

INDIA

Introduction

"Because India is large and contains multitudes, because her people are old and carry over stubborn traditions, they tend to live in many centuries at one and the same time." ... "There is no generalisation so sound that startling and significant exceptions cannot be found to invalidate it; no area so large within the sub-continent that it provides a base for generalisations about the country as a whole". These sentences appear in the opening essay of a YWCA study (1971) of the Educated Women in Indian Society Today. They are useful reminders of the hazards that face anyone writing about any aspect of Indian life, and apply most particularly to the area of family law and its relation to the way people order their lives.

The large population of India is made up of Hindus (defined now by law to include persons who are Sikhs, Buddhists and Jains by religion) Muslims, Parsis, Jews, Christians and those members of the Scheduled Tribes who have not been brought within the operation of Hindu personal law. Each of these groups have their own personal law, defined by their religious affiliation, though provision for cross-communal marriages and their consequences have been made through Acts like the Special Marriage Act and the Indian Succession Act. These have also given some freedom to choose matrimonial and family regimes to those who wished to opt out of adhering to the customs and practices of their communities. Since the purpose of this paper is to look at the ways in which family functioning and family law and practice inter-relate, especially in the handling of family problems, it seemed most useful to deal here only with Hindus, without discounting the influence of the presence of other groups within the country with other ways of functioning and other solutions to the same problems.

Historical Background

Some historical background is necessary if the way family law has been developing in the last thirty years is to be comprehensible. The British presence in India has had a marked, and still continuing, influence on this development. This has been evident in a number of ways. The manner in which the British took and held India called less for subjugation than for accommodation wherever law and order considerations made this possible. In these circumstances the religious basis of the personal laws of the various groups in India probably assured their preservation. The infinite variety of custom and usage found throughout the regions and among the castes confronted those with the responsibility for the administration of justice with the need to bring some order into this field.

The claim is made that Hindu Law "has the most ancient pedigree of any known system of jurisprudence" (Mulla). Commentaries and Digests have over time played a critical role in its development, but it was the role assigned to custom that gave it its vitality and enabled it to survive the passage of time and changing circumstances. The law was based on ancient custom but allowed practices and usages that had been followed for so long that they achieved the status of custom, also to be included. The role of custom in creating law was fully accepted and this provided the kind of flexibility that a system of law needed if it were to meet the needs of so diverse a collection of regions, religious groups and castes. Under the rule of the British, an element of rigidity was introduced. The judges and District Officers they appointed were required to administer Hindu personal law in matters relating to marriage, family rights and obligations, succession and the like in the matters which came before them. They took the advice of

those they considered to be leading authorities in the field in making their decisions. By reason of the operation of the principle of judicial precedent, their decisions in particular cases became effective law for whole of the Hindu community. Thereafter changes could only be made by legislation. The proof of custom was still an important element, but the role of custom had changed. It would no longer be possible for new customs to emerge to meet new situations. The whole process of change and reform had to take a different course.

Reform through legislation in this field, applicable to the whole of India, was, in the early years of British rule, confined to property matters and the removal of some civil disabilities arising from caste rules and customs. The abolition of suttee in 1829 is a well-known example. The Caste Disabilities Removal Act of 1950 provided that any law or usage which required that any person forfeit rights to property by reason of exclusion from the communion of any religion or as a result of being deprived of membership in a caste was to cease to be enforced in India. The Hindu Widows' Remarriage Act was passed in 1859, and Christians and Hindus were permitted to contract a valid marriage by the Indian Christian Marriage Act of 1872. It is of interest that no action was taken on the emotive, for the British, question of child marriage until 1929 when the Child Marriage Restriant Act was passed. Its failure, and that of subsequent amendments to it, to materially change popular attitudes towards the practice illustrates the ineffectiveness of attempting to achieve reforms by legislation where this conflicts with religious and economic considerations.

To administer India the British needed Indians educated in English and in the British way of doing things. The success of this educational programme was undeniable but it had effects that had not been foreseen. Conflict between Indian and British values could not be avoided. To the British perception, much of Hindu social and family life bore hardly on individuals, and some of the harsher aspects were unacceptable. The responses of the Indian elite, created by the educational system, to these criticisms was to acknowledge the need for reform, but there was no agreement as to what shape these reforms should take or how they should be achieved. The result was that there were two main reforming streams - the Western - oriented and the traditional. Though both combined to lend strength to the Nationalist movement, these two streams of thought are still evident whenever any matter of law reform is under discussion.

Population Characteristics

In spite of the impression left by the many large and heavily populated cities of India, the majority of its people live in the rural areas. Roughly speaking, for every person who lives in an urban area, four live in the country. The census tables (1971) on marital status confirm that everyone expects to be married at some time or another in their lives. Considering that some prejudice still exists against marrying someone with a physical or mental defect or deformity, the small percentage of those never married recorded from middle age onward must include many of these. The figures also record the continued existence of child marriages. Of the persons between 10 and 14 who are shown as married, 4.49 per cent of the boys are in that age group and as many as 11.53 per cent of the girls. In the age group 25-29, 84.95 per cent of the girls are recorded as married. The peak among men is reached ten years later, in the 35-39 age group. On the evidence of the tables also, widowhood is far more of a problem than divorce. The disparity between the number of widows and of widowers in the higher age group suggests that widowers find no difficulty in re-marrying, but that it is otherwise with widows.

The importance that independent India attached to education can be seen in the words of the Constitutional directive that laid upon the State the duty to "endeavour to provide within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years".

Thirty years on, participation in full time education is still a privilege of the minority of young persons. Though this statement reflects the overall position, it conceals much variation between the State, from the very high literacy levels of Kerala to the very low in such states as Bihar, Rajasthan and Uttar Pradesh. The majority of those in schools live in the urban areas, and not surprisingly more boys than girls get the benefit of an education. This imbalance is however, rapidly righting itself in the middle and upper classes. Much has been written about the changes in family life that have been and are still being made as a result of the better education of women and their entry into jobs and professions that were once exclusively male. Though as a percentage of the population of India they are relatively few in number, the influence they have been able to exercise in areas such as law reform has been remarkable.

Castes and the Economy

A good deal of attention has also been paid since Independence to the re-structuring and the development of the economy. In spite of a great deal of investment in heavy industry and manufacturing and considerable growth in the public service sector, the majority of people work in the traditional sector, being engaged mainly in agriculture, trading, craft work and construction. In this sector caste and custom still play a large role in determining what jobs are done by them. Among the lower castes there is an equality between men and women not enjoyed by the higher castes. The jobs they do may differ by sex, but both contribute to the economic support of the family. For example, divorce by caste custom has long been permitted to them, as is re-marriage either upon death of a spouse or divorce.

In the modern section of the economy caste considerations also play a significant part, but not in the same way as in the traditional. It is true that new industries have opened up new avenues of employment of education and training. The mobility it has offered to those employed within it both in terms of movement within the country and of change in status where this depends on the job held, has had its effect on patterns of family living and on the influence of caste. But there is very little evidence that either has been substantially weakened, though there is evidence of some change.

The framers of the Constitution evidently intended to outlaw caste - to take away from it any legal recognition as a factor in the organisation of society. Its function as an effective method of organising the working of a large and diverse population was discounted or perhaps not properly understood. It was proposed instead to weld into one nation all these different ethnic, language, religious, regional and functional groups using the Western political theory of individual rights, duties and freedoms. In trying to make sense of this concept in the Indian situation, it was felt that some attempt should be made to redress the evils of caste through positive discrimination. Quotas for education, training and employment for members of the Scheduled Castes were introduced. The competition for these places has encouraged persons to seek such classification, and may have at that level encouraged the perpetuation of a system that the Constitution had intended to outlaw.

On the wider scale what has happened is that the need for the political organisation of groups which is one aspect of a functioning democracy provided a new role for the caste groupings. Caste associations have sprung up throughout the country. Where these represent the interests of propertied classes, they have had considerable success in protecting their vested interests, been a vehicle for the exercise of patronage in such matters as the securing of jobs and contracts, and have provided social services for their members on a bigger scale than heretofore, with excursions into housing, the provision of schools and some welfare services. Attention to religious and family matters still forms part of their duty, though some of the caste influence in family matters, particularly among the higher castes, has been eroded by the existence of the possibility of both economic and legal independence

from it. Caste associations of groups like harijans tend to function in a much more overtly political fashion. Regionally as well as nationally, the appeal to caste interests is widespread at the time of elections, and there seems little doubt that democracy Indian style will guarantee a continuing role for castes in the country.

Certainly no one who has seen the pages of matrimonial advertisements that continue to appear in the local, regional and national press, and read the accounts of the annual betrothal and matrimonial fairs of some castes will doubt that caste considerations continue to loom large in family matters. There is plenty of evidence that even though both are illegal, child marriages continue to take place and dowry is offered and bargained about in the matrimonial arrangements of the upper castes. Clearly the law and social practice are out of step, and as is usual in this area of life, when this happens the law is ignored. In order to understand why this situation obtains today, and is unlikely to change much in the future, it is necessary to look at the way the family is expected to function and the different roles it fulfils in Indian society.

Importance of the Family

Tradition has assigned the family a central role in both religious and secular matters. The interlinking of these is neatly expressed in the Hindu theory of the three debts that if a man dies without paying he must be born again. These are firstly, attention to ritual and worship, secondly learning and teaching, and thirdly, founding a family and raising children. In his life as a member of a family he pays these debts by obeying his elders, learning and practising his craft, trade or job, attending to all the ceremonials and rituals that his religious and family duties prescribe, marrying and having children especially a son, who is necessary to ensure both his spiritual wellbeing after death and the continuation of his family on earth. Though marriage and family customs vary widely all over India, they do have certain basic characteristics in common. One is the importance attached to marriage.

To most Hindus still, marriage is a sacrament and no normal man or woman should die without receiving the sacrament. The importance attached to this can be seen in a practice still used among some castes of including in the burial ceremonies of a dead spinster a ritual marriage. Marriage in the Hindu tradition is an alliance between families, and has an economic base. In spite of attempts by the central Government to try and minimise this aspect of it, there is still the custom among the poorer castes of the giving of a bride price, and of giving dowry to the family of bridegroom among the higher castes. Both these practices arose from the duty of the family to provide for the maintenance and welfare of all its members - the bride becoming on marriage a member of the bridegroom's family in most areas - and reflecting the different economic circumstances of the higher and lower castes.

Since the rules of inheritance depend upon marriage, the legitimacy of offspring is an important concern. This, taken with the fact that until recently, the expectation of life was very short, dictated marriage for a girl at or about the age of puberty, and early marriage for boys. While virginity is still important, the fact that expectation of life for both men and women is increasing, that more men and women are being educated and that more men and women are being educated and that new opportunities for employment are opening up for both, means that the old ways are being subjected to new strains, and changes are being made amongst those groups most affected.

The key social role generally assigned to marriage by Indians is in part due to the importance family life and organisation has necessarily assumed in a country which, as well as being heavily populated, has always lacked strong central religious, cultural or political control. Even at the height of British power, overlordship was shared with the Portuguese and the French, and Indian rulers were recognised in some of the regions. Individuals functioned through their families, and the social and economic groups formed by like families in association, their interaction with other groups being formalised on that basis. The joint family, or the Hindu

undivided family as it is more formally and correctly known, can be seen to be a logical adaption to the circumstances of life in the Indian sub-continent. It is of interest that its pattern of functioning has been copied by other religious groups living alongside them, a measure of its success in meeting the needs of people living in that environment.

A look at the development of the country since Independence does not suggest that for a majority of persons the need for the protections afforded by the joint family will soon disappear. Centre and States are constitutionally locked in a long-running power struggle. In the social and economic sectors the struggle is between the modern and the traditional. Having declared itself a secular state, India cannot look to religion for unity. To survive one has to use the networks available, and the family, immediate or extended is still one of the most important of these.

The Joint Family

Since some kind of joint family arrangement is common to most groups in India, it is necessary to look in some detail at the way the joint family is structured and how it, in general, functions. This has implications for the way marriages are made, the expectations of marriage partners and their relationship with other family members, how marital breakdowns are dealt with, and the difficulties that can arise in making decisions about such consequential matters as the custody of children, divorce and the maintenance of the divorced spouse. Research on the Indian family has in recent years enjoyed some vogue among sociologists, but it is in the nature of the work they do that this tends to be restricted to particular groups in various parts of the country. There is some measure of agreement, however, between them as to the basic structure of the joint family, and what it takes in terms of economics and social adjustment to make it viable.

The actual composition of a joint family can vary quite a lot from time to time, but basically it is formed around three generations. The crucial link is between father, sons and their wives and the children of these. The father's wife, as mother-in-law, has an important role to play in its functioning. Daughters belong until marriage and may be received back upon widowhood or divorce, though they have no claim to this. The father's younger brother(s) may form part of the household, if there was no partition when their father died.

A joint family is "ordinarily joint ... in estate ... in food and workshop...." (Mulla, Hindu Law) but as the cases cited go on to show it can remain joint in law even though there is no estate, or even though the separate families which comprise it do not eat or even live together, or do not worship together. If however a family has been joint, and has become separate, in estate, it ceases to be a joint family. Whether a family is joint or not seems in the end to be largely a question of fact. The senior male member is usually head of the family and manager of its property. He normally has overall control of income and expenditure and can spend the income for "family purposes", which are the maintenance, education, housing and welfare needs of family members, provision for marriage expenses and dowry and for religious ceremonies and other such necessary matters. The direction and control of family business, where there is any, is often also in his hands.

The extent to which the lives of members of a joint family are under the control of the manager (karta) can be inferred from looking at the powers he can exercise. Both men and women brought up in these surroundings have to be taught values without which the system would be unworkable. Obedience and submission to the will of the elders and the welfare of the family as a whole has to come before the satisfaction of individual desires and plans. For women, the care of the family and related members come first. To receive respect from others they should show themselves pliable, self-sacrificing and obedient to the will of their husbands and parents-in-law. In such circumstances individual choice of marriage partners is unthinkable and in practice unworkable. Marriage is regarded as an alliance between families, and as such is often negotiated and

undertaken for family reasons, and when this fails to work out for economic or other reasons, could be broken at the direction of elders. Both men and women accept that the husband's parents will have a good deal of influence over the arrangements of their married life, particularly in the early years, and their expectations of happiness are very low. Girls, in particular, who become members of their husbands' families on marriage expect to have to make considerable adjustments so as to fit into their new family, and do not usually resent the interference of relatives and parents in seeking solutions to any problems that may arise.

In a country that has no social security or welfare provision, except for the small minority who are in the upper ranks of the public service, or who can afford personal insurance, the shelter that the joint family can provide is of importance. For women, especially, the claim to maintenance and shelter is worth protecting and most will put up with a lot before breaking away from it. As will be seen when this problem is looked at in more detail later, divorce does not always offer an acceptable way out for the parties and families involved. The plight of young widows with small children can be equally difficult of resolution. If there is seen to be a choice it is nearly always between degrees of hardship.

Whether in a family or not, most young people still expect that their marriages will be arranged by their parents or relatives. This aspect of marriage continues to attract a lot of attention from sociologists and social investigators, and their findings show that in the urban areas parents are showing themselves increasingly inclined to allow their children to express preference among those presented as suitable mates, but this is still very far from the free choice permitted in most western countries and which forms the basis of their marriage laws. The attraction of what the West has to offer India in material things, in education and in wider opportunities for employment and travel has not meant that western social values and standards of behaviour have been widely accepted, and this is particularly true insofar as relationships between the sexes is concerned. The family has a great deal of control over the socialisation of the young so that the basis for arranged marriage still exists. But it would be wrong to say that the spread of education, the struggle for and achievement of Independence, the spread of the public service and large new industrial developments had been without influence on the family life of Indians. Physically, family members have moved out of the joint family and established homes in other parts of the country in the course of employment. But this has not necessarily meant that they have ceased to share in the family estate or are excused from their part in family obligations. The passage of the Hindu Gains of Learning Act in 1930 provided a way of tackling one of the problems which arose when one member of a family felt he was being unduly penalised because of his greater earning power. He could claim some of his won earnings for himself and still share in the estate of the joint family.

Education, especially for women, has put considerable strains on the functioning of the joint family. As men became more educated they tended to postpone marriage until their education was completed. They tended also to place some value on the educational level of the women chosen for them as brides. Better education of women opened avenues of employment for them. While this could be of value to their new families, it also meant that they were no longer the very young, pliable, self-sacrificing persons that the difficult adjustment to living as a bride in a joint family required. Studies on changing family relationships such as those by Jurian, link them with economic development as well as the rise in the level of education, but underline the point that families ties usually remain strong even when there is household separation. Gupta suggests in his Introduction to Family and Social Change in Modern India, which he edited, that the family was undergoing two types of development which sounded antithetical but were in fact complementary. The first he described as nucleation, the second extension. The first resulted from the wish of individuals to seek economic independence from their families and possibly, separate residence. A number of factors could lead to such a decision, including a desire to pursue personal goals, for which it might be necessary to abandon

the traditional constraints on women and be free to decide on the education of their children. This he calls "functional nucleation" rather than the establishment of western-style nuclear household, and points out that it often does not lead to a disruption of family ties. In fact, family obligations might be more willingly honoured when there is less personal stress in daily living. The other side of the establishment of these small units is that they both need support from and extend support to, other such units in their kin group. This kind of support may be received from and give to kin beyond that of the members of the joint family. He concludes that "Industrialisation, considered to be a major agent of family disintegration in the West, has, in fact, reinforced family ties in India in several ways." There is no guarantee, of course, that this will continue to be the case as new strains and pressures emerge from changing conditions, but there seems little reason to doubt his conclusion that "... though the family is changing it may be too early to say that it is losing its functional unity". If that is the situation for the foreseeable future, it must affect planning for the effective handling of matrimonial causes.

Economic Considerations

It has been pointed out above that to be viable a joint family has to have an economic base. The possible long term effect of the Hindu Succession Act 1956 on the economic viability of the joint family will be looked at later. But it would seem appropriate here to look at one of its economic aspects - the situation of women in relation to joint family property. Normally all property matters are the concern of the male manager. Male members may contribute to the family estate, but a female owning property cannot add this in her lifetime to the property of the joint family into which she has married. She cannot be a coparcener, as she cannot by birth acquire an interest in joint or coparcenary property. Only males enjoy this right. But she can be a member of a joint family and claim to be maintained, educated, and married out of joint property assets as well as succeed to her husband's share in it. This does not imply that she cannot contribute in other ways. She may be allowed to work, and it seems usual in these circumstances that what she earns is not hers but the property of the household.

Marriage is one way in which a woman can contribute to the economic resources of the family of which she becomes a part. The matter of dowry is an important part of the negotiations which accompany an arranged marriage. It is hard to conceive of marriage by choice fitting into the framework of joint family functioning. Though the Dowry Prohibition Act was passed by the Central Government in 1961 it has had little or no effect on the practice of offering and accepting dowry as a routine part of marriage arrangements among the higher castes. Rama Mehta writing in 1974 about the results of her research on the Divorced Hindu Woman reported that those being interviewed had either never heard of the legislation or else dismissed it as irrelevant. Effectively, implementation of the Act depends on initiatives taken by the States, and few have shown any willingness to undertake this thankless task.

To women the matter of dowry is important in a number of ways. Fathers accept that they will have to provide a dowry if they want their daughters to be married. They also accept that it is a parental duty to find a husband and thereby a settled future for their daughters. The amount of dowry will perhaps be the crucial factor in finding her a suitable husband, though her appearance and the level of her education will also be taken into account. Daughters accept that once they have been married, and the negotiated dowry has been paid, they have no more claim upon their parents. It is only in very exceptional circumstances that a divorced or widowed daughter will be accepted back into her natal family, and she knows that she cannot claim such consideration.

The adequacy of her dowry may be quite literally a life and death matter for a bride. The hardships endured by her in her new family if her dowry is thought by them to be less than it should have been are a matter of common place knowledge. Ill-treatment can be physical as well

as mental, and may be increased if it is felt that her parents can thereby be induced either to part with more, or pay in full what had been negotiated but which they found themselves unable to pay. The suicide rate of young brides has for some time been a matter of concern, but in recent years there has been public protest about the number of them who die by burning in circumstances where suicide is unlikely. The majority of these incidents appear from press reports to have two things in common - there have been disputes about dowry and a joint family is involved. In Delhi alone between 1977 and 1981 the annual rate of such deaths alleged and reported has been between three and four hundred. In other larger cities, there have been similar numbers, though prosecutions are few and far between and convictions can be numbered in single figures. Clearly, there are situations that the Divorce Act does not provide a way of dealing with, even taking into account the amendment of 1976 which appeared to offer "easier" divorce. The existence and size of the problem casts doubts on the relevancy and effectiveness of the divorce laws. It seems likely that the very individual basis of their provisions does not fit with the needs and circumstances of joint family living.

The joint family has been described in some detail because it appears from looking at a range of studies on the family in India that there is agreement that it continues to be a most important influence on the formation of attitudes about family living. These include the duties and obligations that attach to being a member of family and patterns of conduct between the generations and between the sexes that are acceptable. It is difficult to access, using census returns based upon numbers in households, how many persons behave as though they were living in a joint family. Joint family life is not always co-incident - if indeed it ever was - with living in one household and eating together. Sociologists refer to joint and to "supplemented nuclear families" (Kolenda) as separate, not because they function differently so far as the way family members behave is concerned, but because it is hard to find a tidy physical definition of a joint family.

Insofar as the law relates to family problems and disputes, the reality would seem to be more important than the accuracy of the definition. Even the evidence of the breaking of joint families may mean no more than the formation of new ones. It is possible that income tax returns would provide a better guide to the existence and persistence of joint families than either sociological research or census data.

Nuclear Families

The importance attached to the joint family should not be taken as denying that there are nuclear families in India and that their numbers are on the increase. Westernization in both social and economic development has helped the process of modernisation and urbanisation. With greater economic and geographical mobility, the establishment of nuclear families is made relatively easy. It has also been helped by an increase in the level of education of men, and more particularly women, and the later age of marriage that seems to follow upon this. It is much harder for a well-educated woman in her twenties to accept her place as a junior member in a family than it would be for a teenaged girl, and the stresses she can experience have been documented in a number of sociological studies. As access to education for women improves, the generational education gap that develops between the members of the group that benefit from it and the older women, undermines the authority of the mother-in-law who occupies such a pivotal role in joint families. The resulting conflicts will have helped along the decision to form nuclear households. As it will be a long time before even basic education is widespread among women, it can be expected that the joint family attitudes will continue to be the dominant ones.

New Patterns of Living and Constraints on them

For people determined to leave, or escape from the joint family, there have been other ways beside formal partition of property by which they could achieve this. For example, the Special Marriage Act of 1872 provided a way. Though this was passed ostensibly to permit Hindus and Christians to marry legally, it has also been used by Hindus either where spouses are of different castes or as a way of declaring independence of the joint family. Marriage under that Act resulted in automatic severance of a person from the joint family. The Special Marriage Act of 1954 retains that provision.

A number of sociologists (e.g. Srinivas, Mehta) have noted that it is the Brahmins who are most ready to adopt new patterns of living and appear most affected by Western ideas. One of the ways in which the new freedom from the traditional constraints of family and caste begin to show themselves is in paying little or no attention to structures for these groups on matters such as mate selection, marital behaviour and the honouring of family obligations. In short, class considerations become more important than caste loyalty. Since Brahmins enjoy the status of the top social group in the society and their patterns of behaviour are the model for the rest, it can be expected that their change of attitude will have some influence. But since the basis for this freedom of action is usually wealth, inherited or derived from professional or commercial success, their influence is likely to be very limited. They do however have much influence in the making of legislation, and their interests will be the ones to be served by it, when, in the name of progress, it reaches the statute books. The divorce legislation is a case in point. There has always been, and still is, divorce by caste custom in some of the lower castes. It became a mark of a high caste, following the Brahmin lead, not to permit divorce. Now that the idea of divorce is acceptable to them, there has been a lot of effort put into getting very modern divorce laws passed in India. It is not clear that these will benefit other women very much, as for many of them resort to divorce, even in cases of dire necessity, is only possible with support from parents and other relatives. If a wife belongs to a caste community which frowns upon a woman seeking divorce, she cannot expect the social support from them which would make life as a single woman bearable. There is therefore considerable reluctance to seek divorce even when abandoned or turned out by her husband's family. There is, however, not a matching reluctance on the part of the husband or his family to seek divorce, for the social consequences for him and for them are relatively negligible. Remarriage for him is acceptable and even desirable.

How a divorced woman is to be maintained, in the absence of her own resources, is a very considerable problem. Where her husband is a member of a joint family, the amount and payment of maintenance is a family matter and ways to delay or avoid or avoid payment are often resorted to, increasing the difficulties of a divorced woman, and posing problems that the courts are ill-equipped to solve.

Also to be borne in mind when considering how marital problems could be constructively dealt with is the very strong mother-son tie which seems to be a fairly consistent feature of the Indian arranged marriage. This seems to be the emotional feature which most affects the son's married life particularly in the early years. Mediation and conciliation patterns borrowed from western-type family counselling to match western-type legislation would seem to be of limited utility in circumstances such as these.

Before looking at the considerable legislative changes that have been made in Hindu personal law since Independence, it may be useful to look back at the social and demographic information referred to above and see what family law problems are likely in the future to come before the courts. In this way it will be possible to make some sort of assessment as to how well the laws will meet the needs of litigants.

Possible future developments

To recapitulate - a longer expectation of life, an economic climate continually changing under the impetus of vigorously pursued industrial and commercial development, the growing numbers of educated persons, both men and women, and the increase in the number of working women, mostly wives - all indicate that there will be growing stress in the kind of family described above. Though there seems to be very little indication that the majority of women will cease to give marriage a central place in their lives and will continue to make strenuous attempts to preserve their position as married women, resort to divorce can be expected to grow. There is nothing now in the law to prevent an erring husband, or simply one desirous of marrying again, from seeking a divorce. That there are now less onerous grounds for divorce are likely to mean that in India as elsewhere when this happens, the lesser remedies of restitution of conjugal rights and judicial separation will be used less and less. As it is now they tend to be used as steps on the way to divorce.

With an increase in divorce, the number of custody and maintenance matters can be expected to grow. Courts have notoriously found such matters difficult to deal with, and in the case of maintenance, enforcement can be a considerable problem. This suggests the need for mediation, reconciliation, and the legislative provisions referring to these will be looked at in some detail. It is also likely that there may be need to develop rules on the distribution of matrimonial property between spouses on the breakup of marriage where the wife has been a wage earner and contributed to the purchase of goods. Derrett remarks in "Death of a Marriage Law" (128) that in many of the matrimonial causes that come before the courts, property problems were the real cause of contention, and that not infrequently the husband and wife were pawns in the quarrel between their families. It will be seen how appropriately the legislation deals with problems of this sort which are unlikely to reduce in number so long as the system of arranged marriages continues.

Legislative Changes to Hindu Personal Law

The progress of legislative change to the customary personal law of the Hindus can be seen as a response to British influence in India. The British decision to administer what they ascertained to be the personal law of the Hindus in all matters coming before their courts where this was relevant, did not necessarily imply approval of its provisions. Indeed the earliest legislative changes to the personal law were an attempt to change practices that seemed shocking to them. The Caste Disabilities Removal Act of 1850 and the Hindu Widow's Remarriage Act of 1856 were examples of this. Further modifications were made by the conferring of certain civil rights on native converts to Christianity, and by the various enactments relating to property, succession and the guardianship of minors.

The setting up of a judicial system under the authority of various Acts of the British Parliament meant not only that the administration of the courts followed the English pattern but also the way that the laws were interpreted in them. The introduction of the principle of stare decisis in reaching decisions when applying Hindu law led inescapably to some confusion. Regional variations have always been, and still are, a fact of life in India, and it is not surprising that the High Courts of the various States reflect this. A mass of case law, often contradictory, resulted. So far as Hindus were concerned, then, there seemed to be a need to have a coherent system of personal law, one that would be applicable to all Hindus without recognising differences related to their various religious beliefs and practices. The large minority of the population who were Muslims already had such a Code of personal law.

Proposed Codification of Hindu Personal Law

The whole question of the codification of the Hindu personal law was a subject for much argument and debate, many traditionalists being

firmly against such tinkering with such a venerable system of law. The movement in favour of it gained some impetus from the struggle for independence. An influential and articulate group of those in that struggle, in which women's organisations played a prominent role, were convinced that a Hindu Code which gave some rights to women and eliminated considerations of caste would help to show the British that Indians were capable of managing their own affairs as a nation in the modern world. The first start on the project in 1941 came to nothing. In 1947 the Rau Committee presented a draft code in which it sought to embody the most progressive elements from all the various schools of law throughout the country. It was intended to be passed into law as a whole and to be applicable to all Hindus. There was never any real chance of this Bill being passed into law. In addition to those who opposed the whole project, there was considerable opposition to the sections on marriage and divorce and some of the proposals relating to succession.

The passage of the Hindu Women's Right to Separate Maintenance and Residence Act of 1946 had dealt with one serious problem. The Special Marriage Act of 1954 gave to Hindus who were willing to use it a way of avoiding some of their difficulties over marriage, divorce and succession. But these only addressed particular problems.

It was expected that the Hindu Code as a whole stood very little chance of getting through Parliament. It was decided instead to separate it into sections and bring these, one at a time before Parliament. The Hindu Marriage Act was first. It was passed in May 1955, followed by the Hindu Succession Act in June 1956, the Hindu Minority and Guardianship Act in August of the same year, and the Hindu Adoptions and Maintenance Act in December. These enactments will be looked at separately below. These Acts brought a measure of order into Hindu personal law insofar as the matters covered by them were concerned. They applied to all Hindus by religion, to Buddhists, Jains and Sikhs - indeed to any person domiciled in all those parts of India to which these Acts extended who was not "a Muslim, Christian, Parsi or Jew by religion..." The Scheduled Tribes fell outside this definition but some have from time to time been brought within their terms.

Hindu Marriage Act

This Act, first passed in 1955 has been amended in 1956, 1964 and 1976. It established the rule of monogamous marriage and provided matrimonial relief by way of divorce for Hindus to whom dissolution of marriage by custom had not been available, and adding lesser relief by way of suits for restriction of conjugal rights and judicial separation. Women as well as men could claim matrimonial relief, and succeeding amendments have made their positions nearly equal before law. Since this equality is not reflected in their position in society nor in their economic situation, the amount of benefit that women get from this equality in law may be questioned.

Because this is an Act of the Central Government and is applicable throughout most of the country, it has to provide for the recognition of customs and usages which may be contrary to its own terms. Customs and usages will be upheld if they are certain, not unreasonable and not opposed to public policy. Also, matters such as providing for the registration of Hindu marriages are left to State Governments to handle. The States are not required to do this; they "make the rules" [sec. 8(1)] but can make these rules compulsory. This has been largely ignored by the States, and in recent years there have been other initiatives by the Central Government but so far without positive result. For Hindus married otherwise than under the Special Marriage Act, there is no easy proof of marriage.

The form of marriage contemplated by the Hindu Marriage Act is clearly ceremonial. A marriage may be solemnized in accordance with the customary rites and ceremonies of either party to the marriage. The Act has adopted the English distinction between void and voidable marriages

though the grounds are not the same. Bigamy, and the parties being within the prohibited degrees of relationship or sapindaship (if not allowed by custom) will make a marriage void, lack of capacity by reason of age does not have this effect. There have from time to time been Acts passed with the aim of revising upward the age of marriage. The latest in 1978 raised the age of marriage for girls from 15 to 18 years, for boys from 18 to 21. It however stopped short of making marriage entered into by persons under those ages void. There is relief afforded to a woman whose marriage was solemnized before the age of fifteen. She may present a petition for divorce if she can show that she repudiated the marriage after she attained the age of fifteen and before she became eighteen. The possibility of this relief being widely used appears remote.

Marriages where one at least of the parties has been incapable of giving valid consent, or where consent has been obtained, either from the party or from a guardian where such consent is necessary, by force or fraud, are voidable and can be ended by a decree of nullity. The incapacity alleged has to be either unsoundness of mind, or mental disorder so great as to make the party unfit for marriage and the procreation of children, or the existence of recurrent attacks of insanity or epilepsy. The fraud that must be alleged in order to avoid the marriage has been spelled out in the latest amendment. It must be a fraud "as to the nature of the ceremony or as to any material fact or circumstance concerning the respondent", a clause wide enough to provide some necessary protection for those whose marriages are arranged with parties whose circumstances may be difficult to ascertain. No-consummation due to impotence and the pregnancy of the wife by some other person than the husband at the time of the marriage, unknown to him also make a marriage voidable. In all the circumstances listed above, the marriage will be treated as valid unless steps are taken to end it. Where force or fraud is alleged, the petition will have to be made within one year of its cessation or discovery. Where pregnancy other than by a spouse is alleged, the petition must be made within one year of the date of the marriage, and there must have been no marital intercourse with the consent of the petitioner after the discovery took place.

Restitution of Conjugal Rights

The amending Act of 1976 has retained the matrimonial relief of restitution of conjugal rights but has substantially changed its nature and effect. The grounds for application for such relief are no longer essentially the same as those for divorce. The sole ground now is that a spouse "has, without reasonable excuse, withdrawn from the society of the other..." The burden of proof of the reasonableness of the withdrawal lies on the person who left. If the court is satisfied of the truth of the matters alleged in the petition, it may, if there is no legal reason which prohibits it, grant a decree of restitution of conjugal rights. Resort to this remedy in addition to making it possible for a wife to obtain an order for maintenance from her husband, now leaves the door wide open to an action for divorce. If there has been no resumption of cohabitation for a period of one year after the marriage of the decree, either party may apply for a divorce. Previously, only the party who had successfully applied for restitution could sue for divorce, but this is no longer so. A wife who only wants to be maintained and does not want a divorce would be well advised not to use the remedy of an application for restitution of conjugal rights.

Judicial Separation

The grounds for an application for judicial separation are now the same as those for divorce for cause. But, unlike a decree of divorce, judicial separation is not final, and a court may, on application of either party, rescind the decree if it considers it just and reasonable to do so. Judicial separation is also a remedy that can be used at the option of the court in certain cases where a decree of divorce is applied for but denied. It may not however be used when the ground of the application is that the respondent has ceased to be a Hindu by conversion to another religion, or has renounced the world by entering any religious order or

has not been heard of as being alive for a period of seven years. In none of those circumstances would it be possible to keep a Hindu marriage alive. The passage of a year after a decree without resumption of cohabitation would, as in the case of a decree of restitution of conjugal rights, leave it open to either party to apply for a divorce. It is not clear whether this applies even when the decree was made at the option of the court when divorce had been applied for. The Act certainly contains no restriction to this effect.

Divorce

The Hindu Marriage Act retains the principle of matrimonial fault as a ground for a decree of divorce though it now also provides for divorce by mutual consent. Adultery, now defined as "voluntary sexual intercourse with any person other than his or her spouse" without the addition of having to prove that the offender was "living in adultery", cruelty, desertion for two years or more, mental disorder such "that the petitioner cannot reasonably be expected to live with the respondent", suffering from a virulent incurable form of leprosy or from venereal disease in a communicable form are all good grounds for divorce. In addition, there are religious reasons that are recognised as acceptable grounds. These are ceasing to be a Hindu by conversion to another religion. The Hindu religion is here taken in the widest sense to include Sikhism, Buddhism and Jainism as well as a variety of other sects. In effect, it means that becoming a Jew, Christian, Parsee or Muslim will provide one's partner with good grounds for an application for divorce. Renunciation of the world by entry to a religious order will have the same effect. A decree can also be asked for on the ground of presumption of death after a seven year absence without being heard of.

Even though matrimonial relief for cause remains an important part of the Hindu Marriage Act, the amendments of 1976 have introduced far more liberal provisions for applying for a divorce. The failure to resume cohabitation for at least a year after the passage of decrees of restitution of conjugal rights or of judicial separation leaving it open for either party to sue for divorce has already been referred to. There is also now provision for an application for divorce to be made by both parties together on the ground that they have been living separately for a period of a year or more, that they have not been able to live together and that they have "mutually agreed" that the marriage should be dissolved. There has in these circumstances to be a six-month delay before the petition can be heard. No motion for the hearing of the matter can be made if more than eighteen months has elapsed since the initial petition by the parties; they would have to begin the proceedings all over again.

When a petition for divorce is by mutual consent the court, in addition to listening to the parties may also make such inquiry as it thinks fit before deciding the matter. This would give them the opportunity to determine whether pressure has been brought on either or both of the parties to seek a divorce. One of the matters that the court may inquire about is whether or not a marriage had been solemnized. The wording of the section makes it obligatory on the court, once it is satisfied that there has been a marriage and that the matters contained in the petition are true, to dissolve the marriage. Since the petition will have been jointly presented, there is no need to wait for time for an appeal to elapse, so that the decree takes effect from the date it is made. It is true that in this, as in other matters under the Act except in the cases where mental disorder, physical illnesses or religious reasons are alleged, that the court has the duty to "make every endeavour to bring about a reconciliation between the parties" - (sec. 23(2)). Such attempts at reconciliation may be made whether the parties desire it or not, if the court thinks it just and proper that the attempt should be made.

In order to allow this to be done, the matter may be adjourned for up to fifteen days, for a person nominated either by the parties or by the court to attempt reconciliation and report to the court whether or not the attempt was successful. This would appear a very reasonable provision if the reconciliation to be attempted were between the husband and wife alone. Since in the large majority of cases the marriages will have been arranged, and particularly if divorce is sought in the early years of marriage, it would seem that mediation would have to be between families as much, if not more, than between spouses. As Derrett points out in his "Death of a Marriage Law" the dispute is more often about property than whether the couple can get along with each other. It would seem that any person or agency attempting reconciliation should be equipped to deal with this aspect of the problem, and that families as well as parties should be necessarily included in any real attempt at reconciliation. Even conciliation, where maintenance and property matters may have to be decided on the breakup of a marriage, should involve family members as well as spouses.

One of the ways the bias of courts in favour of marriage has been expressed is in its unwillingness to entertain a plea for divorce until a period of time, usually three years, has elapsed since its solemnization. This period has now been reduced to one year, though the mitigating circumstances of exceptional hardship and exceptional depravity are still allowed to support a plea for a hearing within the period. In general, the tenour of the Act seems to be that a year is enough to determine whether or not a marriage has broken down, and that justice lies in obtaining a relatively speedy determination of the matter. The target set in Sec. 21B(2) is six months from the date of the service of notice of the petition on the respondent for determining the issue; for appeal, the conclusion should be within three months. If this sort of timetable could be kept to, it would prevent the acknowledged scandal of hearings artificially prolonged in order to avoid the payment of maintenance or the return of property unjustly retained. The settling of time limits pinpoints the responsibility of the court to prevent this sort of thing happening.

Prolonging hearings is a way of bringing pressure to bear on the economically weaker party in a marital dispute. Legal aid is not available in such cases. The way in which the Act addresses what must, in the nature of the way families organise their finances, be a fairly usual problem, is by giving the court the power to order the party with the means, either husband or wife, to pay to the other the expenses of the proceeding and monthly maintenance during the proceeding. It is a method of proceeding which, given the acrimonious nature of most matrimonial disputes which have reached the stage of court action, must be most difficult to enforce.

Maintenance

The right of a Hindu wife to be maintained during her lifetime by her husband has always been an important principle of Hindu personal law. The passage of the Hindu Married Women's Right to Separate Residence and Maintenance in 1946 gave statutory recognition to the practice of upholding her right to be maintained even though she was not living with her husband if she could show that she had good justification for leaving. This right to maintenance has been reaffirmed by the Hindu Adoptions and Maintenance Act 1956. In spite of an increase in exposure to education and entry in growing numbers into employment outside the home, the economic state of the married woman has not changed enough to lessen the importance of the right to be maintained by her husband, or in joint families, by her husband's family.

It is interesting to observe that one of the grounds for divorce limited to wives concerns maintenance. The Code of Criminal Procedure (sec. 125) and the Hindu Adoptions and Maintenance Act (sec.18) both provide ways in which a wife living apart from her husband for cause can be awarded maintenance to be paid by him. If the spouses have not resumed cohabitation since the award of maintenance to her after a year or more, the wife may present a petition for dissolution of the marriage. It is not made clear whether a wife may exercise her right even if maintenance is paid though there is no resumption of cohabitation. Divorce of course would enable her to apply for permanent maintenance which could be available either as a gross sum or as a monthly or periodical payment for her lifetime or until remarriage - likely to be a much more satisfactory arrangement, especially as payment may be secured, if necessary, by a charge on the immovable property of the respondent.

Except for this one acknowledgement of the possible financial status of a wife involved in matrimonial problems, the Hindu Marriage Act treats wife and husband alike in requiring the party with means to support the other during the hearings, pay the expenses incurred for the hearing and provide for their maintenance after dissolution. The court has wide discretion in fixing the amounts to be paid and will take all the circumstances of the case into account, including the means of the parties and their conduct. It is interesting to observe that for both parties sexual misconduct may be pleaded by the other in support of an application to vary, modify or rescind an order to pay maintenance. It is no longer only the woman who must behave circumspectly.

Custody

During the hearing or after the resolution of any proceeding under the Hindu Marriage Act, the court may make orders concerning the custody, maintenance and education of minor children. Since the Act does not provide any guidance on the way custody matters should be dealt with, except to say that weight should be given to the wishes of the children where this is possible, the provisions of the Hindu Minority and Guardianship Act relating to custody must be taken to apply. Section 6 of that act affirms the long recognised principle that the father is the natural guardian of a son and unmarried daughter. If the child is under five years the custody is normally with the mother - which in effect only really means that she exercises guardianship over the young child. If for some reason the father does not have custody, then it passes to the mother. But Section 13 of the Act makes it clear that regardless of claims to custody, the welfare of the minor is the paramount consideration determining the appointment of a guardianship.

The Hindu Minority and Guardianship Act also makes it clear that for a girl at least, marriage does not, as it generally does in other countries, confer the status of adulthood upon her. Her husband becomes the guardian of a married minor girl.

Property

The power of the court to make decrees ancillary to matrimonial causes relating to property is limited to property "presented, at or about the time of marriage, which may belong jointly to both the husband and the wife" (sec. 27). It is clear that the wife is not regarded as having a share in any property acquired during the marriage jointly used by them. Her contribution by way of the running of the household and the care of its members could be seen to entitle her to a claim for maintenance, but it will be more difficult to exclude her from a share in the goods acquired during marriage if she is gainfully employed and has contributed to the purchases of goods and property. In the division of marriage gifts between the parties, the court has, as elsewhere in the Marriage Act, wide discretion. Such division may be made as is deemed "just and proper".

The fact that courts dealing with matrimonial cases have no jurisdiction to deal with the property rights of the parties or to direct the disposal of any property owned by them must make it difficult to arrive at a just solution of the problem of the amount of maintenance to be awarded. All that can be done is to order it to be secured by a charge on immovable property.

Hindu Succession Act

Though purporting to deal only with succession, this Act affects a number of other areas of personal law. In particular, the increase in the property rights of women, and new rights to alienate by will a share in a co-parcenary have had a marked effect on the joint family.

The Act provides for all Hindus a uniform and comprehensive system of inheritance. In effect it abolishes the difference between the two main systems of law, the Mitakshara and Dayabhaga, preferring the rules of the latter to that of the former. All property of a male Hindu, whether separate or an interest in joint family property may be the subject of a gift, devised by will, or pass to his heirs on an intestacy. The law provides that in succession there shall be equitable distribution between male and female heirs. This has further improved the rights of women to property which had earlier been established by the Hindu Women's Rights to Property Act of 1937. This Act had established what was known as a Hindu woman's estate, limited to her life, in a share equal to a son's in her deceased husband's separate property, and her husband's share in joint family property as at the time of his death, where the Mitakshara rules applied. Where the Dayabhaga rules applied, the widow's share was the same as a son's in all her deceased husband's property, separate or joint. This woman's estate was enlarged by the Hindu Succession Act to full ownership without any distinction made between separate and joint property. This did not mean that upon her husband's death she could take his place as co-parcener, but it did mean that she could ask for partition. This placed her in a much stronger position so far as ownership of property was concerned, and would clearly affect her claim to be maintained by her husband's family. Where the property was enough that she could maintain herself, there would be no problem, where it was not, there clearly could be considerable problems if she insisted upon ownership rights.

Also partition can tend to weaken the economic base of the joint family, and understandably there was considerable argument about whether agricultural property should or should not be exempted from the provisions of the Hindu Succession Act. Some States have legislated for their inclusion, other for their exclusion. Where immovable assets such as agricultural property are included in an estate, a female heir may find it more prudent not to insist on getting a share equal to her brothers and thereby forfeiting any claim to their help or support in the future. The practical disadvantages may outweigh the value of the legal right.

With the enlargement of women's property rights has come changes in the devolution of their estates. The Act abolishes all the complicated rules relating to the devolution of woman's property - stridhana - upon her death. As she could make no will, all her property followed rules which depended upon her status at death and the source of the property she had acquired. The Hindu Succession Act confers upon her the right to make a will and in this way dispose of all property of which she is full owner. Upon intestacy, the Act lays down rules for succession to her property, but keeping the distinction between property inherited from her mother and father, and property inherited from her husband and father-in-law.

It is clear that in Hindu law the right to own property and the duty to maintain dependants are seen as complementary. A Hindu woman is now liable, under the Hindu Adoption and Maintenance Act (sec 20) to maintain her legitimate or illegitimate minor children and her aged or infirm parents. She may also be liable to pay maintenance to a divorced husband if she is the party with means, as was pointed out above.

The liability to maintain members of a joint family out of joint family property has been preserved, even if in a rather limited form. Though a co-parcener has the right to will away his portion, this disposition is subject to the rights to claim maintenance of those who can be shown to be dependants. Indeed the Hindu Adoptions and Maintenance Act provides that where a dependant has not received a share of the estate of the deceased, whether by will or upon intestacy, the dependant is entitled to maintenance from those to whom the estate passed. This general principle applies whether the deceased is male or female. Throughout the legislation passed in the 1950's there has been an attempt to balance new rights and old claims, even though it seems that in the long run the new rights will be destructive of the old claims by making them less important than they once were and more difficult to enforce.

Conversion to another religion and loss of caste were at one time grounds for the forfeiture of property and resulted also in exclusion from inheritance. The Caste Disabilities Removal Act of 1850 changed this situation, but succession to the property of the converted person followed the personal law of the religious group that he joined. This rule has been retained by the Hindu Succession Act. A descendant of a person converted from Hinduism to another religion is disqualified from inheriting the property of any of their Hindu relatives unless at the time when they should succeed they are themselves Hindus. Children born to the convert before conversion are unaffected by the rule. In the nominally secular country of India conversion to another religion has far-reaching legal consequences, not only for the convert but for family members and descendants.

Hindu Adoptions and Maintenance Act 1956

Maintenance

References have already been made to those provisions of this Act which refer to the claims of wives and of dependants to be maintained. The purpose of the Act is stated as both codifying and amending the law in these areas. The duty of the Hindu male to maintain his wife, children, parents and other dependants has long been a central part of Hindu personal law. This Act reaffirms and spells out this duty in detail, and adds to it the duty of a Hindu woman to maintain her children and elderly parents. As in the other Acts referred to, Hindu means every person who is not a Parsi, Muslim, Jew or Christian, or any member of a Scheduled Tribe excluded from its operation.

A Hindu wife is entitled to be maintained by her husband during her lifetime. Normally this entitlement is dependent upon cohabitation. There are however certain circumstances in which she is entitled to live separately without forfeiting her claim to maintenance. If he deserts her without reasonable cause, wilfully neglects her or treats her with such cruelty as to make her fear injury to herself if she remains, these will be good grounds for separate residence. The same is true if he suffers from a virulent form of leprosy. Bigamy or the keeping of a concubine by her husband, whether at home or elsewhere will justify her living separately,

she must remain chaste and must remain a Hindu by religion. It will be observed that these grounds would entitle her to other matrimonial relief, such as judicial separation or divorce, but she may choose this lesser alternative without forfeiting the right to proceed later to make application for divorce. As was pointed out above, an order against her husband for maintenance which did not result in a resumption of cohabitation a year or more after, would leave her free to seek a divorce.

A wife's claim against her husband for maintenance is a personal one, arising out of the relationship between them, and subsists whether or not he has any property out of which it can be satisfied. If he dies before her, she has a claim for maintenance against her father-in-law. But this claim is not absolute. It can only be sustained if she is unable to maintain herself out of her own earnings or property, or is unable to obtain maintenance from the estates of her deceased husband or deceased parents or from her children. In addition, her claim against her father-in-law is only enforceable if he has in his possession coparcenary property out of which she has not, on the death of her husband, obtained any share. Her new rights of inheritance to a share of both her husband's and her parents' property has much reduced her claim to be maintained by the family of her husband during her lifetime or until she remarried. This must have introduced into the lives of many widows a considerable degree of economic insecurity.

Both mother and father have the duty to maintain their children, whether legitimate or illegitimate so long as they are minors. An unmarried daughter has the right to be maintained, even though she is no longer a minor, unless she has the means to maintain herself out of her own earnings or property. In her case maintenance includes "the reasonable expenses of and incident to her marriage" (sec 3(b)(2)). Both men and women have the obligation to maintain their aged or infirm parents if they are unable to maintain themselves out of their own earnings or property. A childless stepmother is included among such parents.

In addition to those referred to above, the list of dependants who may claim maintenance from the estate of a deceased Hindu male include the son and daughter of a son who has died, where these minor children are unable to get maintenance from the property of either their father or mother. Also included is a widowed daughter who is unable to obtain maintenance from either the estate of her husband, from her son or daughter or from her father-in-law. The widow of a son or of a grandson, as long as she does not remarry, provided she is not able to obtain maintenance from her husband's estate, from her children or otherwise, an illegitimate son so long as he is a minor, and an illegitimate daughter so long as she remains unmarried are dependants who can claim maintenance from the estates of both their deceased parents. The claim to be maintained can only be sustained if the dependant has not received any share, whether by will or by intestate succession, in the estate of the deceased person, and it lies against those who took the estate, to be shared proportionately between them according to the amount of the shares. Only minors whose share would, if they so contributed, become less than the amount they would be entitled to get in maintenance, are exempt.

In general, maintenance means the provision of food, clothing, residence, education, medical attendance and treatment. The Act gives a wide discretion to the courts to determine whether any, and if so, what amount of maintenance are awarded under its provisions. But in reaching their decisions, the judges are directed to take into account a number of factors. If it is the amount to be paid to a wife, or children or aged or infirm parents, they must consider the position and status of the parties, the reasonable wants of the person(s) claiming, whether the claimant is living separately and is justified in doing so as well as any income or the value of any property the claimant might have. Also to be borne in mind is the number of persons who can claim entitlement to be maintained out of the same property. Where the claim of other dependants is being considered, out of the estate of a deceased person, the value of the estate after the payment of debts, any provision for the claimant under the will of the deceased, the degree of relationship between them,

their past relationships and the reasonable wants of the claimant, have all to be taken into account. Balanced against these are the value of any property owned by the claimant, or any earnings from any source, as well as the number of dependants entitled to maintenance.

A claim to be maintained under the provisions of this Act can only be made so long as the claimant is a Hindu. If a person receiving maintenance is converted to another religion, he or she forfeits his right to it, and the court has the power to rescind any such order that it may have made. Whether the amount of maintenance payable to a dependant has been fixed by court order or by agreement between the parties, it may be varied, modified or discharged by the court upon application if there has been any material change in the circumstances which might justify such action.

Adoption

Adoption as a way of providing a home and family for a child in need, or homeless or an orphan, is not looked upon with favour in India. It was permitted when there was need to supply the lack of a son, and it is males who were principally involved in the adoption process. A woman could sometimes adopt, but only as representative of her deceased husband when there was no lineal male descendant who was a Hindu. The Hindu Adoption and Maintenance Act of 1956 amended and codified the law relating to adoption. The provisions relate only to Hindus in the wide definition given to that term in the other legislation looked at above. Persons other than Hindus are not covered by legislation permitting them to adopt, with the change of family and status that this involves. If such persons wish to take responsibility for a child not of their own family they may only do so under the provisions of the Guardians and Wards Act. This gives them custody of the child who stands in the relationship of a ward to them, and they become responsible for his support, health and education and general upbringing.

Though both males and females may adopt and be adopted, the Hindu Adoption and Maintenance Act lays down very strict rules about who may adopt, who may be adopted and the circumstances in which adoption is permitted. A Hindu male adult may adopt a son, who must also be a Hindu, so long as he has no son, grandson or other lineal male descendant who is a Hindu living. The consent of his wife to such adoption is necessary if she has the necessary mental capacity to consent, is a Hindu and has not renounced the world. He is also permitted to adopt a girl with exactly the same qualifications as those applicable to the adoption of a son, including the consent of his wife. It is clear that these adoptions are intended to replace family members who could in normal circumstances be expected to exist.

A female Hindu who is a single woman, that is unmarried, a widow or a divorcee, can adopt either a Hindu son or daughter. If she is married, she cannot do so unless her husband is of unsound mind or has renounced the world. She may only adopt if she has no son or daughter or other lineal descendant of the same sex as the person she seeks to adopt. Only the parents of the child, or any testamentary guardians appointed by them may lawfully give a child up for adoption. In all other circumstances the court would have to sanction the child's availability for adoption.

From the date of the adoption the child is deemed to be the son or daughter of the adopted parent, and neither may renounce the status of the relationship it brings into being. Property rights in both the natal and the adoptive families are fixed as at the date of adoption. There is one remaining tie, however, to the natal family. A child may not marry within the prohibited degrees of relationship of his or her natal family.

The limitations placed upon the adoption process in Hindu personal law emphasise the important place the family is perceived as occupying in both religious and social life. To introduce strangers who could also be rivals of one's sons and daughters would therefore not be acceptable, and adoption as a way of ensuring the welfare of children in need would be alien to the spirit of Hindu adoption. It is not clear however why other

religious groups should not be permitted legally to adopt in their own way and for their own ends, the welfare of the child being always the paramount considerations.

Minority and Guardianship

In a country in which the expectation of life is still relatively low and the birth rate is high, the question of the guardianship of the person and the property of minors is of importance. The main enactment dealing with this subject is the Guardians and Wards Act of 1890 with its subsequent amendments. That Act did not, however, deal fully with the subject. It expressly permitted the personal law of a minor to apply to the appointment of a guardian of his person or property, though laying down the duties, rights and liabilities of guardians and ways of regulating their conduct in the exercise of their duties. The Hindu Minority and Guardianship Act of 1956 states the personal law of Hindus in this respect.

The Act confirms the supremacy of the father as head of the family, and he is the natural guardian not only of his minor children but of his wife if she happens to be a minor. His right of guardianship over property does not however extend to any undivided shares in joint family property held by his wards nor may he, if he is a minor, exercise guardianship over his ward's property. If the father is unable or unwilling to exercise guardianship of his children, it passes to the mother. When the child is illegitimate, the positions are reversed, the mother having the prior claim to guardianship. As pointed out earlier, the custody of a child under five is normally with the mother unless there is good reason why this should not be so.

The position of the mother as the guardian of minor children in succession to the father has been improved by the provision that she cannot be displaced by a guardian appointed by the father in his will. If on her death she appoints no testamentary guardian for them, then the appointment made by the father in his will would revive. Different rules concerning guardianship apply to the minor's interest in joint family property.

Genesis of Personal Law Statutes

Looking back over the legislation that has been reviewed in this section, it can be seen that those parts of the projected Hindu Code which have been passed into law have gone a long way to providing the basis for a personal law for all Hindus. The Acts show a certain consistency of approach. Where there existed a number of conflicting customs - as in succession - the purpose was to try and take from amongst them what was most just and equitable and enact that into law. Though established customs in families, groups or communities could be retained, it was obvious that the legislation set out what was desirable, and could be expected to be accepted in the future as model by those whose practice deviated from it. This approach would accord well with the nature of change in Hindu law. The aspirations of independent India and its hopes for its future development required that its citizens should be seen to be treated justly and equitably. Therefore it was important to increase the legal rights of women, and make them as nearly as possible equal with men before the law. At the same time, the increase in individual rights was not intended to devalue the importance of the family. The primacy of the father as head of the family is preserved, and the property rights of the joint family protected though with some diminution because of the new right given to women to share in the succession and to hold property in full ownership. In dealing with matters long the subject of Hindu law, the legislation shows the attempt to find a balance between old customs and new rights.

In matters such as divorce and other matrimonial causes, where there was no long history of custom and usage relating to the upper castes, - the pattern has been to follow the English legislation. This was not new, because English laws had already been followed in the Special Marriage Act and other legislation applicable to the English and to Christians in India. But in some ways the Hindu Marriage Act is, unexpectedly, more liberal in approach. The endeavour to treat men and women as equally as possible before the law combined with the developments in English law resulting from the view that it was desirable to shorten and simplify the process of getting a divorce, has resulted in a Marriage Act that is of doubtful relevance to the majority of Indians. It is true that most of the grounds for matrimonial relief depend upon a finding of matrimonial fault on the part of one of the spouses, but this does not necessarily protect the other, when following upon a decree of restitution of conjugal rights or of judicial separation, without cohabitation resuming, either party, the guilty or the innocent, can apply for a divorce. The introduction of divorce by mutual consent, after effectively eighteen months separation (a year plus six months delay before hearing) would seem to provide a sufficiently easy way for those wanting to avoid the long and bitter litigation which so often accompanies cases in which fault must be alleged, to make further changes in the law unnecessary at least for a time. However, consultation is now going on about the introduction of the principle of irretrievable breakdown replacing all the others as the sole ground for divorce. This of course is an appropriate way of handling the breakdown of a contractual arrangement entered into between adults as a result of individual choice. Its relevance to an arranged sacramental marriage, the result of an agreement between families where dowry and property arrangements often form an integral part, is less obvious.

Need for Support Services

It is not always realised that the kind of legislation dealing with matrimonial causes which is being copied in India works only where it has the support of a variety of services offering both economic and counselling aid. Legal aid enables spouses without financial resources to exercise their rights under the law. Without this the existence of the rights are of no help to them. Counselling and conciliation services in order to be effective must be available at a number of stages in the dispute and should be, and be seen to be, disinterested if they are to be at all useful. Emergency help with housing and maintenance should be available. Services like these do not exist in any general way in India. A person with a problem is far more likely to seek the advice of elders within the family or the community before taking any decision or embarking on any course of action, especially if it concerns matrimonial or family matters. Such advice is not likely to be disinterested in the western sense. A woman can normally expect that she will be the one asked to make sacrifices; social attitudes are not supportive of a woman taking action in defence of her rights except in very extreme cases. It is unlikely that without family help she would be able to do so anyway. On the other hand, this situation may make it impossible for her to withstand her family if they wish her to seek a divorce, and men too can find themselves similarly manipulated for family reasons. The very limited reconciliation provisions in the Hindu Marriage Act do not leave scope for such situations to be satisfactorily addressed. Intervention for reconciliation purposes during the course of a hearing has, in any case, only a very slight chance of success.

For a law to be effective people must know that the law exists and relief under it must be accessible to them. In a country like India, with a federal constitution, much will depend on the determination of the State governments to make the law effective. There is plenty of evidence that laws will be ignored if they are felt to be irrelevant. The Child Marriage Restraint Acts and the Prohibition of Dowry Act are good examples. The Committee on the Status of Women reported that its

investigators found that thirty years after the passage of the Hindu Succession Act women in many areas did not know that they had rights to share in their husband's property on his death.

The interest in law reform at the top is not matched by a similar interest at other levels in the legal and judicial system in improving the administration of the laws so that relief is easily accessible to those who need it, and, most important in family law matters, that is dispensed without undue delay. Here and there throughout the country voluntary special interest groups, acting mostly in the interest of women, have undertaken the responsibility of informing people of their rights and helping them by mediation or legal aid. They recognise that without this aid the system is likely to work most unjustly for large numbers of people. Though there have been committees who have discussed the provision of legal aid to the poor it is unlikely that in the foreseeable future there will be throughout the country a properly set up and adequately funded system working as a part of the administration of justice in family law matters.

Conclusion

The demographic and sociological material looked at in the first part of this paper suggested that resort to divorce would be likely to grow, but much more slowly than it has in other countries with broadly similar types of matrimonial legislation. The speed of growth in the numbers of educated women cannot be expected to be rapid, and their employment in the modern sector of the economy is likely to follow a similar path. The review of the law suggests that only the most westernised of Indians will feel that it meets their needs adequately, and, as Rama Mehta points out, even some of these women are reluctant to claim the rights it gives them. This suggests that the increase in divorce is likely to come from the greater numbers of men seeking to end a marriage, perhaps for the purpose of contracting another. The way the laws are administered work unwittingly in favour of the economically stronger party - more often than not, the husband. There is obviously need to find ways of making the parties more equal before the law.

The role that legal aid could play in achieving this has already been referred to. That awkward relief - restitution of conjugal rights - used often as a first step to an application for divorce, could perhaps acquire some real usefulness if the parties were required before or during the hearing to submit to professional counselling and/or conciliation in which family members as well as spouses would be included. The importance that services of this kind can have in all areas of family law has already been mentioned, but they can only function effectively if they have a clear administrative relationship with the courts.

There are two matters usually of central importance in family law about which the laws reviewed have very little to say. One is the division of property acquired during the marriage which is not joint family property, and to the acquisition of which the wife may have contributed. The other is the enforcement of maintenance orders. One omission is interesting in the light of the importance placed on the having of children, particularly a son. While impotence makes a marriage voidable, there is no mention of sterility having a similar effect.

Potentially the legal changes likely to have the greatest effect in the long run are those which concern the increase in the property rights of women and the equal sharing of property between sons and daughters upon succession. It is obvious that at present only those women who know their rights can claim them, and not all of these do. Should it become the usual practice that property on an intestacy is divided as provided, and that women exercise their rights of full ownership, including their share in joint family property as representatives of their deceased husbands, then the joint family's economic base could be so weakened that it would be unable to discharge many of those welfare functions that it now undertakes. If this happened new family patterns could begin to emerge, and new claims on public resources made. The seeds of the change of direction for the future may lie in the legislation which created a personal law for all Hindus.

Notes for the Chapter on India (Hindu Family Law)

The statistics quoted were taken from The Census of India (1971) Social and Cultural Tables.

As background material the study by Irawati Karve on Kinship Organisations in India Asia Publishing House 1965 edition was found most useful.

For general information:

Towards Equality - Report of the Committee on the Status of Women in India (1974) Department of Social Welfare, Delhi

The Educated Woman in Indian Society Today - YWCA of India (1971)

There are a large number of sociological studies on various aspects of the family in India. Use was made of the following:

Main Currents in Indian Sociology: Vol.II on Family and Social Change in Modern India Vikas 1976 which provided a good introduction to the literature - Gupta G.R., Editor

Urbanization and Family Change - M.S. Gore - Popular Prakashan Bombay Bombay (1968)

Family in India - a Regional view - G. Kurian - The Hague Mouton (1973)

Divorced Hindu Woman - Rama Mehta - Vikas (1975)

On the laws, the following were helpful:

Hindu Law - Mulla 14th edition ed. by S.T. Desai Tripathi

Death of a Marriage Law - J.D.M. Derrett - Vikas (1978)

Legislation

Constitution of India as amended to 1981

Caste Disabilities Removal Act 1850

Child Marriage Restraint Act No. XIX of 1929

Guardian and Wards Act No. 8 of 1890 as amended to 1976

Hindu Adoptions and Maintenance Act No. 78 of 1956

Hindu Gains and Learning Act No. XXX of 1930

Hindu Inheritance (Removal of Disabilities) Act No. XII of 1928

Hindu Marriage Act No. 25 of 1955 as amended to 1976

Hindu Minority and Guardianship Act No. of 1956

Hindu Succession Act No. 30 of 1956

Hindu Widow's Remarriage Act 1856

Hindu Women's Rights to Property Act No. XVIII of 1937

Hindu Women's Rights to Separate Maintenance and Residence Act No. LXXXV
III (1946)

Special Marriage Act No. XLIII of 1954