

Litigation in Matrimonial Matters: Some Replicable Models

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Abstract

Litigation in matrimonial matters is widely increasing day by day particularly in towns and cities. When a marriage does not work satisfactorily in some cases partners have to resort to litigation. This is preceded by much unhappiness, anguish and tension created by incompatibility of husband and wife. With the liberalised divorce policy and the changing social attitude the matrimonial litigation has in the recent past increased tremendously and the courts found it difficult to cope with the situation. Hence, a need arose to establish specialised courts with conciliatory to deal with family disputes. There is an imperative need for organizing Seminars, Workshops and short orientation courses for the Judges with regard to Counselling techniques employed in resolving family disputes. The seminars and workshops would help them in exchanging their experiences and familiarizing with the innovative procedures adopted during the course of reconciliation process. The Judges who have been selected from outside the Judicial Service should be given an orientation course in family laws and other procedural laws.

Keywords: Counselling techniques, Ethical norms, Family, Marital discords, Matrimonial disputes, Therapeutic style of resolution, Victim

INTRODUCTION

Litigation in matrimonial matters is widely increasing day by day particularly in towns and cities. When a marriage does not work satisfactorily in some cases partners have to resort to litigation. This is preceded by much unhappiness, anguish and tension created by incompatibility of husband and wife. In fact, matrimonial litigation is one of the most traumatic experiences in the lives of them who have to face it. It has enormous, social, psychological and economic implications not only for the two involved persons but also for families and for society at larger. Laws have been enacted and amended several times to guide family matters so that, where partners could not adjust, the break up of marriage the sufferings and problems of parties who have to resort to the court for solution conflicts in their matrimonial lives [44].

The nature of matrimonial dispute is different from other civil litigation. Evidence led in these matters is usually complicated and lengthy. The result is that the number of cases disposed of in matrimonial affairs is rather low and cases go on piling up and hundreds of such petitions remain awaiting disposal.

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Similarly the litigation in regard to any matter concerning family, whether divorce, maintenance and alimony of spouses or custody, education and support for children or trial of juvenile offenders should be viewed as a social curative problem needing solution. The resolution of family conflicts requires special procedures to reconcile and resolve their differences. This means that

traditional adversarial procedure has to be modified and replaced by a less formal procedure [1]. It means that the procedure must be effective and speedy one otherwise the imbalance in the family unit may bring trouble to the society as a whole. So the administration of justice in this field needs a special care.

As a social institution 'the Family' refers to an organised, formal and regular way of carrying out certain essential tasks in the society, as well as a wide system of norms that organises family units into stable and ongoing social systems [2]. It is both our earliest experience of community and the essential buffer between individual and the state.

It imparts ethical norms, providing the child with his first instructions in the prevailing social rules, (and) profoundly shapes his character [3]. This institution needs to be understood in terms of the interaction interse among its members in the context of their interrelated statuses and social expectations. Usually, a family comes into being on marriage and includes people linked together by marriage, blood or adoptions and having certain reciprocal rights and obligations to one another.

Though the primary tasks of the institution of family remained same throughout, with the changes in the social structure consequent to industrialization and urbanization in the recent past, interpersonal relationships within it have been in a state of decline.

Social Workers and Psychiatrists have pointed out that marital and family as it covers the life cycle for marital given marriage or family as it covers the life cycle for marital and family system at any given time within the society. There are many situations and events throughout the life cycle that produce stress which may sometimes result in matrimonial conflicts.

This in turn may give rise to psychological and social problems for the members of the family. Many sociological studies have revealed that most ills of the society such as juvenile delinquency, drug-addition, destitution and vagrancy etc. arise due to family disharmony. The Law Commission of India has pointed out [4] the institution of family as a significant unit of social structure which needs to be preserved and protected from the adverse forces of the society.

All societies have some mechanisms or devices to tackle marital discords. A widely recognized legal remedy is divorce. Some of the problems such as maintenance of the spouses, the custody and maintenance of the children etc. arise out of divorce, the law has to care of these issues. Any delay in providing legal remedy to the estrange couple would result in wastage of youthful years of the couple. More important is its adverse effect on the children during the period of their character molding.

MATRIMONIAL DISPUTE RESOLUTION PROCESS IN INDIA

To most of the communities in India, marriage is a sacrament. The Hindu consider it as one of the important samsakaras by which a man and woman are permanently united [5].

Divorce was not recognised in traditional Hindu Law. This concept was partially eroded in 1956 was where divorce as a legal remedy in Hindu Marriage Act, 1955 was recognised.

With the changes in marriage laws in 1976, a more liberalized divorce policy was adopted. But divorce does not perse solve many of the issues arising out of matrimonial discords.

Marriage changes the legal positions of the parties and confers certain status together with the reciprocal rights and obligations within this institution. With the liberalised divorce policy and the changing social attitude the matrimonial litigation has in the recent past increased tremendously and the courts found it difficult to cope with the situation. Hence, a need arose to establish specialised courts with conciliatory to deal with family disputes.

In this connection it becomes necessary to trace the evolution of dispute resolution process in family disputes which has charted a discernable path over the period by relating itself to the changing needs of the society. In fact, the changes in social relationship and the character of society have influenced the disputes resolution mechanisms.

In older days, each village was a closed society in itself devoid of any external social and economic influences. Individuals were assigned different roles depending upon their status and position in social hierarchy both 'within' and 'without' the institution of family.

The power and authority relationships within this institution were guided by value choice of the society concerned. The differences and conflicts within the family were reconciled by the power holder in the family.

This was essentially an informal process but as the villages grew in size and structures, the joint family system which was ideal for small economic organisations was severely put under stress. Consequent, to the weakening of joint family system and its control mechanisms, an external and formal force was required to maintain the social relations.

This took the form of Caste and Nyaya Panchayats. This formal conflict resolution mechanism pierced through the veil of family privacy to deal with the discords in the family. The dispensation of justice by these institutions were in conformity with conventions, traditions, customs and religious texts. When the authority of the State extended to administration of justice family disputes also gradually came within the purview of the Courts.

Consequent upon the society's recognition of Social Justice as the paramount goal of State activities, social legislations protecting the interests to the deprived were enacted specially to protect the interests of women and children. An awareness was created among the members of society relating to their respective rights and obligations.

This access of information, urbanization – its problems and the legal aid support from the State resulted in spurt in litigation pertaining to social matters, the bulk of which was contributed by family disputes. The pressure on the courts began mounting by both the increase in the rate of litigation as well as the spread of its portfolio, resulting in the arrears of the courts.

With an anxiety to reduce the pendency, the courts resorted to mechanical and technical disposition of cases. The legislature along with the Judiciary felt the need of therapeutic style of resolution of family disputes, due to the adverse effects of urbanization on the family and the threat to the disruption of this institution.

The same is reflected in the decision of the Supreme Court [6] which said 'in a world where man and women are indispensable to each other and the status of one depends upon the existence and longing of the other, to what extent is competition between two justifiable is a matter to be debated in a cool and healthy setting'.

RESOLUTION OF FAMILY DISPUTES IN RECENT TIMES

There have been significant changes in the emphasis on the remedies that are available to resolve marital discord i.e., from legal remedies to social remedies which are considerably different from each other. The legal remedies determine the reciprocal rights and obligations of the spouses and establish fixed legal relationships consequent upon the act of marriage which make resolution of family disputes by courts of law indispensable. Of late, 'Family Therapy' as a conflict resolution process has grown rapidly as a means of diminishing the bitterness and divisiveness that accompanies divorce or such other legal remedies. The family therapy is viewed both as a theory of family functioning as well

as a treatment technique for the parties concerned or the couple/families. When this institution is faced with stress, the therapy maintains 'family' as a functioning and cohesive system with set of rules and patterns of behaviour.

Thus, an holistic approach needs to be adopted by observing its parts individually and as a whole in its action. Malfunctioning of this unit would result in individual symptomatology.

FAMILY COURTS

Family Courts are specialized courts established for maintaining welfare of the family by developing multidisciplinary approach to resolve family problems within the framework of law. These courts assume a twin function of securing the legal rights of the individuals and playing the role of a guide, helper and counsellor to enable the families to cope with their problems and thereby establish family harmony. In the absence of uniform civil code, family courts were seen as a step forward as it intended to improve procedural laws by providing more flexible, unconventional and investigational procedures aimed at bringing about reconciliation among the affected parties [7].

The concept of marriage is held as sacred and significant for the whole span of life. But it is apprehended that the evils of westernization is adversely affecting the institution of marriage in India too. Indeed the western culture of cohabitation without marriage is gradually creeping into the Indian society. Still, there are attempts to preserve the institution of marriage. Marriage is considered a permanent and sacred bond in the mainstream of Indian cultural life and therefore until recent times it was treated as indissoluble[8]. The traditions of all civilized societies of our pattern, advocate the belief in the theory of indissolubility of marriage.

Indian society also considers marriage as not only an important social institution but also a sacred one. Separation and divorce are treated as harmful practices for the normal functioning of the family. It is a generally held view that separation of spouses can be considered by the kinship network only in extreme conditions and in intolerable problems [9]. Divorce rate in India, taking the total population into account, is low. But it does not guarantee marital peace, harmony, fulfillment and growth. Separation or divorce may not be always desirable as usually it leaves a scar on the personality of both the partners.

In the institution of marriage the dignity of woman must be taken in to account because the dignity of woman is the most jeopardized condition and thereby it is subverting the very institution of marriage [10]. To avoid this menace the relationship between the members of the family has to be maintained. The law arising out of matrimonial bond gain significance here.

Since family life is the fundamental aspect behind the existence of every average Indian woman, much importance is being given to family law. It follows that laws governing family relations have a greater significance for most Indian women than laws governing equal pay, maternity benefits, property or laws dealing with the lending policies of banks and insurance companies [11].

Today religious personal laws are the determining factor in maintaining family relations. The major religious communities like Hindu, Muslim, and Christian etc. have their separate personal laws. In matters of marriage, divorce, succession, adoption, guardianship and maintenance, these personal laws govern them. Though law provides special rights to the women in these fields, practically they are discriminated. Therefore there is an urgent need of providing legal aid to the women irrespective of the fact that they are rich or poor or belong to any particular religion [12].

Although the Constitution of India promises equality of status and opportunity for women in all spheres of life, this remains mostly in principle and not so much in deeds. The Constitution of India ensures equality to both women and men. But women can rarely enjoy legal rights because of the

existing patriarchic forms of society [13]. A main objective in the preamble of the constitution is equality of status and opportunity and the dignity of the individual.

The dignity of the individual is the result of an uninhibited interaction between the concept of social justice and the principal of equality of status and opportunity [14]. The effort taken by the framers is evident from the provisions of the Constitution, which have not only ensured equality between women and men but also provided specifically certain safeguards in favour of women. Briefly, the Indian Constitution has textually liberated woman and guaranteed her dignity and personality.

Equal status and opportunity and non-discrimination on the ground of sex are guaranteed by the Constitution [15]. But the notion of weaker sex complex is a clever invention of male chauvinism [16]. The Constitution, quickened by social conscience, has added invincible legal missile for woman's liberation. Indian womanhood in its severality and collectivity is maimed by man's inhumanity [17].

The concepts of marriage, divorce, maintenance and right to property under personal laws are different from one another. Marriage is the very foundation of the civilized society; it is the foundation of the family, and in turn of the society without which no civilization can exist [18].

Hindu concept of marriage is entirely different from that of Muslims. The former considered marriage as a sacrament, whereas, of Muslims it is a civil contract [19]. Neither of them considers divorce as permissible. Even when divorce occurs the woman has no say in it. For Christians also, marriage is an indissoluble union, a holy tie. It was therefore proclaimed, "what God hath joined together no man put as under" [20].

In Christian matrimonial matters, the supreme authority is Church. Marriage creates a change in the status of woman. Her personality is identified with that of her husband. The traditional concept of sacredness attached to the marital bond is that once it is tied it cannot be untied. This concept is not always practicable. There are many cases in which divorce takes place and the bond breaks.

The later half of the 20th century has been a period of great development in the field of family law. Marital relationship is under increasing strain and becoming complex and demanding. Divorce came to be recognized practically in all societies including those like Hindus and Christians. Divorce cannot be considered as an end to the familial problems, but a beginning. It does not guarantee marital peace, harmony, fulfillment and growth. There are problem marriages and troubled marital life but even in such cases separation or divorce may not be always desirable as a separation or particularly a divorce leaves a scar on the personality of both the parties [21].

Under the Indian judicial system till recently family matters were entrusted to the district judges and magistrates, who are eminent in ordinary civil and criminal trials. They adopt the usual adversarial procedure even in family matters. The already overloaded district courts and magistrate courts could not deal family matters expeditiously.

The delay in matrimonial litigation is dangerous in as much as the entire youth of these couples would be wasted in these litigations. Moreover, "in ordinary courts the procedure is so technical and expensive that by the time any relief or settlement is reached, the partners, particularly, girls are past their age of resettlement in life, emotionally torn and socially embarrassed. Many of them are psychologically wrecked. The procedure involving lawyers on both sides creates much bitterness that makes decent settlement impossible. In fact, legal action in ordinary courts, more often tends to aggravate rather than resolve matrimonial disputes [22].

Children are the most affected victims of matrimonial disputes. The fate of them during such period is simply torturous causing adverse psychological effect. In most of the cases they are used like

shuttlecocks by the litigating spouses. They just do not care for their psychological disturbances nor the children are able to express themselves being weak in every respect. Thus the adversarial system failed absolutely in imparting legal protection to children.

In the adversarial system the clients in the matrimonial disputes were forced to approach a number of courts seeking remedy for their grievances. For separation, one has to go to civil court, for getting maintenance to a magistrate court. In case some property dispute is involved, one has to go to another court. This is a most undesirable situation for a woman. It is also a time consuming and tiring process. This system is not only illogical but leads to inefficiency and injustices.

It was realized that the adversarial system is ill-suited to family needs. It should be viewed as a litigation in which parties and their counsels are engaged in resolving family conflicts where human considerations prevail over, everything else. The resolution of family conflicts requires special procedures designed to help people in struggle, to reconcile and resolve their differences and where necessary to obtain assistance.

The court adjudicating family disputes should function in such a manner that it may tend to protect and not disturb family life. It should be helpful and not harmful to individual partners and their children and it should be preservative rather than punitive to family problems. The fact of the matter is that the adversarial process prohibits reconciliation and conciliation of inter-spousal and inter-parental conflicts. The court engaged in this task requires a less formal and a more active investigational and inquisitorial procedure.

In other words it is not litigation in which parties and their counsel are engaged in winning or defeating a legal action, but an inquisition in which parties, social workers, lawyers and welfare officers, psychiatrists etc. are engaged in finding out a solution to family problems. So, for the settlement of dispute between the members of the family, there should be a procedure. The procedure must be effective and speedy one. Otherwise the imbalance in the family unit may bring trouble to the society as a whole. Hence administration of justice in this field needs a special care.

Taking into consideration this special character of family and its significance in the society, the Law Commission of India in its 59th report in 1974 strongly recommended for the establishment of Family Courts in India for dealing with the disputes concerning the family [23]. The main force behind the establishment of family courts originated from women's movement, which brought to the focus anti-women bias within the law in the courts.

The concept of family court implies an integrated broad-based service to families in trouble. It stipulates that the family court structure should be such as to stabilize the marriage to preserve the family and where the marriage has broken down irretrievably, to dissolve it with maximum fairness and minimum bitterness, distress and humiliation. The demand was made for reforming laws and procedures that would ensure women's economic rights within marriage and make divorce proceedings speedy, less painful and just for women. Mahatma Gandhi had said "family disputes and differences are to be settled generally according to the law of love" [24].

It expressed itself in mutual relationship and co-existence, which shall be the basis of Family Courts Act. Family courts are described as fully responsible judicial tribunals which provide a special social approach to certain family problems and which centralize various legal matters relating to the family in one court equipped to provide this approach [25]. Along with the aim of protecting the legal rights of the individuals, family courts play the role of a guide, helper and counsellor.

MATRIMONIAL LITIGATION

When a marriage does not work satisfactorily in some cases partners have to resort to litigation. This is preceded by much unhappiness, anguish and tension created by incompatibility of husband and

wife. In fact, matrimonial litigation is one of the most painful experiences in the lives of them who have to face it.

It has vast, social, psychological and economic implications not only for the two involved persons but also for families and for society at large. Liberalization and reform in the laws concerning family matters have not been accompanied by reforms in the legal procedures. Matrimonial litigation, whether it is for divorce, maintenance, custody of children or any other issue should be least painful and embarrassing and swift and simple.

Consequently in line with the same idea, law for divorce by mutual consent was enacted in 1976 to make divorce simpler and avoid spouses having to launch charges and countercharges at each other to establish a legally sound case. According to this law it is required that the parties have only to file a joint petition stating that they have not been able to live together and have mutually agreed to separate.

But all these measures have not achieved the desired results as the existing courts are strictly legalistic, over-burdened with cases, time consuming and expensive. In fact legal action in ordinary courts tends to aggravate rather than resolve matrimonial dispute due to many reasons. Jurists, women's organizations and those in the legal profession realized this long ago. The need for family courts was first expressed by a meeting of women's organizations held in Delhi in 1968.

The Law Commission of India [45], while recommending introduction of a new order, into the code to deal with matters relating to family, gave reasons therefore in chapter 32A of that Report thus:

1. 32A.2. In the Administration of justice in disputes relating to the family, one has to keep in mind the human relationship with which one is dealing. The objective of a family counseling, as a method of achieving the ultimate object of preservation of the family, is to be kept in the forefront.
2. 32A.3. Litigation concerning or involving affairs of the family, therefore, requires a special approach in view of the serious emotional aspects involved. For this area of personal relationship, our ordinary judicial procedure is not ideally suited.
3. 32A.4. It is being increasingly realized that:
 - a. As far as possible an integrated broad base service to families in trouble; should become a part of the court system.
 - b. The existing court structure should be so organized that one single court should deal with the problem of preserving the families; and
 - c. The conventional procedure dominated by the adversary system may not be appropriate for disputes concerning the family.

The Law Commission in its 59th report [46] also stressed that there is something more than the buildings, advocates, staff members and furniture etc. that goes to constitute the court. Although all these things are absolutely necessary for the establishment of any court but the personality of the judge is an essential element for the totality of a court constitution and it is in this impression that the said commission strongly recommended the establishment of family courts in this country for dealing with disputes concerning the family.

The commission expressed its view on the need of establishment of family courts to deal with matters concerning the family by adoption of a human approach thus:

“In our Report on the Code of Civil procedure, we have had occasion to emphasis that in dealing with disputes concerning the family, the court ought to adopt a human approach, an approach radically different from that adopted in ordinary civil proceedings, and that the court should make reasonable efforts at settlement before commencement of the trial. In our view, it is essential that such approach should be adopted in dealing with matrimonial disputes. We would suggest that in due

course, states should think of establishing family courts, with presiding officers, who will be well qualified in law, no doubt, but, who will be trained to deal with such courts all disputes in a human way, and to such courts all disputes concerning the family should be referred” [46].

In 1975, committee on the Status of women recommended for the settlement of all matters in relation to family separately.

Subsequently, the Civil Procedure Code 1908 was amended in 1976 [47] and this amendment provided for a special procedure to be adopted in suits or proceedings relating to the matters concerning family. Order 32A was added. Regarding the application of this Order, Rule 1 [26] says for special procedure in suits and Rule 2 [27] contains provisions for in camera proceedings. Sub-rule (1) of Rule 1 contains special procedure in suits.

- a. A suit or proceeding for matrimonial relief including a suit or proceeding for declaration as to the validity of a marriage or as to the matrimonial status of any persons;
- b. A suit or proceeding for a declaration as to the legitimacy of any person.
- c. a suit or proceeding in relation to the guardianship of the person or the custody of any minor or other member of the family, under a disability.
- d. A suit or proceeding for maintenance.
- e. A suit or proceeding as to the validity or effect of an adoption.
- f. A suit or proceeding, instituted by a member of a family, relating to wills, intestacy and success.
- g. A suit or proceeding related to any other matter concerning the family in respect of which the parties are subject to their personal law.

However, so much of this order as relates to a matter provided for by a special law in respect of any suit or proceeding shall not apply to that suit or proceeding. In relation to the duties of the courts this order through its Rule 3 clearly speaks that:

- a. In every suit or proceeding to which this order applies, an endeavour shall be made by the court in the first instance, where it is possible to do so consistent with the nature and circumstances of the case, to assist the parties in arriving at a settlement in respect of the subject matter of the suit.
- b. If in any such suit or proceeding, at any stage it appears to the court that there is a reasonable possibility of a settlement between the parties, the court may adjourn the proceedings for such period as it thinks fit to enable attempts to be made to effect such a settlement.
- c. The power conferred by sub-rule (2) shall be in addition to and not in derogation of any other power of the court to adjourn the proceedings.

Besides, Rules 5 imposes a duty on the court that in every suit or proceeding to which this order applies, they must inquire so far it reasonably can, into the facts alleged by the plaintiff and into any facts alleged by the defendant.

This order through its Rule 4 also provides for the assistance of welfare experts by saying that in every suit or proceeding to which this order applies it shall be open to the court to secure the services of such person (preferably a woman) whether related to parties or not, including a person professionally engaged in promoting the welfare of the family as the court may think fit, for the purpose of assisting the court in discharging the functions imposed by Rule 3 of this order.

It is really pathetic that this amendment to C.P.C., 1908 was enforced with effect from February 1977 but so far not much use has been made of this amendment by the courts in adopting this conciliatory procedure and the courts even today continue to deal with the family disputes in the usual adversarial procedure [28].

In the early 80's demand for family courts attained more strength. Various women's movements wanted reforms in the laws governing women. Women's movements focused attention on the unequal

power relation between men and women and anti-women bias against the latter within the law and in the court. So demand was for laws and procedures, which would assure women's economic rights within marriage and make divorce proceedings speedy, less expensive, less traumatic and more just for women.

In response to the demand of women's movement to reform the laws concerning women several such laws were amended. For example, the rape law was amended in 1982, The Dowry Prohibition Act was amended in 1984 and again in 1986 (Cruelty and harassment to wives was made a cognizable offence in 1983 [29] and a special section to deal with dowry deaths was included in the IPC in 1983 [30].

As a part of this trend of legal reforms concerning women and taking into account the arguments and demands of various women's organizations, jurists and sociologists, The Family Courts Act was enacted in 1984 with a view to promote conciliation in and secure speedy settlement of disputes relating to marriage and family affairs and for matters connected therewith. This Act was considered as a positive step for safeguarding the noble institutions of marriage and family. Family court may be described as fully responsible judicial tribunals which provide a special social approach to certain family problems and which centralize various legal matters relating to the family in one court equipped to provide this approach [31].

Aim of family courts is to be free from subconscious pressures of the preconceived notions and tyranny of dogmas and adopt a realistic, rational and pragmatic approach.

FAMILY COURTS ABROAD

Many countries in the world recognize the importance of treating family matters separately and family courts are already functioning in some western countries. There have been experiments with family courts in common wealth countries.

Australia

Australia has family courts under the Family Law Act 1975 to deal with matrimonial causes including parental rights and custody of children. There the family court is Federal Court and its jurisdiction is defined pursuant to Section 77 of the Constitution by the Family Law Act, which is a law made by the parliament under the relevant powers conferred to it by Section 51 of the Constitution. The court is a superior court of record according to Section 21 of the Family Law Act.

In Australia the Attorney General, while moving the Family Law Bill, stated that the aim of the Bill was to eliminate, as far as possible, the high costs, the delays and indignities experienced by so many parties in divorce proceeding under the then existing Matrimonial Causes Act. A notable feature of the Family Law Act, 1975 is that it introduced break down of marriage as a ground for dissolution of marriage and this is established only if the court is satisfied that the parties have separated and lived separately and apart for twelve months immediately proceeding the divorce application. The Act also made extensive provision for counselors to assist the parties to consider reconciliation.

The family court of Australia is seen as a helping court. Informality is encouraged, robes are not worn, the public is not admitted [32].

A decree in an undefended case may be granted on affidavit evidence alone the parties are not required to attend and give evidence unless there are children of the marriage, but even this may be dispensed with if the court is satisfied by affidavit or other evidence that the attendance of a party to the marriage is unnecessary.

A Directorate of Counselling and Welfare is established together with other counsellors and welfare officers and these are part of the court service. The Act recognizes the importance of both of

reconciliation and of conciliation. The parties may be referred to a counselor if the court believes that there is a reasonable possibility of reconciliation but may advise them to seek counseling if it thinks this may assist the parties to a marriage to improve their relationship to each other and to any child of the marriage.

Parties may also approach the counseling service independently of any proceedings in the hope of avoiding court proceedings entirely. Where the court grants injunctions, or where custody of children is disputed, it has power to direct attendance with a marriage counselor, but non-compliance does not amount to contempt of court.

With regard to the qualification of Judges [33] of Family Court, the Act provides that, a person shall not be appointed as a judge unless.....by reason for training, experience and personality, he is a suitable person to deal with matters of family law.

JAPAN

Japan is also having family courts for several decades. Japan Government established family courts in 1949. Family court in Japan had a goal and developed institutional structure to promote conciliation. Conciliation ranks very high in the value system of Japanese society. Both determination and conciliation proceedings are initiated on an application by the concerned parties. After the receipt of the application, the family court summons the parties and conducts a hearing in the presence of the family court counselors- if necessary, the judge may order investigation by the family court probation officer. Conciliation seeks to settle a family dispute through the intervention of a court facilitating a compromise between the parties.

The conciliation proceedings are conducted by a conciliation committee, which is normally composed of one judge and two counselors of family affairs, one of whom is usually a woman. The parties are ordinarily summoned to the family court for a hearing. An attempt is then made through an expert advice to guide the parties to reach a compromise, which is just and fitted to the actual circumstances. There are fifty principal family courts with 242 branches and 96 sub-branches. It appears that there are 351 judges in the Family Courts in Japan, 1209 court clerks, 1523 family court probation officers, 50 medical officers and other staff of 2342 in all 5525. It will be noticed that the number of probation officers is at least four times of the judges [34].

Family courts in Japan differ from the family courts in India in the sense that in Japan such courts have jurisdiction not only over the matrimonial causes, but also over juvenile crimes including various crimes committed by the teenager under School Education Law, Labour Standards Law and Child Welfare Law etc. Another different point is that in Japan there is an institution known as Legal Training Research Institute, which imparts one year training to the junior officers, and to senior staff refresher courses of varying durations [35].

Pakistan

In Pakistan, the family courts have been established in 1964. In Pakistan the position was not different from what was in India, before 1964. With the aim of simplifying civil litigation in regard to family matters and rendering civil courts more accessible to the general population, particularly women and children in need of their protection. Pakistan enacted the Family Courts Act in 1964. But under the Act of 1964, civil suits were to be filed only before the Family Courts, maintenance application under the Criminal Procedure Code were also to be filed in the Family Courts rather than before the magistrate.

The Family Court Judge has many magisterial powers. The exclusive jurisdiction of the Family Courts in regard to maintenance clearly comprehends both jurisdiction in regard to Section 488 of Criminal Procedure Code matters and also jurisdiction in regard to civil suits under the modified

Muslim law. Muslim women and children, therefore, became entitled to go before the Family Court not only for grant of maintenance but also for recovering arrears of maintenance [36].

However, matters related to bigamous marriage, divorce can be filed before an Arbitration Council as defined in the Pakistan Ordinance of 1961. The Council should take all steps necessary to bring about reconciliation between spouses. A man wishes to divorce his wife and who pronounces divorce, notifies it to the prescribed authority and through that to the Arbitration Council. The divorce shall if not revoked, earlier expressly or by conduct, be effective only after the expiry of ninety days from the date of notice.

United States of America

Family courts were first established in the United States of America, in 1910 where they are called Domestic Relations Courts.

Over 85 years ago, the renowned jurist Roscoe Pound (1906) called for social experimentation with alternative dispute resolution process that could more effectively solve human problems involving the law. Twenty three years later, in 1939, the seed sown by Pound blossomed into the Los Angeles conciliation Court. This court's primary objective was to reconcile spouses through the process of conciliation. In 1963, the Association of Family and Conciliation courts was formed [37].

With regard to the necessity for the establishment of family court, the Vanier Institute of Family at Ottawa, Canada, observed [38]:

If all courts were "human", a family court probably would not be needed. Since courts are not yet so, the family court may become an example for other courts to follow.

By 1980, court based mediation services were available in the major cities of a growing number of U.S. States and Canadian provinces. One significant site for the provision of such services was Ontario's first Unified Family Court, established in Hamilton in 1977. In 1991, this court was selected by the Court Reform Task Force as the test site for a pilot project designed to compare and evaluate comprehensive mediation and lawyer negotiations.

In this pilot project, each spouse must have a lawyer for the specific purpose of reviewing the mediation agreement with respect to distribution of marital property and financial matters in general. In sum, not only has there been an increase in the number of U.S. and Canadian courts providing mediation services, but also in at least one court, mediation is no longer restricted to custody and access issues.

England

From being a matter of indissoluble status marriage, by the 19th century, characteristically came to be treated as a contract [39]. Divorce and like Matrimonial causes are treated by the Matrimonial Causes Act, 1973. Matrimonial Law is administered by the High Courts, county courts and the magistrates courts indiscriminately. Within their separate structure both the magistrate courts and county courts have made efforts to treat family case differently from others.

However the existence of two independent court systems dealing with the same subject matter, often with the same individual case, at separate geographical locations, using their own distinctive procedure, presided over by personnel of very differy characteristics and training and each possessed of a different array of powers makes difficulties and confusion in the litigating parties. There is also the objection that magistrates courts are largely associated in the public mind with the criminal law. Their involvement in family matters runs directly counter to the conciliatory side of family law.

For a significant number of spouses, their first encounter with the legal system in relation to their marital difficulties is in the magistrate courts. The matrimonial conciliation work in these courts is

carried out by the probation officers. Magistrates may refer applicants to the probation officer, but more often the officer will see an applicant before, or when the summons is issued. With the increased availability of legal aid, it has become more common for an applicant to seek legal advice at an early stage than to discuss the matter with the probation officers. The Law Commission 1976, in its report on the matrimonial work of intervention should be encouraged [40].

The Family Division of the High Court exercises the matrimonial and domestic jurisdiction, which includes defended divorce cases and matters relating to the wardship, guardianship, custody, maintenance or adoption of children and deals with non-contentious or common form probate business. It also hears appeals from Magistrate's courts in domestic proceedings.

The work is handled by the President, sixteen puisne judges and fourteen registrars of the Family Division. It is done in London and at first tier Crown Court centers. Most of these have been designated as 'divorce towns' for the purpose of hearing defended matrimonial causes and ancillary applications. Many important aspects of High Court work are dealt with by the registrars of the Family Division and district registrars, including decisions on ancillary matters. Eg. maintenance, adjustment of property rights and the arrangement for access to children [41].

A number of proposals have been made for the establishment of Family Courts. Under the present system, there is jurisdictional confusion as between magistrate's courts, county courts and High Court and there are also discrepancies in the substantive law applied and doubt as to whether a system of accusatorial hearings is appropriate for family matters.

The Finer Committee proposed that the matrimonial jurisdiction of magistrates courts, county courts and the High Court should be abolished and be replaced by a Unified Family Court centred on the divorce county court. The family courts would be organized in tiers, on the analogy of the crown court. The lowest tier would comprise circuit Judge and magistrates and sit in county courts. There would be facilities for conciliation and support by a professional welfare service [42].

The government, however, have been unwilling to provide extra court buildings or add to the workload of the circuit bench. Many of the significant differences between the law applicable by the High Court and the county court on the one hand and magistrate court on the other have been removed, and moves have been made to keep the domestic jurisdiction of magistrate's court separate from criminal proceedings.

The demand for the establishment of matrimonial courts to deal exclusively with all disputes under family laws, has arose even in the international meetings. The Declaration of the Workshop on Family Laws and Human Rights of Women [43] India and Pakistan organized by A.G.H.S. Legal Aid Cell, Lahore call upon concerned persons, social action groups, political parties, legislatures etc. to campaign for and initiate reforms in the family laws in order to make them just and guarantee equal rights to all women and children.

Some of the minimum requirement for such standards are:

- Matrimonial courts shall be established to deal exclusively with all disputes under family laws. These courts shall have jurisdiction in respect of family matters of all religious communities. Court fees should be minimal,
- The matrimonial courts shall have adequate representation of judges from religious minorities and women;
- Execution of decrees passed by the matrimonial courts shall be made more effective and efficient.
- All questions of custody and maintenance of the property and adoption of minor shall be decided by Matrimonial Courts.
- All matters of adoption shall be dealt by the Matrimonial Courts.

So, the importance of establishing exclusive courts for family matters is recognized and demanded by more and more countries not only for the protection of women but also for the preservation of marriage. The concept of family court stipulates that the family court structure should be such as to stabilize the institutions of marriage and family. The traditional adversarial legal system with its outmoded methods of settlement of marital disputes is providing to be clumsy and inappropriate to deal with marital ruptures and aberrations. Therefore there must be a forum where redressal is available both from the social as well as legal angles and this is to be achieved only through a mechanism like Family Court.

Judges of the Family Courts

The Family Courts Act, 1984 is a social welfare legislation considering the fact that the litigation under the Act is to settle family disputes involving fragile, sensitive and complex human relationships unlike any other normal civil litigation. Here, the function of judges is not limited merely to adjudicate and pronounce judgements on legal and technical issues but also to promote the welfare of the family. The Act stipulates that in selecting persons for appointment as Family Court Judges every endeavour shall be made to ensure that persons committed to the need to preserve and protect the institution of marriage and to promote the welfare of children are appointed.

The role of the Judge would depend on the structure of dispute resolution process that is adopted to deal with matrimonial disputes. If 'divorce' is structured in the form of a 'matrimonial cause' and there is a preoccupation with the recognition, declaration and enforcement of legal rights and obligations, then all the tests point to an intention on the part of parliament to deal with the matter Judicially. If on the other hand, it is treated as primarily an adjustment of behaviour patterns and the structuring of interpersonal relationships then the use of judicial machinery become not merely unnecessary and otiose, but clearly would fail to qualify as a suitable – matter for an exercise of the judicial power. In the Indian context, the divorce is still viewed as a matrimonial cause and hence the Judge in Family Courts has an important role to play. Moreover, the Law Commission of India stated that "the Judge plays the most important role of different functionaries who play their part in the administration of justice. He/She is the key man in our Judicial systems in the dispensation of Justice. The image of the Judiciary for common man is projected by the trial court Judges and this in turn depends upon their intellectual moral and personal qualities."

Family Courts in India

Section 4 of the Family Courts Act, 1984 deals with qualifications, selection and appointment of Judges to the Family Courts. The Act prescribes that seven years of experience in a post under Union or the State where special knowledge of Law is required as the essential qualification for the appointment of a Judge to the Family Court. This is similar to that of the Higher Judicial Service. As per the Act, the Central Government, u/s 22 of the Act, has the power to prescribe any other qualifications but only with the concurrence of the Chief Justice of India.

However, the Act is silent with respect to the administrative and disciplinary control over the Family Court Judges. Which needs to be clearly defined as both the State Government as well as the High Court have a important role in selection and appointment of Judges.

Law Commission of India in its 59th Report stated that "we would suggest that in due course, States should think of establishing Family Courts, with Presiding Officers who will be well qualified in law, no doubt, but will also be trained to deal with such dispute concerning the family should be referred.

We may add that selected Judicial Officers could be posted in courts empowered under Hindu Marriage Act, 1955 and Special Marriage Act, 1954, and by dealing with disputes concerning family, they will be able to acquire experience and knowledge which should not only be of value to them but will ultimately benefit the society." Thus Section 4(3) © is an express admission of Parliament's firm

belief that mere legal knowledge or experience as a judge in the ordinary courts is inadequate for a Family Court Judge.

This conviction of the Legislature is further explained in section 4(4) (a) of the Act which states that “every endeavour shall be made to ensure that persons committed to the need to protect and preserve the institution of Marriage and to promote the welfare of children and qualified by reasons of their experience and expertise to promote the settlement of disputes by Conciliation and Counselling are selected.”

In the exercise of its power under section 4(3) of the Act, the Central Government has issued certain guidelines for selection and appointment of Judges to Family Courts, stating that “legislative provisions as well as the object and scheme of the Family Courts Act provide the clue for the Central Government to formulate the qualification necessary for appointment as Judge of the Family Court.

If those rules are not intelligently framed and imaginatively implemented there is every likelihood of the institution becoming yet another court defeating the purpose for which it was created. In this context, the following could form, inter alia, the qualifications for being appointed as a Family Court Judge:

- i. Every Family Court be presided over, as far as possible, by a woman, unless such person is not available for appointment or there are over-riding considerations in not appointing a woman;
- ii. The search for a suitable candidate to preside over the Family Court not be confined to the Judiciary only and should extend to the Government departments and the professions;
- iii. Experience in welfare and conciliatory work is as much important a qualification as knowledge of law for being considered for Family Court Judgeship;
- iv. The extent of involvement in aid activity particularly in Lok Adalats is a relevant consideration in determining the qualification of a candidate;
- v. The number and nature of matrimonial cases argued decided by the candidate is to be taken into account to determine the commitment of the candidate for protection and preserving the institution of marriage;
- vi. Persons who are involved in matrimonial cases argued decided by the candidate is to be taken into account to determine the commitment of the candidate for protection and preserving the institution of marriage;
- vii. Persons who possess degrees in Psychology, Social Work and Sociology are to be preferred if they are otherwise qualified;
- viii. Knowledge of the language spoken by the people is essential for being considered for Family Court Judgeship; and
- ix. Those appointed for Family Court Judgeship should be prepared for compulsory training as prescribed by Government and should be willing to serve in that capacity for a minimum period of five years.”

It is not out of place to mention the case of Dr. Suresh Kumar Bakliwal v. Smt. Dr. Neelanjana Jain¹ before the Jaipur Bench of Rajasthan High Court challenging the establishment of Family Courts in Rajasthan in the absence of Family Court Rules. The case was decided by a Division Bench of Jaipur the Court and the issues framed by the Court inter alia are:

1. Whether the provisions of section 4 of the Act are followed in the matter of appointment of the Judges of the Family Court?
2. What are the terms and conditions of the appointment of Judges including salary and other allowances payable to the Judges of the Family Courts and whether such terms and conditions including salary and other allowances have been fixed by the State Government, in consultation with the High Court?

The Division Bench comprising of Hon’ble Mr. D.L. Mehta and Mr. G.S. Singhvi JJ of the Jaipur Bench of Rajasthan High Court delivered the judgement of this case². The observations made by D.L.

Mehta J. were not concurred by G.S. Singvi J. relating to the selections, appointment of Family Court Judges and the authority of Chief Justice relating to postings and transfer of them, are as follows:

“Family Court Judges cannot be a part of the Rajasthan Higher Judicial Service or Rajasthan Judicial Service. It is an independent cadre itself just like Rajasthan Higher Judicial Service. A separate cadre of Family Court Service will have to be created as posts cannot be considered as a part of Rajasthan Higher Judicial Service as the qualifications required for the appointment of a Judge of a Family Court are not the same as is required for the appointment of Higher Judicial Officer or Judicial Officers is concerned.

There are different sources of appointment and so far every source there must be provision in the Rules and so it cannot be considered as a cadre or ex-cadre post. The present practice of transferring the Judges of the Rajasthan Higher Judicial Service, treating it just like an ordinary Judicial service is not a healthy practice and it has adversely affected the cause for which the Act has been enacted.”

He further stated that “after obtaining the concurrence of the High Court. The Family Court Service Rules should be enacted by the State Government; failure to do so, may disqualify the Judge in future to perform the duties of Family Court Judge and the Family Court may not be allowed to function in further, if proper steps are not taken, even now. The inaction which is prevailing for the last number of years should be changed into action and every wing of the State should take the required steps on emergency basis.”

As regards the posting and transfer of family Court Judges, His Lordship stated:

“It is not only the privilege of the Chief Justice, but, it is the privilege of the High Court. The High Court may constitute a Committee and delegate its powers, it is different matter, but the powers of the transfers cannot be exercised by the Hon’ble Chief Justice alone as the power to post a particular Judge is the privilege of High Court and not of the Chief Justice..... We are of the view that the Family Court is a court sub-ordinate to the High Court on account of deeming provisions of section 7 of the Act read with article 235 and there is a necessity of having separate rules under article 309 read with various provisions of the Family Court Act, 1984, to have separate rules. Rajasthan Family Court Service, Rajasthan Higher Judicial Service or Rajasthan Judicial Service Rules cannot be applied ipso-facto A Judicial Officer is a Government employee though, may be under the control of the High Court. Family Court Judge will not be an employee, but, an authority under the Act of 1984.”

The incidental question before the court which arose was whether the State Government and the High Court had committed an illegality in not following the provisions of section 4, 5 and 6 of the Family Courts Act, 1984.

His Lordship while referring to the case of Gokaraju v. State of Andhra Pradesh held that doctrine of de facto applies and stated that “Family Court Judges posted by Hon’ble Chief Justice without fulfillment of the requisite qualifications of section 4, 5 and 6 cannot be said to be intruder or usurper, but, he is a persons who held the office under colour of lawful authority, though his appointment is defective and is now declared as illegal. Whatever may be the defect, the judgements pronounced by him and acts done by him when he was clothed with the powers and functions of the office albeit unlawfully have the same efficacy as the judgements pronounced and acts done by the de jure.”

Later on in the case of Radhey Shyam vs. State of Rajasthan decided by a Division Bench comprising of Mr. Jasraj Chopra and Mr. N.K. Jain JJ of Rajasthan High Court, Jodhpur discussed at length the case of Dr. Suresh Kumar Bakliwal and the binding nature of its judgement on the State Government and High Court. The Court speaking through Chopra held that the case of Dr. Bakliwal raised serious questions of law and fact which deserved to be decided by a larger bench constituted by the Hon’ble Chief Justice as the entire work of the Family Courts in Rajasthan had come to a

standstill because of the earlier Judgement. Their Lordships stated” the Division Bench in Dr. Bakliwal’s case came to conclusion that on account of violation of Sections 4, 5 and 6, 14 and 23 of the Act, the Family Courts cannot function legally till the rules are made Judges are appointed in accordance with the provisions of section 4 and their service conditions are fixed as per provisions of the law.”

While referring section 4 of the Act it was stated that” It is nobody’s case that the provision of the section 4 of the Act have been flouted by the State Government or the High Court, as the case may be at the time the Presiding Officers of these Family Courts been appointed. Its also nobody’s case that the Presiding Officers of these Courts do not possess seven years experience as a Judicial Officer or do not possess such other qualifications, which have been prescribed by the Central Government with the consultation of the Chief Justice of India.

What is required is that endeavour should be made to ensure that persons committed to the need to protect and preserve the institution of the marriage and to promote the welfare of children and qualified by reason of their experience and expertise and to promote the settlement of disputes by conciliation and Counselling are selected.

It is nobody’s case that the Presiding Officers of these family Courts lack these qualifications. We have already observed that prior to the promulgation of the Act and the establishment of these Family Courts, normally the disputes relating to marriage and family affairs were heard by the District Judges and they were exploring the possibility of reconciliation between the parties and thereafter.

Judgements were rendered do not have any preserve the institution of marriages and to promote the welfare of Children. Of course, the Law provides that the Judges of these Family Courts should be appointed by the State Government with consultation of and concurrence of the High Court. But the Division Bench in Dr. Bakliwal’s case (Supra) has held that these courts are subordinate to the High Court and the postings of Judges of these Courts can be made by the High court.

Their Lordships went on to say that, as in the case of Dr. Suresh Balkiwal’s Judgement did not have concurrence of both the Judges, it can be at best said to be the observations of Shri Mehta J and it is not the judgement which is binding on the State Government or the High Court. They further added that as the Family Courts are courts subordinate to the High Court, there is no option but to apply or follow Rules of the High Court of Judicature for Rajasthan, 1952 in the matters of postings and transfers of Family Courts Judges and these matters of have not been included in rr.15, 16 and 17 of the said Rules, it is within the domain of the Chief Justice to make transfers and postings of Judicial Officers and that will be deemed to have been made by the High Court within, 20 of the said Rules; and in view of the discussion above the observations of J.Mehta need to be expunged and as regards the posting and transfer of Family Court Judge, no rules are required to be framed and only qualifications have to be looked into and an Officer has to be posted by Hon’ble Chief justice as per 20 of the Rules, and finally recommended that these issues are required to be considered by a larger bench of the Court.

CONCLUSION

Following are a few recommendations for the selection, and appointment of ‘Ideal’ Family Court Judges to achieve the objectives of the Act. these recommendations have been made on the basis of the researchers discussions with the Family Court Judges during her visit to various states and also the of Family Court Judges and Counsellors of the ‘Orientation Training Course for the Family Court Personnel’ organised by the National Law School of India University, Bangalore and sponsored by the Department of Women and Child Development, Government of India.

1. There is a need for a separate cadre of Family Court Judges with sufficient avenues for Promotion of Judges.

2. There is an imperative need for streamlining the procedure with regard to selection and appointment of Judges by appointing a Committee comprising of 2 High Court Judges and two experts from the field of Social Work, Psychology and Psychiatry, etc. With Chief Justice of High Court as the Chairman of the Committee.
3. There is also an imperative need for organizing Seminars, Workshops and short orientation courses for the Judges with regard to Counselling techniques employed in resolving family disputes. The seminars and workshops would help them in exchanging their experiences and familiarising with the innovative procedures adopted during the course of reconciliation process. The Judges who have been selected from outside the Judicial Service should be given an orientation course in family laws and other procedural laws.
4. There is a suggestion to amend section 4 of the Act with the following objectives and as follows:
 - “To ensure that sufficiently efficient and experienced candidates are available to fill the posts of Family Courts Judges.
 - a. The personnel filling the posts of Family Court Judges may be interchangeable with the members of the Higher judicial Service of the State provided due care is taken so as not to degrade the atmosphere of the Family courts to that of Ordinary Civil Court with such interchanges. As Judge transferred to Family court may not easily forget the habit in the regular Court.
 - b. Subject to the provisions of the Constitutions Family Court Judges with 10 years experience should be considered eligible for elevation to the High Court.
5. It is also suggested that a Panel of Judges with sufficient experience in matrimonial litigation, be designated as the appellate Bench to hear the cases, in the High Court.

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- ⁷ See 59th Report on Hindu Marriage Act and Special Marriage Act 1974, at p.13
29. ⁸47Civil Procedure Code Amendment Act 1976.
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