanned social changes, the trends etc were examined.
5. The maintenance cases at the Sub-divisional level were also evaluated in relation with the national scene.

Besides these empirical study, an analysis of the provision for divorce and maintenance in relation to the social context has been made.

According to Allen<sup>10</sup>, under the sociological school of law, more stress is on factual investigation of law's actual working and results. It is by practical ascertainment and collation of the facts of law-in-action that weaknesses of orthodox rubrics are disclosed and way is opened for revision.

In the field of marriage and divorce social justice involves administrative know how and collaborative agencies of the other sister departments like the social worker, social psychiatrists etc.

---

10. C.K. Allen, Law In the Making, p. 47, Clarendon Press, Seventh Edition (1978).

Since social setting lends meaning to legal reasoning, the raw reality of life of ordinary common man must form the backdrop of any analysis of law geared for a healing regeneration of the society. Human laws and human justice are means to an end, the uninhibited manifestations of total human potential, its development and achievement.

Marriage is an institution which helps to create and achieve such potential. So long as the marriage leads to the creation of a family and development of the potentials of the individuals involved therein, marriage or family as such does not draw attention. The cause of concern is for those marriages only in which the tragedy overflows from the homes into the lap of society. Justice that is social justice is the chief arbiter in these cases. But it often fails, for, the strict letter of laws, the abracadabra of technicalities and the lawyers vested interest does not allow it to progress. Law does not cast a glance beyond to see the raw realities of the life and the people who form the main backdrop of the society. It is a paradox that law, which is meant to serve a social purpose, and regulate the society at large should be so embroiled in legal technicalities so as to lose sight of its very purpose and goal. Divorce is a paradigm. The law of Divorce which was meant to liberate men and women from marital conflicts, tragedies, and deceptions, have made the technique and procedure of it so complicated that its consequence on the society is more complicated and tragic.

Further, divorce law, in its letter and spirit is meant for both men and women equally. But a common trait of the Indian society, especially of the Hindu society is that there is a predominance of men everywhere. This can be found in the concept of Karta, the head of the family, the guardianship concept, the matrimonial home concept. It is seen in the inter-spousal relationship also. In short patriarchy is recognised and provided for, there is no formal recognition of mutuality. Thus the concept of patriarchy, partiliny patrilocality, patrimony and patriguardianship etc have put women to a disadvantageous position. They cannot take the advantage of divorce law as their male counterpart can.

In addition to this, the marriage of the Indian woman never really gets dissolved. Consider for example the fact that a woman who has gained custody of her child gets the power of physical care, control and supervision of the person of the child. The power of guardianship, maintenance, education and property with relation to the child remains with her husband. If the custodian mother changes her religion, has a relationship with a man, wishes to sell or acquire property for her child, so much so that if she wishes to change the school of her child, then the father may claim the child back from her. In addition, in exchange for her good conduct she is maintained by her husband. So even after divorce she is really not divorced. There is a notional extension of marriage as the co-habitation. Though the letter of the law sets her free, the spirit of the law and the society in addition, does not set her free.

The struggle for social justice is partly ideological, limited necessarily to the ideals of the Constitution. The battle of breaking with the past is essentially that of the people for it is they who undertake the adventure of radical modernisation of law. The path of necessity lies through the Courts. It is the judge and judge alone who decides the path the law must take. Thus judicial justice is a determinant factor in social justice.

Social change is usually heralded by the judiciary. Through judicial activism newer trends in social justice emerge. But the burden of the judges is great. According to Jerome Frank "the judges' unconscious plays an enormous role in the exercise of the judicial process, particularly where it closely touches the contemporary economic and social problems"<sup>11</sup>. Justice Iyer, in tune with this observes that:

"When law speaks equally but acts unequally there is evidence of injustice. If the law speaks stern when the weak are its punitive victims, but chooses to be gentle or silent when the strong molest the society the mask of equal justice is lost"<sup>12</sup>.

These are not theoretical facts, judges continuing to serve the august office have also felt the same way. Little over an year ago, I had the honour of intervieweing His Lordship late Sabyasachi Mukherjee, the then Chief Justice of India, while he was returning

---

11. Jerome Frank, Courts On Trial : Myth And Realities of American Justice, Page 148, Holt Rinehart And Winston, Inc. (1950).

12. V.R. Krishna Iyer, Social Justice, Sunset or Dawn, page 67, Eastern Book Company, 2nd Edition (1987).

110514

27 SEP 1993

GOVT. LIBRARY  
 SUPPLY LIBRARY  
 THE UNIVERSITY

from his tour of Sikkim and North Bengal and was passing through Siliguri. I took the opportunity of talking with him about my work and at my request, he graciously agreed to be interviewed by me. The unabridged and unedited text is produced hereunder as thus has turned out to be his last interview at Siliguri, for soon after he boarded the Darjeeling Mail.

After having the copy typed I sent him a copy for his kind perusal but by then he had left India on his last journey. I fondly imagine that I would have received a few lines in acknowledgement on his return, but my fond imagination remains just that. With a deep sense of loss, I have the honour to present the entire text of the interview below, for it is too precious to be relegated to the appendix.

Interview

on

SOCIO-LEGAL CONSEQUENCES OF DIVORCE

UNDER THE HINDU MARRIAGE ACT : 1955

I. Identification:

His Lordship Sabyasachi Mukherjee, C.J.

Chief Justice of India.

II. In the presence of : District Judge, Darjeeling,

Santi Sekhar Mukherjee.

III. Venue : Circuit House, Siliguri on 24.5.1990 at 4 p.m.

IV. Subject: Socio-legal aspects of divorce under Hindu Law.

1. Has the divorce provision under the Hindu Marriage Act successfully served the social purpose for which it was enacted?

It is very difficult to say whether the divorce provisions have served the social purpose successfully. The reform that is to be brought out by a social legislation depends upon the developments in the society. In 1955 when the Hindu Marriage Act was enacted there were many maladjustments in the society and Section 13 was aimed towards solving them. Certainly it is a temporary solution and it affords a freedom to the parties to lead their own lives. But too much freedom will lead to social imbalance and instability. In a limited way it solves the marital problem.

2. Has this provision become the monopoly of the urbanised rich?

No. This is not true. To begin with it was the monopoly of the urbanised rich. In such cases it was easy to give relief. But to-day a new phenomena has emerged. Divorce suits come from all section of the society and also from those who are not at all rich. This leads to the difficulty in granting relief. I even have a case of a peon from Lucknow whose wife is in Delhi. Question of transfer etc come up.

3. To what factors could the rise in the rate of divorce be attributed?

Lack of ability to adjust. To that extent, from one point of view, early marriages helped the parties to adjust with each other

while they were young. To-day, where the parties to the marriage are matured, difficulty in adjustment arises. Break up of joint family system is another factor. In a joint family people are taught tolerance, sacrifice and adjustment. To-day in small families these qualities are lacking. So parties from such background find it difficult to adjust with each other and end up in divorce though not every one of them.

4. Is the Section 13 of the Hindu Marriage Act responsible for the destruction of the Indian family values?

No. It cannot be put so drastically. However, it also reflects a situation where the parties are unable to live together, but S. 13 alone is not responsible for the deterioration of the family values when marriages are psychologically and physically shattered. S. 13 is one of the remedies. So it cannot be fully responsible for destroying family values.

5. Should one preserve a marriage at any cost?

No. Only happy and good marriages are to be preserved. Broken relationships need not be preserved.

6. Should the divorce law be made more liberal?

No. I would not say that. Divorce law should be able to meet the social demand. Under such laws, bad irreconcilable marriages should end easily, but if divorce itself is made very liberal that will not help. Divorce law should be rational, scientific and reflect the need of the society.

7. Has the status of the married woman become more secure because of her right to divorce?

No. Not necessarily. Right to jobs, right to income, right to stand on her feet alone will help her to become more secure. Right to divorce by itself is of no use to her security. Only education and economic independence alone will render her secure.

8. In spite of so many provisions in favour of them why is the Indian woman still down-trodden?

Lack of education, a feeling, an urge from within to stand on her own feet, to achieve something and compete with the men of similar age and circumstances is lacking in them. It is not to say that they lack the inner urge but that we have not been able to motivate them in proper spirit and on a large scale.

9. Should the divorce law be made more reconciliation based?

Yes. Divorce law must be more reconciliation based, but not to the extent where divorce is not possible at all. Reconciliation should not prevent divorce but it should first seek to preserve the social institution of the marriage. Marriage is a very vital institution of the society and it should be dealt with, with care.

10. The worst victim of marital breakup are the women and children. Should the law make provisions of psychiatric help in order to aid them to tide over the crisis?

Yes, psychiatric help to the victims of divorce is very essential. In divorce, the man, the wife and the child are all involved. It is necessary to instil moral courage in them. But this

should first be done by the society and then by trained professionals and by the sympathetic elders of the family. Such a help should be directed to help them adjust and rehabilitate themselves. But one must remember too much pity or counselling could be harmful in that it can set off a series of emotional reactions.

11. How can the economic aspect of the marital breakup be brought in consonance with social realities?

This is a question which requires a detailed treatment. It requires an indepth study and consideration of the problem in relation to the existing law and social conditions.

12. Will the theory of community property, deduction of maintenance allowance at source and divorce insurance solve the matter to an extent?

A judge should not comment on such matters. This is the work of the legislators. A judge can only interpret them in his judgement.

13. What measures would you suggest for containing the aftermath of divorce?

Broadly speaking, anything or any measure that will help to rehabilitate the victims of the divorce in the society. The rehabilitation should be on social, economic and moral plane. Mere off hand ventures will not help. A concrete formula is required to solve the problem. It can be done with the help of sociologists, legislators and social reformers.

14. If right to life under Article 21 means the right to live and to live with dignity, does the right to divorce also come within the fold of Article 21?

I would not like to answer this question.

15. Any other comments, opinions or suggestions?

A law such as this which deals with a social problem should be studied by sociologists, economists, psychiatrists, doctors and jurists. The problem should be viewed and met with the aid of a continuous process of study. I would not categorically say that this is an interdisciplinary matter, but I would like to point out that this is a complex situation having its ramifications in all directions and they should be met effectively by experts.

There is a need to deviate slightly from this common theme and to address ourselves to the laws, customs and social norms of the tribes. I am coming from Sikkim. The society there is chiefly matriarchal and polyandrous. We have little knowledge of such law. Very little work has been done in these areas and more and more scholars like you should address themselves in this area.

To sum up the important points made by His Lordship were as follows:

1. It is difficult to say whether the divorce provisions under Hindu law serve their desired social purpose. What was appropriate about three decades and six years ago may not be sufficient to-day.
2. The rising trend of divorce may be attributed to the social change and the changing requirements thereof.

3. Disintegration of joint family system and the stress and strain of the nucleus family could be a contributing factor of divorce.
4. More emphasis should be on preserving the inter spusal relationship and the family.
5. Divorce law should be rational, scientific and reflect the social requirements.
6. Economic dependence, lack of education are the basic reasons for the failure of women to take advantage of the social changes.
7. Our laws are inadequate on aftermath of divorce.
8. Rehabilitation of the victims of family tragedies like divorce should be done on social, economic and moral plane.

The Judges, at least in the field of matrimony have done well. They have tried to rise to the occasion in response to a plea for help. Even a cursory glance is sufficient to prove the same. It was an unique gesture by the court when it held in Satyapal Sethi Vs Susheela Sethi<sup>13</sup> it was held that the Hindu wife has her own independent notions of right and wrong. If she, inspite of the existence of good grounds for the dissolution of her marriage, does not want to dissolve it, the Court cannot do so. She may suffer immensely as a result of her decision, yet if she does not desire the relief, the Court cannot give her the same.

---

13. AIR 1984 A 11 81

In Shanti Devi Vs Raghav Prakash<sup>14</sup>, the wife who was admittedly illiterate, falsely accused the husband of having illicit relationship with another person, filed criminal complaints against him and ultimately burnt his Ph.D thesis. The husband was a lecturer. The Court dissolved the marriage on the ground of cruelty by the wife, yet granted her permanent alimony on the ground of her being an illiterate woman with no means of earning a livelihood and that,

"it will have to be accepted as hard social reality that the position, status and life of a divorced Hindu wife in Hindu society so far, is very miserable and pitiable. She is economically and socially poor and had great disadvantage in as much as the society looks down against her. Even though law recognises it, most communities where divorce is not customary and have been introduced by law, a divorced wife is a cursed human being, abhorred by the society"<sup>15</sup>.

The hither-to-fore rule that the second wife of a bigamous marriage did not have a right to claim maintenance was done away with in Rajeshri Vs Shantibai<sup>16</sup> it was ruled that by invoking the power of ex debito justitiae the court could grant maintenance to such wives despite the decree of nullity. On similar principles it was held in Swarnlata Vs Sukhvinder Kumar<sup>17</sup> that maintenance could be

---

14. AIR 1986 Raj 13.

15. AIR 1986 Raj 13.

16. AIR 1982 Bom 231.

17. (1986) I HLR 363.

granted even though the substantive relief was denied.

In T. Sareetha Vs Venkata Subbaiah<sup>18</sup> the Andhra Pradesh High Court held that the provision of restitution of conjugal life enshrined under the Hindu Marriage Act, was derogatory and discriminatory as it forced one spouse to cohabit with the other against the other's will, more so against the woman because it was her privacy that was violated. This decision, though not upheld by the Supreme Court had merit in it.

In Aboobacker Vs Mamu Koya<sup>19</sup> a strong case was made out for recognition of irretrievable breakdown of marriage.

In Alka Bhaasker Bakre Vs Bhaskar Satchidanand Bakre<sup>20</sup> the courts have held that there is an element of mutuality involved in the concept of matrimonial home and hence the wife has an equal say in the matter of determining the locus of matrimonial home.

In Parminderlal Vs Sumanlata<sup>21</sup> the court held that the order relating to custody would not become void merely because the substantive relief was denied to the parties.

Matrimonial problems can easily be adjusted given tactful judicial handling

---

18. AIR 1983 AP 356

19. 1971 KLT 663.

20. AIR 1991 Bom 165.

21. (1984) I HLR 154

"The vice of social inequity assumes a particularly reprehensible form in relation to backward classes and communities which are treated as untouchables. So, the problem of social justice is urgent and important in India as is the problem of economic justice ..... I am using the term social justice in comprehensive sense so as to include both economic justice and social justice. The concept of social justice thus takes within its sweep the objective of removing all inequalities and affording equal opportunities to all citizen in social affairs as well as in economic activity<sup>22</sup>.

Women are also a part of the oppressed backward masses of people. Their lack of education and economic backwardness have dehumanised them to an extent. Torture of women in the form of dowry deaths, domestic violence, desertion, cruelty etc are not only reprehensible but also leads to social degradation. Social justice must be ever growing, adjusting, moulding itself according to the time and the changing concepts in the society, with the new hopes and aspirations of the people, constitution is a primary social document, but such a document is of no use at all if it is not used, interpreted or moulded in a manner to herald a new social order. Thus, judicial and social justice in India will only remain a myth.

Many legal rights and duties flow from the family status. If one were to examine what leads to those rights and duties it becomes clear as to what the family is and what the family should be .

---

22. Supra note 19, page 51.

It is the universal basis of the social structure which comes into force through marriage. Marriage is implicitly a legal concept having sociological emanations. It is not a mere attachment nor annexations of two heterosexual beings or just a pairing. It is a relation of sharing joys and a partnership in stability and unity. That associative natural phenomenon satisfies biological and natural urges and adds to the aggregation of species<sup>23</sup>. Marriage thus is a conscious union of two human beings which takes a form which is recognised at the basic institution of society itself and which is the smallest unit of it, called the family.

All civilised and organised thoughts lay down forms and principles that uphold marriages, dissolutions, successions, inheritances, legitimacy and offer voluminous evidence of the institutionalised character of marriage. The rules of behaviour and of sanction help form the unit of human partnership. Whether it is a holy sacrament or a contract pairing of men in personal relation is a highly social as well as ethical question. Law simply sanctions the form and process recognising its orderly need. The rise of family is traced to this phenomenon, though early forms of family did not necessarily originate out of marriage. A family is also a natural association of the father, mother and child<sup>24</sup>.

---

23. B. A. Masodkar, Society, State And the Law, p. 50.  
N.M. Tripathy (1979)

24. Ibid.

Family forges partnership and habitation, security, sex, food, roof, all are the goods of it. It is an organic cell of the society. Process of inclusion, assimilation as well as exclusion and expulsion is the basic formative process integrating it into a unit. Here, the first germ of authority, submission, co-operation, co-ordination, common enjoyment and relations are all born and nursed<sup>25</sup>. Family creates the concept of property, ownership, rights and title.

Family is the simplest institution of the earliest origin which heralds the social growth. But, family, however simple it may be, because it is an instrument of social growth, it is also exposed to powerful economic, ecological and sociological pressures, and influences. Social growth is interactional as well as dimensional phenomenon.

Legal regulation of spousal relation deals mainly with two areas : (1) support obligations and (2) socio-legal and economic autonomy of women. Law is simply not an efficient and workable means to order spousal relations or to remedy ordinary family relationship and difficulties. Most of the legal standards concerning spousal relations are not tested until significant disharmony occurs and breakup is threatened. The law has announced various standars that reflect social values and serves as moral precepts to guide family behaviour.

---

25. Ibid.

Marital breakdown can be divided into three main categories, (1) divorce which refers to legal termination of marriage, (2) separation, which refers to physical separation of spouses, they no longer share the same dwelling (3) the so called empty shell marriages, where the spouses live together, remain legally married, but their marriage exists in name only.

Despite minor fluctuations, there has been a steady rise in the divorce rate through out the country. It might be expected that modern couples groomed in modern traditions (as against traditional upbringing) may be more than ready to regularise the unsatisfactory marital situations. Disturbingly, there are recorded and unrecorded breakdowns. The recorded ones are taken and analysed whereas the unrecorded number is a matter of guess work. Empty shell marriages cannot be operationalised and put into measurable forms. However it can safely be presumed that eventually such marriages will end in divorce or separation.

From the functional perspective however, especially during the analysis of the recorded cases of divorce, the following factors were considered,

1. Factors which affect the values attached to the marriage by the individuals - e.g. children of broken home, or very posh and losely knit society and family.
2. Factors affecting the degree of conflict between the spouses, example, social and cultural background of spouses, economic criteria like whether both the spouses economic criteria like whether both the spouses are earning or are rich etc.

3. Factors which affect the opportunity of individuals to escape from marriage; example : the supportive nature of the natal family, economic independence, consciousness regarding rights, duties, education etc.
4. Factors which cause divorce; example: grounds like adultery, cruelty, desertion etc.

To this extent it cannot be denied that these factors themselves reflect a change in the social attitude towards marriage and divorce. People expect and demand more from marriage and are therefore more likely to end a relationship which may have been acceptable in the past. Viewed from this angle, the high divorce rate may be indicative of higher and not lower standards of marriage.

On the other hand the adaptation of the family to the requirement of the modern and current economic system has put the family under greater stress and strain. What is functional in one part of the society may not be functional in another. The relationship between the family and the economic system which leads to a relative isolation of the nuclear family from the extended kinship may result in disfunctional consequences upon the family. The structural differentiation of society which involves the establishment of the institution specialising in particular functions may increase as a result of industrialisation and urbanisation. This also has a disfunctional effect upon the family. The high marital breakdown could be the price the family has to pay for the greater good of the family system<sup>26</sup>.

---

26. M. Harlambos with R.M. Heald, Sociology-Themes and Perspectives pp. 360-68, Oxford University Press (1985).

If behaviour is directed by norms and values, a change in the norms and values associated with divorce would be expected. If the stigma attached to divorce were considerably reduced, itself would divorce easier<sup>27</sup>.

Changing attitude towards divorce have been institutionalised by various changes in law which have made divorce easier to obtain. In the Hindu Marriage Act, prior to 1976 under the ground of adultery it was required that the petitioner prove that the opposite party was living in adultery. After the 1976 amendment, it is sufficient if the other spouse has had voluntary sexual inter-course with any other person.

With the introduction of the concept of mental cruelty, which is a very abstract term the door of cruelty has been thrown wide open to the seekers of divorce.

The introduction of Section 13B which deals with divorce by mutual consent and section 13(1A) which prescribes a waiting period of mere one year in case of non restitution and sustained judicial separation after which the parties may seek divorce. All these factors have helped in easy obtainance of divorce. These reforms on one hand reflect the change in social attitude towards divorce and also become the reason for the dramatic rise in incidents of divorce on the other hand. This has been further helped by the mushroom growth of centres for free legal aid and advice. Such

---

27. Ibid.

institutions have helped to control the cost of litigation to a great extent.

The increasing divorce rate can be seen as a product of conflict between changing economic system and its social and ideological superstructure, notably the family. In advanced industrialised societies there is an increasing demand for cheap female labour. Wives are encouraged to take up paid employment not only because of the demand of their service but also because of the media publicity (both audio-visual) which increases the material aspirations of the family and its demand for the goods. This can be satisfied if both the spouses are wage earners. However conflicts result from the contradistinction between female wage labour and the normative expectations which surround the married life; working wives are still expected to be primarily responsible for house work and raising children. In addition they are expected to play a subservient role to their male counterpart who is the head of the household. This alienates the wife as she shares the economic burden of the husband. Such conflict and alienation may lead to marital breakdown<sup>28</sup>.

Where the wife is unemployed and does not share the economic burden of the husband she is expected to bring dowry from her parents as a sort of compensation. Even then her economic dependence upon her husband becomes a source of irritation for him. Even there

---

28. Ibid.

conflicts arise and they are perhaps more serious than in case where both the spouses are working. A look at the recorded cases of divorce that are analysed shows that very few women are employed compared to men.

Apart from this there is a relationship between the rate of divorce and age of the parties at the time of divorce. The more youthful and rigid in their ways the more set they are in their life style.

The chances of marital breakdown increase if the spouses belong to different social backgrounds, for example if they belong to different class, or ethnic group, or where one belongs to a rich family the other to the poor. If the spouses have different marital role expectations from each other which has a background to their different subcultures, conflicts may arise. The increasing social and geographical mobility has also aided the situation wherein individuals with widely differing social background tend to come together for marriage, therefore a potential for marital breakdown.

The list of reasons can be endless, but priority goes to the status of women to a changing society. The more discriminated and dependent the women feel, so long as they remain uneducated vocationally or otherwise, the situation in relation to divorce will worsen.

While divorce must survive as an escape route for the victims of unbearable marriages, attention must be given to improving the status of women, recognition of irretrievable breakdown of marriage and finding a just fair and equitable solution to post divorce problems.