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Role and Functioning of Family Courts for the Protection of Women's Rights in India

DHEERAJ KUMAR¹

ABSTRACT

Family Courts have been established with a view to secure the speedy settlement of disputes relating to marriage and family affairs and for matters connected therewith, and promote conciliation therein. This paper examines the role of family courts in the protection of rights of women in India. Firstly, it introduces about the system and mechanism of administration of justice in the matters of matrimonial disputes under Indian Judicial system. The analyses the reasons, purpose and objects behind the establishments of family courts in India as well as also discusses provisions relating thereto. It also discusses the jurisdictions of family courts under the Family Courts Act, 1984 as well as under the protection of women from domestic violence Act, 2005. It also deals with the procedure prescribed under the Act for the family court in deciding cases before it. Moreover, it mainly emphasizes upon the role of family courts in protection of women's rights, and how far it has proved itself upon the touchstone of the purpose and objects of the Act. Finally, this paper summarises the discussion with concluding critical remarks and some workable suggestions in order to enable the system of family courts to be more efficient in protecting women's rights effectively.

Keywords: *Women's rights, Family courts, matrimonial disputes, domestic violence.*

I. INTRODUCTION

In the context of the Indian legal system as an institutionalised form of justice, it may be said that like all other systems of governance, this has not remained immune to ideological shifts due to social, economic and political transformations over the period since independence. De-colonisation was followed by affirmation in the principles enshrined in Constitution and post-colonial India witnessed enactment of several laws clubbed with assertion of rights by individuals and collective groups. State is configured as a patron of justice and a guarantor of rights on the basis of the assumption that it will redress persistent inequalities existing within the larger social structure. Indian women's movement has also played a crucial role in demanding changes in the law. As a result, during the 1980's, when a resurgent women's movement was asserting itself through public action, several laws were enacted and others were

¹ Author is a Senior Research Fellow at Faculty of Law, Patna University, India.

amended including those addressing issue of violence against women, i.e., dowry law, rape law or law relating to cruelty against married women. Viewed from a broader perspective, the state apparently has helped to empower women through its policies and laws, yet, at the same time, its actions have also tended to institutionalize and reinforce patriarchal norms and values. It has been said that the patriarchal attitudes and values held by the three organs of the Indian State namely, judiciary, executive and the legislature, prevented them from implementing the constitutional mandate of equality in its true spirit.²

Besides, under the constitutional provisions, some rights and remedies have also been provided under the personal laws. In order to remedy matrimonial wrongs within a common structural framework, the Family Courts Act was enacted in the year 1984.³

The immediate reason for setting up of family courts was the mounting pressures from several women's associations, welfare organisations and individuals for establishment of special courts with a view to providing a forum for speedy settlement of family-related disputes. Emphasis was laid on a non-adversarial method of resolving family disputes, promoting conciliation and securing speedy settlement of disputes relating to family affairs.⁴

In 1975, the Committee on the Status of Women recommended that all matters concerning the family should be dealt with separately. The Law Commission in its 59th report (1974) had also stressed that in dealing with disputes concerning the family, the court ought to adopt and approach radical steps distinguished from the existing ordinary civil proceedings and that these courts should make reasonable efforts at settlement before the commencement of the trial. Gender-sensitized personnel including judges, social workers and other trained staff should hear and resolve all the family-related issues through elimination of rigid rules of procedure. The Code of Civil Procedure was amended to provide for a special procedure to be adopted in suits or proceedings relating to matters concerning the family. However, the courts continue to deal with family disputes in the same manner as other civil matters and the same adversary approach prevails. Hence a great need was felt, in the public interest, to establish family courts for speedy settlement of family disputes.⁵

² Sarkar Lotika, "Women's Movement and the Legal Process" (Occasional Paper No. 24 CWDS, 1995, New Delhi), p. 1-2.

³ Mukhopadhyay Maitrayee (1999) *Brother There are Only Two Jatis – Men and Women: Section 125 Criminal Procedure Code and Trial of Wifehood In Institutions, Relations And Outcomes* Naila Kabeer and Ramya Subrahmanian (Eds.) Kali For Women New Delhi.

⁴ National Commission for Women, "Report on Working of Family Courts" (2002), p. 1, *available at*: <https://ncwapps.nic.in/pdfReports/Working%20of%20Family%20courts%20in%20India.pdf> (last visited on June 22, 2023).

⁵ *Ibid.*

II. ESTABLISHMENT OF THE FAMILY COURTS

The enactment of Family Courts Act, 1984 was a part of the trend of legal reforms concerning women. The President of India gave his assent to the Act on September 14, 1984. The Act provides for a commencement provision which enables the Central Government to bring the Act into force in a State by a notification in the Official Gazette, and different dates may be appointed for different States.⁶ However, not all states have implemented this Act.⁷

Setting up of Family Courts and its functioning lie within the domain of State Government in consultation with respective High Court. As per the Act, it is mandatory for the State Government to set up a Family Court for every city or a town whose population exceeds one million. In other areas of the States, the Family Courts may be set up if the State Governments deems it necessary.⁸

The 14th Finance Commission had recommended setting up 235 Family Courts during 2015-2020 in districts where the same were not available. The Commission also urged State Governments to utilize enhanced fiscal space available through tax devolution (32% to 42%) for this purpose. As on May 2023, there are 767 Family Courts functional across the country.⁹

⁶ This Act came into force in the following states: — (i) Union territory of Andaman and Nicobar Islands on 19th November, 1986, vide notification No. 79/22/86, dated 19th November, 1986, Gazette of India, Extra., Pt. II, Section 1. (ii) Madhya Pradesh on 19th November, 1986, vide notification No. 79/6/86, dated 14th November, 1986, Gazette of India, Extra., Pt. II, Section 1. (iii) Uttar Pradesh on 2nd October, 1986, vide notification No. 79/11/86-Jus., dated 4th September, 1986, Gazette of India, Pt. II, Section 1. (iv) Delhi on 19th November, 1986, vide notification No. S.O. 863(E), dated 18th November, 1986, Gazette of India, Extra., Pt. II, Section 3 (ii). (v) Maharashtra on 1st December, 1986, vide notification No. S.O. 944(E), dated 5th December, 1986, Gazette of India, Extra., Pt. II, Section 3(ii). (vi) Karnataka on 25th May, 1987, vide notification No. G.S.R. 685(E), dated 15th May, 1987, Gazette of India, Extra., Pt. II, Section 3(i). (vii) Orissa on 1st May, 1989, vide notification No. S.O. 321(E), dated 27th April, 1989, Gazette of India, Extra., Pt. II, Section 3(ii). (viii) Kerala on 21st October, 1989, vide notification No. 79/5/86, dated 17th October, 1989, Gazette of India, Extra., Pt. II, Section 1. (ix) Goa on 16th April, 1990, vide notification No. S.O. 328(E), dated 12th April, 1990, Gazette of India, Extra., Pt. II, Section 3(ii). (x) Union territory of Pondicherry on 1st May, 1987, vide notification No. G.S.R. 459 (E), dated 29th April, 1987, Gazette of India, Extra., Pt. II, Section 3(i). (xi) West Bengal on 1st November, 1991, vide notification No. 79/12/86-Jus., dated 1st November, 1991, Gazette of India, Extra., Pt. II, Section 1 (E). (xii) Assam on 2nd October, 1991, vide notification No. 79/2/86Jus., dated 30th November, 1991, Gazette of India, Extra., Pt. II, Section 1 (E). (xiii) Bihar on 10th December, 1991, vide notification No. S.O. 838(E), dated 6th December, 1991, Gazette of India, Extra., Pt. II, Section 3(ii). (xiv) Manipur on 3rd February, 1992, vide notification No. S.O. 91(E), dated 30th January, 1992, Gazette of India, Extra., Pt. II, Section 3(ii). (xv) Haryana on 2nd November, 1992, vide notification No. S.O. 784(E), dated 23rd October, 1992, Gazette of India, Extra., Pt. II, Section 3(i). (xvi) Andhra Pradesh on 15th February, 1995, vide notification No. S.O. 92(E), dated 6th February, 1995, Gazette of India, Extra., Part II, Section 3 (ii). (xvii) Gujarat on 1st January, 2000, vide notification No. S.O. 1268(E), dated 20th December, 1999, Gazette of India, Extra., Pt. II, Section 3 (ii). (xviii) Union territory of Daman and Diu on 10th October, 2003, vide notification No. S.O. 1161 (E), dated 14th October, 2003, Gazette of India, Extra., Pt. II, Section 3 (ii).

⁷ Shalu Nigam, "Understanding Justice Delivery System From The Perspective of Women Litigants as Victims of Domestic Violence in India (Specifically in the Context of Section 498-A IPC)", Occasional Paper No. 35 (2005), Centre for Women Development Studies, New Delhi, p. 3., available at: <https://www.cwds.ac.in/wp-content/uploads/2016/09/UnderstandingJustice.pdf> (last visited, June 26, 2023).

⁸ Department of Justice, Government of India, "Family Courts", available at: <https://doj.gov.in/family-court/> (last visited on June 16, 2023).

⁹ *Ibid.*

The main object of the Act is to provide “for the establishment of Family Courts with a view to promote conciliation in and to secure speedy settlement of disputes, relating to marriage and family affairs, and matter connected therewith”.¹⁰

This Act has 6 chapters under various heads such as Preliminary, Family Courts, Jurisdiction, Procedure, Appeals and Revisions and Miscellaneous.

Chapter II ranging from sections 3 to 6 deals with the establishment of the Family Courts and matters connected therewith. Section 3 of the Act empowers the State governments after consultation with the High Court, to establish, for every area in the State comprising a city or town, whose population exceeds one million, a family court.¹¹

Section 4 prescribes the criteria for appointment of a Family Court Judge, same as those for appointment of a District Judge requiring seven years’ experience in judicial office or seven years practice as an advocate. The Central Government is empowered to make rules prescribing some more qualifications. Apart from prescribing the qualification of the Judges of Family Courts, the Central Government has no role in the administration of this Act.¹²

Several High Courts have laid down different rules of the procedure. However, the need for a uniform set of rules has been felt. The Act provides that persons who are appointed to the family courts should be committed to the need to protect and preserve the institution of marriage and to promote the settlement of disputes by conciliation and counselling. Preference would also be given for appointment of women as Family Court Judges.¹³

Section 5 enables the State Government to Association of social welfare agencies, etc. engaged in promoting welfare of families, especially women and children, or working in the field of social welfare, to associate themselves with the Family Courts in the exercise of its functions.¹⁴

Sec. 6 empowers the State Governments in consultation with the High Court, to determine the number and categories of counsellors, officers etc. to assist the Family Courts.¹⁵

III. JURISDICTION OF THE FAMILY COURTS

Chapter III of the Act under the provisions of sections 7 and 8 deals with Jurisdiction of family courts. Section 7 confers on all the family courts the power and jurisdiction exercisable by any District Court or subordinate civil court in suits and proceedings of the nature referred to in the

¹⁰ The Family Courts Act, 1984, *Preamble*

¹¹ *Id.*, s. 3.

¹² The Family Courts Act, 1984, s. 4.

¹³ *Ibid.*

¹⁴ *Id.*, s. 5.

¹⁵ *Id.*, s. 6.

explanation to section 7(1) of the Act.¹⁶ The suits and proceedings referred to in this sub-section are suits and proceedings of the following nature, namely:

- “(a) a suit or proceeding between the parties to a marriage for a decree of nullity of marriage (declaring the marriage to be null and void or, as the case may be, annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of marriage;
- (b) a suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person;
- (c) a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them;
- (d) a suit or proceeding for an order or injunction in circumstance arising out of a marital relationship;
- (e) a suit or proceeding for a declaration as to the legitimacy of any person;
- (f) a suit or proceeding for maintenance;
- (g) a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor.”¹⁷

These, inter-alia relates to suits between parties to a marriage or for a declaration as to the validity of marriage or a dispute with respect to the property of the parties, maintenance, guardianship etc.¹⁸ In addition thereto, the jurisdiction exercisable by a First-Class Magistrate under Chapter IX of the Code of Criminal Procedure, 1973c relating to order for maintenance of wife, children or parents, has also been conferred on the family courts.

There is also an enabling provision that the family courts may exercise such other jurisdiction as may be conferred on them by any other enactment. Provision has also been made to exclude jurisdiction of other courts in respect of matters for which the family court has been conferred jurisdiction.¹⁹

Section 8 deals with Exclusion of jurisdiction and pending proceedings.²⁰ Where a Family Court has been established for any area, no district court or any subordinate civil court referred to in sub-section (1) of section 7 shall, in relation to such area, have or exercise any jurisdiction in respect of any suit or proceeding of the nature referred to in the Explanation to that sub-

¹⁶ *Id.*, s. 7.

¹⁷ The Family Courts Act, 1984, s. 7.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Id.*, s. 8.

section,²¹ nor any magistrate shall, in relation to such area, have or exercise any jurisdiction or powers under Chapter IX of the Code of Criminal Procedure, 1973.²² Moreover, every suit or proceeding of the nature referred to in the Explanation to sub-section (1) of section 7 and every proceeding under Chapter IX of the Code of Criminal Procedure, 1973, which is pending immediately before the establishment of such Family Court before any district court or subordinate court referred to in that sub-section or, as the case may be, before any magistrate under the said Code and, which would have been required to be instituted or taken before such Family Court if, before the date on which such suit or proceeding was instituted or taken, this Act had come into force and such Family Court had been established, shall stand transferred to such Family Court on the date on which it is established.²³

Section 6 of the protection of women from domestic violence Act, 2005 also confers jurisdiction on the family courts in respect of Relief in other suits and legal proceedings. According thereto any relief available under sections 18, 19, 20, 21 and 22 may also be sought in any legal proceeding, before the family court, affecting the aggrieved person and the respondent whether such proceeding was initiated before or after the commencement of this Act.²⁴

IV. PROCEDURES TO BE FOLLOWED BY THE FAMILY COURTS

Chapter IV of the Act consisting of sections 9 to 18 deal with the procedure to be followed by the family court in deciding and handling the cases instituted before it. Section 9 imposes Duty on the Family Court to make efforts for settlement.²⁵

Section 10 deals with Procedure generally. Subject to the other provisions of this Act and the rules, the provisions of the Code of Civil Procedure, 1908 (5 of 1908) and of any other law for the time being in force shall apply to the suits and proceedings before a Family Court. For the purposes of the said provisions of the Code, a Family Court shall be deemed to be a civil court and shall have all the powers of such court.²⁶ The provisions of the CrPC, 1973 or the rules made thereunder, shall apply to the proceedings under Chapter IX of that Code before a Family Court. Family Court may lay down its own procedure with a view to arrive at a settlement in respect of the subject-matter of the suit or proceedings or at the truth of the facts alleged by the one party and denied by the other.²⁷

²¹ *Ibid.*, cl. (a)

²² *Ibid.*, cl. (b)

²³ *Ibid.* cl. (c)

²⁴ The protection of women from domestic violence Act, 2005, s. 6.

²⁵ The Family Courts Act, 1984, s. 9.

²⁶ *Id.*, s. 10.

²⁷ *Ibid.*

Section 11 provides that proceedings may be held in camera, if the Family Court so desires and shall be so held if either party so desires.²⁸

According to section 12, it shall be open to a Family Court to secure the Assistance of medical and welfare experts (preferably a woman where available).²⁹

Section 13 provides that no party shall be entitled as of Right to legal representation. Provided that, if the Court considers it necessary in the interest of justice, may seek the assistance of a legal expert as *amicus curiae*.³⁰

According to section 14, A Family Court may receive as evidence any report, statement, documents, information or matter that may, in its opinion, assist it to deal effectually with a dispute, whether or not the same would be otherwise relevant or admissible under the Indian Evidence Act, 1872.³¹

Section 15 of the Act deals with Record of oral evidence. It shall not be necessary to record the evidence of witnesses at length. But the Judge shall, record or cause to be recorded, a memorandum of the substance of what the witness deposes, that shall be signed by the witness and the Judge forming part of the record.³²

As per section 16, Evidence of formal character on affidavit, however the Court may, if it thinks fit, and shall, on the application of any of the parties to the suit or proceeding summon and examine any such person as to the facts in his affidavit.³³

According to section 17 Judgment shall contain a concise statement of the case, the point for determination, the decision thereon and the reasons for such decision. According to section 18 decrees and orders of the 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. An order passed under Chapter IX of the Code of Criminal Procedure, 1973 shall be executed in the manner prescribed thereunder.³⁴

V. ROLE AND FUNCTIONING OF THE FAMILY COURTS

(A) Role of Family Courts in Protecting Women's Rights in India

The Family Courts Act, 1984 was enacted for adopting a human approach to the settlement of

²⁸ The Family Courts Act, 1984, s. 11.

²⁹ *Id.*, s. 12.

³⁰ The Family Courts Act, 1984, s. 13.

³¹ *Id.*, s. 14.

³² *Id.*, s. 15.

³³ *Id.*, s. 16.

³⁴ *Id.*, s. 17.

family disputes and achieving socially desirable results. The need for such a law was felt as early as in 1974, Justice P.B. Gajendragadhkar³⁵ in the 59th report of the Law Commission of India, observed³⁶: -

“In our Report on the Code of Civil Procedure, we have had occasion to emphasise 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 an 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 dispute in a human way, and to such courts all disputes concerning the family should be referred.”³⁷

Section 9 provides for the actual role of the family court as a matter of duty thereof. In every suit or proceeding, Family Court shall make endeavour in the first instance, where it is possible to do so consistent with the nature and circumstances of the case, in order to assist and persuade the parties in arriving at a settlement in respect of the subject-matter of the suit or proceeding and for this purpose a Family Court may, subject to any rules made by the High Court, follow such procedure as it may deem fit.³⁸

If, at any stage of any suit or proceeding, it appears to the Family 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.³⁹ The power conferred by sub-section (2) shall be in addition to, and not in derogation of, any other power to adjourn the proceedings.

From the provisions of sec. 9 it has been made incumbent on these courts to see that the parties are assisted and persuaded to come to a settlement, and for this purpose they have been authorized to follow the procedure specified by the High Court by means of rules to be made by it. If there is a possibility of settlement between the parties and there is some delay in arriving at such a settlement, the family court is empowered to adjourn the proceedings until the settlement is reached. Under these provisions, High Courts have specified different rules of

³⁵ Former Chief Justice of India

³⁶ as the Chairman of Law Commission of India

³⁷ The Law Commission of India, 59th report on “The Hindu Marriage Act, 1955 & The Special Marriage Act, 1954 (March, 1974)”

³⁸ The Family Courts Act, 1984, s. 9.

³⁹ *Ibid.*

procedure for the determination and settlement of disputes by the family courts.

The case of *Shamima Farooqui vs. Shahid Khan*⁴⁰ deals with the approach of Family Court Judge. Wherein it was observed that Family Courts have been established for adopting and facilitating the conciliation procedure and to deal with family disputes in a speedy and expeditious manner. Family judges are expected to be sensitive to the issue pertaining to the marriage and issues ancillary thereto. Family judge should remember that procrastination is the greatest assassin of the list before it. There has to be a pro-active approach in this regard and the said approach should be instilled in the family court judges by the judicial academies functioning under the High Court.⁴¹

In *Bhuwan Mohan Singh v. Meena*⁴², Hon'ble Supreme Court Observed that the Judge of family court is expected to be sensitive to the issues, for he is dealing with extremely delicate and sensitive issues pertaining to the marriage and issues ancillary thereto. It does not mean that the Family Courts should show undue haste or impatience, but there is a distinction between impatience and to be wisely anxious and conscious about dealing with a situation. A Family Court Judge should remember that the procrastination is the greatest assassin of the lis before it. It not only gives rise to more family problems but also gradually builds unthinkable and Everestine bitterness. It leads to the cold refrigeration of the hidden feelings, if still left. The delineation of the dispute by the Family Judge must reveal the awareness and balance. Dilatory tactics by any of the parties has to be sternly dealt with, for the Family Court Judge has to be alive to the fact that the lis before him pertains to emotional fragmentation and delay can feed it to grow. We hope and trust that the Family Court Judges shall remain alert to this and decide the matters as expeditiously as possible keeping in view the objects and reasons of the Act and the scheme of various provisions pertaining to grant of maintenance, divorce, custody of child, property disputes, etc.⁴³

(B) Present Status of functioning of the Family Courts in India

The present status of the functioning and performance of the family courts in India can be ascertained from the statistics relating to number of family courts functional in different states, number of cases pending before and disposed by them as mentioned below:

⁴⁰ AIR 2015 SC 2025

⁴¹ *Ibid.*

⁴² (2015) 6 SCC 353

⁴³ *Ibid.*

Table 1. Status of Performance of the Family Courts (As on March, 2023)

State (s)	No. of Family Courts ⁴⁴	Pending Cases ⁴⁵	Disposed Cases ⁴⁶
Andaman & Nicobar	0	0	0
Andhra Pradesh	15	12489	698
Arunachal Pradesh	0	0	0
Assam	7	7538	628
Bihar	39	73100	1427
Chandigarh	0	0	0
Chhattisgarh	28	19324	1534
D & N Haveli	0	0	0
Daman & Diu	0	0	0
Delhi	0	0	0
Goa	0	0	0
Gujarat	37	32889	2940
Haryana	32	67296	5781
Himachal Pradesh	3	6417	406
Jammu & Kashmir	0	0	0
Jharkhand	33	15009	1453
Karnataka	40	38961	873
Kerala	35	116301	5755
Ladakh	0	0	0
Lakshadweep	0	0	0

⁴⁴ available at: https://dashboard.doj.gov.in/family-court-cases/fc_functional (last visited on June 30, 2023).

⁴⁵ available at: https://dashboard.doj.gov.in/family-court-cases/fc_pending (last visited on June 30, 2023).

⁴⁶ available at: https://dashboard.doj.gov.in/family-court-cases/fc_disposed (last visited on June 30, 2023).

Madhya Pradesh	62	63039	3844
Maharashtra	40	66834	2907
Manipur	4	627	32
Meghalaya	0	0	0
Mizoram	0	0	0
Nagaland	2	206	21
Odisha	30	37889	1451
Puducherry	2	1310	69
Punjab	34	76924	17463
Rajasthan	50	48684	7321
Sikkim	6	148	26
Tamil Nadu	40	31758	1326
Telangana	10	7304	401
Tripura	9	3928	374
Uttar Pradesh	189	385293	44171
Uttarakhand	18	14298	1438
West Bengal	2	1095	43

Source: *Dashboard*, Department of Justice, Govt. of India (As on March, 2023)

VI. CONCLUSION AND SUGGESTION

From the analysis of the provisions of the family courts Act, 1984 in the light of objectives behind the establishment of family courts and present status of performance thereof, it appears that wherever it is applicable, several lacunae have been pointed out by those who had experience working with it.⁴⁷ One of the major drawbacks includes its object that primarily

⁴⁷ For details, please refer Workshop on Working of the Family Courts (A Background Note) held on March 20, 2002, National Commission of Women New Delhi Also Nagasaila (1991) Family Courts: A Step Backward, The Hindu March 24; Chatterjee Jyotsana, "Justice to Women – Role of Family Courts" in Ratna Verma (Ed.), *Family*

emphasises on the preservation of family in its patriarchal form. The Act ignores the existing power structure dominating conjugal relation and negates the vulnerable position of women within the family and society. It does not take into account the fact that in most cases of marital dispute women opt for legal recourse when other efforts for conciliation have failed to yield result. Therefore, intense stress on reconciliation has proved to be counter-productive.⁴⁸ The Act refused to recognise irretrievable breakdown of marriage and puts an additional pressure on women by delaying the process of awarding maintenance by restarting the process of reconciliation.⁴⁹ Another major drawback of the Family Courts Act happens to be that it doesn't explicitly empower Courts to grant injunctions to prevent domestic violence.

There are several other concerns also that have been raised on several occasions. The ideology as well as procedures of regular civil and criminal courts are substantially different from those of a family court. Well set in adversarial pattern of dispute resolution, the judges have to adapt to the needs of high strung and emotional litigants in family disputes and such a transition is not easy. A point that is raised by the legal scholars is that the judges at senior level at the district court should be appointed to the Family Courts since they would be confident enough to depart from the established pattern in the court, would possess a much greater experience and would easily mould into the environment of Family Courts. But the issue arises when not much of the senior judges accept these transfers to Family Courts as tribunals where their skills of 'judging' as per the legal principles of civil and criminal law with the rules of evidence cannot be used.

At present, most family court judges are mid-career district judges. Although some are innovative and dynamic in their approach with a willingness to experiment in order to avoid the shackles of law, a proper training and sensitization if provided would enable them to perform as ideal Family Court judges. The duties of a family court judge require a great deal of mental involvement and not just the knowledge of law and legal proceedings. It takes two to three years for a judge to adjust to the family court environment and settle down. By the time he/she is able to change the procedural rules, it is time for a transfer. A tenure of minimum five years would be beneficial to the judge as well as the court. This time period would enable the decision makers to make concrete contributions towards bringing effective changes. Various states have adopted different systems regarding the appointment of Family Court judges. Maharashtra has evolved

Courts in India: An Appraisal of Strength and Limitation ((1997, Inter India Publications, New Delhi).

⁴⁸ Ruth Vanita, "Preserving the Family at the Cost of Women: The New Family Court Bill" (1984), *Manushi* 25 41-47 and Agnes Flavia, "A Toothless Tiger: A Critique of Family Court" (1991), *Manushi* 66 9-17.

⁴⁹ Shalu Nigam, "Understanding Justice Delivery System From The Perspective of Women Litigants as Victims of Domestic Violence in India (Specifically in the Context of Section 498-A IPC)", *Occasional Paper* No. 35 (2005), Centre for Women Development Studies, New Delhi, *available at*: <https://www.cwds.ac.in/wp-content/uploads/2016/09/UnderstandingJustice.pdf> (last visited, June 26, 2023).

a different cadre of Family court judges who are appointed through direct recruitments.

One significant development in this area has been the elevation of marriage counsellors as family court judges. The training required for these judges are different than the training for the judges transferred from the district court. Although it is a creditable measure that the judges are appointed directly and the ideological shift that they have to make in order to adapt to the ambience of the Family court would be lesser than those appointed through transfer who are adapted to the complex procedural and legal provisions, these judges face problems of their own as well. It is a common perception that competent lawyers are not much interested in the appointment as judges in Family Courts as it is not considered as an appointment in the mainstream judiciary, and also these judges are never transferred. In West Bengal, family courts are viewed as quasi-judicial forum and judges appointed are usually at the age of retirement. This is because the age of retirement of the judges is 60 years, while that of the family court judge is 62 years. Once appointed as Family court judges, they are deemed to be on deputation to the state government. As and when they reach the retirement age of 60 years, the high court ceases to have supervisory power over their functioning and the state government ought to assume this role. But the state government feels that they have no role in supervising the functioning of the judiciary. This has resulted in the lack of supervision and accountability.

A concern has been addressed by several High Courts and the Supreme Court that matrimonial litigation causes extreme emotional trauma and have called upon the family court judges and counsellors to be sensitive to the needs of the litigants or parties before them. The very purpose of establishing Family courts was to have a different atmosphere which is most conducive to amicable resolution of family disputes, while protecting the rights of the weaker parties. With respect to this, a family court has to be more considerate and lenient than civil courts. Although Family court judges are said to have been armed with additional powers to mould and adopt procedures in the interest of justice, a power which the judges of civil and criminal courts do not have, the question arises that for whose benefit is such a power to be used as the Act remains silent on the issue. Individual judges therefore have to grope their way around the dark and find their own balance. While this is said to be norm today, these discretionary powers are generally used in accordance with the judge's own socialization, value system, exposure and level of gender sensitization. And since it becomes evident from the context of how these attributes play an important role in deciding the usage of the judicial powers, a special training and orientation becomes a requisite in order to see this framework of family law as evolving.

In the words of Justice Krishna Iyer "A socially sensitized judge is better statutory armour against gender outrage than long clauses of a complex section with the entire protections writ

into it.” The Higher Judiciary has repeatedly stressed upon the fact that since the Act mandates a Humanitarian approach towards dispute resolution, the courts ought not to be technical and rigid, and must adopt a compassionate approach. Mere technicalities cannot be allowed to prevail upon substantial interest of justice. The Family court is not like an ordinary court where the law has to be applied strictly and vigorously, and some sympathetic considerations should be extended to the weaker party. The provisions of the act are to be read, understood and construed in consistence with the intention of the act. An attempt should also be made to reconcile the differences so that the structure of the family is not disrupted.
