

SOME QUESTIONS REGARDING THE JOINT HINDU FAMILY

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I. INTRODUCTION

A social institution is a system of stabilised human relationship clustered around specific activities.¹ The Hindu society, with its close knit social structure and a highly developed social philosophy, had devised the institution of joint family which included within its fold all possible human activities—social, economic, political and spiritual. In any society, family makes a profound impact on the social organization and as the foremost agency in the cultural conditioning of the individual provides for him his earliest behaviour pattern and standards of conduct.² In India, the joint family, which is taken to be the normal condition of the Hindu society,³ has for centuries been “the constituent atom of the social order and the centre of jural relations.”⁴ In fact, the Hindu society did not recognize the concept of subjective rights: the entire gamut of property relations of the individual was regulated through the system of joint family. It has been rightly stated that “the unit of Hindu society is not be individual but the joint family.”⁵ Property relations, however, were never static and various instruments of legal growth made constant adjustments in order to accord property relations with social needs. The rapidity of social changes in India during the last century has been unprecedented. Today when our social system is in the process of revision and reconstruction, a reassessment of the joint family and the property relations clustered around it becomes imperative. The institution is to be studied in its historical setting because the joint family system in its present form is a product of historical growth.

II. THE JOINT FAMILY SYSTEM

The antiquity of the joint family system has been a subject of controversy amongst historians and sociologists. One school takes the view that the joint family is an Aryan institution and the system can be traced

1. Stone, *Social Dimensions of Law and Justice*, 300 (1966).

2. See MacIver and Page, *Society*, 240 (1950).

3. Mayne, *Hindu Law and Usage*, 323 (12th ed. 1953).

4. O'Malley, *Modern India and the West* 3 (1941).

5. Panikkar, *Hindu Society at Crossroads* 43 (2nd ed. 1961).

to Vedic literature.⁶ The other denies the existence of the system in the Vedic age.⁷ In the *Dharmasutras* and the early *smṛiti*, no consistent and uniform rules regarding family property are to be found. Evidence can be adduced to support conflicting principles relating to inheritance and partition. Some texts suggest primogeniture and impartible estate while reference can also be found in others to equal division of property amongst the brothers after the death of the father. Some texts even commend partition during the life-time of the father, particularly after he gets old and the mother is past child bearing age. It is clear that during the *smṛiti* period, the rival trends—the one indicating father's absolute power and the other asserting the individual rights of the sons—were persisting side by side. Manu, Gautama, Narada and Katyayana also refer to individual property acquired by gains of learning or by one's own personal labour without the aid of family resources. The recognition of women's property is also to be seen in the legal literature emerging during the sixth and seventh centuries.

The view of Derrett in this regard seems to be more balanced. According to him originally the Aryan family did not mean joint family but "perhaps as a result of a narrowing scope of opportunities, sons married and stayed at home, and the joint family became the rule rather than the exception."⁸ Assuming that the Aryan family was not joint, it could not have escaped the impact of the non-Aryan family systems. It may be reasonable to assume that as a part of the wider social process of synthesis of Aryan and non-Aryan customs, the Aryan family acquired from the non-Aryan systems some of the traits which in course of time became part of the joint family system. It seems that the conflicting trends in the joint family system continue till about the eleventh century. The effort of the law-givers all along during the period was to contain the individualistic forces and to emphasise upon the joint and agnatic character of the family. It was quite natural that during the process some writers would emphasize more on the trait depending on the social needs and urges. But this would be counterbalanced by other writers. The process, it seems, came to a halt with the schism developing by the twelfth century between the Mitakshara and the Dayabhaga schools. It was out of the doctrines enunciated in Mitakshara that the British Courts were to evolve later, the doctrines of coparcenary and survivorship and Hindu joint family was to acquire its present form.

6. Radhakumud Mukherjee, *Hindu Civilization*, 78; Ghurye, *Family and Kinship* 45.

7. Sen-Gupta, *Evolution of Law*, 141-44 (3rd. ed. 1962).

8. For a definition of joint family, see Madan, "The Joint Family: a terminological clarification" in Mogey (ed.), *Family and Marriage*, 7 (1963).

The Hindu joint family was a social economic and religious group consisting of "all males lineally descended from a common male ancestor and their wives and unmarried daughters."⁹ The males descending from the common ancestor in the male line became co-owners by virtue of their birth in the family. No member, however, could claim a definite and specified share in the property until he exercised his right to claim partition. The property was held by the head of the family, usually the eldest male in the eldest line of male descent, in trust for the material needs of the living members and the spiritual needs of those dead. It is evident that the emphasis was not on a precise definition of individual rights over the property but on specifying the purposes for which the property was to be used. Other main characteristics of the system were the absolute authority of the head of the family over its members and common worship.

In its sociological setting, the Hindu joint family was the most important of the three collectivistic agencies—the caste and the village community being the two others—through which social control over the thinking and conduct of the individual was exercised. The affairs of the caste and the family were matters in which the state never directly intervened and it was only through the family that the village community and the caste controlled the individual. These three social institutions were part of a close knit social structure and had been devised "to render definite ideas, ideals and purposes into concrete human conduct and affairs."¹⁰

In its economic and social aspects, joint family was a natural outcome of an agrarian society in its subsistence stage. According to eminent sociologist as Sorokin, Zimmerman and others, the social and political organization of all societies at this stage bears the fundamental trait of a rural family, the basic unit of society. In such societies, the sociologists have observed:

All the other social institutions and fundamentals social relationships have been permeated by and modelled according to, the patterns of rural family relationships. Familialism is the term used to designate this type of social organisation.¹¹

The following characteristics of the family in the familial societies as pointed out by the sociologists, are to be found in the Hindu system as well¹²: (a) Unit of social responsibility, (b) Basis of norms of society,

9. Prabhu, *Hindu Social Organisation* 7 (4th ed. 1963).

10. Prabhu, *Hindu Social Organisation* 7 (4th ed. 1963).

11. Systematic Source Book of Sociology Vol. 11, 41, Desai, *Rural Sociology in India* 36-37 (2nd ed. 1959). quoting 11 *Systematic Source Book of Sociology* 41.

12. *Ibid.*

(c) Its impress in political form, (d) Cooperative rather than contractual relationship, (e) Unit of Production, consumption and exchange, (f) Dominance of family cult and ancestor worship, (g) Dominance of Tradition.

It is evident that under such a system the individual was submerged in and was subordinate to the family collectivity and through the latter to the other groups like the caste and the village community. Since the family system aimed at stability and continuity, the ideas of progress and growth had no scope for expression. The individual could not think that he had interests outside family as well. Absolute authority of the father over the members and their status determined by birth being the hall-marks of the system, the sense of individual self-reliance could not be instilled amongst the members of the joint family. The system also encouraged idle dependence on patrimony and stifling disposition to innovations. No sense of nationhood could develop under this system in view of the expectation of absolute loyalty to the family and other groups. Lack of employment opportunities outside tied down the individual to the position to which he, by birth, belonged. Besides, as has been pointed out in a recent study,¹³ the system led to minute fragmentation of inheritance which proved inimical to the formation of capital necessary for industrial development. Uneconomic holdings proved prejudicial to the formations of stable economic interests which arise from a long and sustained enjoyment of individual property rights. In England, the rule of primogeniture not only saved the property from disintegration but contributed capital towards both industrial and agricultural revolutions. In India, the the rule for the devolution of property under the joint family system was one of the factors against similar developments in the economic life.

Whatever the wider implications of the joint family system, which can now be pointed out in retrospect it was a system devised for and ideally suited to the needs of an agrarian set up with undeveloped technology, lack of scientific methods of farming, and overloaded with spirituality. In such a society the individual could not lead an isolated life outside the groups to which he belonged. The joint family in this set up played a significant role by providing for the economic needs, social security and religious benefits to the members besides, of course, looking after the psychological and personal needs universally fulfilled by the family.

III. DECLINE OF FAMILISM

The decline of familism in India began with the consolidation of British power in the country. Not that it was due to any deliberate policy

13. Misra, *The Indian Middle Class* 50 (1961).

of the Government nor can it be attributed directly to the legislative measures adopted by them. The access to western social thought, which the newly acquired knowledge of the English language gave to a section of Indians, unfolded a train of ideas which, to say the least, were irreconcilable with the traditional values and institutions. The resultant change in social attitudes made it clear that the property-arrangements in the joint family stood in need of revision.

The basic factor responsible for the beginning of disintegration of the joint family system was the western philosophy of liberalism, which led to the development of the individualistic spirit as opposed to the collectivistic or communal principles, the latter being the basis of the joint family system.

Reason, as opposed to both tradition and authority, also came in the wake of liberalism. It is not surprising that the new generation started evaluating the validity of the old institutions and doctrines on the touchstone of reason. The formal concept of liberty, liberation of the individual right to property and equality of sexes were some of the main characteristics of the western political thought in the nineteenth century. Maine while describing Indian society as static emphasised the absence therein of these elements. The reception of western political thought gradually created an intellectual climate in which the joint family was looked at as a conservative institution and a move towards the revision of property relations implied therein was taken to be a progressive step.

The concept of rule of law introduced in place of customary law and the individualistic and secular common law in place of the traditional religious-cum-social-cum-political system gave a powerful blow to the existing institutions. The setting up of a stable and secular government together with the growing popularity of the received ideas affected the basic values behind the traditional system. The joint family which was the foremost operational unit of and a vital link in the system could not remain unaffected.

The economic developments during the period also had a baneful effect on the joint family. With the increase in population the family land could not sustain the increasing number of its members particularly since no scope for further expansion of agriculture was left. In the meantime, due to availability of better means of transport and newly opened avenues of employment outside, the younger generation got a lucrative alternative in migration to the cities. Once a member of the family moved out of the family to the city, the severance of the family tie remained only a question of time. Due to a greater occupational mobility and differences in educational equipment and economic position, all the members

of the joint family were not prepared to accept the idea of equality at least in the regulation of their property relations.

The impact of early industrialisation, though quite feeble in the nineteenth century, on the rural economy was that the joint family as a unit of production was displaced by the mechanised industry. The consumer goods produced by the use of collective labour and traditional skills in the joint family could not compete in the market with the product of the organised industry. The hands which thereby became surplus in the family had to move to the industrial centres for employment. The replacement of the land economy along with its ancillary industries by the money economy reduced the capacity of the family to hold its members together.

The completely subservient position of the woman appeared in the new conditions as the weakest point in the joint family system. It became the main target of attack by the social reformists who vigorously urged a better deal for the woman. Besides the changes in the laws of marriage made in response to this demand, several enactments, as we shall see later, were adopted to give to women certain rights in the family property. The use of legislation for the amelioration of the conditions of women was to be taken with greater vigour after India started taking part in the International conferences. As the Rau Committee pointed out,¹⁴ India became bound in honour to remove the disabilities based on sex and to implement the principle of equality in the law relating to family relations. The India woman was the gainer but at the cost of integrity of the family property.

The cumulative effect of these factors was that by the close of the nineteenth century the joint family had started showing the signs of disintegration. In 1861, the position as found by Maine was that:

However divisible the possessions of a joint family might be theoretically, they were in fact so rarely distributed that many generations succeeded each other without a partition taking place.¹⁵

But the situation changed very rapidly in less than a generation. In 1881, a leading journal recorded that "the archaic principle of joint family is fast decaying."¹⁶ A contemporary writer was constrained in 1883 to observe that:¹⁷

14. *Report of the Hindu Law Committee* 5 (1947).

15. Maine, *Ancient Law* 228 (1891). The first edition of the book was published in 1861.

16. *Calcutta Review*, Vol. 1, XXIII, 14.

17. O'Malley, *Modern India and the West* 325 (1941) quoting Shiv Chunder Bose, *The Hindoos as They Are*.

Separation is the only means that promises to afford relief from the social incubus, and to separation many families have now resorted.

This social attitude continued even in the twentieth century. The Chandra-sekhar Iyer Committee appointed by the Mysore Government reported that the decay of the joint family was a phenomenon, which in their opinion, "could neither be arrested nor need be regretted."¹⁸

It is very clear that during the period beginning from the late nineteenth century the faith in familism and the ideological justification for common family property was being shaken. Due to the political developments in the country, the joint family was also losing its validity as an effective unit in the social structure. Economic changes in the wake of industrialisation were destroying the character of the family as a unit of production. That the law was still upholding the old property relations only shows that legislation, lagging as it often does behind the social needs, tends to be more conservative when the legislatures are devoid of popular element. It is not a sheer co-incidence that the volume of social legislation in India was directly related to gradual increase of popular representation in the legislatures. The legislature, however, did take some reluctant steps in the area of family relations. But the judiciary, rather than acting in response to the felt needs, was giving a rigid legal form to a pattern of family relations it adopted from certain chosen Hindu texts. The few innovations made by the judiciary towards the recognition of individualistic property rights were incidental to the application of English notions of justice and equity. The role of judiciary and the legislature in the regulation of property relations in the family needs close scrutiny.

IV. JUDICIARY AND THE HINDU JOINT FAMILY

For centuries past the social institutions of Hindus had been regulated by the law laid down in the holy text and developed by usage and conventions. The law in actual practice had been constantly undergoing change. The agencies of legal growth being custom and juristic writings it was inevitable that the law in different regions and different communities would be different. Under the British rule, however, the family relations, though still governed by their personal laws, came within the orbit of the newly introduced system of judicial administration which aimed at uniformity and certainty in law. The interpretation and application of the rules of Hindu law, with its peculiar nuances, must have posed a difficult problem for the English judges. For the trained judicial mind of the West, it was not easy to comprehend the spirit behind the Hindu texts the access to which was either through translations or

18. Quoted in Wadia, *Democracy and Society* 93 (1966).

through the interpreters. The result could not always have been very happy. The judicial Committee of the Privy Council itself stated that:

...it is impossible for us to feel any confident in our opinions, upon a subject like this, where that opinion is founded upon authorities to which we have access only through translations and where the doctrine underlying and the reasons by which they are supported or impugned are drawn from the religious traditions, and usages, and more modern habits of Hindus, with which we cannot be familiar.¹⁹

In their quest for uniformity and certainty, the courts accepted one particular facet of the growth of Hindu law as the ideal type²⁰ and relied upon Vijnaneswara and Jimutavahana for the stereotype of Hindu family. A criticism has been made that the reliance placed on the texts written six hundred years back over-looked subsequent developments in Hindu law in the hands of commentators and digest—writers. More recent writers like Nanda, Pandit, Nilakanta and Balambhatta, if relied upon, would have maintained the dynamic character of law.²¹ Added to it was the occasional introduction by the courts of the principles of English law and the English notions of justice, equity and fairplay while interpreting the customary Hindu law. Thus Hindu law was undergoing a transformation having a far-reaching implication on the joint family.

In assessing the role of the judiciary in shaping the law relating to joint family a reference is to be made to the doctrine of survivorship evolved by the Privy Council.²² No text of Hindu law lays down the doctrine as such but the courts evolved it out of the concept of co-ownership of the family property. As observed by Priyanath Sen, "The concept of co-ownership readily chimes with the doctrine of survivorship although the doctrine of surveyership is not an inevitable consequence of the concept of co-ownership."²³ The explanation given by Bhattacharya is that:

On account of the absence of clear texts, the English judges observing a tangible analogy between a Hindu coparcenary and English joint tenancy, to the legal position of Hindu coparcenars, at least in cases where such extension did not run counter to anything to be found in the original texts.²⁴

19. *Rungamma v. Atchama*, 4 M.I.A. 97.

20. "The AHL (Anglo-Hindu Law) accepted the hardly completed situations as if it were final," Derrett in "The Hindu joint family" in 6 *Contributions to Indian Sociology*, 17 at 21.

21. Kapadia, *Marriage and Family in India* 277-78 (3rd ed. 1966).

22. *Appovier v. Rama Subbhi*, 11 M.I.A. 78 (1966).

23. *Hindu Jurisprudence* (Tegore Law Lectures), 147.

24. *Hindu Joint Family* (Tagore Law Lectures), 54.

In fact the whole concept of coparcenary and the doctrine of survivorship, though often attributed to, has no foundation in sastric law. For some time at least after their introduction, the two concepts have been sources of some confusion in the law. They did, however give in the long run some stability to the law relating to joint family but it was the sort of stability which leads to rigidity. This was one of the basic, though not the only, innovation made by the Privy Council in the joint family system. Other innovations were made in defiance of sastric law and they gave impetus to the individualistic traits amongst the members of the joint family which ultimately weakened the joint family system. A few leading cases may be referred to in order to illustrate the point.

In *Deen Dayal v. Jugdeep Narain*,²⁵ the Privy Council laid down the rule that the purchaser of an undivided share of the family property in an execution sale for a separate debt acquired a share in such property and also the right to ascertain and realise it by partition. From one point of view it is only fair that the debtor coparcener should not be allowed to defeat his creditors. But this cannot be denied that the rule was a definite departure from the original Hindu law³⁶ under which the entire family property is held in collective ownership and no coparcener can claim a specific share before the partition. The Court by introducing in Hindu Law the principle with regard to bonafide purchaser opened a new avenue for the disintegration of the joint family.

Another inroad in the joint family was made when the courts upheld the absolute power of the coparcener to dispose of his self-acquired property by gift or will.²⁷ In *Rao Balwant Singh v. Rani Kishori*²⁸ the Privy Council upheld the authority of the father to alienate without the consent of the sons even the self-acquired immovable property in any way he liked. The Privy Council declared that the passages in Mitakshara restricting the right of the father were not mandatory. Derrett describes it as "a case accepted in India without hesitation though it is technically wrong."²⁹ Priyanath Sen³⁰ has ably demonstrated that the Mitakshara did make a distinction between directory and mandatory and that in this case the injunction of Mitakshara was clearly mandatory.

25. L.R. 4 I.A. 247. See also *Suraj Bansi v. Sher Prasad*, 1880) 5 Cal. 148 I.A. 88.

26. This judgment has been criticised by, amongst others, P. N. Sen, *Hindu Jurisprudence*, Lecture v.

27. *Beer Pertab v. Rajinder*, 12 M.I.A. 1.

28. 25 I.A. 54.

29. *Supra* note 20, at 42.

30. *Supra* note 19.

The coparcenary right of the son to the family property received a further set-back in *Madan Thakur v. Kantoo*³¹ in which the Privy Council enunciated the rule that the joint family property could be sold in execution of the money decree against the father. The same view was reiterated in *Nanomi Babuasin v. Medun Mohun*³² where the Privy Council held that the father may sell the entire joint family estate or the creditor may obtain a sale of it by a separate suit if the debt incurred by the father the Privy Council, though deduced from the Hindu Law doctrine of pious gave a right to the debtor of the father to proceed against the property.

The observation of Maine³⁴ that "undoubtedly the dissolution of the joint family was in the early days of our government unduly encouraged by our courts", seems to have its basis in some of these judgments. but, as remarked by a distinguished Indian judge,³⁵ "The result was that the development of Hindu law became rigid and arrested during the long period of British rule".

V. LEGISLATION AND THE HINDU JOINT FAMILY

A. Pre-Independence Legislative Reforms

The professed policy of the British Government in India was to leave the social institutions and the family law as they were. Lest it touched the religious susceptibilities of the masses, the Government, while codifying other branches of law scrupulously avoided interfering with the traditions and customs regarding family relations. The Regulations and the Acts, passed in the late eighteenth and early nineteenth centuries, made an express saving in favour of the traditional family laws of the natives.³⁶

The attitude of the Government, however, could not remain totally unaffected by the contemporary social changes nor could it resist the pressure of the progressive and enlightened section of public opinion, though not numerically strong but well organized and vocal, demanding social reforms through legislation. None of the consequential legislative measure, however, aimed directly at the joint family. The object was to remove some of the social evils that had crept in the system and particularly to ameliorate the condition of the women. It was only incidentally that the family was affected. Enactments like the Hindu Inheritance

31. L.R. 1 I.A. 333.

32. L.R. 13 I.A. 1.

33. L.R. 51 I. 129.

34. Maine, *Early History of Institutions* 206 (4th ed. 1885).

35. Ramaswami, "Hindu Law and the Judges" in (1950) S.C.J. 225 (Journal).

36. See for example, Rule 23 of the Hastings Plan of 1772 for Bengal, Bihar and Orissa, Bengal Judicial Regulation VI of 1799, Madras Regulation III of 1802, The Declaratory Act of 1781.

(Removal of Difficulties) Act, 1928 and the Hindu Law of Inheritance (Amendment) Act, 1929 introduced certain changes in the Hindu law of succession. But none of these enactments had a significant effect on the joint family. In 1928, the Special Marriage (Amendment) Act extended the application of the Special Marriage Act to Hindus as well, whose marriages were so far governed exclusively by their personal laws. This, besides validating certain marriages which could have been invalid according to the personal law, provided that the marriage of a Hindu under the new Act effected his severance from his joint family and succession to his property was to be governed by the Indian Succession Act and not by his personal law.

The first legislative measure of same consequence so far as family property is concerned was the Hindu Gains of Learning Act, 1930. The Act ensured to the individual members separate and exclusive right to the property earned by means of learning, financed out of the joint family funds. Prior to it, the income earned by a member as a result of special training financed by the family was treated as joint family property.³⁷ This was hardly fair to the widow and the daughter of the person, who acquired property by the exercise of the learning, because at his death the collaterals in the joint family got the property to the exclusion of his widow and the daughter. The immediate provocation for the enactment was the decision in *I.C.S. Officers case*.³⁸ Besides, the Government could not but have been influenced by the individualistic traits in the educated minority whose members getting richer by the exercise of newly opened professions did not like to share their income with other members of the family. The recognition of the concept of separate and individual property introduced an element of dualism in the property relations governed by family law.

The joint family received yet another blow in 1937, when the Hindu Women's Right to Property Act was passed. The Act gave to the widow the same interest in the family property as her husband possessed, and also the right to claim, just like a male member, partition in order to vindicate this right. The widow, was neither given an absolute estate nor made a coparcener. Nevertheless, the idea of a female member acquiring property rights in the family and the right to claim partition was a radical one. The effect on the joint family was more symbolic than real since not many widows seem to have asserted their right to claim partition. The Act, however, did not receive the expected welcome from any quarter. The language of the Act was not very clear and the nature of the right conferred on the widow was not unambiguous. The ortho-

37. *Gokul Chand v. Hukam Chand*, 48 I.A. 162.

38. *Ibid.*

doxy took it as an unwarranted interference while the more radical sections of opinion criticised it as being unfair to the daughter, who was provided with no rights under the Act. Consequently, the demand for change in the Hindu law became more vocal rather than having been pacified by the Act.

The Government responded to the demand for reforms in Hindu law by appointing the Rau Committee in 1941. One of the terms of reference of the Rau Committee was to examine and suggest changes in the Hindu Women's Right to Property Act. In the meantime, the view in favour of a comprehensive Hindu Code had gathered momentum. It gained further strength from the Report of the Rau Committee which opined that the Hindu law being a "complicated organic structure", piecemeal legislation was likely to create many problems. The enactment of a comprehensive Hindu Code being quite a problematic task, the Hindu Married Women's Right to separate Residence and Maintenance Act was passed in 1946. The Act gave to the Hindu wife, under certain conditions, a right to separate residence and maintenance against her husband. This Act had some bearing on the joint property since the maintenance provided in the Act was to be on the basis of the husband's means, which included his share in the family property. The share of the husband was made liable to be charged for a maintenance decree and could even be sold for the purpose.³⁹

B. *Post-Independence Period: The Hindu Code*

The Rau Committee appointed in 1941 had prepared two draft bills, one on the law of intestate succession and the other on the law of marriage to be enacted as the part of the suggested Hindu Code. But neither of the two had smooth sailing and their enactment was postponed mainly due to opposition from the orthodox section of public opinion. In 1944, the Government revived the Hindu Law Committee with a view to encourage the formulation and enactment of the remaining parts of the proposed Code. The original drafts were revised several times and ultimately it was decided to split the proposed Code into separate acts, only a few of which have been enacted so far.⁴⁰ The proposed Hindu Code Bill of 1948 contained one chapter on joint family. These provisions, if adopted, would have meant a complete transformation, if not total abolition of, the concept of family property. Section 86 of the Code, which abrogated

39. The Act has now been repealed by the Hindu Adoption and Maintenance Act, 1956.

40. The Special Marriage Act, 1954; The Hindu Marriage Act, 1955, the Hindu Minority and Guardianship Act, 1956; and The Hindu Adoption and Maintenance Act, 1956.

the son's right by birth in the family property, would have proved most devastating for the institution of joint family.

C. *The Hindu Succession Act, 1956*

Of all the legislative measures adopted so far, the most significant from the point of view of the Hindu joint family, is the Hindu Succession Act, 1956. The Act leaves the right by birth theory intact but makes radical changes in the law of succession. In principle the rule of survivorship is maintained by section 6, which provides that the interest of a Hindu in the joint family property will devolve by survivorship and not in accordance with the Act. But the proviso to the section lays down that the succession will take place in accordance with the scheme contained in the Act in case the "deceased had left him surviving a female relative specified in class I of the schedule or a male relative specified in that class who claims through such relative." A perusal of the list of heirs in the schedule makes it clear that the occasion for the application of the rule of survivorship will arise in comparatively few cases. This ambivalent attitude towards the joint family is the result of an attempt to continue the doctrine of survivorship while granting a preferential position to the female heirs. The female heirs, excluded by the original Hindu law, seem to have been provided for with a vengeance and the collaterals have been made to yield the priority to the females.

The changes in the law of succession made by section 6, as also those in sections 14 and 30, are in pursuance of the accepted policy to rationalise the family law of the Hindus and to assure women at least equal treatment. But not so clear is the rationale behind explanation 2 of section 6. According to this explanation a member who separated himself from the coparcenary before the death of another member will not be entitled to claim under the proviso a share in the interest of the latter. Not only the separated coparcener but also his heirs are excluded for no apparent reason. There seems to be no justification for excluding the separate coparcener once the property is decided to be given to heirs several of whom are not members of the coparcenary. Besides being unfair, the explanation may raise a number of problems of interpretation. Does the explanation exclude only those who exercise their option in separating themselves? The Mysore High Court in *Sidrappa v. Laxmi Bai*⁴¹ held that the explanation excludes even those heirs who did not separate themselves by their volition but were separated for the purposes of a notional partition contemplated under explanation 1. This line of interpretation obviously goes against the very object of the Act. If the explanation is

41. (1965) 1 May, L.J. 625.

interpreted to exclude even those who are deemed to have separated themselves otherwise than by the exercise of their volition, it will be particularly hard to the heirs of those who renounced their coparcenary interest or married under the Special Marriage Act. The very justification of the explanation and also its scope deserves serious consideration.

Section 14 of the Act does away with the life estate of the women and converts the properties held so far as life estate into absolute property of women. The succession by female heirs would mean that the property will be irretrievably lost to the family. Another blow to the joint family is given by section 30 of the Act which empowers a coparcener to dispose of by will his interest in the coparcenary property. The section is not very happily worded. Even if it is interpreted to mean that the testamentary power can be exercised only in cases which attract the application of the proviso to section 6, the newly granted testamentary power will have a corrosive effect on the joint property.

None of the aforesaid provisions deal with the joint family as such. They aim at betterment of the position of Hindu women by giving them certain rights in the family property. The joint and common property having been the nucleus of the Hindu family the long term effect of these enactments, however, is bound to be towards the breaking up of the joint family already weakened by the operation of manifold socio-economic forces.

D. Laws Relating to Taxation

The laws relating to income tax have shown a particular indulgence to the joint family.⁴² A Hindu undivided family is a distinct unit for the assessment of income tax and an individual member is not liable to be taxed in respect of his income from the family property.⁴³ The courts have gone to the extent of saying that this income of the individual is not to be taxed even if the family has not paid tax on the income out of which the share was given to the individual.⁴⁴ Further, the income from the joint family is not to be included in the individual's income for the purposes of determining the rate of tax on his total taxable income.⁴⁵ The law does not extend these benefits to other units of taxation like firms and associations.

42. See Gulati and Gulati, *Hindu Joint Family: A Study of its Tax Privileges* (1962) for the privileges of the joint family under the law of taxation.

43. Section 10(2), Income Tax Act, 1961.

44. *C.I.T. v. Lakshmbai*, (1935) I.T.R. 49, at 55.

45. Section 66, Income Tax Act, 1961.

The provision in the Finance Acts for a longer initial margin of income exempt from taxation⁴⁶ gives to the joint family a distinct advantage over other tax payers. On the face of it the rule seems to be only fair since in the case of an ideal type of joint family, income being taxed is in substance the income of more than one individual and then it is subject to a number of rights relating to maintenance etc. This was undoubtedly the case when the joint family was a unit of both production and consumption and all its members were dependent on a common source of income. But this assumption may not hold good for all the joint families and may be valid even for a number of families which are not joint. There are any number of "divided families" in which a number of non-earning members, apart from the children, are dependent on the sole earning member.⁴⁷ On the other hand, due to the changed occupational pattern in the society, all the members of a joint family may be having independent sources of income while the number of non-earning dependents etc. in the family may be very small.

So indulgent is the law of income tax to the joint family that it would not mind the tax liability of a joint family being reduced by the gifting away of portions of family property by the karta to his wife or children. In case, however, an individual (as against the joint family) transfers without adequate consideration a part of his property to his wife or children, the income from the transferred property will be included in the total taxable income of the latter.⁴⁸ But the income of the property validly gifted by the karta to his wife will not be taxable in the hands of the joint family, even if the motive for making the gift was to reduce the tax liability of the family.⁴⁹

No wonder that in this state of law, the joint family is found to be a convenient device to evade income tax. The provision for partial or complete partition of the joint family at the option of the coparcenor or coparcenors can also be resorted to in order to evade tax. A family with income slightly over the exemptions limit can avoid the tax liability altogether by one of its members seeking partial partition. Even in case of a family with income considerably higher than the initial exemption limit, a partition would place the separated individuals or units into lower income brackets subject to a lower rate of taxation.

46. This, however, is subject to two conditions specified in the Act.

47. The only concession given by the Income Tax is the allowance of Rs. 300/- per child upto the maximum of two children.

48. Sections 64(iii), Income Tax Act, 1961.

49. *Raghubir Singh v. C.I.T.*, (1958) 34 I.T.R. 719.

The privileges available under the Income Tax Act to the joint family are not only unfair to other tax payers but also go against the spirit if not against the actual guarantee of equality under the Constitution. The taxation Enquiry Commission (1953-54), which considered the problem, rejected the suggestions that the members of the Hindu undivided family be taxed, just like the partners in a firm, on the basis of their share in the income of the family. If a large number of Hindus particularly those from the affluent section still continue to live under the joint family, it is not improbable that the motive, in some cases at least, is furnished by the provisions of the Income Tax Act. It is rather strange that the taxation policy should give preferential treatment to the joint family while the law relating to succession is working in just the opposite direction. Perhaps the benefits to the joint family are unintended. The legislature has just continued the distinction between the Hindu undivided family and the other tax payers made by the old Act in pursuance of the British policy of not interfering with the religious and social institutions of the people.

The policy contained in the Income Tax Act has, however, not been adopted by the laws levying other taxes. The Estate Duty Act, 1953, for example, makes the interest of a coparcenor in the joint family property liable for the duty. The duty is assessed on the basis of the share which would have gone to the coparcenor, had he demanded partition immediately before his death.⁵⁰

The distinction made in the Income Tax Act between "individual" and "Hindu Undivided family" can at times give rise to unreasonable claims. In *Banarsi Dass v. Wealth Tax Officer*⁵¹, the competence of Parliament to impose wealth tax on Hindu undivided family was challenged. The contention before the Supreme Court was that the Constitution empowers Parliament to levy taxes only on "the capital value of assets . . . of *individuals* and companies"⁵² and that the term "individual" has a limited meaning; it does not include Hindu undivided family. The Supreme Court rejected the plea and upheld the right of Parliament to impose wealth tax on Hindu undivided family as well.

E. Ceiling on Agricultural Holdings

There are other legal forces too at work which provide a powerful incentive for the division of the joint property. An important instance is

50. Sections 7(1) and 39(1), Estate Duty Act, 1953.

51. (1965) 1 S.C.J. 428.

52. Entry 86, List I, Schedule Seventh.

of the laws enacted in practically all the States fixing a ceiling on agricultural holdings.⁵³ Some of these laws were struck down by the Supreme Court on the ground that the definition of the family in the Acts was artificial and the ceiling on the land a "family" was permitted to own was fixed in a manner as to offend the equality clause.⁵⁴ But a subsequent constitutional amendment⁵⁵ has furnished a blanket protection to the legislation relating to ceiling on agricultural holdings. The permissible limit of land which can be owned by a family has been laid down in a manner that puts the joint families to disadvantage. This will be the first powerful impact of law on the joint family in the rural sector.

V. FAMILY IN THE NEW SOCIETY

The commencement of the Constitution in 1950 ushers in a new era in the Indian history. It re-defines the social objectives, aims at securing economic freedom and promises a complete social transformation. The role of the family and the property relations clustered around it is to be examined in this context.

It is clear that both the feeling and fact of jointness behind the joint family is fast disappearing due to the operation of social and economic forces and due to the changed social outlook. The law, both statutory and judge made,—has aided the process by cutting down and dispersing the corpus of the joint property. But the joint family, it seems just like the sphinx, arises out of its ashes. The family units, which come into being after the break up of one joint family, develop in course of time as distinct joint families. So long as the legal presumption of jointness remains in law and so long as the legislative measures do not make radical changes in the basic framework of Hindu family law, the system of joint family will continue to cling to the vast majority of the people, at least, so far as the law is concerned. The legislation relating to joint family, undertaken so far, reveals scant awareness of the wider problem on the part of the law-makers. They seem to have taken for granted the system of property relations implied in the joint family and offered only a symptomatic treatment mainly by granting to female members equal property rights. None can deny the justness of the decision to secure equality of treatment for women. But why should the law-makers have stopped at that? The opportunity could have been utilised to project a view of property

53. See, for example, the Madhya Pradesh Ceiling on Agricultural Holdings Act, 1960; The Madras Land Reforms (Fixation of Ceilings on Land) Act, 1961; The Gujarat Agricultural Land Ceilings Act, 1960.

54. *Karimbil Kunhikoman v. State of Kerala*, (1962) S.C. J. 510; *A. P. Krishnaswami Naidu v. State of Madras*, (1965) 1 S.C.J. 239.

55. The Constitution (Seventeenth Amendment) Act, 1964.

relations which will make the family into a viable unit of the new society. In determining the role of family in the society two aspects of the matter have to be constantly kept in mind. Firstly, the family as the most important social institution, is to provide such cultural-conditioning, value-orientation and behaviour-training as will produce the right type of individual needed in society. Secondly, the sphere of operation of the family is to be so regulated that it aids rather than impedes the social processes at work. The latter depends on arriving at a workable identity of the family with the newly emerging social structure in which the state occupies a dominant position. In regulating the family relations, the law cannot completely overlook the deeply rooted sentiments of the people in the matter. But it is too late in the day to suggest that the law should only reflect the popular consciousness. Law has been accepted in India as an instrument of social change and has to take a lead in the readjustment of property relations vis-a-vis family on which will depend to a great extent the character and the nature, and may be even the composition, of family.

The functioning of democratic institutions envisaged in the Constitution requires a more active participation of the individual in public affairs and a certain standard of political behaviour is expected of him. The actual position today is that due to lack of properly organised secondary groups in the society the political behaviour of the individual is yet influenced to a great extent by the family. The experience so far demonstrates that the behaviour pattern emerging out of the family tie did not have a healthy influence on the individual in the discharge of his public responsibilities. It is not infrequently found that an individual is irresponsible in his political behaviour because of his higher sense of responsibility to the primary groups like the family. Professor Morris-Jones describes this attitude as that of "political irresponsibility" and further observes that "nepotism often reflects a loyalty to the family or clan in excess of loyalty to the State."⁵⁶ A recent study of the Indian society states that: "In a society where familism is as dominant a sentiment and practice as in India, family sentiments induce nepotism as a deep moral obligation."⁵⁷ Besides, the adult behaviour of the individual reveals the effect of the lack of opportunities available to the individual in the family to undertake independent responsibility. What Professor Appleby has described as the "lack of action mindedness"⁵⁸ amongst Indians in the field of administrative action also has something to do with the family atmosphere in which the individual has been brought up.

56. Morris-Jones, *Parliament in India* 36 (1957).

57. Taylor and others, *Roots of Indian Democracy*. 84-85 (1965).

58. Appelby, *Public Administration in India: Report of a Survey* (1953).

The joint family, as the repository of the traditional values, poses a number of serious problems for the individual. The total control it claims over the thinking and conduct of the individual hampers the free formation by the individuals of political and economic groups. It is not possible for an individual to continue as a faithful member of his family simultaneously with his active membership of a political group in the society. Consequently, it has been observed that, an active member of a political organisation has to sever his connection with the family.⁵⁹ This shows that our erstwhile family system has yet to adjust to the needs of democracy assumes complete mobility of power. A number of village studies conducted after independence reveal that the family makes its weight felt in the political decisions of its members.⁶⁰ Democracy in the country will remain a dream unless the individuals are allowed to organise themselves in groups based on political and economic programme rather than be controlled by a group which is based only on authority and tradition.

The institution of joint family and the system of property relations it embodies needs to be given a fresh thought after our social objectives have been redefined. The acceptance of democracy, welfare state and secularism has a two fold effect on the family. Firstly, the political organisation claims total allegiance of the individual whose loyalty to groups like family should not be permitted to stand between the individual and the state. Secondly, the state assumes the responsibility of overall welfare of the individual even in areas which had been a close preserve of the family. The welfare state in India, in pursuance of the directives of social policy laid down in the Constitution, is gradually assuming more and more of these functions displacing thereby the joint family as an agency of social security. The provision for compulsory and free primary education, employees health insurance, provident fund for the workmen, workmen's compensation laws and old age pension are some of the measures in the direction. Financial limitations have not permitted the application of these measures beyond the urban areas and particularly the industrial workers. Whatever the justification so far for the individuals to cling to the joint family property will be lost once it is found possible to ensure these benefits to the entire population. A forward looking legislative policy cannot lose sight of the shape of things to come.

The institution of joint family was originally devised for an agrarian and static economy in which the family was a unit of both production and consumption. The property relations were defined accordingly. With

59. See Park and Tinker, *Leadership and Political Institutions in India*, 35-36 (1956).

60. See, for example, Opler, "Factors of Tradition and Modernity in Rural India" in Park and Tinker, *id.*

the changed techniques of production, it is obvious that the family cannot be a unit of production and its role in economic activity has been minimised. Industrialisation requires mobility of man-power and money which is not possible with the static character of the joint family and the tendency to preserve the pointness of the family property. Even in the rural economy, the methods of farming are being rationalised. The joint family system will be found to be out of place after the ideas of mechanised farming and cooperative farming start catching up.

VII. CONCLUDING OBSERVATIONS

A study of the social and legal changes in the property relations in the joint family system reveals that no final pattern has yet emerged which may fit in the modern society. The directions of change, however, are clear. The uncertainty in the area is partly due to the lack of a clear cut definition of the role of private property in our society. A synthesis is yet to be arrived at between the constitutional vision, judicial attitude and legislative policy relating to property relations in independent India. A stable arrangement of the property relations in the family can have its basis only in such a synthesis.

Another difficulty is created by the peculiar group structure in the present day society. In the absence of properly organised secondary groups in society, the individual has a tendency to attach himself to the family. But to suggest that the present family relations should continue till secondary groups are formed in society will be arguing in a circle. It is well-known that the deep rooted sentiment of the Indians towards the family inhibits free formation of groups. Law cannot set up the secondary groups in society but it can certainly regulate the family relations in a manner that the formation of other groups is encouraged. The other factor responsible for the continuation of the family tie is that the state has not been able to extend social security so as to cover all the sections of society due to the paucity of resources. In view of this, it is not the individual's sentiment, nurtured by tradition, forcing him to look to joint property as a useful institution, which is the cause of the absence of a stable arrangement for property relations in the family.

These are some of the problems of transition but to prolong their solution till this stage is over will lead to perpetuation of transition. Such a situation is inevitable when the traditional ideals, rules and institutions are being displaced by the new ones. Law has to minimise the friction created by the clash between the old and new. Even in order to arrive at a tentative solution, a combined intellectual effort by all the concerned social sciences is called for. Law will, of course, be an effective means to implement the desired changes.

The recent codification of some of the branches of Hindu law does not go far enough to tackle the general problem. Property relations have been considerably changed as a result of these enactments. But the reformist zeal behind these enactments has at times overlooked the need for balance. The provisions of the Hindu Succession Act create an imbalance in favour of women. Some of the imbalance created thereby are results of partial codification of Hindu law. The act gives equal right of succession to both son and the daughter. But the law relating to debts is yet uncodified with the result that the son alone will continue to be liable for the debts of the father. The lapse of time after these enactments has not been long enough to make their full impact felt. But it will not be surprising if there is another spate of legislation in Hindu law soon. It is to be hoped that this legislation will not only be comprehensive but will keep in view the pattern of family relations including property relations needed and desired in the modern society.