

## **1. BACKGROUND NOTE**

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 and promoting conciliation and securing speedy settlement of disputes relating to marriage and family affairs.

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 59<sup>th</sup> report (1974) had also stressed that in dealing with disputes concerning the family, the court ought to adopt an 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.

The Family Courts Act which was passed in 1984 was part of the trend of legal reforms concerning women. The President gave his assent to the Family Courts 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. This Act has 6 chapters under various heads such as Preliminary, Family Courts, Jurisdiction, Procedure, Appeals and Revisions and Miscellaneous.

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. The criteria for appointment of a Family Court Judge are the 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 to play in the

administration of this Act. Different High Courts have laid down different rules of the procedure. A need for a uniform set of rules has however 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. Section 5 enables the State Government to associate institutions 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. The State Governments are also required to determine the number and categories of counsellors, officers etc. to assist the Family Courts (sec. 6).

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 explanation to section 7(1) of the Act. These, inter-alia relate 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. In addition, the jurisdiction exercisable by a First Class Magistrate under Chapter IX of the Cr.P.C. i.e. 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.

Chapter IV of the Act deals with the procedure of the family court in deciding cases before it (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, different High Courts have specified different rules of procedure for the determination and settlement of disputes by the family courts. In the rules made by the Madhya Pradesh High Court, the family court judge is also involved in the settlement, and if a settlement cannot be reached then a regular trial follows. It is also provided that the proceedings may be held *in camera* if the family court or if either party so desires. The family court has

also been given the power to obtain assistance of legal and welfare experts. Section 13 provides that the party before a Family Court shall not be entitled as of right to be represented by a legal practitioner. However, the court may, in the interest of justice, provide assistance of a legal expert as *amicus curiae*. Evidence may be given by affidavit also and it is open to the family court to summon and examine any person as to the facts contained in the affidavit. The judgement of the family court in concise and simple containing the point for determination decision and the reason for the same. The decree of the Family Court can be executed in accordance with the provisions of the CPC or Cr.P.C., as the case may be. An appeal against judgement or order of family court lies to the High Court.

The Act gives power to each of the High Courts to make rules for the procedure to be followed by the family courts in arriving at settlements and other matters. The Central Government has been given the power to make rules prescribing additional qualifications for appointment of a Judge of the family court. The State Government has also been empowered to make rules providing for, *inter alia*, the salaries of family court judges, terms and conditions of service of counsellors and other procedural matters.

The Act was expected to facilitate satisfactory resolution of disputes concerning the family through a forum, and this forum was expected to work expeditiously, in a just manner and with an approach ensuring maximum welfare of society and dignity of women.

The Act however does not define 'family'. Matters of serious economic consequences, which affect the family, like testamentary matters are not within the purview of the family courts. Only matters concerning women and children - divorce, maintenance, adoption etc. - are within the purview of the family courts.

The Act also brought civil and criminal jurisdiction under one roof. This was seen as a positive measure to centralize all litigation concerning women. Secondly, the very nature of criminal courts facilitated quicker disposal of applications to a civil court. Thirdly, there was seriousness and a sense of intimidation associated with a criminal court, which would act in a woman's favour. Also the Act brought under one roof, matters which were handled by forty odd magistrates and at least two courts in the city civil court, into five court rooms in the city of Mumbai.

While the Act laid down the broad guidelines it was left to the State Government to frame the rules of procedure. However, most state governments did not bother

to frame the rules and set up family courts. Rajasthan and Karnataka were the first two states to set up family courts. But soon women litigants as well as activists were disillusioned with the functioning of the courts. The overall situation is the same everywhere, with minor differences. In Tamil Nadu, the marriage counsellors keep changing every 3 months and each time the woman meets a new counsellor she has to explain her problems all over again, with no continuity in the discussion.

The Family Courts Rules in Maharashtra were framed in 1987. They deal elaborately with the function and role of marriage counsellors in family courts. In fact 27 out of 37 sections deal with this aspect. Wide powers have been given to the marriage counsellors e.g. to make home visits, to ascertain the standard of living of the spouses and the relationship with children, seek information from the employer, etc. While a rare and sensitive marriage counsellor makes use of this power in the interest of women, more often these powers are used against the women in the interest of the family since it is imbibed into the minds of such counsellors that their primary commitment is to preserve the institution of marriage. Further, the reports prepared by marriage counsellors based on their investigation, are not binding on the judges. The report of the marriage counsellor is kept confidential, and not made a subject of cross-examination.

After the preliminary meeting with the marriage counsellor, the case would proceed as per the rules of the Code of Civil Procedure. The rules do not simplify procedures but merely reproduce the Code of Civil Procedure with the minor addition that parties should be present in person.

### **Critical Analysis / Suggestions**

The Family Courts Act 1984 was enacted with a view to promote conciliation and secure speedy settlement of disputes relating to marriage and family affairs and for matters connected therewith. Though this was aimed at removing the gender bias in statutory legislation, the goal is yet to be achieved.

Mechanism of the family courts must develop systems and processes, perhaps with the help of civil society organizations, to ensure that atrocities against women are minimized in the first place.

Family courts should align themselves with women's organizations for guidance in matters related to gender issues. In the context of family courts, action forums should be initiated and strengthened by incorporating NGOs, representatives of elected members and the active members of the departments such as Urban

Community Development, as members. State level monitoring mechanisms could be established to review the functioning and outcome of the cases related to women in the family courts. Women judges and those who have expertise and experience in settling family disputes should be appointed.

These special courts should have the authority to try cases against an accused even if the female victim is not willing to testify or is bent upon withdrawing her case.

The marriage counsellors should not be frequently changed as it causes hardship to a women who has to explain her problems afresh to the new counsellors each time.

The family courts committed to simplification of procedures must omit the provisions relating to Court Fees Act. Each additional relief should not be charged with additional court fee.

To begin with, an example where the objective of the family court is diminished due to procedural lapses may be cited. Rules formulated are yet to provide a specific format for the interim applications, summons, etc. Many lawyers still use the format which is provided in the Civil Procedure Code which uses words like "Counsel can be heard by; Counsel for the Petitioner", although the lawyers are not allowed to represent clients.

### **Absence of Lawyers**

The requirement of following the provisions of the Civil Procedure Code makes things even more difficult for the lay person who is completely unaware of the legal jargons. The Act and Rules exclude representation by lawyers, without creating any alternative and simplified Rules. Merely stating that the proceedings are conciliatory and not adversarial does not actually make them so. The situation has worsened because in the absence of lawyers, litigants are left to the mercy of court clerks and peons to help them follow the complicated rules. Women are not even aware of the consequences of the suggestions made by court officials. For instance, when a woman files for divorce and maintenance, the husband turns around and presses for reconciliation only to avoid paying maintenance. It is crucial to the woman that people who are mediating are aware of these strategies. If a judge or a counsellor feels that a woman should go back to the husband simply because he is making the offer and as a wife it is her duty to obey him, it will be detrimental to the woman's interest.

## **Sustaining Rights Lacking**

In addition to procedural lacunae, other problems connected with substantive law persist. Family courts have been set up to deal with problems that arise on the breakdown of a marriage, divorce, restitution of conjugal rights, claims for alimony and maintenance and custody of children. The setting up of family courts does not in any way alter the substantive law relating to marriage. Divorce disentitles a woman to the matrimonial home. Whether or not she gets maintenance during a separation or after divorce depends on her ability to prove her husband's means. In a situation where women are often unaware of their husband's business dealings and sources of income, it is difficult, if not impossible, to prove his income. To make matters worse, the existence of a parallel black economy makes it impossible to identify the legal source of income.

In such a situation, unless the law changes in radical ways conferring rights on women and creating new rights in their favour, the setting up of family courts will not help to alter their position. The right to community of matrimonial property would be the first step in ensuring security for women. This would mean that all property acquired after the marriage by either party, and any assets used jointly, such as the matrimonial home, will belong equally to the husband and wife. Based on such a law, family courts would be able to provide effective relief to women in case of breakdown of the marriage. Even otherwise, courts must be empowered by law, to transfer the assets or income of a husband to his wife and children or to create a trust to protect the future of the children of a broken marriage. But as the law stands today, courts have no power to create obligations binding on the husband for the benefit of the wife or children.

The other much neglected area of law for women is domestic violence. Wife beating is prevalent in all classes and yet there is no effective law to prevent it or protect a woman against a violent husband. Such a law is urgently required.

With these changes in substantive laws, family courts would be empowered to protect women, but without them these courts have ended up being poor substitutes for civil courts. The adversarial system is unsuited to the needs of women who are in any case disadvantaged and have no access to their husband's assets and income. Family Courts must have investigative powers to be able to compel disclosures of income and assets for passing appropriate orders of maintenance. The Family Courts Act does not explicitly empower the court to grant injunctions preventing violence or ouster of violent husbands. Though some courts have started giving these injunctions based on the rights of the wife and

children to reside in the matrimonial home and based on recognition of the husband's obligation to maintain his wife and children which includes residence, there remains a long path yet to be covered. As a result the Act has ended up being an ineffective instrument to impart justice to women.

### **Actual Functioning**

The haphazard way in which the courts were set up is a reflection on the attitude of the state towards women's issues. It reconfirms the fact that most legal reforms have been carried out only as a token measure to appease women's groups without any real concern for women.

The courts were set up almost over night, without any preparation whatsoever. The total lack of infrastructure and basic facilities make the fight for justice a Herculean task. While both men and women are affected, in any given situation women who do not have any exposure to and experience in dealing with public institutions, are the worst sufferers. The women also become victims of the general anti-women bias in society which is reflected in the attitude of the judges, court clerks or peons who treat the women litigants with contempt while the men experience a certain camaraderie (the brotherhood of men) with the judge, the clerks or the peons depending upon the social strata they belong to.

In the absence of basic infrastructure like a stamp office, typist and stationery, services of a notary or even adequate sitting arrangements, canteen and drinking water, the litigants are subjected to endless hardships.

The court is seen more as a court doling out maintenance orders, rather than a court deciding crucial legal and economic issues.

The judges appointed to the family court do not seem to have any special experience or expertise in dealing with family matters, nor any special expertise in settling disputes through conciliation, a requirement prescribed in the Act. The provision that women judges should be appointed and that the judges should have expertise and experience in settling family disputes, have remained only on paper. In many states the family court does not have a single woman judge.

The Act also provides for legal aid services for the economically weaker section of litigants. The Rules provide for tape recorders for recording evidence at trial proceedings which could be used at the appeal stage but this proposal would be too far-fetched for the family courts, which do not even have adequate

provisions for paper and stationery to begin with. Unless these lacunae are removed the family courts will be a hindrance rather an aid to women's fight for justice.

## **2. RATIONALE**

It is known that family courts have been in existence for several decades in countries like Britain, Japan, Australia etc. The movement to establish family courts in India was initiated around 1958 by Smt. Durgabhai Deshmukh, the noted social worker from Maharashtra. From the beginning the objective of establishing these courts was to provide speedy disposal of cases involving problems faced by women who were traumatized by marriages that had turned bitter.

Regular courts had been filled to the brim with civil disputes and could not be expected to provide expeditious relief to these harassed victims. With their heavy work loads, the Judges could not even be expected to display the sensitivity required in dealing with broken marriages. The handling of custody matters are other problems which require a human touch. In order to explore the possibility of a reconciliation, concerted efforts aimed at resolving the disputes, may be through counselling, were needed before sanctioning the breakup of the marriage.

A multi-pronged approach was felt necessary. The Law Commission had, in its 59<sup>th</sup> Report issued in 1974, stressed that in dealing with disputes concerning women, the court must adopt a radically different approach than that adopted in ordinary civil proceedings.

In any case, a great deal of time of the civil courts was being consumed in family disputes which could be handled at much less cost of time and money by family courts. It was felt that these courts would right from the start, adopt a radical approach to family disputes by attempting counselling even before the start of proceedings. Rigid rules of procedures and evidence could also be done away with in such courts. Thus the idea to segregate such cases and establish a new institution of family courts within the judicial system found favour with the authorities.

This was followed by an All India Family Court Conference held in 1982 wherein suggestions emerged that two issues need to be addressed :-

- (a) Divorce on the basis of mutual consent.
- (b) Divorce on the basis of irretrievable breakdown of marriage.



It is important to note that the suggestion of irretrievable breakdown which was mooted first in 1976 has still not seen the light of the day and is a matter which needs to be discussed - either incorporated within the laws or discarded once and for all.

It was felt at that time that family courts should address specified problems like matrimonial home, custody of and provision for children; speedy disposal of cases, informality of procedure, etc. It was specifically thought that lawyers should be prohibited from arguing matters in the family courts unless specific permission is taken from the Court.

Finally, the Family Court Act was passed in 1984 and all welcomed the Act. The Act was meant to provide for the establishment of Family Courts with a view to promoting counselling and securing speedy settlement of disputes relating to marriage and family affairs and matters connected therewith.

The backlog of cases of family matters pending with the various courts was gradually transferred to the newly established family courts thus, reducing the existing load of civil courts.

These courts were meant to endeavour in the first instance to effect reconciliation or a settlement between the parties in a family dispute. During this stage, the proceedings would be informal and rigid rules of procedure would not apply. It is also provided that the courts could take assistance of social welfare agencies, and counsellors and also secure services of medical and welfare experts. The parties to a dispute are not entitled, as a matter of right, to be represented by legal practitioners, However, the court, in the interest of justice, can seek the assistance of legal experts as *amicus curiae*. The Court is to follow simplified rules of evidence and procedure so as to enable it to deal effectively with the family disputes.

The current family court system has a thoroughly dissatisfying record. Over the last 17 years it has fostered intense anger, frustration and resentment over the continual misuse and abuse of its power and authority. It has become a system that has lost trust of the majority population regarding its capability to provide any kind of a fair and just forum for handling family disputes. Unless the present situation of the family courts is remedied, the women will be forced to continue to remain unsecured within their family and society.

### 3. OBJECTIVES OF THE WORKSHOP

From the statistics available from the Department of Justice, it is understood that so far 85 family courts have been set up in different States and Union Territories across the country.

Now that the institution of family courts has been functioning for over a decade and a half, it is important to evaluate its performance and discuss matters relevant to their functioning. In fact, around the first half of 1999 an agenda item was discussed at the Commission meeting to set up special courts for women. It was then felt that it is more important to evaluate the special courts which are already set up, i.e. family courts and to ensure that suggestions are forwarded to the Government for improving their functioning. It is in keeping with this discussion that the present proposal for a national workshop was drawn up.

The workshop aimed at throwing up concrete suggestions/solutions after deliberations with those who have occupied benches of the family courts and who could therefore give a clear picture from within, based on their individual experience, of the difficulties that are faced within the courts and suggestions for improvement.

### 4. SALIENT THEMES EMERGING AT THE WORKSHOP

#### 4.1 Morning Session with the Voluntary Organisations

##### ***4.1.1 Meaning of Family Courts : Judges and Court staff, Counsellors, Psychologists, Psychoanalysts, Social Workers and Social Engineers- Gender sensitization and orientation for them***

It was submitted that there is a need to sensitize, train and orient the judiciary to the real meaning of the Family Courts Act. The social workers escorting women are not given due recognition. Family courts look upon such social workers with contempt or having no role. It was reiterated in the workshop that proper training would add to the informality of the atmosphere, which is required of the family courts.

It was rightly pointed out that the very description of the subject as A ***versus*** B indicates hostility. It was accordingly suggested that the case should be addressed as, '***In the matter of marriage of A and B***'.

It was contended that the concept of change in paradigm has somehow not been recognised. The module could shift from adversarial module to a conciliatory

or even inquisitorial one. This change has not really happened. While establishing family courts, the same judiciary had been incorporated, as it existed in the civil/criminal courts. A change in cadre is yet to be adopted. It was also suggested that the family courts should act as *Mahila* courts.

The new Juvenile Justice Act requires the magistrate to have undergone training in psychology for being qualified for the post. The same was suggested to be adopted by the family courts as well.

It was recommended to have a big campaign by getting all the States Secretaries together for ensuring establishment of family courts in each district. All the best practices should be brought together to inform all the State Secretaries about the working of model family courts in India. Consequently, a drafting committee may draft one set of model rules and those rules should be circulated to all the other States.

Gender justice should be a component for recruitment and it should be made essential for a judge to have undergone a gender sensitization course or training before taking position as a judge. A short model programme was suggested to be built into the training institutes in the country for sensitizing the administrators or judicial members etc., about what family courts are all about and how they can contribute to the setting up and the effective running of these family courts. Even if it is not done at the state level or the national level, but if each Principal Judge can show this level of involvement of including local organizations in the gender sensitization of that particular court, this kind of training is possible.

#### ***4.1.2 The role of judges in subserving the object of the Act including providing for interim measures and their enforcement***

Setting up of a family court bench in the appellate courts was considered a prime necessity during the proceedings at the workshop. This would help the appeal cases to be adjudicated on the basis of the same principles as done in the family courts at the district level.

In Mumbai there have been good number of maintenance orders and even injunctions passed. There are however, incidents where even after orders of injunction passed for restraining the husband from throwing the woman out of the house, the woman has been thrown out. Since a family court has restrictive jurisdiction and does not have the power to decide issues of contempt people do not seem to take the court as seriously as they would a magistrate or a city civil court. With these procedural lacunae in mind, it was recommended that the

family courts be empowered in the true sense and the enforcement mechanism be strengthened. This would help the orders to be duly executed, rather than being reduced to a mere attractive piece of paper.

In many cases where the husbands are the petitioners and maintenance orders are passed against them, even after flouting these orders their matters continue to proceed. Principally there should be a stay of the proceedings. It was suggested that the judges must not permit the defaulting petitioner to flout the orders of the same court before which he appears. It was unanimously felt that judges can play an active role in this.

A suggestion was also made that while assessing the income or assets of the husband for ascertaining the maintenance amount, the judges must take assistance from social workers, NGOs and probation officers who could, *inter alia*, draw inference from standard of living of the family. It was further suggested that the maintenance must be deposited in the court in the beginning of every month, to ensure that the wife receives her dues in time.

#### ***4.1.3 The role of counsellors in subserving the object of the Act***

It was reiterated time and again at the workshop that the counsellors have a tremendously important role to play. At the same time it was pointed out that their role is not restricted to reconciliation, but also mutual settlement wherever necessary.

In cases where the parties approach the family courts after undergoing counselling from outside, it was recommended to ensure that not much time is lapsed by way of repeated counselling.

#### ***4.1.4 The rules/procedures which ought to be followed by the family courts and the need to put down the procedures in writing, in the form in which the person approaching the family courts understands without intervention of an expert in law***

Some suggestions had been highlighted in the workshop in relation to rules and procedures, which ought to be followed while executing maintenance orders. Under section 128 Cr.P.C. there is a provision to issue a distress warrant which gives the powers to the Magistrate to execute the order and to sell the movable property owned by the husband. It was recommended that the family courts too should take up such coercive steps.

Once the maintenance order under S. 125 Cr.P.C. has been passed by the family court, the salary can be attached in the case of the salaried people whether

in public or private sector. If one is an income tax payee, the orders can be passed and the copy of such orders can be sent to those people who are deducting the tax at source. Even for persons who own any property, copy of the orders can be sent to the people who are in the particular district having actual control over the relevant immovable property. The property tax returns can be taken into consideration for issuing suitable orders for attachment.

It was suggested that the power to issue fresh summons to call the other party ought to be exercised sparingly. To avoid ex-parte decisions, the summons should be handed over to the wife personally. Substituted service should also be immediate for avoiding delay.

Regarding the procedures and rules for dispensing with the need for lawyers in simple issues like mutual consent divorce, maintenance under section 125, a format was recommended to be evolved incorporating the fundamental details like names of the parties, their grievances and financial status. This suggestion was welcomed by the participants at the workshop.

***4.1.5 The kind of injunctions that can be issued by the family courts. And innovative methods to be adopted to make the functioning of the family courts more effective.***

Several ideas on the possible range of injunctions for the effective functioning of family courts had come to the forefront in the course of the discussion. Some of these were injunctions against removal of the wife from the matrimonial home, or injunctions against a second marriage.

In a case where a wife is thrown out of the house despite an order of injunction it is the duty of the court to see that she is restored back in the same house. In a matrimonial proceeding where interim maintenance is ordered and the husband fails to pay, he should not be allowed to defend his case.

It was suggested that the National Commission for Women should, through support from State Commissions and at least two NGOs from the specific regions, undertake a detailed study to get the exact status of family courts and their working and success rate.

It was demanded that when the maintenance is granted under Section 125 Cr.P.C., an independent machinery to execute the orders of maintenance ought to be established. Instead of the general police force, those already assigned duty in the family courts should be engaged in such execution.

While concluding the morning session, Madam Chairperson, National Commission for Women, addressed the august gathering and put forward the commission's eagerness to follow up this workshop by way of recommendations. Besides that, she assured that a committee to frame rules as suggested by Mrs. Vibha Parthasarathy, former Chairperson, National Commission for Women, would be soon set up. Another prime area of concern for the Commission reemphasized by the Chairperson, was the non-existence of family courts in most of the States.

#### **4.2 CLOSED-DOOR SESSION WITH THE JUDGES OF THE FAMILY COURTS**

The closed-door session with the judges was organized with the purpose of identifying the deficiencies in the functioning of their family courts.

##### **Suggestions made by the judges :**

The Hon'ble judges of the family courts present at the workshop, acknowledged that the Family Courts Act was enacted with a view to promote conciliation and secure speedy settlement of disputes relating to marriage and family affairs and for matters connected therewith. During the selection for appointment of judges every endeavour should 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 reason of their experience and expertise to promote the settlement of disputes by conciliation and counselling, are selected.

It was suggested that while adjudicating upon the complaints the judges must bear in mind that only ideal spouses make an ideal family. If the spouses are ideal then there is no need for lawyers or family courts. It is, therefore, a duty of the judges to think in terms of bringing about solutions to the misunderstandings or differences between the spouses. A need for formulation of a special mode of recruitment or some special criteria to serve as guidelines while recruiting the judges of the family courts, was also expressed.

A judge from Maharashtra had a pertinent problem to share with the participants of the workshop. There are 8 to 10 persons in Maharashtra, who are directly appointed as family court judges. While other judges can go back to their parent department where they can be absorbed in the district court, in the case of directly recruited family court judges, there is no family court bench in the higher courts like in the Mumbai High Court. These judges are faced with job insecurity on completion of their tenure. In the present circumstances a special Bench in the High Court to deal with the matrimonial disputes is highly desirable for the

absorption of these judges and speedy disposal of the litigations at the appellate stage.

For those judges who do not wish to be family court judges for their life time, it was recommended that there should be some scheme for them to be placed in the seniority list of the district judges as per merit and to get absorbed and elevated as per their seniority so that they get the chance to become High Court Judges. The judges who are directly appointed as family court judges must also be considered for some kind of elevation. Otherwise having worked for so many years in the family court, if a judge is subject to such stagnation, there is every possibility that good and promising people will think twice before taking up this job. Consequently the quality of the judges would deteriorate with the passage of time.

Role of the counsellors in the family courts is equally important, if not more. Fifty percent of the cases can be solved by way of proper counselling. A judge from Rajasthan expressed her concern over not being provided with any counsellor for the last 10 or 11 years. All counselling in the Rajasthan family courts has been imparted in the past decade by its judges. Similar situation was reported even for the family court in Kanpur. The process of selection of the counsellors is significant for delivery of justice. So far as the judges are concerned, they can also participate in counselling at the second stage. At the first stage the cases are sent to the counsellors for counselling. In many cases where at the initial stage the counselling has failed, proactive role of the judge has helped in resolving the dispute. The present rules or practices do not permit the judge to personally counsel the parties when the case has come up for trial.

Another finding that emerged from the deliberations at the workshop was that the common experience of every judge was that if the complaints are lodged under section 498-A, Indian Penal Code, there remain very few possibilities of reunion between the parties. The four Ahmedabad Family Courts were of the opinion that there is no scope for rapprochement in any of the matters in which complaints had been lodged under section 498-A. In about 75% of cases except in the case of adultery, rape etc., the quarrel starts on very simple issues. The initial fault may be either with the husband or the wife. Such disputes can be settled and differences can be washed away if a proper counselling is there but when the parties approach the police the parties develop the least interest for conciliation or amicable settlement.

Under the existing law the matrimonial case can be filed only where the marriage is solemnized or where the respondent resides or where they last resided

together. It is pertinent to note that after dispute the wife usually goes to her parental place or if she is a working woman, she may stay at the place where she works. This might result in jurisdiction based hardship to the wife. A need to confer jurisdiction on courts where the wife resides was accordingly expressed.

Appearance of advocates cannot be completely barred. The main reason is that a judge or a counsellor or any other social worker etc. will be a third person to the litigating parties. It is the advocates who are the nearest persons to the litigants. At the first stage in every family court the first thing is sending the parties before the conciliators and making all efforts for conciliation. The question of appearance of advocates would arise only when the conciliators report that the conciliation is not possible or it has failed.

The question is whether a lawyer's participation will be useful or detrimental to the performance of a family court. That is the crucial issue. It was suggested at the workshop that the Women's Commission should consider whether an amendment could be proposed to allow participation of lawyers subject to a proviso giving power to the court to terminate his *vakalatnama* if he uses delaying tactics by unnecessary adjournments. If such control is given to the court the lawyers will not be able to get adjournments.

Shiela Khanna, Judicial Officer from Madhya Pradesh had enlightened the participants of the workshop regarding the issuance of Madhya Pradesh notification for establishment of family courts at 7 places with effect from 8<sup>th</sup> March 2002. The rules are being framed and the courts are expected to start functioning at the earliest. The day the notification was issued in Madhya Pradesh there was great resentment at the Bar.

This opposition and resentment was particularly in respect of section 13 of the Act which prohibits the appearance of the advocate on behalf of the parties whose cases are tried under different Acts by the family courts. It authorizes the courts to provide service of *amicus curiae*. The argument by the advocates was that it deprives the litigants of their constitutional rights by disallowing the engagement of a counsel of their choice for prosecution or for defending, as the case may be. They feel the resentment is quite natural and with a reasonable basis. Majority of the judges at the workshop expressed their dissatisfaction to provision barring the appearance of advocates. Though sometimes the appearance of the lawyer is an obstacle, but at times their assistance serves useful purpose. It was consistently urged that section 13 should be suitably amended to the extent that if the court feels necessary or if the court feels it is in the interest of the justice looking into



the facts and the circumstances of the case, then the advocates should be allowed to plead on behalf of the parties.

When the advocates are not allowed to appear in the matter, a reasonable apprehension of identification of the party arises. The Registrar who gives oath is not in a position to know whether the person who is coming to swear or to make the affidavit is the same person. May be in place of Mrs. Patel, Mrs. Shah comes and identifies herself that she is Mrs. Patel and takes the oath and the work of the affidavit is over. Some safeguard to overcome this kind of situation of fraud must be incorporated in the rules.

The participants were enlightened about the setting up of legal aid centre in Gujarat working round the clock. Any lady can approach the centre at any moment of the day or night. Opening of such centres, at a district place or where the family courts are working, received encouraging appreciation by all the participants. But in this regard, it was unanimously suggested that the drafting of the application or complaint should be done in the vernacular language.

The infrastructure that is necessary for every court should be supplied at the time of institution of a family court itself otherwise it adds to the backlog of cases. A judge from Gujarat had presented a few figures to cite this unmanageable situation. From different courts of Gujarat, the cases transferred in family suits, civil matters were 1034 in the year 2000. 893 other matters were instituted and 676 were disposed of. So pending file remained 1251. Again in 2001, 953 instituted, 830 disposed of and 1374 remained pending. In criminal matters also 7628 transferred in the year 2000, 451 instituted against it. 3781 disposed of. Pending remained 6498. At the end of 2001, 4709 remained pending.

Attention was drawn to the unsatisfactory conditions in the courts with no proper place for the litigants to sit, no proper place for the judges to be seated and generally very poor working conditions. There is no proper space allotted for the children to meet their separated parents. Here the NGOs can play a vital role. They can provide space as well as services of the social workers in whose presence the children can meet their parents.

In some of the cases there is no communication between the couples for a long time due to filing of complaints from either side, which aggravates the void between them. If sufficient space is available to talk freely with each other, then many matters may be solved immediately. Thus, one separate building should be constructed with all the facilities of family courts, counselling centre, child centre

and so on for providing an informal atmosphere for the women litigants and their children. It should not be within the premises of the district or High Courts.

The Principal Family Judge, Chennai had a valuable suggestion to make. She insisted upon the constitution of an outpost police station in the premises of the family courts. This would benefit the destitute and poor women. These outpost police stations would be vested with powers to exhibit the non-bailable warrant throughout the state with the help of the local police people, which would help these women to obtain maintenance for themselves.

It was noted that the rules for appointment of judges of family courts is very unsatisfactory with no uniformity. Different modalities are being applied while appointing a judge in a family court. The judicial officers who do not wish to be a family court judge are forced to continue there. Section 4(4) requires for some special qualifications for the judges, which have often not been complied with. It was urged in the workshop that some model rules should be prepared for appointment of the judges. There should be some committee for the appointment of the judges consisting of the Chief Justice of the district court, Chairperson of State Women Commission and Chairman of the Public Service Commission as its members. It was further suggested that at least ten judgements of that officer should be called for critical analysis to determine the aptitude of the concerned officer in relation to family related matters.

As regards the appointment of counsellors and social workers as Judges of family courts, the judges present in the workshop, unanimously rejected the idea and insisted that the post of judges should be filled in by persons having a legal background. This was supported by the fact that the judges of the family courts, apart from dealing regularly with the matters usually dealt by the district judge and settling, reconciling or granting divorce have to tackle with many other laws. For example if the husband flouts any injunction and if he is about to leave the country then the court has to pass an order of impounding the passport. While passing such an order the court has to take into consideration several laws affecting marriage. So also if property of the husband is to be attached the court has to take into consideration various laws.

Attention was drawn to the fact that in the absence of properly qualified registrar the judges are over burdened with administrative work of the court as well. It was accordingly suggested that for expeditious disposal of cases the administrative affairs must be handled by sufficiently responsible and capable

persons. The judges as well as all staff members of the family courts, including counsellors and registrar should be gender sensitized to guide the litigants.

The deliberations before the counsellors being confidential, the litigants open up conveniently, which would not have been the case in front of the judge. For instance it has been observed in many cases that if the husband has married second time he will not admit it before the court, though before the counsellor he has admitted it.

It was suggested by some voluntary organisations that the counselling done by the NGOs should be taken into consideration while deciding the matters before the family court. The judges however, while appreciating and encouraging the active role and cooperation of the voluntary organizations in the working of family courts, expressed their reservations on the proposal.

Family courts should be empowered to appoint guardian for the property of a minor. As of now, they have the power to appoint guardians for the person of minors alone. It was also suggested that the powers of remand and remittance should be restricted to some extent. It was also submitted by the judges that a simplified procedure ought to be adopted wherever possible, like in maintenance cases under Section 125 Cr.P.C. It was further noted that while proceedings under section 125 Cr.P.C. are summary in nature yet once the matter has gone to the trial stage there is no limit as to examination of witnesses. The lawyers enter into the field and examine number of witnesses and a lengthy cross-examination follows.

It was suggested that the family courts should take some decision regarding adjournments following the civil procedure code. The adjournment should not be granted as a matter of asking. As regards reconciliation, the family court should evolve a meaningful and effective procedure to ensure that efforts have been genuinely made in that direction.

## **5. RECOMMENDATIONS EMERGING FROM THE WORKSHOP**

1. Legal prudence has to be more simple. Simplification could be achieved by amendment of laws or judicial interpretation.
2. Grant of maintenance should include provision for residence for women.
3. There must be speedy settlement of disputes.
4. Judges and other court staff must be gender sensitised.

5. Family Courts can also take help of NGOs in the settlement of disputes.
6. Counsellors should be permanently appointed and should be given training.
7. Family courts should follow simple procedures which should not create hurdles to justice.
8. There should be an informal atmosphere in the family courts and these courts should not be like any other civil courts.
9. Qualified social workers and social activists may also be appointed as judges of the family courts.
10. To bring uniformity in the rules of family courts all over the country a drafting committee may be set up to draft the rules.
11. Every district should have family courts.
12. The office of probation officers must be strengthened and judges should utilise their services.
13. Good practices such as facilities like children's complex etc. as existing in Mumbai should be introduced in all family courts. Necessary infrastructure should be provided right at the time of institution of the family courts.
14. Model rules should be prepared for the appointment of judges in family courts. Judges can also act as a counsel at the second stage of counselling.
15. A woman should be allowed to file a case in the family court in the district or state where she resides and not necessarily at the place where the marriage took place or where the husband resides or where they both last resided together.

## **6. PRESENTATIONS**

### **6.1 WELCOME ADDRESS BY DR. POORNIMA ADVANI, CHAIRPERSON, NCW**

A very good morning to all of you. Dr. Ayyar, Secretary Women and Child, my colleagues on the dais, dignitaries at the auditorium, Chairperson of the Law Commission, Ex-Chairperson of the National Commission for Women Mrs. Parthasarathi and all our partners in action. Chairpersons of the States Womens commissions are also here and a particular warm welcome to the judges of the Family Court who have come from various States. I am given to understand that judges from ten States are here with us this morning. The subject of family courts

and their working has been a matter of concern since long. The courts were conceived of in a different way. In fact the force behind the need for setting up a family court was propelled partly by the desire of the proponents to ensure that family or domestic matters which largely concern the interest of women and children should be tackled with a greater degree of sensitivity and seriousness than what is experienced in the other courts of civil and criminal jurisdiction and partly by the belief that creation of such courts would improve the speed and manner in which such cases are processed.

As we all know Family Courts Act was passed in 1984. It was conceptualised as an institution which would be committed to the need to preserve the institution of the family without at the same time compromising with the dignity and needs of the woman as an individual in her own right. Special provisions have been made in the Act which were intended to actualise these concepts.

However, we have found that in reality the implementation of this Act has been rather slow. Even 18 years after its enactment where do we stand? There are as of now about 85 such courts in the country which has a population that exceeds one billion whereas the Act provides that such a court should be set up in, and I quote, "every area in the State comprising a city or town whose population exceeds one million". Again it is important to assess whether the existing courts have been able to satisfy the purpose for which they were set up.

Members of the Parliamentary Committee on the empowerment of women in India have toured through the various States, met the judges of the family courts and tried to study the conditions of the family courts in the country. The findings of this Committee have been enlisted in the background paper which is provided to you. The National Commission for Women have from time to time visited the family courts and tried to study their working. The aim of this workshop now is to reflect on all these recommendations - both legislative and administrative- which could then be forwarded by the Commission to the various forums, the government, the legislature, the judiciary. We have been informed that the existing courts lack infrastructure facilities, proper facilities, and support systems for proper functioning. There is a shortage of judges and supporting staff, and very few women judges are appointed. I am informed that there are only 18 women judges in the family courts in India. Skilled counsellors are either not available or are engaged on a very small fees as much as hundred rupees a day. There is no uniformity with regard to their remuneration or the method of appointment.

Consequently they feel demoralised, and have no interest in giving quality time or attention to these cases. In most of the States we are given to understand that now specific rules have been framed for the functioning of the family courts. It was contemplated that the proceedings in such courts should be informal and simple so that the parties can present their cases. However, we also know that lawyers continue to play a major role in the proceedings. The other school of thought has been that it would not be possible for the litigants to present their cases which may involve complex issues of law and fact and therefore the role of lawyers appears to be imperative. We have members of both schools of thought in this august gathering and I am sure that there will be deliberations on this issue as well.

It has also been felt that strict adherence to technicalities of code of criminal procedure has contributed to the delay in the settlement of cases. To assess the working of family courts in the country, the National Commission for Women requested various High Courts to provide information on, for example the disposal of cases, the number of courts established, whether the rules have been framed etc. The replies received from these courts have also been compiled in the background note made available to you. The question of the adversary system and the public cost of maintaining it exchange well beyond the ambit of family court. It has been suggested from various quarters that in family related disputes which normally affect the lives of even innocent children, there is a greater need for judicial intervention and the interest of the child should be paramount.

The United Nation's Convention on the Rights of the Child, 1989 provides that actions taken by the courts as well as by administrative bodies which concern children must give primary consideration to the best interest of the child. Our domestic legislation adopts the same premise. It has therefore been suggested that this emphasis on the interest of the family and of the women in particular requires rigors of the administrative system to be tempered. Many believe that we should limit the role of the counsellors. The benefits of such an approach are said to be the ability to focus on the protection of women and advancement of their interest. It has been compellingly argued that this is the end to which the justice system is the means.

Further benefits mentioned are greater speed in disposal of cases and reduced cost. On the other side it is equally convincing that the absence of proportional representation adversely impacts on the functioning. If gender justice is assessed qualitatively the basic issues which need to be considered are whether

the women have direct access to the judges. However it must be emphasised that the judge who has the eventual power of decision must always act to preserve the element of impartiality.

In the context of case management, caution needs to be exercised against the fashion of regarding courts as a means for providing service. It is important to counter balance this approach with a broader appreciation of the functions performed by the legal system. Courts do not provide a public funded dispute resolution service only to litigants as consumers. The courts perform a core function of administration of justice. The concepts of marriage, parental rights, custody of children have changed tremendously during the 20<sup>th</sup> century and these concepts will change even more rapidly in the coming century. The ultimate answer depends on a sensible assessment of our social values and recognition and weighing of all the impacts. In that way we must surely place a high value on access to justice and on enabling the courts to meet their responsibilities to the community.

In the dialogue that we propose to have between the judges, the lawyers, the social activists, the NGOs through this workshop of family court we hope to reach a consensus on what is minimally required within such courts to meet the needs and demands of the suffering litigants. To address the issues, which are generated in this workshop the National Commission for Women will make recommendations to the government. The presence of the Hon'ble Minister of Law and Justice would therefore be very meaningful. Dr. Ayyar, the Secretary, Government of India looking after the nodal department for women and child would surely play his role for a quick implementation of the recommendations to both the departments concerned - Department of Justice which falls under the Home Ministry, and the Law Ministry.

The participant judges will, I am sure, carry the message from the workshop to their respective States and initiate space in their own courts to implement the recommendations. They would also be sharing with us some of the good practices that have been followed in the courts which have been in existence for these years. The family courts must foster an attitude of concern and care for the plight of the affected parties. We sincerely hope that today's workshop would help in identifying factors that need to be taken care of to actualise the fundamental objectives of the legislation relating to family courts. I would also like to read out a message which we have received from the Chief Justice of India for today's workshop. "I am happy to learn that the National Commission for Women is

organising a one day workshop on working of family courts on 20<sup>th</sup> March. I send my felicitations and good wishes for the event". Signed, Justice S.P. Bharucha. I am grateful again to each one of you for participating in this workshop and we look forward to very meaningful recommendations which we can move ahead to the various quarters. Thank you, Jai Hind.

## **6.2 ADDRESS BY SH. R.V.V. AYYAR, SECRETARY, DEPTT. OF WOMEN & CHILD DEVELOPMENT**

Chairperson of the National Commission for Women, Members of the National Commission for Women, Chairperson, members, Chairpersons of the State Commissions. Mr. Justice Shri Jagannath Rao Garu and other distinguished justices, judges and friends. Let me thank Poornima Advani for associating me and my colleagues with this very important workshop. The Hon'ble Law Minister would be coming any moment and I am sure that with his very sharp legal brain he will outline very clearly what at least is the current thinking of the government on family courts issue. So I would not say much on that but outline three general propositions.

The other day we had a very interesting discussion in another forum on the domestic violence bill where the Law Minister again outlined clearly what the thinking on the domestic violence bill is. Now from the limited interaction I had with him on a number of occasions what comes out is that he has mapped out a clear strategy for judicial reforms. On the economic front, he is trying to address the new issues of regulation and other matters. Another social front which I think he is trying to delineate is as to the legislative spaces which are not occupied and which need to be filled in by appropriate legislation and also an overall review of the various laws including the personal laws. Now we have been greatly benefitted by the exercise of the National Commission for Women which has reviewed a large number of the existing enactments. Therefore by and large we broadly have some understanding of what are the existing laws which need to be reviewed and on some sort of modification to be attempted and as to what types of new legislations have to be enacted. Apart from domestic violence bill, we are also looking forward to the recommendations from the National Commission for Women on two major matters. One is the sexual harassment where there is a judgement law and which needs to be legislated properly and second I think a review of the enforcement of the Dowry Prevention Act. This leads me to the second proposition. The second proposition is that we consider the National Commission for Women and other forums extremely viable partners for the reason



that the government machinery is constrained by certain conventions and certain norms.

Another third point which I want to say is, a law is as good as it is implemented. Quite often, we find that the policy is good but the implementation is bad or the law is good but the implementation is bad. I think we need to look at the issue in a holistic manner.

So the question that I was raising is that we need to reflect on the fact whether these family courts are functioning as optimally as they ought to be, or if there are any practical problems. I am sure that we will get very valuable recommendations. Thank you very much.

### **6.3 INAUGURAL ADDRESS BY SH. ARUN JAITLEY, HON'BLE MINISTER, LAW, JUSTICE & COMPANY AFFAIRS**

Thank you Mrs. Nayyar, Dr. Advani, Mr. Ayyar, Mrs. Reddy, the Chairman and Members of the Law Commission, Ladies and Gentlemen.

At the outset I would like to apologize for the delay which was something beyond my control. We have a biannual ritual of photography with the retiring members of the Rajya Sabha which was fixed at about 10.10 today that kept me back. We now have an experience of several years of the functioning of the Family Courts Act. And since family courts deal primarily with the matrimonial and family disputes, perhaps one of the ideas when these courts were set up when the Act was legislated was that involvement of the court, the kind of evidence required, the kind of costs involved, the delay in the procedures, these are all issues which would normally be detrimental to the object which is sought to be achieved in litigations within the family and therefore you require a forum which though judicial would at least have a large number of other social constraints of training etc. in the discharge of its judicial functions.

I tried to collect the figures from the department of Justice. We asked various States as to how the functioning has been. It was required to be set up in almost every city which has a population of one million plus and we have 27 such cities in India with a population of one million plus where family courts were required. 15 out of those 27 have set it up. In 12 including Delhi, Delhi being the largest amongst them, the family courts have still not been set up. You have 85 courts functioning in the country and this year the government of India has initiated a suggestion which department of justice is pursuing to even fund the States on

a sharing basis and at least attempt to set up 34 more courts in the year 2002-2003 that is the endeavour. In terms of their sheer performance, the courts which have been functioning, if we compare them to the normal judicial tribunals and wholly judicial institutions functioning, they do not seem to have done a bad job. The figures I got somehow for 2 years, I mean 4 lakh 99 thousand matters have been covered and today out of these which have been disposed off about one lakh 12 thousand approximately are pending and what is significant is not these two figures but the significant fact is how long does it take a case to get over. The total number of cases in all family courts which are pending for more than 3 years, and 3 years for a normal civil litigation in the civil court in India is not considered to be a very long period as against these very large number disposed of and pending is only 7 thousand 7 hundred and sixty nine.

Now I am giving these figures because it effectively shows that where they are functioning, they appear to be functioning expeditiously. They are disposal oriented. I am not dealing with what the quality of justice they are able to dispatch. I am also not dealing as to the kind of measures which they are now adopting in the areas of improvement which are required. My own experience, not so much with the government but in my earlier capacity as a member of the Bar has been that one of the great endeavours of any lawyer who is dealing with these matrimonial courts or any litigant or even the judge has been that the lady involved in the litigation eventually is the long term sufferer. In most cases she has no economic resources, she has to limp back to her parental family or some other support except in rare cases where she herself is an earning spouse. And it is delay in the determination of her economic rights which actually puts her to a disadvantage in the litigation. So if any clever lawyer appears for the husband, he would tell you that if you are able to delay this part of the case for years together and drive the wife to a state of destitution where she is absolutely resourceless and plus she may also have the additional liability of children to support which in most cases she does have, then she will obviously settle on the terms that you want her to settle at. And this is reality in every matrimonial case. Very few matrimonial case lawyers practising in this area and litigants who come through this process will tell you eventually that the case did not last till the end. They start with some element of bitterness, rancour and after a few months or some reasonable time there are various kinds of pressures including pressures from within you to eventually go and settle and settle on reasonable terms. And this settlement has to be such that they are effectively capable of taking care of the female spouse or the

children for a very long period of time because in the absence of any other economic resources that is how the lady will have to survive.

Anywhere in the world, divorces are a very costly proposition. You have to share properties, you have large amounts of alimonies and even in countries where divorces have become very common, they are still very costly proposition. In fact the cost of going through a divorce at a time is considered more than the social pressures of those societies - a big deterrent against the break up of marriages. In the absence of any such objective, merit or criteria in Indian judicial system, there seems to be an effective problem and this is one area where even if you have more informal involvement of or more considered involvement of family courts which is functioning, the measures by which these are determined are inadequate.

I always very strongly felt that these measures should become more realistic. Whether this is now required by redrafting the law, amending the laws or in terms of judicial interpretation. For instance you do need effectively now to link alimonies and maintenance not to declared incomes but to life styles.

You know before the separation the schools and colleges where the children were being educated in, the localities you were living in, the kind of life that you had, the quality of life that you were undergoing. And these are instances where judges are quite capable of making a rough and ready measure of standard of parties and doing what would be a larger picture of justice rather than getting into arithmetical calculations because arithmetical calculation as we all know would not be a representative figure enough.

The second area has been this great debate on lawyer's representation in the family courts. I would like you to consider in the course of your deliberations today that more than the merits of any case a large number of these cases are resolved effectively through competent and clever legal strategies. Thus, if somebody does not pay you money, you do not file a case against him and sit at home for the next 10 years. You somewhat convert it into a case of cheating so that it can be settled within months and there has been an increased tendency almost an enormously increased tendency which in terms of legal fairness we will say is improper but it has been achieving one larger object - that it has been settling this dispute expeditiously at least.

Now these are all legal strategies which your advisers or whoever you turn to are capable of advising you as how to achieve quicker justice. There are people who resort to criminal law remedies, people who resort to using a male child as a litigant in order to ask for share in hereditary properties. These are also legal strategies which people follow and the Bar Councils have been representing that in fact these strategies have been capable of achieving a lot more for the spouse than normal civil procedures would have achieved. So if you look in the abstract, you would say well the court must call everybody and you must not call the lawyers around because these are very difficult areas. This is something which you really need to examine as to whether it really helps the wife to debar a legal practitioner's representation or to make it discretionary because in a number of cases the lady litigants appeal that they are incapable of representing themselves before special forums particularly in the country where female literacy levels are still at a very moderate or less than moderate level.

Now most litigants are not competent enough to do that particularly the lady litigants. In some cases, men may also not be competent but in a number of cases they may be able to do that.

So this issue has been raised. So what has been the experience as a response to what the Bar Councils have been saying? I am sure those who practice in these areas will certainly go into this.

The third factor which also requires a discussion and particularly in the context of almost every law which we frame this issue is raised. This is with regard to what happens to the right of residence. Now this is a live issue. Now it is being also demanded by a number of women's organisations that the women should have the right to share the residence. Now should this be incorporated as part of law itself or should it be a part of maintenance of support.

That the right of residence or a provision for residence has to be one of the components of the maintenance factor and some element of judicial discretion as to where a share of residence is possible, where an alternative resident is to be provided for or alternatively where a compensation for a residence is to be provided for, has to be mentioned.

Now I say this because it has taken us almost decades, not years, for one of our first pronouncement to come that the residence is a part of maintenance.

You cannot be oblivious of the requirements of residence and say that it is the responsibility of the woman's parents to provide her residence.

Now whether it should be a mandatory right to get a share in the residence or that it is one of the relevant considerations which the judicial authority must have in its mind and see on the circumstances whether a share residence is possible or of an alternative residence or a compensation in lieu of residence is to be provided for. These are all areas we have to really now come to terms with. But I think, the greater challenge is going to be the first point that I mentioned. That the object of family courts really has been to save a marriage and where they cannot be saved, the marriages are nulled expeditiously but the expeditious annulment also has to be a part of a larger package and that larger package must provide for economic security as far as the family of the spouse is concerned. Well, we will have to come a long way.

Some modifications have been done in that direction but I think if that is not enough movement; a time will come when we may still have to think in terms of specifying those details so that the economic packages itself are capable of legislation defining itself in law. I am extremely grateful to you for having extended this opportunity to me to interact with you in this session and I am sure your deliberations during the course of the day would be very successful and provide some guidance for the subject. Thank You.

#### **6.4 INTRODUCTORY REMARKS BY JUSTICE SUNANDA JOSHI**

Chairperson of the National Commission, respected delegates and ladies and gentlemen. It gives me a great pleasure in associating myself today with this gathering. I may state here that I am working as a Principal Judge in a family court in Mumbai. I am working as a judge of family court for the last more than 10 years. As rightly pointed out in the initial stage in the speech by Dr. Poornima that the establishment of the family courts was initiated by the Law Commission's 59<sup>th</sup> report which stressed the need for a public approach and a different procedure in dealing with matrimonial and family disputes. So Law Commission in its 59<sup>th</sup> Report which was published in 1974 stated that disputes relating to marriage and family affairs should be dealt on a special footing and the ordinary adversarial procedure which is followed in all other civil matters should not be followed in dealing with matrimonial disputes. In pursuance of this recommendation of the Law Commission, the civil procedure code was amended in 1976 and a provision

was made for a special procedure to be adopted in dealing with the matrimonial disputes.

Thereafter women's organisations and other social organisations urged the need for the establishment of the family courts. This is just a little background and with this background the Family Courts Act was passed in 1984. I will be representing family court at Mumbai of the State of Maharashtra because I have the statistics and information regarding the family courts in Maharashtra. The first family court was established in Maharashtra in 1989 in the city of Pune. Thereafter in the same year the family court was established in Mumbai, thereafter at Nagpur and thereafter at Aurangabad. At present there are 16 family courts in the State of Maharashtra. I have also gone through the report of the Parliamentary Committee on functioning of the family courts. Some of the facts which have been referred to by Dr. Poornima in her speech are that there are in all 84 family courts in India and 18 states and UT's have established the family courts and 18 states and UT's have yet to establish the family courts.

So there are 16 family courts in the State of Maharashtra. So also she referred to a fact which is there mentioned in the report of the Parliamentary Committee that there are 18 women judges out of 84 judges in all the 84 courts. The lady judges are 18 through out India and I may proudly state here that 10 are from Maharashtra. Out of 16 family court judges in Maharashtra, 10 family court judges are females in Maharashtra, out of total 18 through out India.

As provided in the Act a family court is to be established in every city and town where population exceeds one million that is 10 lakh but so many states or the cities are having a population which is more than one million but the family courts have not been established. Now we go little ahead. I just very briefly introduce the procedure which is followed in the family courts. Now unique feature, I should say of the family courts, is the institution of marriage counsellors. Necessarily when the case appears for the first time before the family court and both the parties are present in the family court on the first day, the parties are referred to a marriage counsellor necessarily and the object of the Family Courts Act is to settle the matrimonial disputes and to bring about reconciliation and speedy disposal. What we are trying to do is the maximum fairness and minimum bitterness. We want to put an end to all the matrimonial litigation before the counsellor.

So far as the state of Maharashtra is concerned, I may state that Maharashtra is one of the few States which have detailed and elaborate rules regarding the functioning of the family court as well as regarding the service conditions, recruitment,

remuneration to counsellors and all other detailed rules regarding counsellors also. One more thing is that the counsellors in all the family courts in the State of Maharashtra are in the permanent service of the government and they are attached to the court. So when they are class-I government officers in the permanent service, it gives, you can say, a different picture because as stated in the report of the Parliamentary Committee, I think most of the States, even I have experience in Kolkata and Bangalore with the family courts over there, they do not have a permanent staff of the marriage counsellors; the services of the marriage counsellors are hired from time to time from different places. So they are not trained persons. They do not have this knowledge of counselling.

The essential qualification, so far as Maharashtra is concerned for a person to be appointed as a counsellor is Masters Degree in social welfare with minimum 2 years experience in family counselling. With these trained people it is easier to settle the matrimonial disputes. What do the marriage counsellors do? They have a scientific and a totally professional approach. They talk to the parties, try to find out their differences, help them in understanding their problems and try to solve their problems as far as possible. They also try to bring about reconciliation between them. You see we have experience that in most of the matters it so happens that when there is a dispute between a husband and a wife and they are separated, they do not talk to each other. They do not meet each other for years together and only when the litigation comes before the court they have a chance to talk to each other.

So before the counsellors they can redress their grievances and misunderstandings can be sorted out. It is provided in the Act itself that the family court can take the help of the experts like sexologists, sociologists, psychologists, medical experts. So I can say, we are making fullest utilisation of all these provisions in the Family Courts Act.

In Mumbai family courts, we have a list of panel of such experts who are psychiatrists, psychologists, medical experts, sexologists. We refer the parties to them. They try to help the parties in solving their problems. We have also maintained a panel or list of social organisations and welfare associations who are supposed to help the functioning of the family courts. They help us in providing shelter for the women, provide them with employment, provide for the access to a place for the children, provide them legal aid wherever necessary.

So with all these efforts, the marriage counsellors, who are trained persons first attempt to settle the matrimonial dispute. Settlement can be two fold. It can

be either reconciliation that is bringing the parties together or it can be a divorce settlement that is a divorce by mutual consent. We settle all the issues or say at least some of the issues. Most of the times, the issues can also be settled by the marriage counsellors.

You see now in the complex world the matrimonial problems are getting very much complicated. If trained counsellors with a professionally scientific approach are not there in the family court, it would be a great disadvantage towards the attainment of the goal of settlement of matrimonial disputes amicably.

Now the second stage, when the marriage counsellor's efforts come to an end and the matter comes up before the court. Now I may state here that when the matter comes before the court and it is contested that means all the efforts have come to an end, then it is a trial before the court and then we have no choice but to follow an adversarial procedure. After all this is a court. So when there is a contest, you cannot put aside all the provisions of civil procedure code. It has to be conducted in a proper way because the criminal procedure code, the civil procedure code, the Evidence Act are all applicable to the family court matters also. It is provided in the Family Courts Act itself. Section 10 of the Family Courts Act provides that a court can have its own procedure in settling the dispute or in arriving at a truth of the matter but at the same time it is also stated that the Civil Procedure Code and the Evidence Act are also applicable.

After all you have to remember one thing that when it is a contest and we give judgement on merits, the appeal lies before a Division Bench of the High Court and all the rules of procedure have to be followed.

Now one more area of controversy regarding this is that when the contest is apparent and all the efforts come to an end and the trial begins in the court whether the help of advocate is necessary or not. Now section 13 of the Family Courts Act provides that no party in a suit or proceeding before the family court is as of right entitled for a legal representation but the court can take the help or the assistance as the *amicus curiae* from some legal expert. Now let me tell you one thing that the examination in chief, cross examination, application of law, interpretation of law, then various different interpretations of the case law, these are all technical things. Leave aside an uneducated person but even a highly qualified person is not in a position to conduct the examination in chief and the cross examination. So when there is a contest it is desirable to have the advocates to represent the parties. In a 1991 judgement the Mumbai High Court has held that legal representation should not be refused without convincing reasons and



it has also added further in that case (Lila Mahadevan Joshi versus Mahadev Anant Joshi, 1991) that section 13 of the Family Courts Act and rule 37 make an adequate provision for representation by an advocate.

So it is not a total bar and advocates have to be allowed when the complicated issues are involved. And when there is a contest the issues are naturally complicated and one more thing to be remembered in this is that this judgement is given in a divorce by mutually consent petition. So we do not need the advocates for that. So High Court has gone to the extent of making this observation when there was an appeal from a divorce by mutually consent matter. But when there is a contest it would be in a more glaring manner than in the matters in case of divorce by mutual consent.

Even then I may tell you that we, the judges of the family courts, at least in the State of Maharashtra, are not allowing the advocates to appear and plead the case from day one till the time the contest is not there. We try to keep the advocates away as far as possible. So we do not allow the advocates to meet the counsel. In fact you will be surprised to know that even the hearing of interim applications like maintenance, custody, access, is done without the help of the advocates.

Only when the technical issues like injunction or jurisdiction are involved, we need the help of the advocates at the interim stage also. Otherwise normally we never allow an advocate to appear till the final stage of hearing and that too without an application is made to that effect by a party. Then only we allow the advocates to appear. So this is so far as the representation by the legal practitioners is concerned in the family court matters.

Now one or two more things I would like to say. A unique feature of the family court at Mumbai is a children complex. Now what is known by children complex. I am very proud to say that this is the only family court having the children complex throughout India leave aside Maharashtra because the Parliamentary Committee, when visited my court, the family court at Mumbai, they were also very happy and pleased with the functioning and they branded it as best in the country. They have visited so many courts. So what do you mean by a children complex. Children complex is a place where the access is given to the parents to meet their children.

Children are the worst affected in matrimonial litigation. Family court children complex provides a place, a special meeting place for the parent and the children.

Where the access is not possibly successfully worked out in the premises outside the family court, we give the access in the children complex which is in the family court itself. Such access is supervised and a register is also kept which keeps a record of the meetings. This children complex at Mumbai is also having toys, games, books everything over there which help to build the relationship between a child and a parent and it is working very successfully.

I may also mention here one more feature - a unique feature of the family court at Mumbai. That is we have started a centre for psychological services and stress management free of cost. Now you see the matrimonial disputes tend to disturb the mental equilibrium of the parties and if this depressed state of mind continues for a long period of time it may lead to suicidal tendencies or the person may suffer from a nervous break-down. So it was observed by the Mumbai High Court in one of the Division Bench judgements that if such psychological services are provided the establishment of family court itself will help a long way to minimise their stress or do something about it. So accordingly as per this suggestion in May 2000 we have started in our building itself a centre for psychological services where the clinical psychologist comes thrice a week. They give us a free of charge service, they are available from 11.00 a.m. to 5.00 p.m. and the counsellors and the judges motivate the litigants to avail of these services. Now one more thing, I will finish within 5 minutes if there is no time but let me at least focus on a few very important points on which I would like to enlighten the people. We have a cash department where the maintenance amount is deposited by the husbands or when the amount is deducted from the salaries of the husbands that cheque comes to our court in the name of the Principal Judge. The entire maintenance amount is deposited in the family court and it is given to the wife whenever she comes. So this is working just like a banking cash counter. We have 8 to 10 thousand accounts. We are keeping the ledgers, ledger books as we find in the banks where the lady litigant is given an account number. Her photograph is also affixed over there. I may proudly state here that the collections every day in the family court at Mumbai, by way of the maintenance amount is one lakh of rupees. It may also go up to one lakh 75 thousand per day sometimes and we distribute about approximately Rs, 90,000/- per day to the lady litigants. I do not think this is a small achievement naturally because when the family courts were not in existence and these matters were tried by the civil courts or the magistrate courts. We are taking special efforts to see to it that as far as possible, the maintenance amount is deducted from the salary and it is deposited in the court.

So this is a fantastic achievement and the recovery is very high in the family court at Mumbai. Now second achievement is the role of the marriage counsellors; the role played by the marriage counsellors is so successful here at least in Mumbai that about 45% of the matters, are settled for divorce by mutual consent or reconciliation. Out of 45% 8 to 10% is the reconciliation. This is also, according to me, not bad. So this 45% settlement includes 8 to 10% reconciled matters so total 45% matters are settled. 20 to 25% of matters are initially filed for divorce by mutual consent. So we have nothing to do in that having already settled and come before the court for divorce by mutual consent. So about 70% matters are disposed off without contest. This is no exaggeration. I have got all the figures. So if you say that 70% of the matters are disposed off without contest, then only 30% is the contest. Is it not an achievement.

What is lacking, as stated in the report of the Parliamentary Committee, is that most of the States do not have the rules of the functioning of the family court, rules regarding the marriage counsellors - they are paid very poor, and are not in the permanent establishment as stated by the report, lack of infrastructure, inadequate number of courts, inadequate number of judges, courts remaining vacant for a particular period of time and lot of other things regarding non-framing of rules. These are the main factors which are coming in the way of successful functioning of the family courts. So if all these matters are taken care of naturally we would be more successful not only in Maharashtra and in Mumbai but in other States also. So what should be the demand. Demand should be that framing of rules regarding the functioning of the family court as well as regarding marriage counsellors. They should be in the permanent establishment of the family court, permanent service of the government. They should be available there and they should have a good remuneration, if there is a permanent service they will put in maximum to settle the disputes. If all these matters are taken care of, then we will achieve a greater success. Thank You, Thanks a lot.

#### **6.5 INTRODUCTORY REMARKS BY MS. KIRTI SINGH, ADVOCATE**

First of all I would like to thank the National Commission for Women for inviting me to address this gathering and I consider it a privilege and a great opportunity to be able to do so because I have been a practicing lawyer in family law for many years.

I speak here as a representative of the women organisations which had played a great role. It is women's organisations who had played a great role in demanding these family courts and who have been in touch with the family courts

and have been monitoring the functioning of the family courts. I feel that it is important therefore to specify why the women groups and organisations in the country wanted family courts. The obvious answer is gender justice. Apart from that of course women organisations when they had demanded family courts had conceived of a non-adversarial court in which one could get the truth more easily in which women could represent and air their grievances which would be social, accessible and they felt that once they could reach these courts in the absence of lawyers, they could perhaps get nearer to getting justice. Why I am dwelling on this fact is because I feel that some of the complaints that have come about the functioning of the family courts have come because of the lack of this gender justice.

As the Law Minister pointed out a woman has the additional burden of looking after children without any help at all. So therefore one of the important things that we have to see is that when she approaches the court what does she get in the first instance. We want that wherever possible people should live happily; that marriage should be based on the principle of equality; that marriage should be preserved. There are, however, reports from Tamil Nadu, there are reports from Pondicherry, there are reports from Karnataka, there are reports from U.P. when women have often been forced to go back to their marital home and then no subsequent monitoring is done to see how happy they are, whether they are being looked after, whether they are not being subjected to violence and I think this is a very important component. This was a very important component of family courts which should now be paid attention to.

Similarly, with the need to settle family disputes and with the need to perhaps reconcile or settle the parties to part amicably. This is one thing I feel that requires to be discussed because the Family Court Act makes it clear that the court should in the first instance try to arrive at a settlement but what it also says is where it is possible to do so consistent with the nature and the circumstances of the case. What I would like to say here is that it is not necessary, for instance if a woman comes who has no money who has been thrown out of the house who needs maintenance quickly, to send all the parties for conciliation proceedings in the first instance. You must simultaneously give orders for maintenance and necessary orders regarding the children.

Why should it be presumed by all of us that it is the bounden duty of her natal family to look after the women and children in the absence of the husband doing so. That is the first point that I wanted to make about the family courts

functioning because that is a major complaint and you will pardon me for just bringing up this criticism because I am aware that some of the family courts have been functioning with great efficiency in a number of other matters.

The other point that I want to bring up really as a discussion point is what is the kind of procedure that the family court should follow. We had conceived of a simple procedure, a procedure where technical aspects of the law will not hinder the progress of the case. A procedure where the judges will themselves assume certain duties and section 10 of the Family Courts Act, sub section 3 gives wide powers to the judges to do so. It says that to arrive at a settlement or to get at the truth of the facts alleged the judge can lay down its own procedure.

So inspite of civil court being there and inspite of the technicalities of the civil court which we have inherited and which actually ought to be only used for solving commercial matters and matters of that kind not in matter where there is a family dispute going on, where sometimes people need to, where any kind of documents must be allowed in the court, where judges actually should make it their duty to see that all the documents relating to maintenance have been filed, where on the basis of an affidavit the judges can actually act more in a inquisitorial mode.

Also I want to say that family courts were conceived of public places which are non-inimical, where women could go, where atmosphere was such that women and children could easily go and interact with the judges and with the counsellors and to begin with, so it is important for us to insist that wherever family courts are set up that they are set up in such a way that they do not resemble the same old intimidating court room that we have otherwise. I think we need to look at the best practices that we have evolved in our courts and there are plenty of these. We had judges in Delhi, in Delhi the family courts have not been set up but we have judges in Delhi who for instance give maintenance quickly even without all the documents coming because by the time the documents come it is 1½ years down the line. We have judges from other parts of the country who give injunctions order to see that a woman is not removed from her matrimonial home and Flevia has been telling us about a lot of these orders from again Maharashtra, specifically the Mumbai family courts.

We have judges who have been seeing that the woman has a place to stay and is protected. We have the children complex in Mumbai which I think is a very important addition to the family courts and we should replicate it all over the country because children do need supervised visits and if you go to Delhi matrimonial

courts you will be shocked and horrified to see how a father has to meet his child in the court room in one corner for half an hour. He cannot even talk to the child. So I think it is necessary to have the proper atmosphere and the space.

First point that I was making was how conciliation proceedings can go on simultaneously with giving of answer and important orders. I think I have made a few points which are more than enough at this stage. Thank you for listening to me. Thank you.

#### **6.6 CONCLUDING NOTE BY MEMBER, LAW COMMISSION OF INDIA**

In December, the Law Commission has sent a recommendation so far as this aspect is concerned enabling a woman to file a case where she resides. Powers of remand of cases to the family courts and the district courts should be restricted. One of the things I have always had in mind, is that there are hundreds of courts of magistrates in every state which deal with section 125 applications. Now a family court is constituted at the headquarters of the district - may be one or two courts. Certain districts are very large in Uttar Pradesh. A woman who wants to file an application under section 125 was able to file a case in a magistrate's court very near her home but now under the Family Courts Act the jurisdiction of all the magistrates will be immediately ousted once the notification is made and she has to go to the headquarters of the district for every hearing and for filing. This has created serious problems for women. In the beginning when I was in the State of Kerala as Chief Justice in 1991, family courts were formed, first for the entire State. The government, which was deficient of funds, sanctioned only 3 matrimonial courts for 20 districts.

So all the cases pending at least at 7 districts before magistrates got transferred to a single family court resulting in total chaos where women were not able to go to the courts. This is still happening because a number of family courts established in the entire country or in any State are not as many as would easily enable filing of section 125 cases. Please consider whether where family courts are not adequate in number, the High Courts could be given a discretion to continue cases in magistrate's courts so that people do not suffer, women do not suffer. Once they have to go to another place, they may have to stay there for one or two days, male members have to accompany them, the accommodation is a problem, children may be very young; they have to carry them.

There is another problem. There is no point in overnight ousting the jurisdiction of all the courts and vesting power in a family court. A single court will not be able to handle so many cases. This is one aspect which requires consideration.

## APPENDICES

### *Appendix-I*

#### **MODEL FAMILY COURTS RULES, 2002**

##### **The Family Courts (Court) Rules 2002**

In exercise of the powers conferred by Section 21 of the Family Courts Act 1984 (Central Act No. 66 of 1984), and all enabling provisions in that behalf, the High Court of \_\_\_\_\_ hereby makes and prescribes the following rules to regulate the proceedings of the Family Courts in the State of \_\_\_\_\_.

#### RULES

1.
  - a) **Short Title** : These rules may be called the High Court of \_\_\_\_\_ Family Courts (Court) Rules 2002.
  - b) **Commencement** : These rules shall come into force on such date as the High Court may by notification in the official gazette appoint in this behalf.
  - c) **Application** : These rules shall apply to the Family Courts established in the State of \_\_\_\_\_ under Section 3 of the Family Courts Act, 1984.
2. **Definitions** : In these rules, unless the context otherwise requires
  - (a) 'Act' means the Family Courts Act, 1984
  - (b) 'Centre' means a counselling centre
  - (c) 'Counsellor' means a person referred to in Section 6 of the Act
  - (d) 'Court' means the Family Court established under Section 3 of the Act
  - (e) 'High Court' means the High Court of \_\_\_\_\_
  - (f) 'Institution' means any institution or organisation engaged in social welfare.
  - (g) 'Petition' shall include an application under Chapter IX of the Criminal Procedure Code, unless the subject matter or context requires otherwise

- (h) All other words and expressions used but not defined in these rules and defined in the Act, or in the Code of Civil Procedure 1908 or in the Code of Criminal Procedure, 1973, shall have the meaning respectively assigned to them in the Act, or, as the case may be, in the Code of Civil Procedure, 1908 or in the Code of Criminal Procedure, 1973

3. **Working hours :**

- (i) The office of the Family Court shall be open daily, except authorised holidays, for transaction of office work between 10.00 a.m. and 5.00 p.m.
- (ii) The Judges of the Family Court shall ordinarily sit in the Court between 10.30 a.m. - 4.30 p.m. on working days of the Family Court with recess between 1.00 p.m. - 1.30 p.m.
- (iii) The Judges may, for expedience, hold proceedings of the Court beyond the working hours as prescribed in sub-rule (ii) above, and even on holidays.

Provided no such proceedings shall be held under sub-rule (iii) except with the consent of the parties to the proceedings.

- (iv) The Family Court shall hold its sitting in open or in camera as determined by it in each case, but shall hold the proceedings in camera if either party so desires.
- (v) No act of the Family Court shall be invalid by reason of holding or continuing its sitting at any place of its choice or on any holiday or outside normal working hours, when such sitting is informed to the parties in advance.

4. **Place of Sitting :** The Judge of the Family Court may hold sitting at places other than the ordinary place of sitting in consultation with the parties to the proceedings; the provision of the Legal Aid Scheme may be invoked in appropriate cases in the proceedings under the Act.

5. **Institution of Proceedings :**

- (a) All proceedings instituted before a Family Court shall be by way of an application as per form no. 1 appended to these rules which should



be duly verified by the petitioner. Interlocutory application in the proceeding to be instituted or already instituted shall be filed in form no. 2 after being duly verified by the applicant. The petition in form no. 1 or the interlocutory application in form no. 2 can be in any language falling in schedule VIII to the Constitution.

- (b) There shall be no court fee or any other fee in respect of any petition or any interlocutory application filed before the Family Court.
- (c) In respect of application under Section 125 of Cr.P.C. or other application under Chapter IX of the Criminal Procedure Code, the provisions of that Code shall apply.
- (d) The application may be filed before Family Court as permitted under any law which also includes provisions contained in the following laws viz.
  - i) Chapter IX of the Criminal Procedure Code 1973 (2 of 1974)
  - ii) Hindu Marriage Act, 1955 (25 of 1955)
  - iii) Maintenance under the Hindu Adoptions and Maintenance Act, 1956 (78 of 1956)
  - iv) Guardianship of the person or custody of or access to any minor under the Hindu Minority and Guardianship Act, 1956 (32 of 1956)
  - v) Dowry Prohibition Act, 1961 (28 of 1961) for an order for injunction in circumstances arising out of marital relationship
  - vi) Hindu Marriages (Validation of Proceedings) Act, 1960 (19 of 1960)
  - vii) Personal law applicable to Muslims including :
    - a) Muslim Personal Law (Shariat) Application Act, 1937 (26 of 1937)
    - b) Dissolution of Muslim Marriages Act, 1939 (8 of 1939)
    - c) Muslim Women (Protection of Rights on Divorce) Act, 1986 (25 of 1986)

- viii) Parsi Marriage and Divorce Act 1936 (3 of 1936) which can be instituted or taken out before the Parsi District Matrimonial Courts constituted under Sections 18 and 20 of the said Act
  - ix) Indian Christian Marriage Act, 1872 (15 of 1872)
  - x) Indian Divorce Act, 1869 as amended in 2002
  - xi) Special Marriage Act, 1954 (43 of 1954)
  - xii) Child Marriage Restraint Act, 1929 (19 of 1929)
  - xiii) Anand Marriage Act, 1909 (7 of 1909)
  - xiv) Arya Marriage Validation Act, 1937 (19 of 1937)
  - xv) Foreign Marriage Act, 1969 (33 of 1969)
  - xvi) Suits or proceedings relating to Part B States Marriages Validating Act, 1952 (1 of 1952)
  - xvii) Guardians and Wards Act, 1890 (8 of 1890)
6. **Filing of Petition** : A petition or any other application shall be filed with two copies signed by the parties alongwith as many copies to be sent to all the respondents by an officer designated for this purpose. One copy of such petition or application shall be forwarded by the designated officer of the Family Court to the Counsellor forthwith.
  7. **Notice to Respondent** : Notice of the proceeding including interlocutory application, shall be issued in Form No. 3 appended to these rules alongwith a copy of the petition or the application as the case may be. In respect of matter under Chapter IX of the Criminal Procedure Code the summons to appear and answer shall be in Form No. 4.
  8. **Name and address of the party or of the representative to be stated in every process** : The name and address of a party or of the representative appearing for a party shall be stated in every notice, summons, witness summons, interim application, warrant and every process of the Court issued at the instance of such party or representative.
  9. **Notice, Summons, etc. how attested and signed** : All notices, summons, rules, orders, warrants and other mandatory processes shall be sealed with

the seal of the Court and shall be signed by the designated officer of the Court.

10. **Returnable date of notice, summons** : Unless otherwise ordered, the notice, summons shall be made returnable three weeks after the date of filing of the petition, if the respondent resides within the local limits of the Court, and five weeks after the date of the filing of the petition, if the respondent resides outside the said limits.
11. **Mode of service of notice, summons –**
  - (a) The notice, summons shall be served in the manner prescribed in the Code of Civil Procedure, save and except in proceedings under Chapter IX of the Criminal Procedure Code where the provisions of that Code will apply. Alongwith the notice, summons, a copy of the petition and exhibits annexed thereto shall be sent.
  - (b) In addition to the normal process of service by the Court, the applicant will be at liberty to serve upon the respondent, the notices, summons of the court alongwith copy of the petition and exhibits either through person or through other recognisable mode of service including registered post and shall file affidavit of service upon the respondent.
12. **Proof of service of summons** : It has to be shown either by affidavit or application or other evidence that the notices, summons were served upon the respondents.
13. **Substituted service** : In case of failure to serve by normal process, the Court on an oral/written application of the applicant, may direct for serving upon the respondents by substituted mode, i.e. through pasting, publication in the newspaper, etc., and applicant shall file affidavit stating as to the mode adopted for service of summons.
14. **Copy of petition to be furnished to the respondent** : The applicant shall furnish the complete copy with all exhibits to the respondent who asks for the copy on the ground that he has not received the copy of the petition or that he has not received complete copy.
15. The provisions under Order 1 of Civil Procedure Code for addition of a necessary party or a proper party shall be applicable to a proceeding before the Family Court.

16. Proceedings before the Court shall be taken up in the presence of the parties, and a legal practitioner shall be allowed to appear only as *amicus curiae*, if the court finds it necessary in the interest of justice.
17. **Directions on the returnable date :** On the returnable date of the notice, summons, the petition shall be placed for directions before a Judge of the Family Court. On that day, the designated counsellor shall attend the court of the Judge giving directions. The Judge shall, in consultation with the counsellor, direct the parties to attend a specified counsellor for the purpose of counselling. The Judge shall fix a specified date by which counsellor shall file a memorandum setting out the outcome of the proceedings before him. On that day the court will pass further orders and directions as it deems fit and proper.
18. **Role of the counsellor :** The counsellor appointed to counsel the parties shall fix time and date of appointment. The parties shall be bound to attend the counsellor on the date and at the time so fixed.

If either of the parties fails to attend the counsellor on the date and time so fixed, the counsellor may fix another date and shall communicate the same to the absentee party by registered post. In case of default by either of the parties on the adjourned date, the counsellor shall submit a report to the court and on receipt of such report, the court may proceed with the matter without prejudice to other powers of the Court to take action against the defaulting parties.

The counsellor entrusted with any petition on appearance of the parties before her/him shall assist and advise the parties regarding the settlement of the subject matter of dispute and shall endeavour to help the parties in arriving at conciliation.

The counsellor may, in discharge of her/his duties, visit the home of either of the parties and interview the relatives, friends and acquaintances of either of the parties;

The counsellor in discharge of her/his duties may also seek such information as she/he deems fit from the employer of either of the parties and such requisition for information shall be made through the Court.

The counsellor may take the assistance of any organisation, institution or agency in discharge of her/his duties.

The counsellor shall submit a report to the court as and when called for to assist the court in deciding the case in hand. The report may, inter alia contain the following points :

- a) Living environment of the parties concerned
- b) Personalities
- c) Relationship
- d) Income and standard of living
- e) Educational status of the parties
- f) Status in society
- g) Counsellor's findings

The counsellor may also supervise the child/children if and when called upon by the court.

19. **Confidentiality of information** : Information gathered by the counsellor or any statement made before the counsellor or any notes or report prepared by the counsellor shall be treated as confidential and the counsellor shall not be called upon to disclose such information, statement, notes or report to any court except with the consent of both the parties.

20. **Efforts for arriving at settlement** :

- (1) Every Family Court shall maintain separate lists of :
  - (a) Institutions and organisations engaged in social welfare together with names and addresses of representatives of such institutions or organisations;
  - (b) Persons professionally engaged in promoting the welfare of the family with their addresses;
  - (c) Persons working in the field of social welfare with their addresses.

Report from institution, organisation etc. (1) A Family Court may call for report as regards efforts made or to be made by the institution, organisation or persons referred to in Section 5 of the Act :

Provided that where efforts for amicable settlement are continuing or are deferred, the Family Court may require the institution, organisation or person to submit before it an 'interim' report.

21. When the parties arrive at a settlement before the counsellor relating to the dispute or any part thereof such settlement shall be reduced into writing and shall be signed by the parties and countersigned by the counsellor.

#### **HEARING OF PETITIONS IN COURT**

22. **Adjournment by the court :** The petition so fixed shall not be adjourned by the Court unless there are circumstances justifying such adjournment and to meet the ends of justice. The Court shall record its reasons for adjourning a matter.
23. **Memorandum of evidence :** The Court shall record only the substance of what the witness deposes and prepare a memorandum accordingly which shall be read and explained to the witness and the memorandum of the said substance recorded by the court shall be signed by the witness and the presiding officer of the court and shall form part of the record. The evidence taken on affidavit, if any, shall also form part of the record of the court. The Judgement shall contain a concise statement of the case, the point for determination, the decision thereon and the reasons for such decision.
24. The Court shall furnish to the parties to the proceedings before it a copy of the judgement certified to be a true copy free of cost.
25. Appeal under Section 19(1) of the Act shall be in the manner of appeals against the original decree or order in a civil proceedings, but there shall be no court fee payable for the appeal.
26. The rules framed under the Guardians and Wards Act, 1890 by the High Court and published in \_\_\_\_\_ Gazette-II, dated \_\_\_\_\_ shall be applicable in matters relating to Guardians and Wards Act, 1890 to the extent they are not inconsistent with the provisions of the Act or the Rules framed thereunder.
27. **Application for guardianship :** All petitions for guardianship other than applications over which the High Court has jurisdiction, shall be filed before the Family Court.
28. **Contents of the application :** Every petition for guardianship when it is by a person other than the natural parent or natural guardian of the child shall be accompanied by a home study report of the person asking for such

guardianship and his/her spouse, if any. Such report shall be prepared by an approved association of social welfare agencies, etc. or a suitably trained social worker, from the list of agencies and/or persons for the purpose of their association with the court, approved by the Government in the rule made under Section 5 of the Act, in consultation with the High Court.

29. In case of a child placed in guardianship the court may, at any time direct a counsellor attached to the court to supervise the placement of the child and submit a report thereon to the court in such manner as the Court may deem fit.
30. A child study report of the child proposed to be taken in guardianship together with a photograph of the child should also be filed in all petitions for guardianship, as required under Rule 23 of the Rules framed under the Guardian and Wards Act, 1890. Such report shall be in a particular Form prescribed by the court when the child is institutionalised (or court committed). The report shall be countersigned by the petitioner.
31. A proceeding before the Family Court shall not become invalid by reason only of non-compliance with any of the procedural requirements prescribed herein.

#### **INTERIM APPLICATIONS**

32. **Interim applications** : All interim applications to the Court shall be separately numbered as 'Interim Application No.\_\_\_\_\_'. In Petition No.\_\_\_\_\_.
33. **Interim application while matter is pending before Counsellor** : An interim application may be made even while the matter is pending before a counsellor.
34. **Report from the counsellor** : The Court may ask the counsellor to submit an interim report for the purposes of such an application before deciding an interim application. The Family Court Rules, 2002 relating to reports to be submitted by counsellors, shall *mutatis mutandis* apply to interim reports also.
35. **Officers** : The High Court may authorise and empower judge of the Family Court, or if, there be more judges than one in a Family Court, the principal judge of such court, to appoint so many and such clerks and other ministerial officers as may be necessary for the administration of justice and due execution of all powers and authorities exercisable by a Family Court :

Provided that the appointments of officers and ministerial staff shall be subject to any rules or restrictions as may be prescribed or imposed under the Act.

36. The proceedings before the court shall be heard and disposed of as expeditiously as possible, preferably within 3 months, and in achieving this objective the rules or procedure may not rigidly be adhered to.
37. **Control of High Court** : Every Principal Judge, and judge of Family Court shall be under administrative and disciplinary control of the High Court.
38. **Power of High Court to transfer judges, officers, etc.** : Without prejudice to the administrative and disciplinary control of the High Court under Rule 12, such court or a judge thereof authorised under general or special order in this behalf by such court, may where it is considered necessary or expedient so to do, transfer any Principal Judge, Additional Judge, Judges, or any officer or Ministerial official of one Family Court to another Family Court in this State or retransfer such Principal Judge, Additional Judge, Judge, officer or ministerial official, as the case may be and every such Principal Judge, Additional Judge or Judge, officer or ministerial official shall comply.
39. **Power of High Court to issue directions** : For carrying out the purposes of the Act and for ensuring the uniformity of practice to be observed by Family Courts and for expeditious disposal, the High Court may from time to time, supervise and inspect the Family Courts and issue directions/circulars etc. to the Family Courts.
40. **Judge not to try a case in which he is interested** : No Judge shall hear or decide any case to which he is party or in which he/she is personally interested.
41. The Family Courts may use such forms and containing such particulars as may be approved by the High Court.
42. **Powers to call for information etc.** : The High Court may require Family Courts to maintain such registers and records and containing such particulars as may be approved by the High Court.



**Appendix-II**

**MODEL FORMS**

**FORM NO. 1**

**IN THE FAMILY COURT OF \_\_\_\_\_**

PETITION NO. \_\_\_\_\_

Between

Mrs./Mr. \_\_\_\_\_

W/o or S/o \_\_\_\_\_

Age \_\_\_\_\_ Occupation \_\_\_\_\_

Present address \_\_\_\_\_

Permanent address/residence \_\_\_\_\_ petitioner

And

Mrs./Mr. \_\_\_\_\_

W/o or S/o \_\_\_\_\_

Age \_\_\_\_\_ Occupation \_\_\_\_\_

Present address \_\_\_\_\_

Permanent address/residence \_\_\_\_\_ Respondent

Petition under Section \_\_\_\_\_ for \_\_\_\_\_

The above named petitioner respectfully submits as under :

1. That the petitioner and respondent are legally married \_\_\_\_\_ & \_\_\_\_\_. Their marriage was solemnized on \_\_\_\_\_ at \_\_\_\_\_ according to \_\_\_\_\_ customs. After the marriage both the petitioner and respondent had been living/lived together as husband and wife at \_\_\_\_\_. Out of the wedlock the couple was blessed with the child aged \_\_\_\_\_ named \_\_\_\_\_ and another child aged \_\_\_\_\_ named \_\_\_\_\_.

2. The petitioner submits that (give the grievance of the petitioner against the respondent with full particulars)
  - (a) .....
  - (b) .....
3. This petition is not presented in collusion with the respondent and there is no unnecessary or improper delay in institution of these proceedings.
4. Cause of action for the petition arose on (date) when the marriage of the petitioner with the respondent was performed. It also arose on several occasions when the respondent behaved and committed .....
5. The petitioner and the respondent both last lived together at \_\_\_\_\_ (or where the marriage took place (or where the respondent at the time of presentation of the petition resided) which is within the territorial jurisdiction of this Hon'ble Court.

**PRAYER**

6. The petitioner therefore prays that this court may be pleased to pass an order directing \_\_\_\_\_ .

Place :

Date : Petitioner

Verification :

I, \_\_\_\_\_ Daughter/Son of \_\_\_\_\_ aged \_\_\_\_\_ resident of \_\_\_\_\_ do hereby declare that the above facts stated in the petition are true and correct to the best of my knowledge, information and belief. Hence, verified on this the \_\_\_\_\_ day of the month \_\_\_\_\_.

Petitioner

**FORM NO. 2**

**IN THE FAMILY COURT OF \_\_\_\_\_**

Interlocutory Application No. \_\_\_\_\_

In

PETITION NO. \_\_\_\_\_

Between

Mrs./Mr. \_\_\_\_\_

W/o or S/o \_\_\_\_\_

Age \_\_\_\_\_ Occupation \_\_\_\_\_

Present address \_\_\_\_\_

Permanent address/residence \_\_\_\_\_ petitioner

And

Mrs./Mr. \_\_\_\_\_

W/o or S/o \_\_\_\_\_

Age \_\_\_\_\_ Occupation \_\_\_\_\_

Present address \_\_\_\_\_

Permanent address/residence \_\_\_\_\_ Respondent

Interlocutory Application under Section \_\_\_\_\_ for \_\_\_\_\_

The above named petitioner respectfully submits as under :

1. That the petitioner and respondent are legally married \_\_\_\_\_  
& \_\_\_\_\_. Their marriage was solemnized on \_\_\_\_\_  
at \_\_\_\_\_ according to \_\_\_\_\_ customs. After the  
marriage both the petitioner and respondent had been living/lived together

as husband and wife at \_\_\_\_\_. Out of the wedlock the couple was blessed with the child aged \_\_\_\_\_ named \_\_\_\_\_ and another child aged \_\_\_\_\_ named \_\_\_\_\_.

2. The petitioner submits that (give the grievance of the petitioner against the respondent with full particulars)

(a) .....

(b) .....

**PRAYER**

The Petitioner therefore prays that this court may be pleased to pass an order directing \_\_\_\_\_.

Place :

Date : Petitioner

Verification :

I, \_\_\_\_\_ Daughter/Son of \_\_\_\_\_ aged \_\_\_\_\_ resident of \_\_\_\_\_ do hereby declare that the above facts stated in the petition are true and correct to the best of my knowledge, information and belief. Hence, verified on this the \_\_\_\_\_ day of the month \_\_\_\_\_.

Petitioner

**FORM NO. 3**

**IN THE FAMILY COURT AT \_\_\_\_\_**

Petition No. \_\_\_\_\_ of \_\_\_\_\_

\_\_\_\_\_ Petitioner

*versus*

\_\_\_\_\_ Respondent

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Whereas the above-named petitioner has instituted a petition against you, as set out in the petition (annexed with the petition & annexure).

And whereas the petition will be placed for directions on \_\_\_\_\_ day of \_\_\_\_\_

You are hereby summoned to appear before the Family Court to answer the petitioner's claim on the said \_\_\_\_\_ day of \_\_\_\_\_ at \_\_\_\_\_ O'clock and

Take notice that on the day before mentioned after hearing parties who appear directions will be given by the Judge as to the date of hearing before a counsellor of the family court and other matters concerning the petition, and

Take further notice that if you fail to appear before the Judge on the day the petition may be ordered to be set down on Board on the same day or any subsequent day as "undefended" and you will be liable to have a decree or order passed against you.

Witness \_\_\_\_\_ Judge at \_\_\_\_\_, aforesaid this \_\_\_\_\_ day of \_\_\_\_\_

Registrar

**FORM NO. 4**

**IN THE FAMILY COURT OF \_\_\_\_\_**

PETITION NO. \_\_\_\_\_

Between

Mrs./Mr. \_\_\_\_\_

W/o or S/o \_\_\_\_\_

Age \_\_\_\_\_ Occupation \_\_\_\_\_

Present address \_\_\_\_\_

Permanent address/residence \_\_\_\_\_ petitioner

And

Mrs./Mr. \_\_\_\_\_

W/o or S/o \_\_\_\_\_

Age \_\_\_\_\_ Occupation \_\_\_\_\_

Present address \_\_\_\_\_

Permanent address/residence \_\_\_\_\_ Respondent

Petition for maintenance under Section 125 of Criminal Procedure Code.

The above named petitioner respectfully submits as under :

1. That the petitioner and respondent are legally married \_\_\_\_\_ & \_\_\_\_\_. Their marriage was solemnized on \_\_\_\_\_ at \_\_\_\_\_ according to \_\_\_\_\_ customs. After the marriage both the petitioner and respondent had been living/lived together as husband and wife at \_\_\_\_\_. Out of the wedlock the couple was blessed with the child aged \_\_\_\_\_ named \_\_\_\_\_ and another child aged \_\_\_\_\_ named \_\_\_\_\_.

2. The Petitioner submits that (give the grievance of the petitioner against the respondent with full particulars)
  - (a) .....
  - (b) .....
3. Petitioner has no independent resources/limited resources to maintain herself and her minor children. She is presently dependent upon her parents, who have their own expenses and may not be in a position to support the petitioner for long period.
4. That the petitioner on \_\_\_\_\_ called upon the respondent to provide money for maintenance for herself and her minor children but as yet no amount towards maintenance has been received from the respondent.
5. That the respondent is a person with means and has the following property, monthly income etc.
  - (a) .....
  - (b) .....
  - (c) .....
6. In the circumstances stated above there is no alternative for the petitioner and her minor children but to approach this court for maintenance.

**PRAYER**

The Petitioner therefore prays that this court may be pleased to pass an order directing the respondent to pay Rs. \_\_\_\_\_ towards maintenance of the petitioner and Rs. \_\_\_\_\_ towards maintenance of the minor children.

Place :

Date :

Petitioner



# **Family Courts**

**(Report on Working of Family Courts  
and Model Family Courts)**

**Report of the Workshop Held on 20 March 2002**

**NATIONAL COMMISSION FOR WOMEN**  
4, Deen Dayal Upadhyaya Marg, New Delhi-110002



## **PROJECT TEAM**

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## FOREWORD

The quality of family life determines not only the health and happiness of the parties concerned but also of the society at large. Unfortunately today, the myth of permanence and inviolability of marriage has been blatantly eroded and a phenomenon which has been growing over the last few years is turmoil within the family relationships and rickety marriages. The fall-out of this is marital break ups with its concomitant problems like illicit or socially unacceptable alliances, neglected children, vagrancy, delinquency and destitution.

There is no gainsaying that matrimonial litigation is a traumatic experience in the lives of partners and of their children. Apart from emotional problems, it creates many legal, social and practical complications. It is unfortunate, however, that generally, the only way available to parties to obtain “relief” from an unhappy and intolerable relationship is by subjecting themselves and their spouses to the hazards of ordinary court procedures.

It needs to be pointed out here that realising the futility of thrusting an odious relationship on the parties, divorce laws are being liberalised everywhere. In India as well, from 1955 when the Hindu Marriage Act was passed, till date, several amendments have been made to liberalise the grounds for divorce; coupled with that, the courts have also so construed and applied the provisions as to provide maximum relief with least hardship to any of the parties. The same is true in regard to other personal law statutes governing Christians, Parsis and Muslims, as well.

However, while sensitivity of law makers is evident in substantive laws, there is little done in the direction of removing hardships in the procedures involved in matrimonial litigation. The whole process of settlement of matrimonial disputes, which includes divorce, annulment, separation, maintenance, settlement of matrimonial

property and child custody, is nerve-racking, complex, expensive and time consuming. It is adversarial in nature involving a lot of mud-slinging. The pain and suffering of the parties already in agony, is compounded and by the time any relief comes from the court, the parties are physically, financially and emotionally wrecked and past their age of resettling in life. As aptly pointed out by Lord Hailsham [Quoted by Cretney and Massion in *Principles of Family Law*, p.161, f.n.9 (1990)]

“though the law could not alter the facts of life, it need not unnecessarily exaggerate the hardships inevitably involved.”

Thus, in order to ensure that the hardship is not unnecessarily exaggerated, we need to seriously reform the procedures. Just as in medicine the agony of a patient suffering from even the most dreadful and painful of diseases can be mitigated by drugs, gentle nursing, love, care and sensitive handling of the patient, so also in case of marital breakdown, special procedures and sensitive handling of the parties, in an informal manner, can make the painful and embarrassing process, less traumatic.

The Law Commission, in its Report, as early as 1973 (Fifty Fourth Report on the Code of Civil Procedure), strongly recommended the need for special handling of matters pertaining to divorce. Consequent to these recommendations, Order 32-A was incorporated in the Civil Procedure Code in 1976. This order “seeks to highlight the need for adopting a different approach where matters concerning the family are at issue, including the need for efforts to bring about an amicable settlement”.

After a lot of debate and discussion, the Family Courts Act was passed in 1984. The whole idea behind the Act is to ensure speedy and inexpensive relief with least formality and technicalities. There is a lot of emphasis on conciliatory efforts and amicable settlement. However, even after two decades of the enactment of the law, family courts have yet to be set up in most of the states.

Even in states where they have been set up, the feed-back on their efficacy is mixed. The main reason for this is that despite provisions for expeditious disposal, informality and expert counselling, the necessary infrastructure is not there. Besides, there is an opposition from the bar as well since lawyers are, as a matter of rule, not allowed to appear in these courts with an exception that the court may seek their

assistance as *amicus curiae* if it thinks it necessary in the interest of justice. Another major hurdle in the effective implementation of the Family Courts Act is the absence of uniform Rules under the Act.

The National Commission for Women in its workshop on “Working of Family Courts in India” has deliberated on various aspects of the issue which have been brought out in the report.

It has been aptly pointed out that in the absence of proper infrastructure and uniform rules with regard to remuneration etc. of the counselors, “skilled counsellors are either not available or are engaged on very small fees ... consequently they feel demoralised and have no interest in giving quality time or attention to the cases”. Actually, these counsellors have to play a very crucial role in shoring up the marriage which should be the principal aim of all proceedings in the family courts.

It may be mentioned that the task of writing the report was assigned to Ms.Nupur Mitra, Project Coordinator; the report has been edited by Prof.Kusum, Former Research Professor, Indian Law Institute, New Delhi and the workshop had been organised by the legal Cell of the National Commission for Women.

The NCW has now completed the onerous task of drafting of uniform Model Rules under the Family Court Act. These have been given in the Appendix of the Report. Four model forms have also been appended in the Report.

It is hoped that the Report will serve as a useful guide for the formulation of uniform Family Court Rules, as also motivate the states to set up family courts, where none exists and improve the efficacy and functioning of those in existence today.

**Poornima Advani**