

Conference for District Judiciary on Matrimonial Laws (P-1317)

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National Judicial Academy organized a conference for judges from the district judiciary on the theme of Matrimonial Laws. The conference aimed to identify optimal approaches for adjudicating family disputes and the proper role of judicial officers while addressing family law issues. Participant judges shared experiences on issues and concerns that arise during the adjudication of family disputes and the innovative best practices adopted by them in dealing with such issues. The focus of the discussion was on the matters related to divorce, maintenance and Section 498A IPC, anti-conversion legislations, child custody and guardianship. A psycho-social perspective was provided to comprehend the causes and catalysts of family disputes and the tools to deal effectively with parties involved in family disputes.

The conference commenced with the introductory remarks by the Director who stated that the subject of the conference is a combination of law and social systems. Reference was made to the *parens patriae* jurisdiction of the court and emphasis was placed on the need for ensuring social justice rather than mere legality.

The discussions in the first session on *Understanding Family Disputes: A Psycho-Social Approach* commenced pointing out the stereotype of assigning the job of the family court judge to women judges. The general gender bias and stereotyping was highlighted and the need to address this issue was stressed upon in order to create a level playing field in the court. The gendered differences observed in court between male and female litigants was attributed to cultural, social and situational differences. Further, it was stated that these unresolved differences between parties leads to disagreements and disputes. Underlying the entire dispute in family courts is the sense of injustice which is felt by the parties to the dispute. The concept of justice was dwelt upon in the course of the discussion and it was stated to be a subjective concept which varies from case to case and person to person.

The realities of the Indian social milieu including male privilege and bias towards male child was discussed. It was stated that familial upbringing conditions women to accept inequality as such differential treatment of male and female child is accepted as part of life by the female child. In this context it is worthwhile for judges to keep in mind that a woman who stands

against injustice meted out to her in the family is required to stand against the people who are closest to her and consequently, the court must be sensitive to her challenges. Concerns were expressed regarding the growing disenchantment towards marriage was dwelt upon. The major factors leading to marital breakdown were stated to be aggression, lack of communication, lack of patience, absence of mental and physical intimacy, parental role related stress, alcoholism, domestic violence, lack of commitment, maladjustment with each other and with family, incompatibility, and personality differences. Reference was made to the book 'Getting to Yes' by Roger Fisher and William Ury.

Access to justice was also a point of discussion, and it was stated that access to justice is not synonymous with access to courts. The impediments faced by litigants especially women in approaching the judicial system were highlighted *viz.* –

- Illiteracy
- Ignorance of law
- Distrust of systems including police and government administration
- Fear of ostracization
- Family pressures
- Delays in courts
- Lack of finances

With this background, it was emphasized that the court must create a level playing field for both parties to ensure equity. This can be achieved by ensuring that both parties have equal legal assistance. The court must make efforts to address the weak point of the disadvantaged party to ensure they do not suffer due to the inadequacy of legal assistance and are afforded a fair trial. The participants were advised to focus on the quality of justice rather than the quantity, and to not get bogged down by the number of cases before them. It was also suggested that judges should interact with the parties during the hearing to understand the nuances of the matter. The participants were also advised to encourage communication between the parties. A note of caution was sounded regarding the appearance of neutrality on the part of judge. A judge should not appear to be too close to any party. The participants were called to be unbiased while adjudicating the matters before them and were also urged to strike a balance between the right of the individual and the institution of marriage. Discussions were also undertaken on marital rape and *khula* marriages as an emerging issue in matrimonial law.

Emphasis was placed on mental health issues and their impact on matrimonial relations. It was pointed out that suicide, attempts to commit suicide and threat of committing suicide can be an indication of a conflict and may be a symptom of distress. It may also be a fracture of the mind requiring medical help. Suicide may also be a manifestation or outcome of trauma, cruelty and abuse. Hence, it is crucial for judges to screen all such cases and ensure a meticulous history of the matter and the person is undertaken to identify the cause of the conflict. The participant judges were also made aware of mental health issues like depression and its symptoms.

It was stated that the emotions that are predominantly exhibited in the Family court are anger, revenge and hate. It is necessary to address these emotions to identify the root cause of the conflict and to promote settlement. The participant judges were advised to provide an opportunity to the parties to vent their emotions and to discuss the matter. The role reversal technique was suggested as a useful tool to promote conciliation between the parties. The judges were advised to deal with acrimonious fights by firstly, solving the smaller issues in the dispute and secondly, by engaging agencies to counsel the parties.

The second session on *Adjudication of Family Disputes: Disputes relating to Marriage* was commenced highlighting the expectations of persons who enter into a marriage. Fault based divorce in Indian law was discussed. Emphasis was placed on the need to understand the underlying causes of dispute, the perspective of the parties and their expectations. The objective of the Family courts i.e. promotion of conciliation and resolution of disputes was underscored. It was stated that delay in adjudication of family disputes impacts the effectiveness of the Family Courts in achieving conciliation and settlement between the parties. The major areas that a family court deals with were listed (dissolution and continuance of marriage; injunctions; maintenance and alimony; *stridhan*; cruelty, harassment and domestic violence; and custody, care and contact with children).

A collaborative approach in the adjudication of family disputes was suggested. The participant judges were advised to engage experts (medical, welfare and counselling experts) and NGOs to assist them in ensuring conciliation between the parties. The agencies involved in family court processes in other countries including technical specialists, interdisciplinary intervention and in-house court services were pointed out. Mediation, negotiation and client counselling were also suggested as useful tools to promote conciliation.

Unequal power relations and power imbalance between the spouses were stated to be the source of cruelty, domestic violence and abuse in marriage. The social and cultural causes of cruelty were also elucidated. The major factors which contributed to the breakdown of marriage i.e. urbanization, breakdown of joint family system, communication gap, and personality disorder; were discussed. The emerging types of family arrangements were highlighted (traditional marriage, live-in relationships, nuclear family, adoptive family, and joint family).

Discussions were undertaken on the types of cruelty in marriage (physical, mental, emotional, psychological, economic, social, and sexual)

The concept of cruelty, and its definition in the UN Model Legislation were discussed. Cruelty was stated to be gender-based physical, sexual and psychological abuse inflicted by a family member against a woman in the family. Cruelty was stated to include acts and attempts to commit assault, aggravated physical battery, kidnapping, threats, intimidation, coercion, stalking, humiliation, verbal abuse, forcible or unlawful entry, arson, destruction of property, sexual violence, marital rape, dowry or related violence, female genital mutilation, violence related to exploitation through prostitution, and violence against household workers.)

The concept of domestic violence under the Protection of Women from Domestic Violence Act, 2005 (PWDV Act) was explained to include physical, mental, verbal, sexual, emotional, economic, and psychological violence. A distinction was drawn between Section 498A, Indian Penal Code, 1860 and Section 3, PWDV Act. A comparison was drawn between the law in India, USA and UK on violence against women in the family. An illustrative list of acts of domestic violence was drawn in the course of the discussion. Reference was made to the case of *R. v. Kiranjit Ahluwalia*, (1992) 4 All ER 889, *Aruna Ramachandra Shanbaug v. Union of India*, (2011) 4 SCC 454 and the domestic violence case of Nicole Brown Simpson.

Discussions were undertaken on Section 498A, Indian Penal Code, 1860 and emphasis was placed on sifting through cases to identify legitimate cases and to weed out false cases. IN this context, reference was made to the judgments in *Rajesh Sharma v. State of UP*, 2017 SCC Online 821 and *Social Action Forum for Manav Adhikar v. Union of India*, 2018 10 SCC 443. Emphasis was placed on the need for gender neutral laws. The psychological, social, physical and economic effect of domestic violence was highlighted. The required measures to respond to domestic violence – preventive, punitive, infrastructural measures, and stakeholder

sensitivity were elaborated upon. The reliefs provided in the PWDV Act were discussed (counseling, protection orders, monetary reliefs, custody orders, compensation orders etc.)

The underlying objective of the establishment of the Family Court to enable access to justice for women was dwelt upon. The low rate of divorce and reasons for the same were dwelt upon. Emphasis was placed on the unequal position of women vis-à-vis access to courts and marital rights (including right to dissolve a marriage) were cited as reasons for the establishment of Family Courts as a family friendly court. It was stated that Family Courts are required to consider three intertwined factors (law, justice and gender) while dealing with matters before them. The position of women as the weaker disadvantaged section was highlighted and emphasis was placed on the need to strike a balance between the parties, and ensure gender equity.

The unequal position of women in the family was highlighted citing the legal position of the economic value of domestic services provided by the women and the dependant status of the wife. The consideration in MACT law of the economic contribution of women in the household was highlighted and the need to consider the contributions of the woman in housework, raising of children, caring of aged persons in the family was emphasised. Reference was made to the case of *Rajnesh v. Neha*, (2021) 2 SCC 324.

The concept of marital home and matrimonial property was discussed and discussions were undertaken on the woman's right to live in the marital home (Section 17, PWDV Act) and matrimonial property (Section 27, Hindu Marriage Act, 1955). Reference was made to the judgment in *Balkrishna Ramchandra Kadam v. Sangeeta Balkrishna Kadam*, (1997) 7 SCC 500. The social realities which prevent women from exercising their right to claim a share in the property of her parents was noted. The challenges in ensuring economic equity between the parties was discussed viz. lack of legal clarity on matrimonial property; difficulty in ascertaining true income of husband; and ensuring financial security of the woman. It was suggested that the true income of the husband may be assessed by considering the movable and immovable property of the husband, the standard of living, assets owned, and lifestyle including club memberships and spending

On the quantum of maintenance, it was asserted that the Court should ensure that the woman be provided enough maintenance to ensure the same standard of living she was accustomed to

at the time of marriage. Efforts must be made to ensure gender equality through maintenance. Further, it was stated that the fact that the wife is educated and able itself does not form a sufficient ground to refuse maintenance. The court must be conscious of the social realities as often women are required to give up their job at the time of marriage or at the time of child birth. A distinction was drawn between the ability to earn and the actual earning of the woman.

The third session on *Intersection of Anti-Conversion Legislations and Laws relating to Marriage* commenced with pre-historic times, or when marriage came to be established as an institution there was no concept of conversion but now it is the recognition of the personal autonomy of an individual through Article 21 of the constitution of India. The exercise of parens patriae jurisdiction by the courts in matters of conversion recognized so that the life prospers and does not get extinguished was emphasized.

It was discussed that one of the many factors that contributed to the fall of the Roman Empire was the rise of a new religion, Christianity. By approving Christianity, the Roman state directly undermined its religious traditions. Finally, by this time, Romans considered their emperor a god. But the Christian belief in one god, who was not the emperor, weakened the authority and credibility of the emperor was discussed during the discourse. The period from protestant to the establishment of French sovereignty, to look the end of the crusade, and paving the way to the establishment of sovereign states with adaptations and modifications, is a period of reason. It was mentioned that this period of reason had a totally rational and natural law approach which leads to the concept of liberty. The process of reasoning has actually allowed denying the authority of the theocratic state and allowed the principles of natural ideals. Today, the issue of conversion is again going through the process of reasoning to justify conversion to gain liberty. In India, which is diverse and where the social structure is different, the freedom of choice of religion, principles of liberty, and exercising rights as per Article 19 and Article 21 is subject to the decision of the constitutional courts of India. It was mentioned that no government could control the subject of religion unless it is attached to certain values. The fear of the dominance of one religion over other is always present. The legislature is always and till date avoid conversion of one religion into another was highlighted. Freedom of religion is not about the choice we make rather it's about the dominance of one religion over another which the legislature has been trying to avoid since historic times and that is the reason for the introduction of anti-conversion laws in India. It was highlighted that a balance needs to be maintained between anti-conversion laws on one hand and privacy and autonomy on the other.

Further, Privacy as a concept is where man tries to shield himself from the invasion of others to protect himself in terms of clothing, shelter and some notions of values. The concept of privacy got highlighted in 1890 by Samuel D. Warren & Louis D. Brandeis in Harvard Law Review wherein they highlighted about the right to privacy because until then the notion of protection of property is a tangible interest. They expanded the idea of privacy which includes the right to enjoy one's life as per one's choices. The idea of enjoyment were mooted. It was discussed that autonomy is derived from Greek word which means self-govern. It has three aspects, (a) non-interference from others, (b) independent decision and (c) to live in one's own decision. The concept of legal paternalism in terms of Article 19 and Article 25 i.e. the power of the state to regulate the behaviour was discussed. The state has the right to consider what is good for the people and in context of this the state has the legislative competency to legislate anti-conversion laws but the extent to which this right can be exercised is a debatable issue. Furthermore, it was mentioned that the two elements that governs autonomy are the informed choice and societal compulsions. The sad reality in India is the forceful compulsion of women mainly because of the demand raised by the groom's family and to balance these things it is important to have an anti-conversion law. It was stressed that the conversion should absolutely be one's choice.

The session concluded with a discussion on a plethora of cases ranging from *Joydeep Majumdar v. Bharti Jaiswal Majumdar*, (2021) 3 SCC 742; *Narasimha Sastry v. Suneela Rani*; *Beena v. Shino G.Babu* 2022 SCC OnLine Ker 778; *Fr. P. George Ponnaiah v. Inspector of Police and Others* 2022 SCC OnLine Mad 81; *Lavanya case* and *Nazeer v. Shameena's case*.

It was advised that a judge should not surrender to the clergy. They should keep aside their personal philosophy and look at the principle of constitutional morality that should infuse one's soul. Secularism is a basic feature of the constitution as propounded in *S R Bommai case*. It was highlighted that under Karnataka conversion law, there is a ban on forced conversion. Post 2017, these conversion are mostly related to marriage. The role of District Magistrates is under challenge and many states have stayed these until the final disposal of the case. Lastly, it was pressed that there is no interfaith marriages perhaps it is interfaith love culminating into marriage and in the process anti conversion laws creates a barrier.

The fourth session ***Adjudication of Family Disputes: Custody & Guardianship*** mentioned that Law has travelled from lawful custody, habeas corpus, paramount consideration, and now to

the best interest of the child. The participants were made to understand how to deal with sensitivity when dealing with guardianship and custody cases. A child is a child and he cannot be equated with an adult therefore, it is necessary to take some decisions on behalf of and for the benefit of the child. It was mentioned that child has the right to both parents looking from the perspective of the welfare of the child. The court should always strike a balance between the rights of the child vis-à-vis the rights of the parents. A hypothetical situation was given to teach the participants how to handle situations involving an alcoholic father who abuses the mother, beats her black and blue, but is also affectionate to the child at the same time, and how to pass orders regarding visitation rights. It was suggested not to let the divorce grounds and arguments between parents colour the custody hearing, and the decision should involve a balanced approach to ensure the child gets the best of both parents. It was advised to have compassion when you are dealing with custody matters because you are dealing with human lives. Law can give you the parameters but it is for the judge to mold the relief. The judge needs to take efforts to cool down the anger and get the parties to talk rationally. A child should never become the bone of contention in any matrimonial dispute. The participants were made to understand that a matrimonial dispute is a dispute between couple, a child should never become the victim of the same. A child should never be the bargaining chip in a matrimonial dispute. A judge should take time out to de-escalate the conflict and to equitably balance the needs of parents and children. The speaker highlighted such litigation as vicious litigation. Furthermore, it was advised that the standard approach of denying visitation rights if maintenance is not given should be avoided as in this process the relationship of the child with the parent is broken. The concept of shared custody should often be used as a device to balance the child's inclination towards both parents. Cases of brainwashing and tutoring the child by one parent should be handled with caution. Negative influences of the parent on the child is also a cause where child started disliking one parent. Custody and guardianship are viewed as the power to determine the rearing of the child. Faith, education, etc. are also factors that become a part of the custody and guardianship terms. It was suggested while passing orders regarding custody and guardianship, sensitivity and humane aspect should be kept in mind.

There is a need to identify fake and true cases in matters of incest claims in custody. There are difficulties in quashing such cases, such allegations are sometimes used as measures to make the case complicated. The speaker highlighted the need for careful examination of allegations to identify the truth. Every case is unique so the solution in each case should be unique, satisfaction of the parties should be an important consideration in the adjudication of family

disputes. A parent is a parent regardless of gender, so custody should be granted considering the child's best interests. During the discussion, it was advised that the mother's maintenance should be increased once the child turns 18 as she is responsible for covering all the child's college expenses.

Lastly, it was highlighted that the law should not be an obstacle to doing the right thing. The role of a judge should be dynamic and proactive. The doctrine of *parens patriae* was emphasized. In cases of remarriage and stepchild, the mind of the judge should be open and bias should not play any role while delivering any judgment. Don't let the emotion sway you. Look to see the truth and Break the barriers to reach the true facts.

The fifth session on *Optimal Approaches for Adjudicating Family Disputes* commenced with a discussion on the law and judicial decisions on the recognition of foreign orders and decrees in matrimonial disputes. In this regard reference was made to Sections 13 & 14 of the Civil Procedure Code, 1908. Reference was also made to the judgments in *Narasimha Rao v. Y. Venkatalakshmi*, (1991) 3 SCC 451, *Satya v. Teja Singh*, AIR 1975 SC 105 and *Minoti Anand v. Subhash Anand*, AIR 2009 Bom 65 on the issue of recognition of divorce decrees passed by a foreign court by courts in India. Reference was also made to the judgments in *Kirti Sharma v. Civil Judge, Senior Division, Etah*, AIR 2005 All 197, and *Lily Thomas v. Union of India*, AIR 2000 SC 1650. The judgment in *Bhuvan Mohan Singh Vs. Meena & Ors.*, AIR 2014 SC 2875 was cited stress on the need for awareness as to the emotional issues involved in matrimonial disputes and the increase in the fragmentation of relations due to delay in the disposal of the case. Emphasis was placed on timely disposal and stern response to the dilatory tactics of parties. The Family Court judge was called upon to be sensitive to the issues involved in the matters before them and to handle such issues with discernment and sensitivity.

The procedural flexibility provided to the Family Court under Section 10 of the Family Courts Act, 1984 was highlighted to urge the participant judges to mould the procedure according to the case to ensure justice. Further, emphasis was placed on the exemptions in evidentiary standards under Section 14 of the Family Courts Act, 1984 which provides sweeping powers on Family Court to receive as evidence any Report, Statement, Document, Information or Matter, irrespective of the fact whether it is otherwise relevant or admissible under Evidence Act. Sections 15 & 16 of the Family Courts Act, 1984 which relate to the recording of evidence by the Family Court was discussed. Further, the overriding effect of the Family Courts Act,

1984 *vide* Section 20 was also pointed out. It was stated that the objective of these provisions is to enable the Family Court to adopt pragmatic approach *sans* procedural technicalities to ensure expeditious justice. It was stated that the Family Courts Act, 1984 provides discretion to the judge and relaxes procedural requirements in order to ensure that the litigant benefits from the judicial process. The participant judges were advised to use this discretion in the spirit of Article 15(3) of the Constitution of India. It was stated that judges presiding over Family Courts have a special mandate to alleviate the sufferings of litigants and bring speedy justice to them. Furthermore, matrimonial litigation causes extreme emotional trauma, hence judges have to be sensitive to the needs of the litigants and be lenient with respect to procedural technicalities. It was emphasised that the overarching aim should be to create the atmosphere which is most conducive to an amicable resolution of the dispute while protecting the rights of the weaker parties. Reference was made to Section 17 of the Family Courts Act, 1984 to underscore the need for concise judgments with points for determination, reasons thereof and the decision.

The words of Lord Denning were quoted to emphasise on the role that a Family Court judge ought to play – “*the presiding Judge of a matrimonial court should not act like a microscope but should act as a stethoscope so that the Judge could feel the rival matrimonial parties and try to reconcile them for a happy family life.*’ It was stated that the success of the Family Court depends on the approach adopted by the judge. An innovative and dynamic approach with de-formalisation was suggested. Reference was made to the judgments in ***Romila Shroff v. Jaidev Shroff***, II (2000) DMC 600 FB and ***Capt. Ramesh Chandra Kaushal v. Veena Kaushal***, AIR 1978 S.C. 1807 to emphasise on the requisite approach to be adopted by Family Courts.

The discussion in the session also threw light on the distinction between a conflict and a dispute. It was stated that conflict is a natural phenomenon in human life. Conflict is usually handled by the methods of avoidance, de-escalation and communication. Communication was stated to be a crucial element for resolution of disputes and conflicts. The participant judges were advised to attempt to resolve conflict in matrimonial matters by hearing both sides. The major causes of dispute in marriage were highlighted *viz.* ego, incompatibility (financial, emotional and physical), addiction, violence/ abuse, fraud, extra-marital relations, behavioural disorder, perception, medical factors etc.

The objective of the Family Court i.e. amicable settlement of matrimonial disputes was highlighted, and emphasis was placed on speedy disposal of disputes, promotion of conciliation and settlement. The legal mandate on the Family Court under Section 9, Family Courts Act, 1984 to make efforts for settlement and the importance of mediation and conciliation in matrimonial disputes were underscored.

Mediation was highlighted as a suitable method of settlement of matrimonial disputes. The features of mediation and its advantages over adjudication which make it a feasible and attractive option for litigants were delineated. The process of mediation was explained and emphasis was laid on the 'win-win' outcome of mediation i.e. both parties win in mediation and the settlement is based on mutual agreement.

The role of the referral judge in mediation was focused upon. It was stated that the referral judge plays an important role as he/she is required to identify cases which are fit for settlement. It was stated that referral for mediation should be made in cases where

- The parties are willing for settlement
- Parties are not willing for settlement but are ready to explore the possibility of settlement
- The referral judge is satisfied that the element of settlement exists.

The role of the referral judge in the pre-mediation stage was threefold – identify and refer suitable cases, motivate and prepare parties, and pass a referral order. The stage at which the case may be referred for mediation was discussed and it was opined that matrimonial disputes can be referred after service of respondents and before filing of written statement. Discussions were also undertaken on the issue as to whether consent of the parties is necessary for referral of the case for mediation. It was stated that consent is not mandatory for referral. The judge can refer the case if he/she is satisfied that the case is suitable for settlement.

On the role of the judge in motivating and preparing the parties for mediation, it was stated that the judge should make the parties aware of the concept of mediation, its process and advantages; should attempt to convince them regarding the utility of settlement; and the address their concerns regarding the mediation process. The referral judge should highlight the major benefits of mediation i.e. the parties' control over decision making; democratic process; cost-

effectiveness; time-effectiveness; and bringing about an end to litigation. The referral judge plays an important role in fostering an attitude of settlement in the parties. Referral judges should also verify if there have been any previous attempts made to settle the dispute.

Emphasis was also placed on the need to ensure that mediation is not used as a dilatory tactic to delay or disturb the trial of the case. Judges were advised to not adjourn the case excessively for mediation. It was also emphasised that the selection of the mediator should be based on his/her training, experience, reputation and quality. Further, it was underscored that the judge should not have any *ex parte* communication with the mediator. Any communication made should be in writing and should be approved by the parties. The mediator should only communicate the final outcome of the mediation to the judge. The process of referral of the case for mediation was explained and the format of the referral order was outlined.

It was stated that in cases of successful mediation, the judge should examine the settlement in terms of Order 13 Rule 3, Civil Procedure Code, 1908 to ensure its legality and thereafter pass a decree. In cases where the mediation is unsuccessful, the judge can make fresh efforts for settlement if suitable or proceed with the trial of the case. It was stated that the success of the mediation depends on the mindset of the parties. Reference was made to the judgments in ***K. Srinivas Rao v. D.A. Deepa***, (2013) 5 SCC 226, ***B.S. Joshi & Ors. v. State of Haryana & Anr.***, (2003) 4 SCC 675, and ***Gian Singh v. State of Punjab & Anr.***, (2012) 10 SCC 303.