

FAMILY COURT ACT 1984: PAST LESSONS, FUTURE OUTLOOK

Aniket Desai¹

INTRODUCTION

Status of women in different human societies was varied in different historical periods. “The history of mankind is a history of repeated injuries and usurpations on the part of man towards woman, having indirect object the establishment of a tyranny over her”.² Within the Indian subcontinent, there have been infinite variations in the status of women diverging according to cultural malice, family structure, class, caste, property rights and morals.³ In the words of Pandit Jawaharlal Nehru, “*You can tell the condition of a nation by looking at the status of its women*”. In many cultures around the globe, even though theoretically the women were respected, in practice they were subjected to cruelty and ill-treatment in one form or another by the male counterparts. One of the most unique features of India is that it is a country of contradictions. Women in India are among the most oppressed and discriminated in the world, and it is equally true to say that they are among the most liberated, valued, the most articulate and perhaps even the most free. The status of women in India has been transformed over the past few centuries. History of the status of women has travelled through various stages. From a largely unknown status in ancient times to the promotion of equal rights due to the developmental initiatives in Independent India. an Indian woman is considered a Goddess and valued as mother, sister, wife and daughter and is portrayed as the symbol of culture but there is always a gender stereotyping.

The objective of the National Policy for the Empowerment of Women 2001 is to “bring about the advancement, development and empowerment of Women”⁴ The year 2001 observed as the year of Women’s empowerment. *Swa Shakti, Stree Shakti, Swayamsidha, Balika Samridhi Yojana* and STEP are some of the Government programs launched for the empowerment of women. These initiatives are targeted to bring formal gender equality. Are they bringing about substantial equality or any alteration in the attitude of a patriarchal society? at the outset, we can observe that Indian women have entered and excelled in all sectors today. India is having woman president, speaker and chief ministers in decision making positions. But is it reflected in entire Womenfolk? a reality check of the status of women in India shows mixed results. Most of the benefits of the government program and legislation are limited to the urban women. Rampant practice of female feticide is evident in the country as child sex ratio has declined from 945 to 933 in 2011. There is a

¹ Student, Institute Of Law, Nirma University, Ahmedabad

² Womens Rights Conventions, Manifesto, Seneca Falls

³ Romila Thapar, Looking Back In History, In Devika Jain, Indian Women, Publication Division, Ministry Of Information and Broadcasting, Government Of India, New Delhi. 1975, Pp 6

⁴ Gender Empowerment Policy (2001), India

wide gender disparity in the literacy rate:82.14% for men and 65.46% for women in 2011⁵, which negatively affect the family planning and population stabilization efforts. as per the 2001 statistics, the proportion of women workforce in India was29%, less than (China, Somali and Nigeria) compared to 51.93 % of their men counterparts and most of these women are working in agriculture, sales and elementary services and handicraft manufacturing. Of this, only 20% are working in the organized sector. In no Indian state, women and men acquire equal wages in agriculture. Women's rights to inheritance are still not just and fair. Even though, Hindu succession amendment act, 2005 are women's right to inheritance are approved by law. Bina agarwal's study from Kerala shows that incidence of violence among women is 49% among them without property⁶. So long as social acceptance to the equal property rights is not realized, legal rights are not going to empower Indian women.

The Nirbhaya case forced the parliament to repeal the Rape laws and to pass the sexual harassment (prevention, prohibition, and redressal) act 2013, violence against women is the biggest challenges to the Indian Women. Human trafficking, forced prostitution, rape, honor killings, gang rape, acid throwing, dowry deaths, female feticide and domestic violence. The list of crimes against women is endless in India. Violence against small girl child is violence against humanity, and there is an urgent need for legal intervention in the matters of child sexual abuse. Girls and women are not safe in their own house and schools in India. The graph of gender based violence is mounting at an alarming rate. The report of the NCRB (National Crime Records Bureau), indicate that crime rate against women such as rape, incest, sexual harassment, dowry related murders, abduction, deprivation of food, kidnapping , trafficking and importation of girls and domestic violence is increasing against all sections of women, at a faster pace. With globalization and the participation of women in IT Sectors, new forms of violence are being reported. Displacement, lack of access to resources, unemployment, and privatization of services are the after effects of globalization for the poor women. The inclusion of 20% of skilled women in the IT sector is the positive aspects but women's question in the liberalized economy is a brave odyssey with deep costs.

The pendency of cases in all courts in India is increasing. The life span of cases is also increasing as the appointment of judges is not proportionate to the growing population. With changes in the family structures, socialisation there was an increase in the disputes among the family members. Hence the numbers of cases related to family relations are coming under the judicial scrutiny are also on the rise. It was thought suitable to have specialised courts, to deal with particular so that the pendency can come down. Generally the life span of a case related to family issues ranged from 7 years to 30 years.

⁵Census 2011 Report , India

⁶Bina agarwal: a Field Of One's Own: Gender and Land Rights In South asia (Cambridge: Cambridge University Press (CUP), 1994, Reprinted In 1998).

There was a need to review the approach of the courts in deciding disputes arising from domestic relations. The approach had to be conciliatory in nature rather than procedural. The fact that not all disputes within the four walls could adhere to the rules of evidence. at the backdrop of this situation several associations of women and other organisation and individuals urged, from time to time, that Family Courts be set up for the settlement of family disputes, where emphasis should be laid on conciliation and achieving socially desirable results and adherence to rigid rules of procedure and evidence should be eliminated.

Many social work organizations, women's associations and individuals have urged from time to time for establishment of a forum where the focus would be on conciliation for peaceful settlement of family disputes. Even though the Code of civil procedure, 1908 was amended in 1976 to adopt a special procedure in suits and procedure in the matters concerning the family, as the court continued to deal with family disputes in the same manner as other civil matters. The Law commission in its 59th report⁷ in 1974 also expressed a strong urge that certain courts concerning family disputes be established and the rules of procedure to be followed by such courts be made much simpler and radically different from the rigid rule of procedure and evidence and it should make reasonable efforts at settlement before the commencement of the trial.

DEFINITION

The family court act 1984 is an act to provide the establishment of family courts with a view to promote conciliation in and secure speedy settlement of disputes relating to marriage and family affairs and for matters connected therewith. The act has been divided into six chapters.

ESTABLISHMENT OF FAMILY COURTS

For the purpose of exercising the jurisdiction and powers conferred on a Family Court by this act, the State Government, after consultation with the High Court, shall, institute for each area in the State where the population exceed one million, a Family Court; and specify, the local limits of the area to which the jurisdiction of a Family Court shall extend and may, at any time, increase, reduce or alter such limits.

APPOINTMENT OF JUDGES

The State Government may, with the concurrence of the High Court, appoint one or more persons to be the Judge or Judges of a Family Court. The selection criteria and qualification of the judges and their numbers are also specified in the act.

ASSOCIATION WITH OTHER WELFARE AGENCIES AND EXPERTS

⁷<http://Lawcommissionofindia.Nic.In/51-100/Report59.Pdf>, accessed On 16th September 2015

The State Government may, in consultation with the High Court, provide, by rules, for the association, of social welfare agencies, counselors and officers whose association with a Family Court would enable it to exercise its jurisdiction more effectively in accordance with the purposes of this act.

JURISDICTION

The Family Court shall have and work out the entire command exercisable by any district court or any subordinate civil court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the explanation. a family court shall also exercise the jurisdiction exercised by a Magistrate of the First Class under IX of the Code of Criminal Procedure 1973.

EXCLUSION OF JURISDICTION OF PENDING PROCEEDINGS

Under section 8 of the Family court act, no District Court, Civil Court or Magistrate have or exercising any jurisdiction or powers under Chapter IX of the Code of Criminal Procedure, 1973, each suit or proceeding was instituted or shall shifted to family court on the date on which it is established. This is because after establishment of the family court, the jurisdiction of the civil court is to be exercised by the family court. There is no bar against the parties from approaching other courts outside the jurisdiction of the family court.

Duty of Family court to make efforts for settlement: In every suit or proceedings, endeavor shall be made by the Family Court to help and pressurize the parties in arriving at a agreement the suit or proceedings. In any suit or proceeding, at any stage, it appears to the Family Court that there is a reasonable possibility of a settlement between the parties. The Family Court may adjourn the proceedings for such period as it thinks fit to enable attempts to be made to effect such a settlement.

RIGHT TO LEGAL REPRESENTATION

Under this act, no party to a suit or proceeding before a Family Court shall be represented by a lawyer but if the Family Court considers it is necessary in the interest of justice, it may take the assistance of a legal expert as *amicus curiae*. a Family Court can take, statement, documents, information or matter that may, in its opinion assist it to deal effectually with a dispute as per the Indian evidence act 1872.

Execution of decrees and orders a decree or an order (other than an order under Chapter IX of the Code of Criminal Procedure, 1973, (2 of 1974), passed by a Family Court shall have the same force and effect as a decree or order of a Civil Court and shall be executed in the same manner as is prescribed by the Code of Civil Procedure, 1908, for the execution of decrees and orders.

An appeal shall lie from every judgement or order, from the family court to the high court both on facts and on law. But each appeal shall be favoured within a period of thirty days from the order of a family court.

Together with this, the act recognised the power of the High court, Central Government and state Government to make rules by notification on matters relating to the timing of the the family court, qualification of the Judges and terms and conditions for the judges recruiting in these courts. The family court has more than one judge. The state government in concurrence with the high court appoints one judge among the many to be the principal judge and any other judge to be the additional principal judge. The principal judge is the administrative head of the family court and hence makes arrangements for division of work among various judges. The state government in discussion with the high court provide for association with organisations in social benefit, family welfare persons working in the field of social welfare. Since the first objective of the family court is to bring reconciliation among the disputing family members there are counsellors appointed. The counsellors have the first interaction with the disputing parties and submit a report to the judges. In every suit or proceedings it is open for the family court to secure the services of the medical expert or such person who is professionally occupied in promoting the family welfare which court may think good. Such an expert helps the family court in discharging the functions as envisaged in the act.

This act is expected to bring family and marital disputes away from the overcrowded, intimidating and congested environment of traditional courts of law and bring congenial, sympathetic and supportive surroundings to protect the institution of marriage. as per the procedure taken on in Family court, the Code of civil procedure (CPC) and Cr. P.C shall apply for maintenance proceedings. It is conferred with the powers of a civil court. It is also granted the power to put aside its procedure with a view to arrive at a agreement in respect of the subject matter of the r proceedings or at the truth of the facts assumed by one party and denied by the other party. It also provides for association with the institutions promoting family welfare and seeks assistance from councillors, medical and welfare experts.

CHALLENGES OF FAMILY COURT ACT

But the working of the family court in three decades in India highlights the following challenges. Even though the Family Court act bars the appearance of advocates in the family courts, those living in areas where civil courts govern them are entitled to legal representation, while those who are subject to the family court's jurisdiction suffer without legal help. This force the litigant to go to the family court at every step from filing, numbering, taking out the process, and appearing in the court for every hearing even when the respondent has not been served notice. It burdens the litigant public with the responsibility to prosecute or defend oneself with no rightful legal assistance. Even though those who try to prepare the case and file it, the family courts go beyond these and insist on proving the case even before they are numbered and taken on file as a case. Some family court started insisting on documentary proof of marriage. Several cases are kept unnumbered because of the insistence of documentary proof. So the Family courts are sometimes blocking judicial remedies at the inception. The family court must be looked from a multidisciplinary

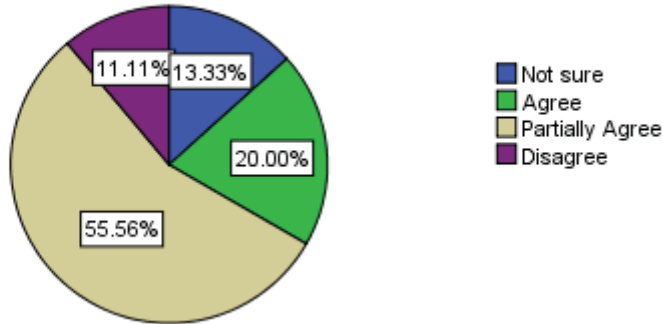
approach not only from legal perspective. Keeping in mind of the imbalance in power relations and existing manipulations in domestic affairs, the counsellors will have to play a major role in family courts in concillary efforts and amicable settlement and must be engaged right from hearing of the case to the final judgement. This will help in establishing a family friendly approach away from the technicality of the usual courts. Keeping in mind of the family, as the basic grouping and the behaviour and relationship within this institution, a psychiatrist or a counsellor can only deal with the emotional outbursts and sensitive issues and to understand the trauma, time and dominating and depressive behaviour and personalities of disputing parties. a counsellor's compatibility test and report must be taken by the judges seriously to final judgement. Even though the objective of the Family court act is to speedy redressal of domestic disputes, the lengthy process continuing in the family courts, which will delay the decisions and it will enhance the bitterness and allegations of the parties of the domestic disputes. The lawyer's component in the court makes the procedure complicated and lengthy which is economically beneficial to the lawyers. Saving the family and marriage statistically is not important, peaceful settlement and long term solutions to the existing problems are the need of the hour. Children are pulled into the family courts invariably without any favourable and child friendly atmosphere and exposed to disputes and allegations which will affect their psyche. In the existing state of affairs in the family courts, more infrastructure facilities, association of social welfare agencies and number of staff is essential for the smooth functioning of the family courts. Otherwise the family courts will function like any other courts as a forum to fight for money and to express the differences and disparity without fulfilling the objectives of peaceful settlement of family dispute.

In this empirical study, the respondents were family court judges, lawyers, counsellor, clients, office staff and academicians. Forty five people were separately interviewed for this study. Questions were mainly related to Family Court act 1984, and challenges faced in effective functioning of the family court. The questionnaire is attached as the form of annexure C.

Regarding the question on whether Family Court act 1984 facilitated speedy justice to the disputes related to marriage and family, 44 per cent of the respondents gave an affirmative answer, whereas, 40 per cent remarked that it helped only to some extent.

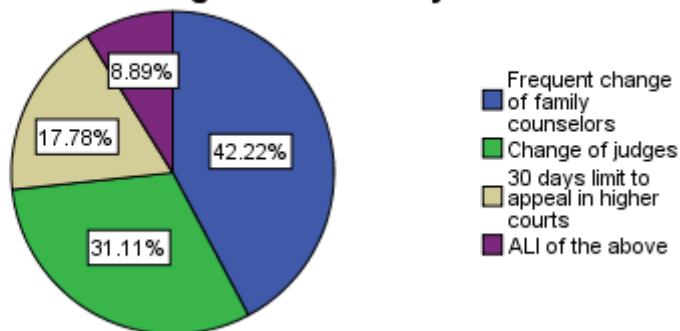
Regarding the opinion on whether the Family Court act helps for the conciliation of the disputes in a marriage instead of going for divorce. Divorce case is filed by the husband when a woman files a case for maintenance. This is in order to escape providing her maintenance. Only 20 per cent of the respondents agreed that it helps. However, about 56 percent of the respondents partially agreed with this statement. Fig. 5.13 gives more details on this.

5.13 Possibility of Conciliation



About 60 per cent of the respondents remarked that more and more women started approaching the Family Court, and could be one of the reason for having more woman judges in the Family Court. Twenty two per cent of the respondents were of the opinion that women judges are able to resolve the issue socially than legally. as regards challenges faced by the Family Court, 40 per cent of the respondents remarked that “Service Providers” are the most important issue, followed by staff strength (29 per cent) and infrastructure (24.4 per cent). On the other hand, 42 per cent of the respondents said the most important challenge for the Family Court is the frequent changes of family counsellors. Fig. 5.14 depicts the challenges of the Family Court, according to respondents.

5.14 Challenges of the Family Court



The opinion of the respondents on need for psychologist’s help to the Family Court, engaging of counsellors in the family disputes from the beginning, restrictive jurisdiction of the Family Court and lack of uniformity in the procedures and rules of functioning of Family Courts across different states are combined in Fig. 5.15. In all these, majority of the respondents replied affirmatively.

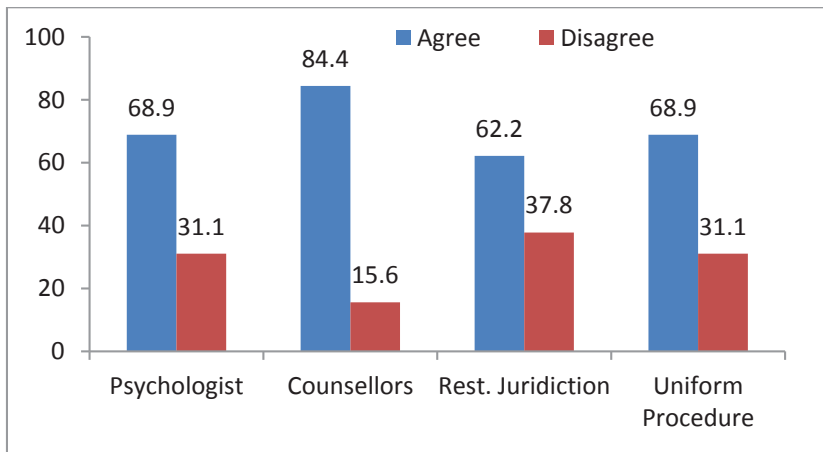
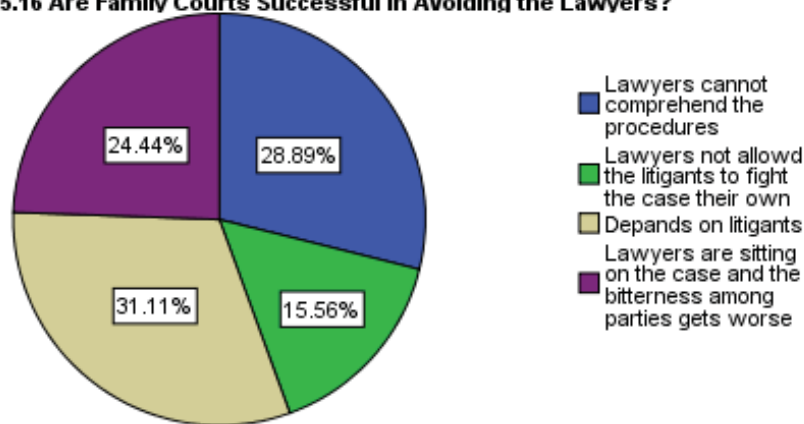


Fig. 5.15 Psychologists, Counsellors, Jurisdiction, Non Uniform Procedures

It is worth examining the perception of the respondents on whether the Family Court act is successful in barring the lawyers from the court and thus removing all technicalities of legal procedures. Respondents have a mixed opinion on this aspect. about 29 per cent of the respondents were of the opinion that laymen cannot comprehend the procedures and 25 per cent remarked that lawyers are sitting on the cases, and delay in working of the cases and as a consequence, the disputes between the parties are becoming worse. Figure 5.16 consolidates all the opinions on this particular aspect.

5.16 Are Family Courts Successful in Avoiding the Lawyers?



About 56 per cent of the respondents were of the opinion that this act benefit only about 30 to 60 percentage of people who use it, whereas, 40 per cent said that it benefits less than 30 per cent. This clearly indicates that there is a need for amendments to this act. Majority of the respondents (about 80 per cent) were of the opinion that the judges in the family court need extra training to handle family related disputes and there is an urgent need to simplify the procedures.

CONCLUSION

A specialized court to deal with family matters with different perspective may be a good idea to experiment with. But at the end of it, we will have to see who all are the part of the system? Engaging Judges of the civil courts and the involvement of lawyers will not make any difference to the family court system. With lawyer's involvement, commercial interests are going to dominate. It is essential to make family court more people centric, and system centric rather than procedure centric, where lawyers are an exception and people can fight their cases on their own. Unless and until there is a relearning of how to function within the system differently, we are not going to achieve the objective for which family courts are established. Often, the access of women to the system is very low in Indian scenario. Either wives are earning less than their husbands or they are economically dependent. We cannot expect the same kind of evidences for intimate Family violence; we need different training, and different perspective. The kind of system which is described in the act is not followed and implemented. It needs to be followed and implemented. The administrative issue of Family courts of different states are related to infrastructure, and budget allocation. as common people approach the lower courts as compared to the Higher Courts and Supreme Court it is necessary to bring about changes in matters related to infrastructure, budget allocation and easy procedure to deal with cases.

Law only cannot make any difference to women's situation. attitude change, human values of equality and respecting each other must be a part of culture from the childhood. It is not the existence of law, but following the law as a value must be instilled in the younger generation, for a better tomorrow. Until and unless we do not take that initiative towards younger generation, social changes are not possible. Law must be flexible, people friendly, and feasible to give justice. Law is not unwanted as it gives us a forum and platform, for the women who want to use it. In a diverse country, the impact of the same laws is different to different groups. But making laws alone cannot give solution. There is a need to view law in totality. The cultural impacts, economic situation, political background, caste and educational status of the people must be considered while analyzing the impact of the laws in diverse society.