INTRODUCTION

That divorce is a necessity, is now accepted on all hands. It is not an antithesis of marriage. It is rather there to strengthen the institution of marriage. The present trend, therefore, is to consider divorce more favourably, calling it the mark of emancipation, specially, of the fair sex, a type of escape value for the release of undesirable tensions of marriage. It is indeed a part of the sifting out process, designed to produce a more rewarding and stable family life.¹

Divorce legally dissolves the marriage tie. But it cannot erase the past. Nor can it create an unrelated future. In a sense, it adjusts the relationship by realigning bonds between the parties. It has, therefore, been rightly said that divorce may end marital tie, it cannot end all family relations.²

For at least two purposes, the relationship of the parties continue even after divorce. Firstly, in so far as one spouse is under a liability to pay for the maintenance

¹ Raj Kumari Agrawala, "Changing Basis of Divorce and the Hindu Law", 14 J.I.L.I. 431, at p.432 (1972) (citations omitted). The Law Commission of India, 71st Report, para 3.2, has said that "(D)ivorce should be seen as a solution and an escape route out of a difficult situation..."
of the other spouse, the relationship continues. Secondly, where there are 'children of marriage', the relationship of the parties continue in relation to their custody, maintenance, education, etc. Thus, divorce is not the end of the whole episode; certain relationship and obligations do survive divorce.

In India, until 1955\(^5\) under Hindu law, a marriage could not be dissolved on any ground whatever\(^6\) except


4. For the meaning of the expression "Children of Marriage", see Part B under the heading "Minor Children", Chapter VI, infra.

5. Before 1955, however, there were certain provincial Acts which were passed enabling the Hindus to get divorce on various grounds, see for instance, Baroda Hindu Nibandha (Hindu Act), No.37 of 1937; Bombay Hindu Divorce Act, 1947 (Act No.XXI of 1947); Madras Hindu (Bigamy and Divorce) Act, 1949 (Act No.VI of 1949); Saurashtra Hindu Divorce Act, 1952 (Act No.XXX of 1952) and Madhya Pradesh Divorce Act, 1955. All these Acts were repealed by the Hindu Marriage Act 1955 (Act No.25 of 1955).

where it was permitted by a valid custom. We accepted
divorce grudgingly in 1955 when Parliament enacted Hindu
Marriage Act. At the time of the introduction of the
remedy of divorce some resistance was put by the members
of the Parliament on various grounds. For instance, divorce
was thought as repugnant to the sacramental character of
Hindu marriage. It was also feared that it will destroy

7. A departure from the strict rule of indissolubility
of marriage may be noticed in the gentle evolution
of customary practices particularly in such communi-
ties such as Sudras and other low castes where the
influence of religion on social mores is meagre.
Steele, Law of Custom of Hindu Castes Within the Deccan
See also W.H. Rattigan, Notes on Customary Law as Adminis-
terated in the Court of Punjab, (Lahore, 1876) at pp.95-96.
H.R. Rose, A Compendium of the Punjab Customary Law, (Lahore,
1911); at p.32; S. Roy, Customs and Customary Law in
British India, (Tagore Law Lectures, 1911) at p.311; J. Lal,
Law of Marriage and Divorce in India, (Delhi, 1956), at p.32;
Virendra Kumar, "Evolution of Divorce Under Hindu Law",
(1968) XX, The Law Review; R.K. Agarwala, "Hindu Divorce

8. See B.K. Sharma, "A Modern Perspective of Our Divorce
Policy", Law Towards Stable Marriage, P. Diwan and
simply cited as Stable Marriages). See also G.R.
(1975). Moreover, due to the resistance and the threat
to veto the Bill by the then President Dr. Rajinder
Prasad who was conservative Hindu, the Bill was shelved
and passed later on, see Grayville Austin, The Indian
Constitution: The Corner Stone of a Nation, at pp.140-43.
the institution of marriage. But the most cogent and convincing argument seems to be that "without economic independence and property rights for women the provision of divorce was not only going to be of any use to them but would also operate against their interests". Probably, this was one of the reasons that Hindu women were given an equal right in the property of their parents. Mr. Pataskar, who piloted the Bill (which was later enacted as the Hindu Succession Act, 1956) in the two Houses, exhorted:

"It would now be (after having passed the Hindu Marriage Bill) the moral and legitimate duty of those gentlemen to see that woman is restored her natural rights in property and to take steps to ensure her economic independence..." (Emphasis added).

The resistance put to the introduction of divorce, it seems, was mainly focused on its aftermath in relation to the hardship caused to women. But it seems that the post-divorce problem, particularly of children, was not canvassed in the proper perspective. One reason for the absence of

10. Id., at p. 541.
11. For instance, the question of custody of children was taken from the point of benefit of the wife. Stressing the need of handing over custody of children up to the age of 12 years to the mother, the opinion of Joint Committee was that the question of custody was "the greatest stick to beat the woman with" and that the children would be a main stay of a divorced wife. However, it was also made out that children will be safer with the mother who is unlikely to remarry after divorce (a thing which may not be true now) in contrast with the father where on his
such a debate may be that in 1950s the English matrimonial law had yet not realised the gravity of the problem. The vast increase of divorce cases in England after the two World Wars "created problems as well as solutions". It was only after the Report of the Royal Commission of Marriage and Divorce in 1956 that some fundamental changes in the matters relating to children on divorce were made. It was

remarriage children will be worse at the hands of step-mother, see Gazette of India, Extra, Part II, Sec. 2, Dec. 4, at pp. 692, 702.

12. O.M. Stone has described in a picturesque manner, the pre-1958 state of English law in this respect, as follow:

"Perhaps nothing about our marriage laws would more greatly astonish that fashionable hero, the visitor from another planet, than the fact that in all the law concerning matrimonial litigation in England and Scotland, there is only one minor reference (Matrimonial Causes Act, 1950, section 2(2)) to the interests of the children. Having grasped this fact, he might be steeled for discovery that English lawyers group orders for custody of children in matrimonial causes under the grotesque description of "ancillary relief" and the courts not infrequently deal with them accordingly", in "The Royal Commission on Marriage and Divorce: Family Dependents and Their Maintenance", (1956) 19 M.L.R.601.


14. See infra.
this new move that prompted Kahn-Freund, while commenting on the new provisions of the Matrimonial Proceedings (Children) Act, 1958, to say: 15

"It is an admission by Parliament that the whole theory of divorce law is wrong. The denial of dissolution of the marriage does not restore the marriage; it sounds like a commonplace but the entire divorce law rests on the assumption that only one of those "grounds" on which a divorce or separation can be granted gives the spouses the right to live apart. Section 3 of the new Act (which empowered the courts to grant relief even where main relief was refused) shows that where the law is prompted by a realistic desire to help, that is, in this case, to promote the interest of the children, it must ignore the outdated fiction on which the divorce law is founded".

In India, some developments in the social pattern of life, especially in the last decade, have escalated the divorce rate. For instance, dissemination of higher education among more and more women 16 has broadened their horizon of thinking. The woman who at one time felt shy of telling the name of her husband, can now discuss philosophy of sex with a man. The dispensation of higher education has also resulted in better and greater avenues of employment for women. This economic independence has given the

16. The report published by University Grants Commission for 1982-83 has shown that the number of women students in colleges and universities has increased from 40,000 in 1950-51 to 8,93,000 during 1982-83, see Editorial, "Women's Education", The Tribune, May 14, 1984.
women the guts to express themselves. Moreover, the attitude of the society towards the notion of divorce is changing. This attitude is essentially expressed through the Legislature, which now has made divorce easy by making large scale amendments in the Hindu Marriage Act. The change is also perceptible in the post-1976 judicial decisions. Thus, the escalated divorce rate has affected more and more children of such divorced parents; hence, it has necessitated to have a second look at the post-divorce problems.

In England, till 1958, proceedings with respect to children were ancillary to the main petition for any matrimonial relief. The Royal Commission on Marriage and Divorce expressed great concern over the seriousness of the problem. "of the problems resulting from the dissolution of marriage", says

17. H.Andrup, B.Buchhofer and K.Ziegert, after analysing the phases of social developments, have come to the conclusion that the economic dependence of the marriage partners upon each other has a stabilizing effect on their living together. To the extent this dependence is reduced, the stability of their relations become weaker, "Formal Marriage Under the Crossfire of Social Change", in Marriage and Cohabitation in Contemporary Societies, J.Bekelaar and S.Katz, Eds., at p.33.


19. See generally, B.K.Sharma, supra note 8.

of the Royal Commission, "none is more serious than that/trying to ensure the future well-being of the children". 21

The size of the problem was indicated by the figures of 20,000 children affected each year by the divorce of their parents. 22 It was the declared policy of the Royal Commission that "in every divorce case the interests of the children" should "be an issue before the court and that that issue" should "be recognised as one which is just as important as the question of divorce". 23 A number of Recommendations were implemented by the Matrimonial Causes (Amendment) Rules, 1957. 24 But more fundamental and basic changes were introduced by the Matrimonial Proceedings (Children) Act, 1958. First fundamental change was that before making a divorce decree absolute, it must be satisfied that for the care and upbringing of each child of marriage "arrangements have been made...and that those arrangements are satisfactory or are the best which can be devised in


22. Ibid.


the circumstances. Secondly, that the court could pass an order in respect of children not only where the relief had been granted, but also where it was refused. These provisions were carried in subsequent statutes and now these related matters are subject matter of a separate 'Part' in the Matrimonial Causes Act, 1973.

In contrast, section 26 of the Hindu Marriage Act, 1955, is the sole provision which deals summarily the question of custody, maintenance and education of children of the divorcing couple. Considering the gravity and vastness of the problem, the provision is an inadequate respite to the poor little souls orphaned by divorce. Under the existing provision, the children are, more often than not, held as pawns by the parties in the divorce proceedings. For instance, it has been held that if the main proceedings are dismissed, the court has no power to adjudicate upon children.

26. Id., Section 3.
28. Sections 41 to 44, Financial Provisions for children are dealt in Part II alongwith that of the spouses.
29. See generally Chapter II, Part B, supra.
Very recently the Himachal Pradesh High Court has ruled that an order for the custody of the child does not become void merely because subsequently, the main petition for divorce was dismissed. The word 'decree' occurring in section 26, the Court held, means not only a decree granting relief but also a decree refusing relief. Accordingly, even where the main petition has been dismissed, the court has jurisdiction to grant ancillary relief in respect to children.

A further question arises: Does the court have jurisdiction to entertain an application under section 26 after the main petition has been dismissed? For instance, under section 26 an application for the custody, maintenance and education of children can be made either during the pendency of proceedings or after the proceedings have been terminated. When the main petition has been granted, no doubt, the court retains the jurisdiction to entertain such an application after the decree. By the stretch of reasoning an order made during the pendency of proceedings is also held within the jurisdiction of the court. But to entertain an application under section 26 de novo, where the main petition is already dismissed, where is the cause of action? If the court entertains such an application, it is submitted, the court is not assuming jurisdiction in an ancillary matter, but hearing the application under the ordinary law. This is a point a casus omissus under section 26.

31. ibid., at pp 183-84.
32. Supra note 30, ibid.
Similarly, no clear provision exists enabling a party to have access to the children where it did not have custody. Furthermore, an acute controversy is raging amongst the High Courts on the question whether interim maintenance can be granted for children under section 24 of the Act where there is no separate application under section 26. The provision is under review of the Law Commission.

It is no gainsaying that the social interest involved in the protection of children, in such cases, requires that adequate and satisfactory arrangements should be made for their upbringing, education, etc. But the enquiry under section 26 of the Act is of a perfunctory nature. For instance, the discretion of the court is limited to decide question relating to children only upto the age of minority. Thus where the children who has become major and are receiving education, the court cannot make provision for them in the decree. Moreover, if such an order was made earlier, it ceases to be effective from the date the child comes of age. It throws a very heavy burden on the custodial spouse, who, in

33. See Part C, entitled "Parental Liability to Maintain Their Children", Chapter VI, infra.
34. See note 169 and the accompanying text, Chapter VI, infra.
35. For the meaning of the term "minor children" occurring under section 26, see Part B entitled "Minor Children", Chapter VI, infra.
majority of the cases happens to be the mother. Unlike English law, the court under section 26 has got no power to enquire before a decree for divorce is passed whether suitable arrangement for such children is made or not and refuse to make a decree in case such an arrangement is not made.

For those women who are not economically independent divorce removes the ground from under their feet. The divorced women of middle class strata of society find their remarriage difficult and sometimes may have to lead the life of "a desolate lone voyager". Sometimes a divorced wife loses those benefits which even a widow might receive. For instance, a widow becomes entitled to the pension and other benefits of her husband and is also an heir of her husband. Moreover, her parents-in-law also extend their sympathy and support. Thus, after divorce, the problem of her maintenance and support assumes importance.

There are two statutory provisions which provide for the maintenance of a divorced wife. One is section 125 of the Code of Criminal Procedure, 1973. This provision is of a general nature and obtains to all the communities in India. The provision corresponds to section 498 of the Code of Criminal Procedure, 1898. The new Code retains the old

37. See supra.
notions that the object of the provision is to prevent vagrancy and provide summary remedy to the wife. Accordingly, on the one hand it limits the power of the Magistrate to grant up to the maximum of rupees five hundred, \(^{39}\) per claimant, \(^{40}\) per month, and on the other, disentitles a wife to claim maintenance if she has her own means to maintain, however small. \(^{41}\) Looking to the urgent and summary nature of the provision, a limit seems to be desirable. However, owing to the huge inflation in the market prices it needs a second look that the maximum of 500.00 should be raised. The practical benefit of the remedy under the Code lies in its speediness and jurisdiction in granting maintenance to the wife, and above all, the procedure of

39. Section 125(1) of the Code of 1973 provides *inter alia* that the Magistrate shall grant maintenance "at such monthly rate not exceeding five hundred rupees in the whole."

40 See for instance *Ramesh Chander v. Veena Kaushal* A.I.R.1978 S.C.1807 where the award of rupees 1000/- per month to the mother and two children was upheld.

41. See for instance, the recent case of *Bilquis Bai v. Sher Khan Ilabi Bux*, 1984 H.L.R.166 (M.P.) where the court construing the words *AVEDIKA KA GUJAR BASAR HONE MUSHKIL HO RAHA HAI* (It is difficult for the applicant to make both ends meet) held that difficulty or inconvenience (Mushkil) in maintaining oneself is not a ground to seek maintenance under section 125 of the Code of Criminal Procedure, 1973. The wife's small earning by making at *biris* was held to be sufficient to maintain herself.

enforcement of maintenance orders.42

The Hindu Marriage Act, another enactment confers the right of support and maintenance on both the spouses. However, it is mainly the wife, who suffers from the vice of dependency and claims maintenance.43 Section 24 of the Act provides for the interim maintenance during the pendency of the proceedings. Section 25 entitles a party to claim permanent maintenance after the passing of a decree in the main proceedings. Under the provisions, there is no upper limit provided by the Act and the court has wide discretion to grant what is just or reasonable in the circumstances of a case. The court may vary, modify or rescind the order for permanent maintenance if the recipient spouse has become unchaste or has remarried. The provision is of a general nature and provides for permanent maintenance in all types of matrimonial reliefs under the Act, viz., restitution of conjugal rights, judicial separation, nullity of marriage and divorce. The condition of chastity of the recipient spouse may be relevant in two former types of reliefs, i.e., restitution of conjugal rights and judicial separation, since the parties continue to be husband

42. See generally Chapter V, infra.
43. The author has come across no case where the husband was granted maintenance against the wife. In Bibi Balbir Kaur v. Raghubir Singh, 1977, H.L.R. 20 (P&HD), the wife and the husband both applied for interim maintenance under section 24 of the Act, but the husband's application was dismissed.
and wife. Some sort of conjugal fidelity is expected from the marriage partners, but to impose the observance of a 'chastity belt' after the marital relationship of the parties is severed (by a decree of divorce or nullity of marriage) seems incoherent and without reason. A post-order fact to be taken into consideration for the variation, modification or rescission of the order, at least, should bear some relevance to the economic position of the party concerned. In this respect the provision under the Code of Criminal Procedure is liberal. Section 125(4) and (5) of the Code provide that the wife shall be disentitled for maintenance if she is "living in adultery". Conceptually divorced wife cannot commit adultery. Moreover, the term "living in adultery" is a wider term than the term "unchastity". Even a single lapse on the part of woman may amount to unchastity on her part.

44. Manu, IX, 101, says: "Let mutual fidelity continue until death".

45. Under English law, chastity of the recipient party has little relevance after divorce, except so far it affects the financial position of the parties, see Margaret Spencer, "Effect of Conduct on Matrimonial Relief", (1978) 128 N.L.J. 346. In U.S.A. the majority view in respect of the effect of unmarried cohabitation is to consider pragmatically whether the ex-spouse's support needs have changed as a result of cohabitation. See also J. Thomas Oldham, "The Effect of Unmarried Cohabitation by a Former Spouse Upon His or Her Right to continue to Receive Alimony", 17 J.F.L. 249 and "Cohabitation by an Alimony Recipient Revisited", 20 J.F.L. 615.

46. It has now been held in Mariamma v. Mohd. Ibrahim, A.I.R. 1978 Ker. 231, that the term "living in adultery" does not apply to a divorced wife.
The financial aspect of the post-divorce problems relate to another field also, what we may call, the division of 'marital assets'. The problem may be canvassed from two angles. First, there is increase in the number of married women in the labour force; thus, the wife contributes significantly to the common pool from gains of her own employment or other work, which results in the augmentation of the family income which can be utilised in the purchase of 'family assets', including immovable property. This means that increasingly married women are acquiring property through their own work as distinguished from the property which comes to them, say, by dowry succession, inheritance, etc. Secondly, a wife who devotes herself to the work of culinary and rearing of children, indirectly helps her husband in the acquisition of "family assets" and other property by her thrift and skill. Moreover, her contribution towards the family by her physical work is no less important than the husband's financial contribution.

So far as the marriage is a going concern, while purchasing the property, the spouses little bother, in

47. For the meaning of the term "family assets" see Part B, Ch. VIII, infra.

48. English law not recognises, "the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family" as one of the consideration which the court has to take into account while making any financial provision on divorce. See section 25(1)(f) of the Matrimonial Causes Act, 1973. The provision first originated in Section 5(1)(f), Matrimonial (contd....)
whose name the property is put irrespective of the fact from whom the consideration flows. They plan their future as a lifelong affair; the very idea of divorce is repugnant to the conjugal harmony. Where both the husband and the wife are gainfully earning, the property may be purchased in the name of individual or both the spouses jointly. But since a large chunk of married women in India remains confined to the four walls of the house, it is not unlikely that generally the property is purchased in the name of the husband alone. Since in India property follows the ownership, in most of the cases the wife has to walk out of marriage bare handed. While in her husband's house, she is the samaralya (queen), but when she is to leave that house there is nothing which she can call her own. By a telling metaphor, Sir, Jocelyn Simon, P., has stated the common situation (in relation to English women when their contribution in the home were not recognised) thus:


49. It is possible that for some technical reasons the property is put in the name of the wife. For instance, where the wife gets a house building loan in her name from her employer, the house property will be in her name alone, or the property is purchased in her name to avoid tax complications.

50. An old Indian adage that man comes in this world with great potentialities, like a live cartridge, but goes from it like an empty shell (Mithhi bandh ke asva jagmen, haath pasaare Jaavega) squarely apply to Indian women who comes to the house of her husband with valuable possessions, but on divorce, has to go empty handed.

51. Rig Ved. IX. 85.
"The cock can feather the nest because he does not have to spend most of his time sitting on it."  

The Royal Commission also had taken notice of such a situation which caused injustice to the wife saying "if on marriage, she gives up her paid work in order to devote herself for caring for her husband and children, it is unwarrantable hardship when in consequence she finds herself in end with nothing she can call her own". In consequence, English law now recognises the wife's contribution in the home. In India also there is no reason why her services in the home should not be recognised in terms of money, when on divorce the question of distribution of 'family assets' arise.

One more social fact has compounded the problem. Earlier, majority of the married couples were expending their income on the current needs of food, clothing, shelter etc. But now with the distribution of durable consumer goods by way of instalment purchases and instalment mortgages, more and more assets of a durable nature are being acquired by the spouses. For instance, a matrimonial home, and other family assets like family car, scooter, television, 

gerator etc., can now be easily purchased by a middle class family by raising loan or on instalment purchase. Both the spouse contribute either in cash or by his/her skill, thrift and hard work. On divorce, the question of distribution of these assets assumes importance.

Thus, the essence of grievance against the ordinary law of property is that it emphasizes the fortuitous or calculated taking of title and ignores the wife's contribution to the family. The wife may contribute to the family by sharing the breadwinner role with her husband, by being a housewife and mother, or by combining such functions. Therefore, when the family is a functioning unit, the wife's contribution should be regarded as equal to that of the husband, whether they consist exclusively of services in the home or also involve supplementing the family income. Thus, on divorce the problem of division of family assets calls for careful consideration, especially in the light of the developments which are taking place in many parts of the world, particularly, in Europe, in the name of 'matrimonial property'. Solutions adopted by certain other legal systems include 'community of property' (under which the property belonging to both spouses is administered by the husband and divided between them when the marriage comes to an end).

55. For a short summary of the comparative developments in the European countries, see Ian Baxter, Marital Property, (1973), Chapter 40.
'community of gains' (which limits community to property acquired during the marriage otherwise than by gift or inheritance) and 'deferred community' (under which each spouse remains free to acquire and dispose of his or her own property but at the end of the marriage any net gain or surplus is divided equally between them).

However, despite the fact that English law does not recognise any such community regime between the marriage partners, the existing wide discretionary powers already enable the court to make a fair distribution of all property on divorce. In India, the solitary provision is section 27 of the Hindu Marriage Act which empowers the courts to make such provisions as it deems just and proper in respect of any property which is presented "at or about the time of marriage" and which "may belong jointly to both the husband and the wife". The words "at or about the time of marriage" has been construed at the actual time of marriage.

56. The Law Commission in its Working Paper No.42, at pp.278-315, considered how a system of community of property could be adapted for English law, and suggested the adoption of the West German Zugewinngemeinschaft (deferred community), but after receiving views from the public did not favour this scheme, see First Report on Family Property: A New Approach, Law Comm.No.52(1973).

57. See our discussion in Part B(b), Chapter VIII, infra.

This law, which confines the court’s power only to the property “presented at or about the time of marriage”, has simply become “out of date”. Now the whole concept of social life has changed. There is ample opportunity for the women to work outside home. Moreover, her services in the home, as explained above, should also be recognised as important as, if not more important than the money contribution made by the husband. On the other hand, at the time when the Hindu Marriage Act was passed, giving and taking of dowry was lawful. But now to give, take, or demand dowry, or to abet giving or taking of dowry is punishable offence under the Dowry Prohibition Act, 1961. Moreover, property presented at or about the time of marriage is mostly in the nature of consumer goods which, if the divorce takes place after a few years of marriage, may depreciate to be of no value to the wife. The main focus for the division of property on divorce, therefore, is the property which the spouses acquire during marriage by their mutual contributions and which the law of maintenance is inadequate to compensate. Thus, when women are, in fact, contributing to the family income directly or indirectly by staying in home and doing household work and rearing the children, there is no reason to draw a distinction between property presented “at or about


the time of marriage" and property acquired subsequent to the marriage.

Upto now our main attention was focused largely on what should be the mode of dissolution of marriage. For instance, the amendments carried out in 1976 in the Hindu Marriage Act enlarged the grounds of divorce, but hardly any amendment was made in the provisions regarding ancillary reliefs. Again, the Law Commission of India in its Seventy-First Report, has recommended the insertion of breakdown grounds in addition to the existing grounds. Accordingly, the Marriage Laws (Amendment) Bill, 1981 was introduced in the Lok Sabha which, however, lapsed with the dissolution of the House. Thus, hitherto, attention has been devoted mainly towards enacting and amending the laws relating to marriage and its dissolution but little has been thought and done in the resolution of post-divorce problems.

From the year 1955 onward, when divorce was recognised by Hindu Marriage Act, the policy of Legislature has tended to make divorce easy. In this respect, the Legislature

62. The Commission recommended the insertion of sections 13C to 13E in the Hindu Marriage Act, 1955, for incorporating irretrievable breakdown of marriage as a ground of divorce along with the existing grounds.
made large scale amendments in 1976 liberalizing the grounds of divorce and also introduced the consent theory of divorce. Surprisingly, neither the Law Commission nor the Parliament had shown any solicitude to the post-divorce problems. In contrast when English Parliament introduced irretrievable breakdown of marriage as sole ground of divorce in 1969, the enforcement of the Act was deferred for some time due to the fact that the government promised that the divorce law will not be in operation till the law on maintenance, and on certain property matters had also been reformed. Consequently, Matrimonial Proceedings and Property Act, 1970, was passed which embodied these reforms. For instance, the court was conferred with great discretion to deal with the property of the spouses whether held individually or in the joint names, to adjust equities between the parties, similarly, the wife's contributing in the household were recognised. Moreover, earlier, conduct of the parties during marriage had a large bearing on the question of the award of periodical payments to the wife, but under the Act it was

64. Section 13B, Hindu Marriage Act, 1955.
65. Section 1, Divorce Reform Act, 1969.
merely one of the various factors to be considered while making any order in financial matters.

It is here interesting to note, that the Marriage Laws (Amendment) Bill, 1981, 69 which proposed irretrievable breakdown of marriage a ground for divorce; 70 taking a lead from the English law, took note of these ancillary matters and provided certain safeguards. For instance, clause 13D of Section 2 of the Bill provided that the wife will have the right to oppose the petition for divorce on the ground that it will result in "grave financial hardship" to her. 71 Further, unless the court is satisfied that

69. As introduced in Lok Sabha on 27th February, 1981.
70. The relevant portion of clause 13C of Section 2 of the Bill provided:
   "(1) A petition for the dissolution of marriage by a decree of divorce maybe presented to the district court by either party to a marriage—on the ground that the marriage has broken down irretrievably.

(b) The Court hearing such a petition shall not hold the marriage to have broken down irretrievably unless it is satisfied that the parties to the marriage have lived apart for a continuous period of not less than three years immediately preceding the presentation of the petition...

71. The relevant part of clause 13D of Section 2 of the Bill provided:
(1) Where the wife is the respondent to a petition for the dissolution of a marriage by a decree of divorce under Section 13C, she may oppose the grant of a decree on the ground that the dissolution of the marriage will result in grave financial hardship to her and that it would in all the circumstances be wrong to dissolve the marriage.

(2) --- --- ---
---, and if the court is of the opinion that the dissolution of the marriage shall result in grave financial hardship to the respondent and that it would in (contd....)
"adequate provision for the maintenance of children born out of the marriage has been made consistently with the financial capacity of the parties to the marriage", it shall not pass a decree.72

One principal objection here is that by merely providing the safeguard of refusing a decree on wife's "grave financial hardship" arising on such divorce, without making adequate provisions in the sections providing for ancillary reliefs,73 may prove meaningless. For instance, the spouses during marriage purchase a matrimonial home and some other family assets. Due to the subsequent fallout one spouse leaves, and divorce is sought after three years of separation. How the Court, in view of the existing provision under section 27 of the Hindu Marriage Act, would resolve the question about such 'family assets'? Does the solution lie merely in refusing a decree of divorce? Further, assuming the house is in the name of the husband and the wife is living in the house with children, can the court, disentitle the husband from asserting his proprietary rights in the house? Or assuming further, the house is in the name of the wife alone and the husband had paid mortgage installments, how the court would compensate the husband? In the all the circumstances be wrong to dissolve the marriage it shall dismiss the petition, or in an appropriate case say the proceedings until arrangements have been made to its satisfaction to eliminate the hardship."

73. Sections 24 to 27 of the Hindu Marriage Act, 1955.
circumstances, merely refusing a decree for want of adequate powers with the court to deal with these related problems serves no purpose when in fact the situation calls for the dissolution of marriage.

The financial hardship envisaged by the provision includes the loss of the chance of acquiring any benefit which the respondent might acquire if the marriage were not dissolved, such as widow's pension right or chance of succeeding under the husband's intestacy. However, the practical importance of pension right seems to be only in the case of a "well-paid employee who is to retire in the comparatively near future". If he is a young man, the loss will be insignificant. The word "grave" is also significant, which shows that the wife has to show not only that she will lose something by being divorced, but that she will suffer grave financial hardship. Moreover, even if

75. See Mathias v. Mathias (1972) Fam.287, (army and State pensions, no financial hardship); Thomson v. Thomson, (1946)N.Z.L.R. 265, wife only of seventeen years of age when married with a man of fifty-four. At the time of petition the wife was thirty-seven and the husband of seventy-four. The wife's position might be seriously prejudiced if the petition were granted. For if he obtains a divorce, he might marry again and her rights under the Family Protection Act in the event of his death would be lost and her right to maintenance may be endangered. The petition was dismissed. See also Julian v. Julian (1972) 116 Sol.Jo.763, (potential loss of pension rights; petition dismissed).  
76. See Le Merchant v. Le Merchant (1972) 3 All E.R.343, where it was held that it would be quite wrong to approach this (contd....)
it is established that grave financial hardship will result from divorce, it still does not follow that a decree for divorce must be refused. The court must consider "all the circumstances" such as conduct of the parties to the marriage and the interests of the parties and of any children or other persons concerned, and finally "that it would in all the circumstances be wrong to dissolve the marriage". Thus, in a sense, the opposing of decree of divorce in case of 'grave financial hardship' to the respondent, is confined to a very limited number of cases. In majority of the cases kind of case on the footing that the wife is entitled to be compensated pound for pound for what she will lose in consequence of the divorce. See also Jennifer Levin, "The Divorce Reform Act 1969", (1970) 33 M.L.R. 632, at p.643, where he argues that "(t)he fact is that most hardship, including financial hardship, is caused by the fact of matrimonial breakdown, which the courts are powerless to prevent, and not by the grant of a divorce decree". 77 Cretney has observed that this provision (Section 4 of Divorce Reform Act, 1969 now section 5 of Matrimonial Causes Act, 1973) "will make it harder for the courts to refuse a decree, rather than harder to obtain one", supra note 74, ibid. Cf Dominik Lasok, "The Illusion of Grave Financial Hardship", 121 New L.J. 1005; George G. Brown, "Grave Financial Or Other Hardship", 121 New L.J. 516; See also Ian Snaith, "Grave Financial Hardship", 126 New L.J. 341.

77.
the wife who generally suffe rs financial hardship, albeit not grave, will be unable to oppose the grant of decree of divorce.

Only that divorce law is the best law which successfully and efficaciously deals with post-divorce problems. In view of the plethora of post-divorce problems, a reappraisal of ancillary provision is desiderated, and a study of these provisions may, in fact, prompt us to have a second look at the divorce provisions themselves. Our future policy of healthy divorce entirely depends on how we resolve these post-divorce problems. The amplification of these problems may, therefore, eventually enable us to determine the very shape of our divorce provisions.

The various theories of divorce on which the policy of divorce is presently framed are inadequate to resolve the problems which arise in the wake of divorce. Presently, the Hindu Marriage Act provides grounds based on all the three theories of divorce, viz., fault, consent and breakdown theories. In divorce by consent, the problems relating to maintenance, custody of children, etc., does not pose a serious problem since all these related matters are mutually sorted out by the parties themselves at the negotiation table. Moreover, generally divorce by mutual consent of the parties happens in the early years of marriage. Therefore, most of these marriages remain childless. Similarly the problem of division of marital property does not arise because the marriage has lasted for a short duration. In such cases, generally,
the dowry is returned to the wife. The question of main-
tenance is solved by payment of a lump sum to the wife. However, it depends and varies from case to case. For instance, if the wife is the party interested in getting divorce and pursuades the husband, it is possible that she may forgo her right to maintenance in lieu of his agreement to such a divorce.

In comparison, the divorce granted on ground of the fault of the respondent poses more serious challenge so far as these related problems are concerned. The fault theory is based on the premise that one party be guilty or responsible for the conduct leading to divorce and that the other be innocent. The petitioner's success in obtaining divorce depends on his or her ability to prove the respondent's fault for having committed some marital offence. Thus divorces are to be 'won' by the innocent party against the guilty party. This adversary procedure which is said to be remnant of the Norman mode of "Trial by Battle" frequently "has the

78. See for instance Devinder Singh v. Loveleen Kaur, 1982 H.L.R.135(P&H) and, Vash Paul v. Vilay Kumar, 1982 H.L.R. 469(P&H). In both these cases the parties were locked in a contested divorce proceedings who eventually come to a compromise and the High Court awarded a decree of divorce. See also Balwant Kaur v. Bahadur Singh, 1982 H.L.R.123(P&H).


undesirable effect of entrenching the very attitudes and acrimonious actions which brought the parties to the Court". Moreover, when the parties have to spend all their time, money and energy in defending and prosecuting matrimonial proceedings, it adds fuel to the fire making adjustment or decision of ancillary matters difficult. On the other hand, the philosophy of the guilt of the respondent reflects in the settlement of ancillary matters. It is one of the reasons that divorce suits are vehemently contested and it is difficult to realise maintenance amount decreed against the innocent husband. Similarly, the proof of guilt of the party has a direct bearing while the court is called upon to decide the question of maintenance and the custody of the children.

The twentieth century researches in the field of social and behavioural sciences marked the shift in the philosophy of divorce from guilt to breakdown of marriage. The latter postulates that it is not the fault of one party alone which has led to the marriage breakdown but the other party also has directly or indirectly been responsible towards the conduct of the guilty party. For instance, the adultery of the wife may be no more than a symptom - the result of callous and indifferent behaviour of the husband spread over the years. It has been very aptly remarked

by an eminent judge that "it takes three to commit adultery". 82 This thinking has influenced the divorce process in various ways. 83 For instance, the removal of fault as the basis of the grounds of divorce and the most potent factor in determining the question of custody and resolution of financial matters between the parties has saved the parties from "washing dirty linen" in the public and thereby becoming hostile to and antagonists of each other. Secondly, the financial aspects of divorce is now based on equality and economic need rather than an either fault or sex-based role assignments. Similarly, the standards for child custody also reflect in the increasing concern for the "welfare of the minor" than the fault of the either party. Moreover, the quantum of periodical payments or the property adjustment order may turn out on the basis of present and future needs of the parties.

In sum, fault based divorce law and the law based on breakdown theory reflect two contrasting visions of 'justice'. The traditional law sought to deliver a moral justice which rewarded the good spouse and punished the bad one. It was a 'justice' based on compensation for past behaviour, both sinful and virtuous. The new approach ignores both moral character and moral history as a basis for awards. Instead, it seeks to deliver a sense of fairness and equality based

on the financial needs of the two parties. Ignoring the past conduct, therefore, it takes a futuristic approach. What are the respective needs of the parties in future? is the basic question on which the decision eventually turns out.

Thus, post-divorce-resolution - oriented-thinking eventually should focus more on these related problems than multiplying the grounds of divorce. In this regard the policy of law should be directed to achieve two-fold objective. First, whenever in the circumstances it is realised that the marriage is no more viable the parties should be provided an opportunity to part 'amicably' and start afresh. Secondly, to remove the catastrophe caused by the sudden break in life-long companionship, law should take a humane and realistic approach. It would mainly serve three purposes. Firstly, the parties' responsibility to provide for the needs of the other after divorce will eventually reflect on their decision to dissolve the marriage tie. Secondly, the law's mould shall be designed towards rehabilitative methods so that the parties could lead a happy and stable life. Finally, it will indirectly help in the stability of the institution of marriage by eliminating those unions which have not remained viable.

Looking from the angle of hardship that the spouses have to face in a limping marriage, the advocates of
individual liberty sometimes argue that there should be easy divorce. But in India, at least, these propounders of easy divorces have not been able to recognize that divorce alone, without giving a proper thinking to post-divorce problems, would not remedy the evil. It is not uncommon in

84. For instance, Mr. N. B. Mehere has observed that marriage "is a personal affair between the husband and the wife and the mental state of affairs and agonies in matrimonial ties cannot be patched up by the force of law", therefore, there should be easy divorce whereby spouses can part easily without undergoing a longdrawn agony of litigation, "The Divorce by Indian Style", (1974) 6 Lawyer (Jour) 195. He gives the analogy of a broken glass which even if patched would not provide the projection of its original state of affairs. But it is submitted, the analogy does not comport with the nature of human beings which is not as fragile as glass. Moreover, marriages has never been considered to be a personal affair between the parties but the interest of State is as important as, if not more important than, the interest of the individuals.

Mr. R. Jagannmohan Rao, finds mainly two schools of thought in India; one, progressive and reformist, in favour of easy divorce which is led by Dr. Paras Diwan, and second, conservative led by Prof. Derrett, "Indissolubility of Marriage and easy Divorce", Stable Marriages, supra note 8, at pp.179 et seq. The author after considering the problems which the divorce leaves in its trail, and the fact that Indian society as yet, is not ripe to respond to this progressive views, comes to the conclusion that in order to preserve the institution of marriage divorce should not be easily granted, id., at p.185.

85. K. M. Kapadia, an angry progressive Indian sociologist, who otherwise welcomes divorce law, admits: "Divorce alone will not better the position of women because a majority of them are economically dependent on men and a divorced women would find it difficult to find someone else to marry her", Marriage and Family in India, (1958), at p.117.
India, where the social taboo is unnecessarily harsh against women, that a woman would find solace even in an unsatisfactory marriage rather than taking precipitate action. 86

Apart from the hurt feelings, which law cannot assuage, it fails to give the much needed monitory assistance to the divorced woman and the children, as it stands today. We, perhaps, cannot do better than quoting Sukumaran J., in Radhakumari v. K.M.K.Nair, 87 where the learned Judge observed:

"Law feels almost helpless, uninitiated as it is in the art of caring and curing, in that sensitive area. Law can do little for the reparation of the weeping wounds in the emotional capillaries. Sufferings exist not only in the emotional sphere. Pecuniary disability adds to the agony of a discarded spouse or neglected child." 88

In the title of the thesis, the mention is only of the "Inter-Spousal Conflicts". Because there is a process of readjustment, it is not every conflict with which the law is concerned; but only that conflict which assumes the dimension of a 'problem'. In the married life, it is possible

86. See Rama Mehta, Divorced Hindu Women (1975), at p.130; B.E.Sharma, note 8 supra at p.101. See also observations of T.Sathiadev, J., in Soundarammal v. Sundara Mahalinga, 1980 H.L.R.570, at p.583(Mad.); Ms.Devinder Kumar, "Some Findings and Re-Divorced Hindu Women", in Stable Marriages, supra note 8, at pp.107 et seq.

88. ibid., at p.418.
that after a 'tiff', the reconciled parties feel more deeply immersed in love than before. But, after divorce the parties become strangers; the past bitterness still lingering on their minds. Every little conflict which otherwise would have been a delightful experience of a married life, rakes up the past, refurbishing the old wounds as if rubbing of the salt. The law should be designed in such a way that there is no or little scope for conflict.

Further, the term "inter-spousal" emphasizes the fact that the parties arrayed in such proceedings are husband and wife. In proceedings regarding custody, maintenance and education of children, children are not made a party to dispute lest the contest will become three-cornered than two-cornered one. This matter is taken care of by the provision that while deciding the dispute, the court may also consider the wishes of the children, whenever possible. 89

The thesis is divided into eight Chapters. Chapter I is introductory. In this Chapter attempt is made to emphasize the relevance and importance of the subject of the thesis.

In Chapter II and III, the evolution and the development of the concept of ancillary relief is discussed. Inter-spousal maintenance is discussed under Chapter II, whereas, the problems of maintenance, custody, access and education of children are the subject matter of Chapter III.

89. See section 26 of the Hindu Marriage Act, 1955.
Since the concept of ancillary relief as it is reflected presently in the Indian law, has been borrowed from, and continue to be influenced by, English law, a comprehensive reference to the same is made wherever appropriate.

Chapter IV is divided into two parts. Part A deals with alimony pendente lite; Part B deals with permanent alimony and maintenance. The bifurcation is necessitated by the fact that these two different provisions are made at two different stages. Maintenance pendente lite is granted when proceeding for divorce is filed, and permanent alimony and maintenance only when the decree is passed or thereafter. However, certain matters like enforcement and variation of the quantum of maintenance, which are common to both the types of orders, are dealt with in Part B.

The enlarged ambit of the provisions of Code of Criminal Procedure, 1973, which now enables even a divorced wife to claim maintenance is the subject matter of study in Chapter V.

Chapter VI and VII are exclusively devoted to the problems relating to the children of divorceing parents. The financial provisions which can be made for the children are the subject matter of study in the former Chapter. The matters of custody, visitation and education of children are discussed in the latter.

Chapter VIII deals with the settlement of the spousal property. Since the resolution of the inter-spousal conflicts
calls forth, speaking functionally, re-adjustment of financial relations of the parties involving their proprietary interests, attempt has been made to show that how within the ambit of the existing provisions of the Hindu Marriage Act, 1955, the courts could legitimately achieve this objective. This has been done through the analysis of relevant case law coupled with our suggested construction of the involved provisions. This course is necessitated because of the conspicuous absence of the concept of spousal property as such under the Hindu Marriage Act, 1955, and for that matter in any of the systems of the personal laws of India. The only provision which is available to this effect is contained in section 27. However, by combining the effect of ancillary provision as is contained in section 25, it is attempted to construct the concept of spousal property around the provision of section 27. This in fact is our conclusion on the post-divorce spousal conflict problems. No separate chapter on conclusion is added. It is not required specially because whatever other conclusions or suggested reforms in this area of law are considered proper in the light of our analysis are noted in the course of the discussion itself.