

Non-Adversarial Approach In Family Courts: A Paradigm Shift In Conflict Resolution

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Introduction

Family Courts are established by the Family Court Act 1984. It came into force from 14th September 1984. Every State has the responsibility to establish family court. Rajasthan was the first State to establish family court followed by Karnataka, Maharashtra and so on. The Act is considered of great significance owing to distinct features, adjusted to the needs of the people with therapeutic approach. Many foreign nations have established family courts and it plays major role in dealing with matrimonial issues much before India recognized it. Like USA introduced family courts in 1914, Australia in 1975.

At the outset it appears that it resolves marital issues with appropriate approach and stabilizes the society by maintaining marital chord intact. However, the task should stand the litmus test of intense social realities in the form of patriarchy.

Paper analyses the functioning of the family court in the light of the procedural shift in conflict resolution from adversarial to non-adversarial approach. It highlights various issues and challenges concerning family court and critically analyzes the procedure within the constitutional set up.

The paper is divided into five sections. First section explains the theory in establishing family courts. Second section traces genesis, objects, jurisdiction of the family court. Third examines the procedural paradigm shift in the family court from adversarial to non-adversarial forms of adjudication. The fourth section highlights the overall issues concerning the Act. Final section deals with conclusion.

I Theory

Family court has no specific definition, even the Family Court Act 1984, did not define it. Some of the jurists attempted to define it taking into consideration the features attached to it, like procedural practice, trained judges, staff, participation of other social scientist like psychologist, etc. (Babb 1998; Wade 1978; Kepharti 1955).

Family courts are established under the principle that the State is under Constitutional obligation to protect its citizen, particularly the vulnerable sections of the society, such as women and children, as they are unable to protect themselves and thereby to preserve the family life and maintain their welfare (Goldberg & Sheridan 1959: 539).

The New Encyclopaedia Britannica 1993 underlines three reasons for establishing Family courts they are (1) The family

law is concerned with the human relationships so issues arising out of it should be deal separately different from that of traditional civil actions. (2) Certain issues especially concerning child left un-contentiously or undefended, so to thoroughly hear and determine the interest of all stakeholders, therefore the family court. (3) Family matters involves deeper social aspect issues, so to bring it to the fore it requires ancillary services from counsellors, medical experts, psychiatrics, etc. (The New Encyclopaedia 1993: 82).

Flavia Agnes believes that the underlying ideology in establishing Family courts in India was to create women-friendly adjudication seeking gender justice (Agnes 2011: 271).

Family Courts viewed as a procedural reform towards securing effective operation of substantive law of marital rights before the Court of law. As procedural law forms the vital part of justice delivery system, treating both parties equally. As Howard & Summers consider procedural law as the 'heart of law' and justifies it on the grounds that, (1) procedure gives the substantive law the authority through bringing it in consonance with the reality of concrete facts, in the absence of which the substantive principle is indeterminate; (2) judicial procedure is more responsible for the efficient legal system, if the trial or pre-trial procedure in the court is unfair then the citizens concludes that the whole system is unfair; (3) procedural worldwide has uniformity in certain context mainly in its 'absolute values', which are followed in every legal system, like 'no man should be judge in his own cause', 'issuance of notice', '*audi alteram partem* i.e. hearing of both sides' and so on, thus establishing procedural absoluteness; (4) procedure is fundamental as it upholds the basic substantive values such as life and liberty; (5) law of procedure truly maintains the basic function of law i.e. maintenance of order, through resolving and settling the disputes (Howards & Summers 1972: 82-86).

Procedural reform in the form of family courts an attempt to ensure gender justice but with a pre-requisite that the law should be framed in proper manner undertaking the social realities.

II Genesis, Objects, and Jurisdiction of the Family court

Report of 'Committee on the Status of Women' 1975, the report of Law Commission 1974, the Code of Civil Procedure Amendment 1976 and persistent efforts of the feminist movement in 1980's led to the establishment of family courts.

The 'Committee on the Status of Women,' in 1975, submitted a report to the United Nations General Assembly on the occasion of 'International Women Year', stressed for the establishment of specialized family court (Agnes 2011: 270). Similarly, the Law Commission in its 59th report 1974 recommended that in dealing with disputes concerning family, the court ought to adopt 'humanistic approach' distinguished from the existing 'radical approach' in the ordinary civil proceedings, reasonable efforts at settlement before the commencement of the trial, participation of gender-sensitized personnel including judges, social workers and other trained staff.

However, the Law Commission did not recommended for specialized Family court directly but stressed for adopting distinct method in dealing with the family issues within the existing traditional court. As a result, Order 32A was inserted in the Code of Civil Procedure in 1976 with distinct procedure concerning family matters. But in true sense the demand for specialized family court was laid down by the feminists in 1980's by creating pressure on the government as women experienced rampant gender discrimination in family and society (Verma 1997: 28). As a result finally Parliament enacted the Family Court Act, 1984. Act mainly served two purposes, first, to settle the marital disputes including family affairs with non-adversarial approach like conciliation and second, it strive to settle such disputes speedily without any undue delay.

Family Court exercises territorial and subject matter jurisdiction. Territorial jurisdiction includes family matters within the metropolitan area (population above one million). Subject matter jurisdiction includes, suits relating to marriage for a decree of nullity of marriage, restitution of conjugal rights, judicial separation, dissolution of marriage, validity of marriage, matrimonial status of any person, issues relating to matrimonial property of either spouse or both, issues relating to the legitimacy of any person, suits relating maintenance, child access custody and guardianship, maintenance cases of criminal nature filed under Section 125 of the Code of Criminal Procedure, 1973. The establishment of family court within the metropolitan area excludes the jurisdiction of civil court and criminal court over family matters.

III Procedural Paradigm Shift from Adversarial to Non-adversarial Approach

The Act has brought procedural paradigm shift from 'adversarial to non-adversarial' mode of settlement in marital issues. In adversarial judge plays least role, applies law towards the facts and delivers judgment upon the facts presented by the lawyers applying strict rules of evidence. Common law generally adopts this pattern. Non-adversarial meant settlement by the parties themselves in the presence of neutral person and in the absence of lawyers.

Family court adopted non-adversarial procedure of conciliation with the trappings of adversarial setup. As the Act (1) obligates

judges and counsellors to prevent the breakdown of marriages by assisting, adjourn proceedings if there exist reasonable possibility of settlement, and persuading spouses for settlement by referring the matter to counsellors (section 9); (2) selection authority to appoint qualified judges committed towards the protection and preservation of the institution of marriage and women as judge preferred (section 4); (3) Counsellors determines options of settlement and convince parties for settlement (section 6); (4) family court avail services from the social welfare agencies, institutions, professional persons, medical experts, and persons in social welfare or any other association who are engaged in promoting the welfare of the family thereof (section 5); (5) Lawyers restricted from appearing before the court but can act as amicus curie on the discretion of the court and it was believed that they engaged in delay tactics; (6) No appeal against the settlement (section 19).

Family court governed by three kinds of procedure, (1) General procedure regulate general proceedings of the Court and includes the application of Criminal Procedure Code, 1973 for the maintenance under Section 125 of the Code of Criminal Procedure, 1973 and the application of Code of Civil Procedure 1908 with respect of the suits of civil nature; (2) Rules framed by the State government in consultation with the concerned High Court of that State; (3) Family Court to develop and adopt its own procedure relating to the suits or proceedings or truth of facts for settlement.

IV Issues

Issues were primarily raised in *Smt. Lata Pimple v. Union of India and others* AIR 1993 Bom. 255. In the instant case sections 3, 13, 10, 14, 15, and 16 were challenged on the ground of violating Art. 14, 19(1)(a) and 21 of the Constitution of India.

Section 3 authorizes the State government to establish family court in cities exceeding one million, however, it grants discretion to lower the norm. Section 3 was challenged for being irrational, unconstitutional, and arbitrary therefore violative of Article 14. Petitioner challenged the provision for treating metropolitans and non-metropolitans unequally on the basis of population the classification was not based on intelligible differentia. Court rejected the submissions of the petitioner and held that section 3 provides separate forum to the family disputes through phase wise application. With respect to the 'intelligible differentia', the court reiterated the discretionary power granted to the State and observed that metropolitan cities have high matrimonial disputes with high pendency rate section 3 serves this purpose.

Section 13 denies right to counsel as it prevent lawyers from practising before the court, however, lawyers were permitted as amicus curie on the discretion of the Court. Petitioner contended that, it violates Article 19(1)(a), 21 and 39 of the Constitution. Court declared the section valid and held that

fair reading of the section indicates that there is no total prohibition of being represented by a legal practitioner.

Section 10, 14, 15, and 16 were challenged on the ground that the procedure prescribed under chapter IV of the Act was discriminatory in nature and therefore violative of Art. 14 of the Constitution of India. The petitioner further contended that, section 10(3) empowers the Family court to lay down its own procedure with a view to arrive at a settlement in respect of subject matter of the suit or proceedings or at the truth of the facts alleged by one party and denied by other. Court refuted the contention and held that though there exist overlapping of procedure but is not arbitrary.

Besides feminists like Shivaramayya (1997: 34), Jyotsana Chatterjee (1997: 68), R.R.Singh (1997: 89), Flavia Agnes (2011: 271-272) among others have criticised the Act as it failed to ensure gender justice to the women. They further note their concern that historically women are subjugated socially and economically and this unequal position victimizes their position before the counsellors and will be pressurised for settlement and to preserve the institution of marriage.

V Conclusion

Demand of the family court was mainly to seek gender justice enshrined under Article 15 of the Indian Constitution however Act failed to achieve it in principle. It indirectly imposes the judges through their appointment under section 4, to preserve the institution of marriage by applying non-adversarial method of settlement. Institution of marriage requires protection but only where both spouses enjoys equal status within the given society. In India offences against women are rampant. Women are socially and economically subjugated. Obvious reason lies in the inherent patriarchal mindset of the society. In this given scenario there are more chances that non-adversarial approach victimise women by not providing fair procedure of representation before the court of law as the judges are legally bound to protect the institution of marriage. In the absence of lawyers their condition worsens.

This approach is highly in contrast with the international practise. Family Courts in Australia established under Family Court Act 1975, Family Proceedings Court in United Kingdom, and Family Court in State of Missouri in United States of America applies non-adversarial approach of mediation for the child welfare, property distribution among spouses, parental responsibility among others. Moreover before the initiation of settlement proceedings the Family Proceedings Courts in UK strictly observe that the parties are at equal footing enshrined under Rule 1.1 (2) (c) of the Family Procedure Rules 2010. Moreover these foreign family courts undertakes intensive course to educate the litigants about their rights about mediation. Such rules and functions are completely absent in the Family Court Act of 1984.

The presence of substantive inequality in the form of patriarchy within the society doubts the functioning of family court in the long run to achieve a constitutionally recognised settlement. Unless the legislature frames proper rules to check the ingrained substantive inequality no non-adversarial process could seek genuine results.

Non-adversarial approach of conciliation is undoubtedly a best process, but should not be applied in maintain the marital chord rather it should be applied for the betterment of child welfare and for the benefit of women.

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