GENDER JUSTICE THROUGH DISTINCT AND ALTERNATE LEGAL FRAMEWORK: A CRITICAL STUDY ON THE WORKING OF FAMILY COURTS IN THE STATE OF KERALA

Thesis Submitted to the

The National University of Advance Legal Studies

For the Award of the Degree of

DOCTOR OF PHILOSOPHY

In

THE FACULTY OF LAW

By

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Under the guidance of

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THE NATIONAL UNIVERSITY OF ADVANCED LEGAL STUDIES

KALAMASSERY, KOCHI, 683505, KERALA

2015

Declaration

I do hereby declare that the thesis entitled "**Gender Justice through Distinct and Alternate Legal Framework: A Critical Study on the Working of Family Courts in the State of Kerala"** for the award of the degree of Doctor of Philosophy is the record of the original research work carried out by me under the guidance and supervision of Dr. M.C.Valson, Professor, NUALS, Cochin. I further declare that this work has not previously formed the basis for the award of any degree, diploma, associate-ship or any other title or recognition

Adv.T.Geena Kumary

Kalamassery

Date:

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This is to certify that the thesis entitled "**Gender Justice through Distinct and Alternate Legal Framework: A Critical Study on the Working of Family Courts in the State of Kerala**" submitted by Adv.T.Geena Kumary for the award of Degree of Doctor of Philosophy is to the best of my knowledge, a bonafide record of research work carried out by her as part time research scholar, National University of Advanced Legal Studies, Kalamassery, Cochin under my guidance and supervision. This thesis or any part thereof has not been submitted elsewhere for any degree.

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Date: (Supervising Guide)

Certificate

This is to certify that the thesis entitled "**Gender Justice through Distinct and Alternate Legal Framework: A Critical Study on the Working of Family Courts in the State of Kerala**" has been presented in a research seminar held at the National University of Advanced Legal Studies on 22nd April 2015.

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This is to certify that all relevant corrections and modifications suggested by audience during the pre submission seminar and recommended by the Doctoral Committee has been incorporated in the thesis entitled "**Gender Justice through Distinct and Alternate Legal Framework: A Critical Study on the Working of Family Courts in the State of Kerala**" submitted by Adv.T.Geena Kumary for the award of Degree of Doctor of Philosophy

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Preface

Conventional adversary legal systems have been deplored as unsuited for matrimonial disputes primarily due to time consuming procedural intricacies, structural animosity and lack of privileged treatments to women and children involved in the altercations. In the matrimonial cases, an alternative legal system that is capable to address these issues was demanded by the activists as well as the policy formulators. There was a great demand for a judicial system in the familial domain that would pursue conciliatory practices and disposes the disputes expeditiously. Such a distinctive and innovative judicial system was also presumed to be proactive in delivering gender justice effectively.

The study investigates the effectiveness of family court as an alternative dispute resolution system with conciliatory procedures and time bound disposal of family disputes. The loophole and lacunae in law and procedure are identified and suggestions made for the effective functioning of the court to achieve the very aim of establishment of Family Courts with a view to promote conciliation in and speedy settlement of disputes relating to marriage and family affairs and for matters connected therewith.

At the outset, I would like to extend profound gratitude to my guide and research supervisor, Dr.M.C.Valson. His academic interventions and in depth knowledge on the subject have led to the fruitful completion of this

study. He has been motivating and continuously supporting me to get focused on interesting and highly relevant issues on the topic.

I offer my sincere obligations and heartfelt gratitude to Dr. N.K. Jaya Kumar, former Vice Chancellor, NUALS, who inspired me in selecting and focusing the topic. I express my sincere thanks to Dr. K.Gopakumar, Gulati Institute of Finance and taxation and Dr. J. Devika, Associate Professor, Centre for Development Studies, who has been of constant support and inspiration to me.

I am grateful to faculty members of NUALS especially to Dr.Anil R Nair, Dr.Sheeba S Dhar, Dr.Balakrishnan and M.G.Mahadevan, Registrar NUALS for all support extended to me during the research study. I am expressing my sincere thanks to Vice Chancellor, all faculty members, library and office staff and fellow research scholars for their continuous support.

I would like to thank my family including my husband Adv.V.K Nandanan and my little one N.Govardhan for their love and encouragement. I remember with much gratitude, the efforts taken by Adv.B.Jayachandran Nair, who shared his time to successfully complete the empirical study and supporting me all my endeavours.

Date:

Cochin Adv.T.Geena Kumary

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Chapter 1

Introduction

"A woman feels as keenly, thinks as clearly, as a man. She in her sphere does work as useful as man does in his. She has as much right to her freedom-to develop her personality to the full-as a man. When she marries, she does not become the husband's servant but his equal partner. If his work is more important in life of the community, her's is more important in the life of the family. Neither can do without the other. Neither is above the other or under the other. They are equals" [1]

Origin and evolution of marriage and family from primitive communism to modern industrial capitalism have been subjects of incessant discourses among the social scientists and quite a few theories regarding these establishments have been propounded by them from time to time. These establishments have been identified and addressed as diametrically opposite characteristics depending upon the role they have played in the societal revolution[2]. A cursory perusal of these theories will be enough to

[1] L. Denning, *The due process of Law*, 194-195(1981)

[2] They have been praised as well as criticized from social structures to perform religious rituals to the most anti social organizations. According to David M Walker, 'The *legal system commonly treats the family as a social institution to be preserved and supported. In many systems of different times rules have been sought to encourage family life, favoring marriage legitimate children and succession within the family'*. D.M walker, *The oxford Companion to Law*, 451 (1980),B.M Gandhi praising the institution as *'Family is social unit, a small but the most important part of the social organization'*. B.M. Gandhi, *Family law Volume-I*, 4 (2012)..But Babel criticizing it as 'Marriage *and family are the foundation of the State. Whoever therefore attacks marriage and family is attacking the society and state and undermining both. Monogamous marriage as has been*

infer that the trajectory of transformation of early hunting and gathering nomadic groups into societies of families based on marriage and monogamy[3] has been complex, influenced and guided by various socio-economic factors[4]. Metamorphoses of tribal and ethnic groups into feudal and subsequent capitalist societies have marked the growth of inequalities based on social/economic class, race/ethnicity, and gender[5]. Similarly transformation of the system of temporary partnering between men and women, the practice that existed in the primitive societies; to stable marriage relations and structurally impeccable families has correspondingly marked a systemic denigration of the status of women in both these establishments[6]. Copious literature generated on the subject, especially by modern feminist writers, has exposed this aspect precisely[7]. To a great extent, unanimity

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sufficiently shown is the outcome of the system of gain and property that has been established by bourgeois society, and therefore undoubtedly forms one of its basic principles'. See, A. Babel, *Women and Socialism,* 21(2010)

[3] The statement is squarely applicable even in those cases where polygamy has been socially and religiously accepted.

[4] All social dependence and oppression is rooted in the economic dependence of the oppressed upon the oppressor. In *Ancient Society*, Morgan Lew Henry commented, "As it is undeniable that portions of the human family have existed in a state of savagery, other portions in a state of barbarism, and still others in a state of civilization, it seems equally so that these three distinct conditions are connected with each other in a natural as well as necessary sequence of progress, which is influenced and transformed by various socio economic factors.' He formulated a grand scheme of social evolution focusing on progress in the domains of technology, government, family, and property, M.L Henry 1877:3 from www.marxist.org by I. Hasan, February 2004;(2-1-2014 at 21.30 hrs)

[5] A. J Specter, "*Class Structure and Social Change*", 65 Sociological Inquiry, 329-338 (1995)

[6] For example, the Hindu Undivided Families and coparcenaries under the sastric Hindu law. According to *Manusmriti*, women were subservient to male relatives, widow marriage was not allowed and the law sanctioned the practice of Sati, a truly atrocious practice. According to Manu Smriti 'a women should never be independent; her father has authority over her in childhood, her husband in her youth and her son in her old age.' J.C.Khurana, *'Status of women in Law and Society'*, The Indian Advocate, 89, (July-Dec 1974).

[7] A theoretical and political stance within the contemporary feminist movement integrates gender analysis in feminist theory with class analysis. In the 18th and 19th century Europe, Mary Wellstone

among the social scientists can be noticed on the point that the status of women in family and marriage in the settled societies, except in a few for short and temporary periods, [8] has been subservient to their male counterparts[9]. Eventually, a great portion of the studies of the evolution of these social establishments has been dedicated to unveil the causes of degradation of the status of women in the society over time[10]. It is socially and historically ironic that in the course of development of the society 'from status to contract'[11] the status of half of the population has been ridiculously belittled.

Craft and Flora Tristan combined nascent socialism with analyses of women's status in society. These analyses predated the socialist "Women Question", which originally was examined in such texts of August Bebel and Frederick Engels. See A. Bebel, Supra 2 and Frederick Engels, Origin *of Family, Private Property and the state,* 129 (1884).By the 20th century such socialist women as Clara Zetkin and Alexandra Kollontai analyzed the 'women question'. Their writings extended the theoretical understanding of women's subordination as rooted in the family and private property to everyday struggles around work, sexuality, and political liberation, C. *Zetkin: Selected Writings*, 227, (1984) A. Kollontai, *Selected writings of Alexandra Kollontai*, 326, (1977). Eleano Marx With Edward Aveling ,Simone de Beauvoir, Charlotte Perkin Gilman *etc* exposed the historical defeat of women in their writings, See, E. Marx With E. Aveling, *The Woman Question*. 320 (1886), S.D Beauvoir, '*The Second Sex* (1989) and C.P.Gilman, *Women and Economics*, (1998)

[8] There are systems in south west India known as Tharavad, thavazhy, kudumba, kavaru or illam in which Marumakkathayam and aliyasanthanam systems of inheritance prevailed. In the Malabar region (in Kerala) and Canara districts the descent was traced in the female line. They are known as Malabar joint family system. R. C Nagappal, *Modern Hindu Law,* 840 (2nd ed., 2008). *Thiruthippallli Raman Menon v Varaingattil Palisseri Raman,* ILR 1901.24

[9] There are discriminations regarding the law of divorce, marriage, inheritance for persons belongs to the same socio economic ground and it is only on the basis of sex. See, Dr. N.Purohith, *The Principles of Mohammedan Law,* 43 *(*2nd ed., 1998). Similarly women are not entitled to equal share in Christian succession also Gangly, *Indian Succession Act* ,(1998)

[10] F. Engels , Origin *of Family, Private Property and the states,* Marx/Engels Selected Works, Volume-III, 209*;* H. Child and A. Russet, *The Second Shift,* 172 (2013) also , C.M. Della and S. James ,*The Power of Women and the Subversion of the Communit,*68 (1975)

[11] Sir Maine propounded the theory that the development of society has been development from 'status to contract.' However, women were not entitled for entering into contract in many societies and similarly, they were considered as not a full citizen/person., H. Maine, *The Ancient Law, Its Connection with the Early History of Society and Its Relation In Modern Ideas* , 321, 362(1861)

Of course, there were strenuous efforts from political, social and other women centered organizations, especially since the middle of the last century, to redefine the status of women in the society and in the family[12]. At the international level also there were a series of movements started from the Universal Declaration of Human Rights (UDHR) to the 4th conference on women held in 1995 for equality and equal justice[13]. It has been universally accepted that for a full and complete development of a country requires the maximum participation of women on equal terms with men in all the fields[14].

Despite social and political movements[15] for equality of status for the women, consequent Constitutional guarantees[16] and focused legislations granting privileged discrimination to the feeble gender,[17] the subservient

[12] See, S.D Beauvoir, *The Second Sex*,128 (1989) Germaine Greer, *The Female Eunuch*,213 (1970)

[13] Prohibition of discrimination on sex was first articulated in the UN Charter of 1945 and later reiterated in UDHR of 1948. The International covenant on civil and political rights approved in 1966 guarantees equal protection of law to both sexes. The International covenant on Economic, Social and Cultural Rights approved in 1966 promises women equality of status. From the first UN World conference on Women held Mexico in 1975 and the other conferences including the 4th UN World conference on Women, 1995 attempted to reaffirm gender equality as a fundamental pre-requisite for social justice. The platform for action at Beijing conference addressed eleven substantive areas of concern, poverty, education, health, violence armed conflict, economic structures and policies, decision making, mechanisms for achievement of women, Women's human rights, mass media and the environment.

[14] The most important conceptual frame work in the International law of Women's Rights, 1978 is the Convention on the Elimination All forms of Discrimination against Women (CEDAW), which provides that women be given rights equal to those of men on equal terms. The preamble maintains that "the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women on equal terms with men in all fields."

[15] The various political, social renaissance and peasant movements including struggles against sati, parda, devadasi, child marriage, struggles for widow marriage, education, equal pay for equal work etc.

[16] Along with preamble Art.14, Art,15,Art 15(3) and Art.16 enunciates equality.Art.39(A),39(C) Art.42 deals with for better working condition for women.

17 The Hindu Marriage Act of 1955 amended in 1976 provides the right for a girl to repudiate a child marriage, Amendments brought in 1984 to the Dowry prohibition Act of 1961. Incorporation

status of women in the matrimonial dwelling could not be eliminated totally[18]. In the post second world war period, mainly due to the success of anti-colonialism and socialism, there were innumerable legislations[19] the world over granting equality of status and opportunities to the women. India was no exception. The preamble of Indian Constitution of 1950 declares social, economic and political liberty and equality of status and opportunity to all citizens irrespective of gender.[20] It has categorically prohibited class legislations on the basis of religion, caste, creed and gender as well[21]. The provisions of adult franchise, non-discrimination on the basis of sex and

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of Sec.304 B in Indian Penal Code, Amendment in Factories Act, The medical termination of pregnancy Act of 1971, The Pre Natal Diagnostics Tests Act, 1994 and The Criminal Law Amendments in 2013 are some of the privileged legislations.

[18] Crimes against women including domestic and sexual violence are increasing as per the statics published by the State and National Crime Records Bureau as well as the Annual Report of State National Commission for Women, *Annual Report*-2012-2013 available at http:// ncw. in from /Annual Reports.aspx last seen on 12/04/2014. See also http://ncrb.nic.in/CD-CII2011/Statistics2011.pdf. The statics shows alarming increase in issues such as female infanticide, dowry death, rape, sexual violence, wife beating etc, K. Menon,Sen and A.K .Sivakumar, *Women In India: How free? How Equal*, Report commissioned by the Office of the Resident Coordinator in India, United nations, available at http:// www.wave india.org/resource/ undp .india .pdf. last seen on 14/01/014.

[19]. In Australia, the women acquired the right to vote and stand in federal elections from 1902, but discriminatory restrictions against aborigine women voting in national elections were not completely removed until 1962. Most European, Asian and African countries did not pass women's suffrage until after World War II. Late adopters were France in 1945, Italy in 1946, Greece in 1952, Switzerland in 1971, and Lichtenstein in 1984. The first wave feminism focused mainly on suffrage and overturning legal obstacles to gender equality but second wave feminism began from 1960s and lasted till the last 1980s. Second-wave feminism broadened the debate to a wide range of issues: sexuality, family, the workplace, reproductive rights, de facto inequalities, and official legal inequalities, *The Rutledge Companion to Feminism and Post Feminism*, 25 (2001)

[20] In *Radha Charan Patnaik v State of Orissa*, AIR 1969 Orissa 237, the court rejected the contention that no married women shall be entitled to be appointed to the judicial service and where a women appointed to the service subsequently marries, the state government may if the maintenance of service so requires call upon her to resign. See also *CB Muthamma v Union of India* ,AIR 1979, SC 1868, *Air India v Nargesh Meerza*,AIR 1981 SC 1829, *Maya v. State of Maharashtra* (1986)SLR 743, Pratibha Rani v Sanjeev Kumar 1985 Cr.LJ 817, *Sheela Barse v. State of Maharashtra* ,AIR 1986 P 378

[21] *Laxmi Kanwar And Anr v State (Panchayati Raj Dept Ors)* on 15 March, 2013, the use of words reservation for women quota is unconstitutional.

affirmative discrimination in favour of women and children placed Indian women legally far ahead of many of their counterparts in other countries[22]. Equality and non-discrimination became fundamental and enforceable rights[23]. The scope of Art.21 could be expanded to read into the issues of social and economic justice including gender justice[24].

Concept of Gender justice

Precisely, gender justice is a concept understood differently in different cultures and at different periods in history. Until recently the question of gender equality was merely a topic of theoretical discussion but things are changing but rather slowly[25]. The concept of gender justice has a variety of meanings. In the area of law, the concept of gender justice can mean formal equal rights between men and women. [26] As well, it can relate to uncovering gender biases that are integral to the legal process and which

[22] In contrast, the Canadian women were granted right of equality in 1982, the Swiss women were granted the right to vote in 1972 and the US has not yet endorsed the equal remuneration Act, see foot note 19 also.

[23] They have been specifically provided in Part III of the Constitution dealing with fundamental right the enforceability of which it is a fundamental right under Art. 32. The Supreme Court in *Visakha v State of Rajasthan* AIR 1997 SC 3011, enlarged the gamut of fundamental rights of women by pronouncing that the right to life for working women includes an environment free from sexual harassment, In *Randhir Singh v Union of India & Ors* AIR 1982 SC 879 the Supreme court held that equality and equal remuneration for men and women are fundamental right and it can be enforceable as per Art.32

[24] Art.21 of the Constitution ensures protection of life and personal liberty. Supreme Court of India has read various socio economic measures into this right like 'right to minimum wages' *People's Union of Democratic Rights v Union of India* 1982 (3) SCC 235 'right to lively hood' *Olga Tellis v Bombay Municipal Corporation* 1985((3) SCC 545, and 'right to education' *Mohini Jain v State of Karnataka* 1992(3) SCC and *Unnikrishnan v State AP* 1993 (1) SCC 645). *Indra Sahney And Ors v Union Of India,*1992 SCC 212

[25] J.A.S. Anand, *Justice for Women-Empowerment Through Law*, the speech on the occasion of inauguration of a colloquium at India Habitat Centre Auditorium, New Delhi on 8th May 1999, published in *Justice for Women –Concerns and Expressions,*(3rd edn, 2008)

[26] Gender differences are socially created differences between men and women upheld by ideology and perpetuated by socialization processes. They are to be contrasted with sex difference, which are biological

affect the ways women come to experience the law. In the legal terrain, the concept of gender justice is contingent on location—within the family, the class and/or religious community as well as within the definitions of the nation-state[27]. Law is not the only site for the pursuit of gender justice but given law's location as an authoritative discourse, it does have a critical role to play in shaping the meaning and content of gender justice.

In the legal paradigm there are mainly three approaches to gender justice. They are: *Protectionism, Equality and Patriarchy*.

Protectionism- perhaps the most problematic articulation of gender justice in law- perceives the relationship between women and law as one of protection[28]. Scholars who endorse this approach have reinforced an essentialist understanding of gender difference, assuming that women are naturally weaker than men[29]. The protectionist approach accepts the traditional and patriarchal discourses that construct women as weak, biologically inferior, modest and incapable of decision-making[30]. Such so-called feminine characteristics are perceived as natural, immutable and thus, as the appropriate starting place for legal regulation. Writers with this approach often extol the role of women within the family—roles which are

[27] R. Kapur and B.Crossman, *Subversive* Sites*: Feminist Engagements with Law in India*, 89 (1996)

[28] This approach recognizes women as a group different from men because of the social assumptions that perceive women as weak, subordinate and need of protection.

[29] M. J. Anthony, *Women's Rights*, 1085 (1994)

[30] H. Lee, Paper Presented at the Canadian Political Science Association Annual Conference, 2011, Session: Development of Public Opinion. The sources of female protectionism: the consequence of the knowledge gap in economics

assumed to be natural, selfless and sacred[31]. In this approach, the role of law is un-problematically asserted as protecting women. This approach is firmly located within patriarchal discourses and it does not consider the way in which law treats women, nor does it consider women's subordinate status[32].

A second and perhaps more familiar approach to gender justice is one that is based on promoting *equality***.** Implicit in this perception is the assumption that law can play an important role in advancing women's equality by removing the legal obstacles that have limited women's full and equal participation[33]. This theory highlights both laws that continue to discriminate against women and successful challenges to such discriminatory laws[34]. In the present research study an attempt is made to relate legal processes and access to law with the concept of equality. According to this approach, law has contributed to women's oppression by exclusion. Women's oppression is understood largely as a result of discriminatory treatment. Thus, law can contribute to overcoming oppression by the creation of a legal order that includes women on an equal footing[35].

A third approach in the literature on gender justice is one in which law is seen as an instrument of *patriarchal* oppression. In this approach, the focus of gender justice is to challenge the patriarchal assumptions on which

[31] J.P Atray, *Crimes Against Women*,214 (1988)
[32] R.Kapur and B. Crossman, Supra 27
[33] L. Sarkar, and B. Sivaramayya, (Ed.) *Women and Law: Contemporary Problems* 128 (1994)
[34] *CEDAW-Restoring Rights to women*, Partners in Law Development, 24,25 (2004)
[35] R.Kapur, and B.Crossman, Supra 32

law is based. Laws continue to reflect patriarchal oppression and discriminate against women. These laws, and the judicial interpretations of these laws, are connected to the patriarchal social relations in whom women have been oppressed[36]. The law as a patriarchy approach tends to examine the ways in which gender justice in law is informed by and serves to reinforce patriarchal social relationships[37]. A primary concern includes the way in which law reinforces male control over women's sexuality, together with the way in which law continues to exclude or marginalize women's values and needs in the legal processes[38]. The approach has made an important contribution in attempting to locate women's oppression within broader structures of gender oppression, as well as in exposing how even the most intimate space of the home and family is political. In the context of law, it has been crucial in revealing the importance of the legal regulation of sexuality and of violence in the oppression of women[39].

When analyzing gender justice, even though constitutional safe guards are there, purposeful changes are necessary in substantive law and in

[36], N..Haksar, *'Human Rights Layering: A Feminist Perspective'* in Amita Dhanda, and Archana Parashar, *Engendering Law: Essays in Honour of Lotika Sarkar*, 71, 88 (1999).

[37] The constitutional validity of discriminatory provisions of S.10 of Indian divorce was first challenged before the Madras court in Dwarakabai's case. The court explained the logic as "Adultery by man is different from adultery by wife. A husband cannot bear a child and make it legitimate to be maintained by the wife. But if the wife bears a child the husband is bound to maintain it". See, Dr.Dwaraka *Bai v Prof. Ninan Mathews*, AIR 1953, Mad 792.

[38] L.Gonsalves, *Women and the Law*, 183 (1993)

[39] While examining the evolution of family laws situated within a patriarchal social structure, discrimination against women is forgone conclusion. Caste, class and clan purities are maintained through the a strict sexual control F.Agnes ,Law and Gender inequality in *Women and Law in India*, 203 (2004)

procedural laws to reap the benefits provided under the constitution[40]. But these progressive constitutional declarations and legal offshoots have not succeeded fully in granting social and economic equality to the women in India corresponding with their male counterparts mainly due to the typical social structure that prevailed in the country[41] and the absence of a distinct legal system for addressing the unique issues of women.[42]

In India, the limits and extent of social intercourses had been determined and regulated by the diktats of religion or caste and these customary practices have been upheld as valid pieces of personal law[43]. Undoubtedly, these personal laws with ritualistic characteristics had been fabricated basically with male dominated values and used as the sharpest tool for suppressing the women socially as well as domestically[44]. Since

[40] For eg, Art.39(C) ensures equal pay for equal work but women workers are still suffering discrimination. Dr.G.Q.Mir, *Women Workers and the Law*,.34 (2002)

[41] The strong basis of religious and caste structure is unaffected by any of the legislation of judicial pronouncement. F.Agnes, *Communal Undertones Within Recent Judicial Decisions* Supra 39, Uniform civil code is yet a constitutional goal even after the repeated directives of Supreme Court, *Sarala Mudgal v Union of India and others*,1995 (3)SCC 635.

[42] In Indian legal system the division of cases as civil and criminal only and there was no provisions for treating the matrimonial cases exclusively. 'Women's movement needs to explore the possibility of a secular family law'. See, D. Gabriele, *Women's Movement and Religion* in J. Mary , (Ed) *Women's Studies in India*,514 (2008)

[43] In *Ramanand Lal v Damodar Das*, 1942 AIR All 110, the Privy Council observed that "clear proof of usage will outweigh the written text of law". See also *Collector of Madura v Mottoo Ramalinga Sathupathy* 1868(12) MIA 397. One among the condition relating to the Special Marriage Act is that the parties may not be within the degrees of prohibited relationship. But if the custom permits, such marriage can be solemnized (Sec.4 of the Special Marriage Act, 1956). In *Kailas Singh v Mewalal Singh Gond* AIR 2002 MP 112, it was held that the provisions of the Hindu succession Act, 1956 is not applicable to the Schedule Tribes.

[44] Mohammadan law prohibits polyandry while polygamy is not. A Muslim husband is given absolute power to repudiate his wife whenever he wants to do so. A Muslim man can marry a kitabis (non Muslim) woman but a Muslim woman cannot marry a non-Muslim. In matters of inheritance also a Muslim woman is not on par with her husband or her brother. She inherits only half what her brother does. Among Hindus, divorce and widow marriage are still a problems for

major chunk of customary laws are not in conformity with the constitutional prescriptions of liberty and equality, those personal laws, which were apparently discriminatory, have been fundamentally modified by the legislature as well as judiciary for granting equal treatments to the women in the fields of marriage, divorce, maintenance, etc[45].

However, with the adoption of universal standards against inequality and discrimination and the evolution of a rights-based approach in the empowerment of women, the concept is today susceptible to judicial evaluation and judicial determination. In this process the legal system and courts have played a significant role during the last few decades with the support of the liberal provision of the Constitutions, with the aid of a series of pro-women international human rights instruments and increasingly assertive women's movements[46]. The complaint seems to be that more could have been done if the judges had been so inclined. Furthermore, it is argued that the judicial system as a whole did not change enough to absorb the emerging standards of equity and equality vis-à-vis women with the result the bulk of women approaching the subordinate courts neither receive equal

their family and community. Usually in Hindu society a divorced woman experiences loss of status and a sense of guilt. K.Devendra, *Status and Position of Women in India,*98(1985)

[45] Parliament had enacted sec 14 Hindu Adoption and Maintenance Act, 1955 to remove the pre existing disabilities fastened on Hindu families. Sec 14 is therefore to be construed harmoniously, consistent with the constitutional goal of removing gender based discrimination and effectuating economic empowerment of Hindu female. See,*C.Masilamony Muthaliayar v Idol of Sri.Swaminadha Swami Thirukoil,* 1996 (8) SCC525, Sec.14 (1) thus, transforms a limited right into an absolute right. *Benibai v Reghubir Prasad 1999(3) SCC 234* See, *Santhosh v Saraswathi Bai*, AIR 2008 SC 500, B*aliram Atmaram Dhake v Rahu bai*, AIR 2009 Bom 57, *Man Singh v Ram Kala,* AIR 2011 SC1542, Mary Roy etc. v State Of Kerala & Ors 1986 AIR 1011

[46] J. A.S. Anand, Supra 25

treatment nor are able to access the full benefit of the principle of equal justice under law[47].

In this milieu also, a section of judiciary has adopted an orthodox and biased position in interpreting the provisions of personal laws[48]. Drawing spirit from the constitutional mandate of equality and liberty, several discriminatory provisions of the personal laws were brought before the judiciary for declaring them as illegal and non-enforceable. But in many cases the courts have stopped short of declaring the discriminatory dictates of various personal laws as unconstitutional but on the contrary upheld the inequitable provisions as valid and based on reasonable classification[49]. On the contrary, the progressive attempts of the legislature and judiciary could not achieve the desired results primarily due to the lack of an efficient support system with apposite operating parameters[50]. This has indeed developed a very weird social and legal situation.

When we discuss the concept of gender justice within the Indian context, the fact is that Indian Constitution demands gender justice on terms

[47] N.R M. Menon, *Gender Justice and Judiciary, An Assessment*, Speech Delivered at the All India Meeting of Chief Justice of High Courts on Women Empowerment, New Delhi December, (2004)

[48] In *Kamalesh Kumar Agarwal v Mamta Devi*, AIR 2005 Jhar 10, held that cruelty by parent's of wife amounts to cruelty.

[49] While deciding cases of restitution of conjugal rights and divorce the general trend of the judiciary is that, it is the duty of the wife to go along with her husband wherever irrespective of her job, health, education or any inconvenience. See *Ram Prakash v Savithri devi*, AIR 1958 Punjab 87, Trath Kaur v Kripal Singh, AIR 1964 Punj28, *Gaya Prasad v. Bhagavath* AIR 1966 MP 212, *Surinder Kaur v Gardeep Singh* AIR 1973 P&H 134, *Kailashwathi v Ayodhya Prakash* ,ILR 1977P&H 642,FB *Jagdish Mangtani v.Geetha Jagadish Mangtani*, XLIV (1) 2003, Guj LR 309. See F. Agnes,Supra 41

[50] *"The gains of much publicized judgments for gender justice amounts to naught"*, See F. Agnes in *Implications of Identity Politics*, Supra 27

of equality and dignity and Indian judiciary has come to play a decisive role in government based on fundamental rights and rule of law. What needs to be addressed is how the performance of judiciary in this regard can be further improved towards advancing the realization of the constitutional mandate of justice to women[51]. The responsibility of the judiciary not only ends in a few landmark decisions of superior courts against discriminatory practices but extends to the entire range of adjudicatory practices till attaining relief to the aggrieved.[52]

In the Indian context, marriage and the resultant rights and duties of not only the parties to it but even of the offspring have been decided by the personal law of the parties concerned mainly by reference to their religious beliefs[53]. Marriage which is now an institution by itself initially might have been a contract of natural law but with the passage of time it has been given sanction of religion to cement and perpetuate the concept[54]. For the *sastric* Hindu law, marriage is a sacrament, a union, an indissoluble union of flesh with flesh, bone with bone to be continued even in the next world[55]. Although, in the strict legal sense, *Nikah* under the Muslim law is a civil contract, it has always claimed some sort of divinity[56]. Marriages solemnized under Christianity have been rigidly a matter of church and

[51] C.J. R.C .Lohoti, ,in All India meeting of Chief justices of women empowerment vis-a-vis legislation and judicial decision,11 December 2004,Organised by National Commission for Women, compiled by Namitha Agarwal,

[52] Dr. N.R.M. Menon,Supra 42

[53] S. K. Aiyer, Law *of marriage, Maintenance, Seperation and Divorce*, 89 (2010)

[54] M.Basu, *Hindu Women and Marriage Law from sacrament to contract*, 22 27(2004)

[55] *Subndari Bai v Shivnarayan*, ILR Bom 81

[56] J. Schacht, *An Introduction to Islamic Law*,32 (1975)

religion and the nuptial knot was considered as sacred and divine and beyond the human capabilities to untie[57]. Although elements of a legal contract can be noticed in the marriage of all religious communities it is something much more than an ordinary civil contract because it creates a social entity or relations between contracting parties in which not only the parties to it but the state is also interested[58]. However, the concept of family and marriage and its inviolability in the neo liberal era is undergoing a change because of a shift in the emphasis of the old tested morals and social values on which this institution is based[59].

Despite the concerted legislative attempts to eradicate gender discrimination, many areas of unequal and prejudicial treatments to women by the personal laws have been left unaltered[60]. But this aspect has not belittled the relevance and importance of the progressive legislations that have played very vital roles in qualitatively transforming the status of women in society[61]. Nevertheless, performance evaluation of the progressive

[57] "Marriage in Christendom may be defined as the voluntary union for life of one man with one woman to the exclusion of all others". *Hyde v Hyde*,1866 LR 1 P&D 130

[58] The interest of the state in marriage is well established in *Lata Singh v State Of Uttar Pradesh*, AIR 2006 SC 2522,Right to marry is a component of the right to life under Art.21 of the Constitution, *Mr.X v Hospital Z*,AIR 1999 SC 495.

[59] Matrimony is an institution in the modern era must be recorded as serious dimension of the pursuit of the mission of life by equal adult person seeking perfection, completeness, harmony, happiness and contentment in life *Aboobackar C.K. v Rahiyanath and Another* 2008(3) KLT 482,

[60] There are discriminations in wages in organized and unorganized sector, G.Q Mir .*Women Workers and the Law*, 328 341(2002). Inequality among men and women are visible in the heritance as per the Indian Succession Act and Mohammedan law. As per the provisions of Mohammedan law a female has to approach the court and establish the grounds for dissolution of marriage while male can dissolve the marriage by pronouncing talaq without proving the reason for the same.

[61] For instance the Hindu Marriage Act 1956 prohibits polygamy has direct influence in society and equal treatment to males and females in the case of inheritance. 73rd Constitutional amendment was

legislations has highlighted the systemic failures of the legal and judicial system in delivering justice to the parties as perceived by the statutes[62]. One of the important reasons for this failure has been identified as the absence of effective procedural and organizational backing to the justice delivery system[63]. It has been recognized that the ordinary legal and judicial system with its despicable trait of insistent procedural intricacies would not be able to deliver justice promptly to the hapless victims of domestic injustices. Likewise, the apathetic approaches of a dialectical legal system were found to be grossly inadequate to handle the fragile issues of conjugal jurisprudence[64].

The major lacuna was that in the procedural side there were no differences in the dispute settlement between the ordinary civil cases and the matters related to the more delicate topics like marriage, divorce, alimony etc. A great deal of time of the court was being consumed in disputes related to personal laws which could be handled at lesser cost of time and money by an alternative and distinct judicial system[65]. Most importantly, in the

passed and came into force with effect from 24th April, 1993. It lays in Art.243 D (3) that not less than one third of the total number of seats to be filled by direct election in every Panchayat shall be reserved for women and that such seats may be allotted by rotation to different constituencies in a Panchayat.

[62] Report of National Commission for Women on All India Meeting of Chief Justices of High Court on Women Empowerment and Judicial Decisions on 11th December 2004, retrieved from ncw.nic.in last seen on 19-1-2014 at 22.30 hrs.

'[63]B.Debroy, *Justice Delivery in India, a Snap shot on Problems and Reforms,* Institute of South Asian Studies working paper No.47 , National University of Singapore, (2008)

[64] *"Ordinary judicial machinery is ill suited to deal with such disputes and tensions in the family",* B.M.Gandhi, *Family Courts in India,* Supra 2

[65] The Law Commission in its 59th Report (1974) had also stressed that in dealing with disputes concerning the family, the court ought to adopt and approach radical steps distinguished from the

proceedings of such courts, rigid rules of procedures and evidence could also be done away with[66]. With this legislative intention, the Code of Civil Procedure was amended in 1976 to provide for a special procedure in suits or proceedings related to matters concerning the family[67]. However, not much use has been made by the courts in adopting this conciliatory procedure and they continued to deal with family disputes in the same manner as other civil matters and the same adversary approach prevailed[68].

Need and origin of family courts

The idea of establishing new judicial institutions exclusively for dealing with family laws and speedy settlement of disputes was found favor with the authorities. It was also conceived that such judicial forums should, right from the start, adopt a radical approach to family disputes by attempting counseling even before the start of proceedings[69]. The idea was not to drag the matrimonial or other family related issues to the court if they can be otherwise settled through conciliatory measures. A multi pronged

existing ordinary civil proceedings and that these courts should make reasonable efforts at settlement before the commencement of the trial.

[66] Ibid

[67] Suits Relating to Matters Concerning the Family were included *in camera proceedings* if the Court or either party so desires. In every matrimonial proceedings, an endeavor shall be made by the Court in the first instance to assist the parties in arriving at a settlement in respect of the subject-matter of the suit. If, in any such suit or proceeding, at any stage it appears to the Court that there is a reasonable possibility of a settlement between the parties, the Court may adjourn the proceeding for such period as it thinks fit to enable attempts to be made to effect such a settlement. In every suit or proceeding of family matter, it shall be open to the Court to secure the services of welfare expert **.** It shall be the duty of the Court to inquire, so far as it reasonably can, into the facts alleged by the plaintiff and into any facts alleged by the defendant.

[68] F.Agnes, *Family Courts: From the Frying pan into the Fire?* in John Mary E (Ed.), *Women's Studies in India – A Reader*,272, Supra 42.

[69] Statement of Jayanthi Patnaik, from Cuttack, parliamentary discussion on *Family Courts Bill* ,Loksabha, dated 27-8-1984

approach was felt necessary. The law commission had stressed that in dealing with disputes concerning women the court must adopt an approach radically different from that adopted in ordinary civil proceedings[70] . There are cases dealing with a broad spectrum of issues such as family matters and property which continue for generations. The cases of family law ordinarily continue for a period ranging from 3 to 12 years[71] . In such situations, channelling of cases to different courts, set up specially for the purposes not only ensures speedy disposal but also makes sure that they are dealt with more effectively[72].

The judicial system will be a blessing for families in trouble if complex familial problems are resolved with maximum fairness and minimum bitterness, distress and humiliation[73]. This can happen only if the approach of the judiciary to women and gender justice is substantially modified and informed. In order to assess the approaches and attitudes of the functioning of the judiciary in this critical sector they should be continuously monitored. There are several ways through which judiciary's approach to gender justice can be evaluated. First, of course, is a review of gender-related decisions of courts on issues of family relations, criminal justice administration, labour and employment matters etc[74]. A second yardstick for assessment of judicial performance in gender justice is the

[70] 59th Law Commission of India Report, *Marriage Amendment Laws*,1974 ,
[71] N.Janval, *Have Family Courts lived up to Expectations*? Mainstream, Vol XL VII No.12 (2009)
[72] See, Flavia Agnes ,supra 68
[73] B.M. Gandhi, supra 53
[74] See. J. Basant in *C.K Aboobacker.v Rahiyanathu and others,* 2008 (3) KLT 482.

manner in which judges treat women in court whether they appear before them as litigants, witnesses, victims, lawyers or subordinate staff[75]. This is where women experience discrimination and develop perceptions of justice/injustice in which build or erode their confidence in the system[76]. Therefore, it is a critical input in the assessment of the system in respect of gender justice. Finally, the strength in terms and position of women in the judicial establishment is indicative of how well the judiciary is disposed to the practice of gender justice.

In the early years of Indian independence, the attitude of society, as reflected in several judgments, dealing with the plea of discrimination against women, was paternalistic in nature[77].The social thinking and the approach to the question of the role which women had to play in society was tradition bound[78]. The protectionist attitude of the past is slowly giving way to the realization that a woman is in every respect entitled to claim equal rights with man[79]. This change in the attitude of society, on the question of

[75] In *Joseph v SI of Police,* 2005 (2) KLT 269, popularly known as Suryanelli case the court held that "the evidence of the prosecutrix in this case is not of such quality'.

[76] Mary E John(Ed),*Women's Studies in India-A reader*, 266,Supra 42

[77] For eg, while discussing the constitutionality of restitution of conjugal rights were discussed in a number of cases and in all of them there is common aspect of paternalistic protection of women within the institution of marriage. see , *T Sareetha v T.Venkadasubbaiah,*AIR 1983 AP 356, *Saroj Rani v Sudersan Kumar* AIR 1984 SC 1562 and *Harivinder Kaur v Harmendar Sing,* AIR 1984 Del 66

[78] K..Saradamony '*Progressive Land Legislations and Subordination of Women'* in Lotika Sarakar and B.Sivaramayya (Ed.),*Women and Law: Contemporary Problems*, 155,167 (1994)

[79] For eg, *C. Masilamani Mudaliar & Ors v The Idol Of Sri Swaminadhaswami Thirukoil & co,* 1996 AIR 1697

gender based discrimination, is voiced in numerous post- 1970s judgments of the judiciary[80].

Two important points demanded the attention and consideration of the State in respect of family laws. Firstly, in the substantive provisions of the personal laws, regardless of customary or statutory status, there were so many aspects that were against the constitutional ideals of right to freedom, equality and liberty[81]. Since large volumes of the personal laws have not been codified, the customary laws continue to rule the respective fields unless they have been judicially declared as void. These customary laws are, as said above, indiscreetly biased in favour of the values of male domination[82].

In the case of statutory laws also there are many areas where the females are subserviently placed than their male counterpart.[83] Secondly, the procedural formalities since the filing of a case in the appropriate judicial

[80] For example, Randhir Singh v Union of India AIR 1982 SC 879, the Supreme court observed that " *equal pay for equal work is not a slogan. It is a constitutional goal capable of attainment through constitutional remedies, by enforcement of constitutional rights. 'This* case is a harbinger of a new judicial trend of reading directive principles into fundamental rights. In personal law also the same change of trend is visible see. *Mohammad Ahammad Khan v. Shah Bano Beegum,* AIR 1985 SC 945,*Mary Roy v State of Kerala* 1986 AIR 1011

[81] Discrimination on the ground of sex for divorce; for eg: man and women from same socio economic cultural background have different procedure and ground for dissolution of marriage among Muslims, There are discriminations on the ground of sex in the personal law regarding inheritance, maintenance, guardianship and property rights

[82] The main sources of personal laws are customs. The sources of Hindu customary law are Srutis or Vedas, Smritis/dharmasasthras, Dharma, Suthras, and Puranas. As that of Mohammadan law are Koran, tradition, unanimity of opinion, legal decisions, legal fictions and that of Christian are Bible. All of them are the products of feudalist era and reflect subservient attitude towards female, in all respects without any modification. Hence all of them remain highly patriarchal in nature

[83]Demand was made for laws and procedure, which would ensure women's economic rights within marriage and make divorce proceedings speedy, less expensive, less traumatic and more just for women but it was only a myth'. F. Agnes, supra 68 and Report of the Workshop on 'Working of Family Courts and Model Family Courts' " ncw.nic.in/pdf last seen on 30/05/2014 at 2.30 hrs

forum till the disposal of the case finally by the appellate authorities have been too harsh, prolonged and sufficiently complicated to prevent a victim of domestic injustice to seek justice through the ordinary judicial system[84]. The State had to address both the issues effectively. While considering suitable solutions for the grave issues of the family laws, the State was more concerned about securing the families from unchecked dissolution, protecting the interests of minors and ensuring sustenance to the indigents in the family. The State was also interested in ensuring fast and speedy disposal of cases so that the damage in the family system due to the prolonged litigation would be minimal. Therefore the necessity for a discrete legal system with moderate procedural formalities and compassionate approaches was felt[85].

Creation of family courts is attributable to this theoretical backdrop. Considering the gravity of the issues, the Parliament has enacted the Family Courts Act, 1984 (No.66 of 1984) (hereinafter only as 'Family Courts Act') to promote conciliation in, and secure speedy settlement of, disputes relating to marriage and family affairs and for matters connected therewith[86]. From the preamble of the Act it is deducible that there is a great compulsion on the

[84] N. Janwal,Supra 71

[85] Of course the Supreme Court of India in *V. K. Gupta v Nirmala Gupta* 1979 (4) SCC 258 has, in the matrimonial case, resorted to a conciliatory approach even before the enactment of Family Courts Act, 1984.

[86] Statement of object and Reasons, the Family Court Act, 1984

family courts to make efforts for settlement[87]. However, it has been held by the Court that the conciliation processes are not mandatory[88]. Major deficiency in the legislative endeavour was that it deals solely with the procedural aspects of the personal law and has left the substantive part totally unattended.

Formation of family court has been a progressive initiative in the Indian Judicial system, especially in the domain of personal laws, which has been distinctively sluggish and time consuming in delivering justice. In spite of strict statutory injunctions to dispose of the matrimonial cases within the stipulated timeframe,[89] the victims of domestic injustices had often been entangled with the procedural complexities and thus been the victims of 'denied justice' as well.[90] There was no rendezvous for the legislative rhetoric and the procedural realities in the personal law litigations regarding the speedy disposal of cases. Unique characteristics of the matters involved in the family law also demanded alternative mode of dispute settlement in

[87] See the preamble, '*an act to provide for the establishments of Family court with a view to promote conciliation in, and secure speedy settlement of disputes relating to marriage and family affairs and for matters connected with it*' ,The Family Courts Act,1984

[88] It is observed that a mere fact that attempt for reconciliation or sufficient attempt for reconciliation had not taken place is not a valid reason to invalidate the verdict of the family court , *James K Avaran V. Jancy Ritamma George*, 2009(3) KLT 786. *Indira Rachel v Union of India*,2005 (3) 1071

[89] Since Sec 125 Cr.PC proceedings are summary trial, it is to be disposed within 6 months. Even though there is no time frame prescribed in the Act, the attempts for settlement and early disposal are the paramount consideration of the court.

[90] Currently a petition for divorce or maintenance ordinarily takes 2 to 7 years. "Justice delayed is justice denied" thus says the legal maxim. Currently a petition for divorce or maintenance ordinarily takes 2 to 7 years. See supra .73

contrast to what has been allowed by ordinary civil or criminal jurisprudence[91].

The need to establish Family Courts in India was first emphasized by the late Durgabai Deshmukh after her visit to China in the year 1953, where she had the opportunity to study the working of family courts. She discussed the matter with Hon'ble Justice Mr. Chagla of Mumbai High court, Hon'ble Justice Mr. Gajendra Gadkar the then judge of Mumbai High Court and with the then Prime minister of India Pandit Jawaharlal Nehru[92]. It is evident that since the early days of Indian independence the necessity of separate courts to deal with personal laws was felt at the policy making level. However, notwithstanding this awareness at the upper echelon of political governance, it has taken more than three decades to make family courts a reality.

The family courts are designed in such ways that the family disputes are dealt with separately from general criminal cases so that they are handled with a more humanitarian view. The aim of the family courts ought to have been '*to be free from subconscious pressures the preconceived notions and tyranny of dogmas and adopt a realistic, rational and pragmatic*

[91] The 59th Law commission report (1974) stressed that in dealing with disputes concerning the family the court ought to adopt an approach radically different from that adopted in ordinary civil proceedings and that it should make reasonable efforts at settlement before the commencement of trial. Several association for women, other organizations and individual have urged from time to time that family court be set up for the settlement of disputes, where emphasis should be laid down on conciliation and achieving socially desirable results and adherence of rigid rules of procedure and evidence should be eliminated. These principles have been reflected in the Statement of objects and reasons of The Family Court Act, 1984.

[92] A.Agnihotri and M.Srivasthava, *Family Courts in India an Overview*,http/www.legal service India.com/article; last seen on 31-12-2013 at 12.30 hrs

approach'[93]. It also enables the parties to the case to approach the court independently and not along with other accused in the criminal cases[94]. The Family Courts Act is the procedural law dealing with maintenance, divorce, nullity of marriage, marital status, custody of children and disputes relating to the property arising out of marriage[95] and the corresponding substantive laws are the personal laws. The laws relating to marriage, divorce, inheritance and succession have the nomenclature 'Personal Laws' which happens to be different for people belonging to different denominations of religion [96] . The peculiarity of the personal laws is the diverse and multifaceted substantive and procedural legal structure[97]. Enforcement of rights under the personal laws thus has to encounter the dual threats, emanating from the procedures prescribed under the parliamentary enactments as well as the customary prescription. Establishment of the

[93] F.Agnes, Supra 39

[94] The Bill seeks to exclusively provide within the jurisdiction of the Family courts the matters relating to

- Matrimonial relief, including nullity of marriage, judicial separation, divorce, restitution of conjugal rights, or declaration as to the validity of marriage or as to the matrimonial status of any person
- The property of the spouse or either of them
- Declaration as to the legitimacy of any person
- Guardianship of a person or custody of a minor
- Maintenance including proceedings under Chapter IX of the Code of Criminal Procedure.

(Statement of objects and reason ,Published in Gazette of India Part II S.2 EXT.No.47)

[95] Sec.7 of The Family Courts Act,1984

[96] J.D.Nandan in his introduction in S K. Iyer, *Law of marriage, Maintenance, Separation and Divorce*, 7(1989)

[97] While approaching family courts the litigants had to settle more than one issues among them such as property both movable and immovable, custody of child/children, maintenance, inheritance etc and also they have to go through different procedural formalities including counseling, conciliation, adalth etc

Family Courts aimed to address the traditional as well as the complex procedures in the personal laws[98].

Examination of the class structure of the litigants reveals that socially and economically marginalized women and destitute children are the major sections that approach the family court to establish their social status and economic rights including maintenance[99]. The ground reality is that women are the most oppressed and weaker section of the society irrespective of the caste or the class to which they belong[100]. It is therefore plausible to equate operational efficiency of the family court system to gender sensitive justice delivery. The primary objective of setting up the Family Courts is to provide speedy remedies through alternative legal system with minimum damage to the conjugal establishments.

Issues related to family and matrimony have often been linked with other economic or social rights[101]. But in many cases the parties concerned are not able to enjoy such rights mainly due to the unsettled issues in areas of personal laws. By establishing family courts there occurred a chance to combine the entire family related issues under a single roof and settling the

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[98] Simplify the rules of evidence and procedure so as to enable a family Court to deal effective with a dispute-2 (h)of Statement of objects and reasons, Published in Gazette of India Part II S.2 EXT.No.47.

[99] Report of the Workshop conducted by National Commission For Women on the *Working of Family Courts in India*, supra

[100] J.A.S.Anand, *Justice for women – concerns and expressions*,89 (3rd edn, 2008)

[101] Disputes between spouses may involve recovery of money, gold ornaments, house hold articles including stridhana or other property, maintenance including food,shelter,education and health needs etc.

disputes at a relatively shorter time.[102] But it has been pointed out that the court is seen more as a court doling out maintenance orders which cannot be enforced, rather than a court deciding crucial legal and economic issues concerning women[103].

Chapter IV of the Family Courts Act lays down that the commitment of the statute is towards the settlement of family dispute[104]. This has been often misinterpreted by a section of judges and counsellors as the primary objective of the law and at times, forces the women for reconciliation with their husbands even at the risk of violation of their human rights. This reveals the absence of orientation training to the judicial officers. As the implementation of the provisions of the Family Courts Act demands alternative orientation for the Bar and Bench the persons working in both these areas should be specifically selected and trained.

Many studies have pointed out that the family courts have failed to usher in a new and dynamic approach to family litigation and to ensure gender justice[105]. The family court system has been further criticized that the aspiration of ushering in a less formal and technical and more women friendly environment has been shattered[106].

[102] Statement of objects and reason ,Published in Gazette of India Part II S.2 EXT.No.47,Bill No.21/1984

[103] F.Agnes, Supra 68

[104] Sec.9 of Family court act

[105] A study of Family Courts of Tamilnadu,conducted by EKTA,resource Centre for Women available at http:// ektamadurai.org/2011 /Family Court Study book.pdf. last seen on 18/03/2014 at 23.30 hrs.

[106] Ibid.

Justice is a combination of various factors including enactment of laws responsive to the changing needs of the time, their effective enforcement, progressive and proactive interpretation and application so as to fill up any void that is left and not taken care of by statutory enactments. It is the law in action which is more important than just the law. In the family court system, the importance of proactive roles by gender sensitive judges has been often highlighted[107]. If one were to ask to name a significant single factor which could make the delivery of justice, just and meaningful, the answer would be-a sensitized judiciary which views the circumstances and situation in a holistic manner[108]. As laws alone cannot make justice available to citizens in a society, seeking equality in an unequal society is a task demanding concerted action on the part of the individuals, the community, government and the judiciary on a continuing basis. Law is not merely an enactment but its essence lies in the manner in which it is unfolded in law courts[109]. Any serious discourse on justice in general and gender justice in particular must realize this fundamental understanding before leading towards further explanations[110].

[107] Gender sensitive judges can take more proactive role in the proceedings rather than simply responding to material presented by lawyers. A.S. Anand, supra 102

[108] In a number of cases various courts reiterated that the court shoulder a great responsibility while deciding cases of rape, dowry death, child abuse etc. *State of Andhra Pradesh v Ganguli Sathyamoorthy* AIR 1997 SC 1588,S.*Gopal Reddy v State of Andhra Pradesh* 1996 AIR 1996 SC 2184,*Ranjith Hazarika v State of Assam* 1998(8)SCC 635,*State of Uttar Pradesh v Babul Nadh* 1994 SCC (Cr) 1585,*Dhananjoy Chatterje@Dhanv State of West Beng*l,1994(2) SCC 220,*State of Karnataka v Krishnappa*,2000(4) SCC 75,*Visakha v State of Rajasthan* AIR 1997 Sc 3011

[109] F.Agnes, Supra 68

[110] *"The fight is not for women status but for human worth. The claim is not to end inequality of women but to restore universal justice. The bid is not for loaves and fishes for the forsaken gender*

Family Courts in Kerala

Kerala is considered to be a unique State in many social aspects as compared to the rest of India[111]. This unique phenomenon of socio economic development has also been very widely referred to as the 'Kerala Model of Development [112] . Kerala's achievements in attaining high human development indicators have put the State way ahead of other Indian States and on par with developed economies in critical areas such as literacy, health care, gender consciousness, labour rights and participative governance[113]. These strengths can be leveraged further by understanding the changing aspirations of the people in the light of global dynamics.

Although the status of women in Kerala, compared to that of their counterparts in other states of India, is very high,[114] several social indicators reveal that they are relatively disadvantaged[115]. Due to the high literacy rate,

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but for cosmic harmony which never comes till women comes" J.V.R.K Iyer, *Law and Life*, 31 (1979)

[111] In spite of having a low per capita income and high rate of unemployment, compared to other Indian states, Kerala has achieved a quality of life, which is much higher than all the other states in India as well as some industrialized countries. Notable among its achievements is the good health indicator in terms of mortality and fertility rates and high levels of utilization of formal health services. See, L. Gulati and Ramalingam, *Gender Profile, Kerala*, (2005)

[112] K.K.George, *Limits to Kerala Model*, 6.(1999) See also his later papers, "*Whither Kerala Model*?" presented at the International Conference on Kerala Studies, in 1994 A.K.G. Centre, Thiruvananthapuram,

[113] Report of Kerala State panning Board. *The Economic Review* .2012,

[114] The indicators that contributed to higher status of Kerala women include; favorable sex ratio of 1084 women for 1000 men, higher age at marriage, higher medical attention, material quality of life, infant mortality rate, mother mortality rate, number of children, high education etc. As per the 2012 Economic Review 2012 the state of Kerala has the highest literacy rates of 92% for women and 94% for men in the country as compared to the national rates of 54%for women and 76% for men. Supra 114

[115] Which include the low participation and representation of women in politics, gender differences in professional education, low work participation of women, gender differentials in wage structure, relatively unequal property rights, high workload and household responsibility on the women, lack of autonomy or decision making power etc. See the official website of Government of Kerala,

it is believed that the people of Kerala know well about the laws affecting their lives. With abundant print and electronic media, the state is marked with higher rates of legal awareness[116]. Even though a sizeable percentage of the women population in Kerala is educated and beneficially employed it has been pointed out that they do not enjoy equal social and legal status with men[117].

In spite of better living standard of women in Kerala, crimes against them are nonetheless increasing at an alarming rate. Kerala is the most crime-prone state, ahead of Uttar Pradesh and even Delhi[118]. The latest National Crime Records Bureau (NCRB) figures comparing incidents of crime across states, note that Kerala is the most crime affected state and Kochi the most dangerous city. Figures compiled on an yearly basis till 2010 show that Kerala has a crime rate of 424.1, more than double the national average of 187.6. Domestic violence dominates among the crimes against women as 51.4% [119]of the crimes are related to domestic crimes and 44.9 % of victims are between 26 to 40 years[120].

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www.kerala.gov.in see also S. I. Rajan,and K Sreerupa in S.Mukhopadhyay (Ed.), *'Gender Disparity in Kerala : A Critical Reinterpretation,* 32-49 (2007). S.Mukhopadhyay, *The Enigma of the Kerala Woman: A Failed Promise of Literac*,37,'(2012)

[116] Advertisements and propaganda by Kerala Women's Commission, Kerala Women's Development Corporation, Department of Social Welfare, Kerala State Legal Service Authority, NGOs like Sakhi, Anweshi, Abhaya, Kerala Mahila Samkhya and other progressive women organizations have also helped to improve the legal awareness among the women in Kerala.

[117] Dr.J.Devika and A. Mukherjee, '*Re-forming Women in Malayalee Modernity : A Historical Overview*',178(2007)

[118] Statistics of national of National Crime Records Bureau, Supra,2013

[119] Report of study on ' *Women Victims of Crimes in Kerala 2012-13* ' conducted by Institute of Social Science Delhi, available in Kerala police .org last seen on 27/03/2014 at 17 hrs.

[120] ibid

The dichotomy between the growth of society in general, achieving high physical quality life indices, and unequal treatment of women population has resulted in social and domestic turbulences posing serious threats to the very foundation of the patriarchal family system prevailing in the state[121]. Demands of the womenfolk for equal status, dignified living and violence free social and domestic atmosphere have compelled the society to redefine the concept of family, granting different social dimensions. But this process has neither smoothly nor uniformly happened in the state, resulting in unending litigations at greater rates and breakdown of families. The role of family courts has thus become of greater relevance in Kerala.

The Act came into force in the state of Kerala during 1989[122] but it took further three years to come into existence and during 1992[123]. In Kerala three courts were started only during 1994 at Thiruvananthapuram, Ernakulum and Kozhikode. Now, out of 410 family courts in the country 28 courts are in Kerala[124].

Relevance of the current study

The review of literature shows that there is a dearth of relevant studies on family courts and gender justice in the context of Kerala. There are few studies conducted on the functioning of family courts in the country since their inception and all those are only analytical studies based on some

[121] A.Vijayan, *Violence against Women on the rise in literate Kerala*, Infochange India news & Features (2007) available at http: //infochangeindia.org/ last seen on 10/3/201 at 11.30 hrs.
[122] Vide No.79/5/86 dated 17/10/1989,Gazette of India Ext. Part II,Section-1
[123] Vide no. 117/92/home dated 6/6/1992,published in Kerala Gazette Ext.No.679 dated 6/6/1992
[124] As per the official website of Ministry of Law and justice ,*www.lawmin .nic.in* , last seen on 2-1-2015 at 11.30 hrs

particular courts. There is not even a single one regarding the State of Kerala. Majority of the reports on family courts are narrative and descriptive in nature without any empirical data. While considering the Kerala context, there is hardly any study which questions the gender mainstreaming image of the state in the realm of legal system and working of family court. No effort was undertaken to examine the women friendly projection of family courts in the State, if any. Therefore the present study attempts to fill the existing lacuna in legal research focusing gender justice through family courts in Kerala. Given the broad theoretical framework of gender justice and quest for equality, this study critically analyzes the changes that have been brought about by the family courts in Kerala in the realm of speedy, conciliatory and alternate justice for women.

Objectives of the study

Justice is a combination of various factors including enactment of laws responsive to the changing needs of the time, their effective enforcement, progressive and proactive interpretation and application so as to fill up any void that is left and not taken care of by statutory enactments. It is the law in action which is more important than just the law. Hence the objective of the study is to review the working of the family Courts and to analyze whether the provisions of the Act is competent to achieve its aims and objectives of speedy disposal and conciliation. The study examines the deficiencies in the enforcement regime and also suggests modifications in the Act and improvements in the mechanism

Hypotheses

1. Family courts, which were established throughout the country with a view to promoting reconciliation and securing speedy settlements of disputes relating to marriage and family affairs, could not ensure gender justice and equality as expected
2. Family courts cannot function effectively unless and until there is a corresponding revision in substantive laws related to women and their rights.
3. The high social status of women, higher level of civil society activism and media vigilance in Kerala society have not been reflected in the gender question in Kerala as domestic violence, divorce rate, sexual abuse etc are increasing at an alarming rate.
4. Procedural inertia, lack of coordination, absence of uniformity in rules, excessive role of lawyers and lack of infrastructural facilities are major hurdles in the effectiveness of family courts in Kerala.
5. In spite of the high level of social awareness, justice through family courts is not accessible to women victims especially those who hail from lower socio-economic background due to distance, cost, procedural delay, absence of compassionate approach etc.
6. Gender bias, cost, and lack of gender sensitivity erodes the effectiveness of family courts
7. Notwithstanding the procedural lacuna and insensitive approach, family courts can play a vital role in providing gender justice if the

inconsistencies are corrected and refined with a view to making it more inclusive and non technical.

Review of literature

The literature regarding family courts, it being a comparatively new system, is scanty,[125] Very few reports and articles are available on this matter. The reports of National women's commission[126] is the pioneers in this area and the later studies of family courts at Varanasi,[127]Tamil Nadu [128] and Rajasthan[129] and some articles[130] are mere repetitions even in words and sentences of the earlier ones.

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 counseling etc. The workshop suggested 15 concrete recommendations to improve the system as a whole with a draft of model uniform rules under the Family Court Act. All the recommendations and discussions were only with

[125] First family court was established in the year Mumbai during 1989 and in Kerala 1994(4 courts) in Kerala and the number was raised to 18 during 2005

[126] Report of Workshop held on 20th March 2002, conducted by National Commission for Women,Supra 83

[127] Family Court in Varanasi, A case study, Published by National Institute of Public Cooperation and Child Development

[128] A study of Family Courts Thamilnadu,conducted by EKTA- resource centre for Women ,supra 134

[129] *Functioning of the family court in Rajastan*,Central India Law Quarterly, Vol. 5 :2,259-289 ,(2005)

[130] Article published in Mainstream weekly '*Family Courts Lived up to Expectations*' is more or less repetition of the article *'Family courts: from frying pan to fire'* published in *Women's Studies in India A Reader'*

respect to the procedural difficulties and the legal frame work and the corresponding substantive laws remain untouched

The study, "*Family Court in Varanasi: A Case Study*[131], attempts to highlight the issues in the functioning of family Courts for policy interventions. The case study clearly brings to the fore that Family Court as alternate dispute resolution route for women is effective. At the same time, it needs infusion of better infrastructure, more judges and involvement of non-government organizations to a greater extent to promote paralegal assistance. It is silent about the other substantive rights lacking and fulfillment of the very objects[132].

This study of Family Courts in Tamil Nadu[133] by the EKTA team includes recommendations to address the different constraints which act against the interest of women getting justice speedily where their rights have been violated within the family, and which hinder their access to counseling services to reconcile when there is scope for change towards equal relationships within the family. The recommendations deal with changing traditional mind sets of stakeholders where necessary, expansion of Family Courts in Tamil Nadu, modifying administrative procedures where essential, staffing and qualification/expertise of staff of Family Courts, infrastructure

[131] Supra 146

[132] The aim of the study was the typologies of cases dealt within the Family Court, to discover the actual reasons behind disputes within the family, to find the total number of pending cases in the court, to determine the reasons for delay, to find out the number of cases disposed of during the period1999-2003, to highlight the functioning of support services, if available, in the Family Court, Varanasi.

[133] Supra 147

and location of Family Courts, the role of advocates in Family Courts, and lastly amendments to the Act itself that are required. According to the study if implemented, there will be greater gender justice in Tamil Nadu and lesser trauma for men and women going through difficulties in their marriage and their children. But substantive laws and their role as a hindrance to secure gender justice were not included in the study, without which there will not be any considerable change in the situation.

The aims and objective of the study of 'Functioning of Family Court in Rajasthan' were to evaluate the working of the Family Courts in Rajasthan, to identity the problems of the Judges and litigants of the Family Courts and to suggest remedies thereof through administrative and legislative steps. It was a study based only on interviews and the legal frame work was not critically evaluated.[134]

Flavia Agnes in "Family Courts: From the Frying Pan to the Fire?'[135], has criticized the Family Courts Act as pro- family and anti-women. She points out that in addition to the procedural lacunae, older problems connected with substantive law persists even after the legislation. She argues that the requirement was for "*matrimonial laws and courts somewhat along the lines of labour laws and labour courts, which recognize the unequal power balance between labour and management."*

[134] See,P.K. Bandhyopadhaya,Supra 27
[135] F. Agnes,Supra 68

Namitha Singh Jamwal, in 'Has Family Courts lived up to expectations?' [136], criticized family courts for not being able to achieve the objective of removing the gender bias in statutory legislation. The Act has been vehemently criticized for its non-gender attitudes and approaches. It has been argued that over the last nearly quarter of a century, the system has given rise to anger, frustration and resentment over its functioning. The system lacks the trust of the majority of justice seeking population regarding its capability to provide a fair and just forum for handling family disputes. It has been cautioned that unless the present situation of the family courts is remedied, the women will be forced to remain unsecured within their families and society. The article seems to be a repetition of the earlier work of Flavia and the other studies.

There is a need to examine the extent to which the ideological framework of gender justice has been integrated within the family court project. This innovative experiment in dispute resolution was of immense value for women who were burdened under the stress of lengthy, technical and costly legal battles for their crucial rights of survival and human dignity and for which the term gender justice is to be made clear.

While defining the term, gender justice, María do Mar Castro Varela in *"Envisioning Gender Justice"*,[137] argues that the term is often used with reference to emancipatory projects that promote women's rights through legal changes and women's interests in social and economic policy.

[136] N. Jamwal, ,Supra 71

[137] María do Mar Castro Varela, *Envisioning gender justice*, (1998)

However, the term is seldom given an accurate definition and is too often used interchangeably with notions of *gender equality*, *gender equity*, *women's empowerment*, and *women's rights*, which makes it difficult to pin down. She further explains that any concrete definition of *gender justice* is based on a specific political ideology, a set of convictions about what is 'right' and 'good' in human relationships, and how these desirable outcomes may be attained.

Ratna Kapur and Brenda Crossman explain the three distinct perspectives on gender justice and law including protectionism, equality and patriarchy. [138] Anthony [139] , Atray [140] and Deshpande [141] endorse the protectionist view of gender justice in which women are viewed as secondary and subordinate to men in biological as well as social realms. A woman's position as a wife has been given the highest place over all other roles which she is required to play because it is here that she is required to perform the most arduous of duties and the most difficult of responsibilities. As a wife, she is beyond everything else and sits on a pedestal as high and as glorious as the imagination can reach.

[138] R.Kapur,and B. Cossman,Supra 27
[139] M.J.Anthony,*Women's Rights*,1985
[140] J.P.Atray,*Crimes Against Women*, 1988
[141] V.L.Deshpande, *Women and the New Law: With Particular Reference to the New Law of Rape,1984 , Being the Criminal Law Amendment Act, 1983, and New Law of Dowry*, Chandigarh, R.K. Malhutra, Punjab University Publications.(1986)

Fareeda Shaheed's work [142] highlights the patriarchy approach of the law. She argues that patriarchy in Pakistan results in inequalities to women and the law has been used as a way of vindicating patriarchy. The three sources of such laws are customary law, religious law, and British civil and criminal law. Lina Gonsalves[143] analysis in her study *Women and the Law* is also an example of scholarship within the law as patriarchy framework. Feminist historians have played a leading role in the articulation of a more complex understanding of the role of law in social change.

A second and perhaps more familiar approach to gender justice in the literature is one that is based on promoting equality. The literature has primarily focused on providing empirical reviews of laws that affect women. Writers with this approach have tended to provide comprehensive reviews of a range of legal provisions affecting women, from personal laws to criminal and labor laws. This literature highlights both laws that continue to discriminate against women and successful challenges to such discriminatory laws. Venkataramiah, Singh and Jethmalani endorse this view.[144]

Anne Marie Goetz , however, contends that the term *gender justice* is increasingly used by activists and academics because of the growing concern and realization that terms like '*gender equality'* or '*gender mainstreaming'*

[142] F. Shaheed, ed, *'The Cultural Articulation of Patriarchy: Legal Systems, Islam and Women*',.38 44, (1986)
[143] L.Gonsalves ,*Women and the Law,* 1993
[144] R.Jethmalani, ,*'India: Law and Women'* in Margaret Schuler, ed. *Empowerment and the Law: Strategies for Third World Women,*(1986)

have failed to communicate, or provide redress for the on-going gender-based injustices from which women suffer.[145]

Savitri Goneskere examines the evolving concept of substantive equality and its implications for South Asia; a region where, despite some gains, the stark reality of gender based discrimination is still all pervasive.[146] The paper argues that substantive equality has evolved from a narrow concept of formal equality of treatment, to become a strategy to evaluate and address result and outcome in introducing laws and policies to accelerate gender equality and justice. Ann Stevart has considered training to judges on gender issues as one way of tackling this problem.[147] However such training presents considerable challenges for both educators and recipients and raises a range of questions.

Lata Mani, Radhika Singha and Tanika Sarkar are among the feminist historians who have critically examined the complex relationship between law in colonial India and women's subordination. Singha[148], for example, considers the ways in which law-making was a cultural enterprise, where the colonial state could draw upon differences such as rank, status and gender. Rajeswari Sunder Rajan [149] has examined the relationship between the postcolonial, Indian nation-state, law and Indian women's actual needs and

[145] A.M. Goetz, , "*Gender Justice, Citizenship and Entitlements: Core Concepts, Central Debate and New Directions for Research*". In: M. Mukhopadhyay and N. Singh (eds.): *Gender Justice, Citizenship, and Development*,(2007)
[146] S.Goneskere, *The Concept of gender Justice*, www.uniferm.org
[147] A.Stewart, *Judicial Attitudes to Gender Justice in India: The Contribution of Judicial Training*, Warwick School of research in Law Series, (2003).
[148] R.Singha, *A Despotism of Law, Delhi*, (2000)
[149] R.S.Rajan, *The Scandal of the State: Women, Law, Citizenship in Postcolonial India* ,(2000)

the contradictions produced through this relationship. She argues that law and citizenship define not only the scope of political rights for women, but also their cultural identity and everyday life.

Archana Parashar[150] in her study of family law reform examines and evaluates some of the insights of debates within feminist legal studies. In developing her analysis of the role of legislation and the promotion of gender justice, Parashar argues for the importance of law reform in women's struggles. However, her view of the nature of the role of law reform is informed by a consideration of the limits of law. She argues, for example, that 'instead of dismissing law reform as a means of achieving equality for women, it is more productive to realize the limitations of law and have appropriate expectations that law reform by itself will be insufficient to change society and end women's oppression.

Flavia Agnes[151] work has also been an important contribution to the development of more complex and nuanced analyses of feminist engagement with law. Throughout her work, Agnes interrogates the effect of law reforms on women and questions whether laws intended for women's benefit have lived up to their promise. Agnes explores the broader questions of why law has had so little effect in women's lives, and whether law can bring about social change[152]In her work, *Access to justice and rule-of-[good]*

[150] A. Parashar, *Women and Family Law Reform in India,* (1992).
[151]F. Agnes, ,Supra 39
[152] F.Agnes. *Women and Law in India: An Omnibus Comprising Law and Gender Inequality, Enslaved Daughters, Hindu Women and Marriage Law.*(2004)

law: The cunning of judicial reform in India, Pratiksha Baxi[153]focuses on the reform based research on judicial delay and "alternate dispute resolution" as an illustration of how the problems in the administration of state law comes to be equated with *access* to justice.

Shalu Nigam [154] attempts to understand the justice delivery mechanism from the perspectives of women litigants specifically within the context of Section 498-A Indian Penal Code, 1860. This research work empirically examines and explores the process of women's resistance to the male dominion within the sphere of family and law. The study suggests that the justice delivery system does provide a platform for a woman to raise her concerns and a space to negotiate for her rights; yet, at the same time it also acts to disqualify her claims and often ends up in re-victimizing the victim.

While coming to the context of Kerala, Mridul Eapen and Praveena Kodoth[155] says that changes in the structure and practices of families in Kerala in the past century have had wide-ranging implications for gender relations. According to them the changes in marriage, inheritance and succession practices have changed dramatically the practices of erstwhile matrilineal groups as well as weakened women's access to and control over

[153] P.Bakshi, *Access to Justice and rule of law: The cunning of judicial reform in India,* Institute of Human Development, (2007)

[154] S. Nigam, Understanding Justice delivery system from the perspectives of Women litigants as victims of domestic violence in India

[155] M. Eapen and P.Kodoth**,** ***Demystifying the 'high status of Women in Kerala attempt to understand the contradictions in social development,*** Centre for development Studies,(2001)

inherited resources. J.Devika[156] also shared similar views that women's education and employment have not played the transformative role so generally expected of them. Changing levels of female employment and the persistence of a gendered work structure have limited women's claims to "self-acquired" or independent sources of wealth. Underlying these changes are conceptions of masculinity and femininity, which privilege the male working subject and female domesticity.

The working of family court as an alternate and distinct legal framework has not been seen analyzed in any of the works and any type of study in that area will be a novel one. Hence a Critical Study on the Working of Family Courts in the State of Kerala

Research methodology

This is a study based on primary and secondary sources of legal data. The primary data is collected through the interviewing the women victims who approached the family courts. By empirical study analyzes the functioning of the Family Courts and examine how far the supposed benefits of speedy disposal and conciliation have been extended to the women litigants The secondary data for the study is collected from books, reported cases, reputed journals, research papers, law commission reports, data obtained from the High Court administration committee, parliamentary debates, websites, government reports, reports of commissions and committees etc

[156] J.Devika, *Imagining women's social space in Early modern Keralam,* CDS working Papers, (2001)

Research Questions

Every movement that demanded judicial forums exclusively to deal with matrimonial disputes concisely highlighted the unequal power relationship between men and women at every level and the anti-women bias within the law and in the court[157]. Consequently strong demands were put forward to enact laws and develop procedures that would ensure women's economic rights and personal liberties within the matrimonial dwelling and, in the event of irreconcilability, make divorce proceedings speedy, less expensive, less traumatic and more just for women[158].

However, when the Family Courts Act was enacted, the concept of gender justice was missing in the statute and the same has not been specifically declared as an objective of the enactment[159]. In the theoretical sense, the family courts will not, therefore, be compelled to take a proactive position favourable to the feeble gender or interpret the provisions of the personal laws, which are disgustingly patriarchal, in favour of women. Despite the lack of specific statutory directions the Family Courts have time and again taken pro-women stance and made meaningful attempts to tilt the personal laws in favour of women. A detailed analysis of the provisions of the Family Courts Act and the Rules made there under, thus become

[157] F.Agnes , *Women and Law in India*, supra 39

[158] Parliamentary discussion on *Family Courts Bill* ,Loksabha, dated 27-8-1984

[159] P.Banerjee, *The Acts and Facts of Women's Autonomy in India,* Paper presented at Maison Des Sciences de L' Home (MSH) Paris, on February 2005 in a conference on "Constitution, Law and Constitutionalism,".14 (2005)

indispensable to underscore the pro-women provisions with latent objectives of gender justice.

A brief background of the family courts in India and their underlying assumptions in pursuit of gender justice and substantive equality often lead to a notion that these alternative dispute resolution bodies have successfully addressed the hitherto existing injustice and gender bias in our legal system. However, in contrast to the general impression about the effective functioning of the family courts in India, some official studies have explicitly highlighted the underperformance as well as the anti-women attitudes of the family courts[160]. They have been criticized for trying to victimize women and asking them to compromise with a view to sustaining the institution of marriage and family notwithstanding the cruel and atrocious treatments meted out to them within these establishments[161]. Of course, the patriarchal social and religious settings must have surely made impacts on the outlook of the courts, which can be changed only through strong social reformations. But it can definitely be argued that the theoretical milieu of the Family Court laws also allows the courts to take such a position. From the gender equality point of view, this aspect needs thorough investigation and analysis.

The Family Courts Act has not defined the term 'family' and consequently all the matrimonial and family issues have not been brought

[160] Study of Family Court, Varanasi, A case study, Published by National Institute of Public Cooperation and Child Development, (2007)
[161] Ibid

under the purview of the Act. What is within the purview of the Family court is matters concerning spouses and children and not the entire family[162] and that too only with respect to the procedure. The substantive rights remain un touched and it will be as per the personal law of parties concerned. Since women's rights are inextricably interwoven with various provisions of the family laws, how far this piecemeal approach will be able to ensure gender justice and equality as envisaged by the constitution is a truly relevant question. The Family Courts Act speaks only about the speedy settlement and conciliation strategy[163]. It is to be noted that word used is speedy settlement and not speedy adjudication or disposal. Looking at the level and substance of inequality in the field of personal of family disputes and not laws, the Family Courts Act has left various aspects which a beneficial legislation like it should have surely taken into account. Therefore, any study about the Family Court should, in addition to the topic of effective performance, contain a critical evaluation of the areas of personal laws that have been left out of the jurisdiction.

Family courts have been established since 1989[164] throughout the country with a view to promoting reconciliation and securing speedy

[162] A suit or proceeding for dissolution of marriage, Restitution of conjugal rights, nullity of marriage, ,judicial separation, declaration as to the validity of marriage, suit or proceedings with respect to the property of the parties, declaration as to the legitimacy of children, suit or proceedings for maintenance, a suit or proceedings in relation to the guardian ship are the only matters coming under the purview of Family Courts Act. Sec.7, Family Courts Act, 1984

[163] The preamble declares that the family courts are established only to promote conciliation and to secure speedy settlement of disputes relating to marriage and family affairs.

[164] The first family court was established in Maharashtra in 1989 in the city of Pune. See the report of National Women's Commission, Supra

settlements of disputes relating to marriage and family affairs. How far the family courts have proved to be successful in developing an alternative legal system through conciliation processes needs to be investigated thoroughly. Another crucial aspect that demands detailed analysis is the speedy settlement of disputes by the family courts. Has the family court system contributed significantly to resolve the family disputes and deliver justice to the victims of domestic injustices faster than the ordinary judicial establishments? How far the fast track mechanisms are desirable to settle the family issues? These are two critical issues that demand attention and analysis.

It has been made statutorily imperative that only those persons who are committed to protect and preserve the institution of marriage should be appointed as judges of the family courts[165]. Conservation of family has been thus given as a predominant aim of the Family Courts Act. What mechanisms have been suggested by the statute to ensure the prescribed qualifications of judicial officers and how far they are effective? Does the importance granted to the preservation of family take away the basic human rights of the parties more particularly of the woman? These two aspects are required to be evaluated methodically for understanding whether the

[165] As per subsection 4 of Section 4 of the Family Courts Act in selecting persons for appointment as Judges, every endeavour shall be made to ensure that persons committed to the need to protect and preserve the institution of marriage and to promote the welfare of the children and qualified by reasons of their experience and expertise to promote the settlement of disputes by conciliation and counseling are selected.

attempts of the courts to upkeep the families are at the cost of justice and equality of women in the matrimonial binding.

The Family Courts Act speaks only about the procedural simplification and conciliation strategy[166].Looking at the level and substance of inequality in the field of personal laws, the Family Court Act has left various aspects which a beneficial legislation like it should have surely taken into account. Therefore, any study about the Family Court should, in addition to the topic of effective performance, contain a critical evaluation of the areas of personal laws that have been left out of its jurisdiction.

The Family Courts Act has originally discouraged the representation of lawyers[167] and they were permitted only with previous sanction of the court[168]. Since 15th June 2011 legal representation is made as a matter of right as per the notification of Section 30of Advocate Act 1961[169]. This transition has its own merits and demerits. Appearance of advocates converts the disputes into litigations and the parties are automatically entrapped into protracted legal intricacies. On the other hand the judicial system demands technical expertise which the ordinary persons are lacking. Unless the traditional procedural formalities are dispensed with, ordinary women will not be able to present their grievances properly before the court

[166] Sec 10 and 14 of Family Courts Act,1984

[167] Sec.13 of Family Courts Act prohibits the party to be represented by a legal practitioner. If the court considers it necessary in the interest of justice it may seek the assistance of a legal expert as *amicus curiae*

[168] *Sumithra Mohan and others v Rajesh Unnikrishnan Nair* ILR 2005(2) Ker.776

[169] As per section 30 of Advocate's Act, every advocate whose name is entered in the state roll shall be entitled to practice throughout the territories including Supreme Court, tribunal or any other authority. It is notified on 15th June 2011

without the support of legal experts. Has the modification of the procedure that enabled the advocates to represent the parties in the family court improved the quality of justice delivery system? Was the system in which the parties presented their cases directly before the court more beneficial to them and helpful for speedy disposal of the cases? These questions demand empirical analysis for working out a better and effective operational framework.

Family courts have been established solely for resolving disputes in the assigned areas of personal laws in a fast track manner and also by resorting to conciliatory measures. The only duty cast on the Family Court by the Act to make endeavour to assist and persuade the parties in arriving a settlement in respect of subject matter of the suit. Should the Family court feel that there is a reasonable possibility of settlement between the parties, the proceedings have to be adjourned for a reasonable period to enable the parties to a settlement.[170]. Only if it comes to the conclusion after the above exercise that the settlement is impossible, then the case should be posted for further steps such as written statement or counter, issues, trial and so on[171]. But the quality of services from these courts, apart from reconciliation and speedy disposal, is to be measured also on the basis of various reliefs associated with or supplementary activities. They include the efficiency of the execution of the decree or order, interim reliefs, counseling, infrastructure in the court premises etc. Deficiency in these areas will

[170] Sec 9 of Family Courts Act,1984

[171] *R.Durga Prasad v Union of India*,AIR 1998,Andh.pra.290

adversely reflect on the quality of services delivered by the courts. In order to ascertain the quality of services provided by the family courts it is indispensable to conduct empirical studies on the services in the aligned areas as well. Suitable and periodical changes in the functional levels can be made only on the basis of such evaluations.

Till the creation of family courts the disputes relating to divorce, maintenance, and custody of children and declaration of title as well as status were handled by the decentralized judicial mechanism including the magistrates and subordinate judges[172]. The creation of family courts brought all the cases handled by different courts of different regions into a single place and a single hand which resulted accumulation and centralization. This is a matter demands critical evaluation.

Easy accessibility of women to the judicial system for enforcing their rights is an indispensable element of gender justice. This can happen only with due awareness about the rights and enforceability, uncomplicated procedures, inexpensive and affordable monetary liabilities and effective support services. How far the setting up of family courts has succeeded in providing these vital aspects of gender justice to the society in general and the women in particular? These areas need a detailed evaluation.

A gender friendly approach of the establishments is inevitable for ensuring an efficient justice delivery system. In the absence of such attitudes, the women surrounded by the feudal structure will be hesitant to

[172] Sec 8 of the Family Courts Act,1984 excludes the jurisdiction of other courts and pending proceedings with respect to the matters falling under sec 7 of the Family Courts Act

approach the court to establish their legitimate rights. The functioning of the family courts ought to be 'free from subconscious pressures, the preconceived notions and tyranny of dogmas and adopt a realistic, rational and pragmatic approach.'[173] The system should not be one which gives more emphasis to uphold the paternalist norms of the society. The attitude of judge, counselors, advocates and other staff are to be complementary to these notions. But in practice are these concepts properly honoured by the bar, bench and the subordinate services? Are they enlightened about these ideals and prepared to enforce them? From the practical point of view, answers to these questions are of great significance.

Association of social welfare agencies[174] and assistance of medical and welfare experts[175] in the judicial mechanism are unique factors of the family court as an alternate and distinct system. If employed properly, these agencies will be able to contribute considerably for the delivery of gender justice. Currently the services of these agencies are limited in conducting *adalaths* and mediations. As the primary supporting system, functioning of these agencies is required to be evaluated. What is the general attitude of these agencies in the case of gender equality and justice? Do they function with the objects of gender justice? Are they legally as well as administratively directed to provide services favourably to the women in distress? What are the other areas where the assistance of these expert

[173] Flavia Agnes, Supra 68
[174] Sec. 5, Family Courts Act, 1984
[175] Sec. 12, Family Courts Act, 1984

agencies can be beneficially utilized? These are the relevant and crucial questions that demand further enquiries.

The Family Courts Act allows the Courts to accept any report, statement, document, information or matter that may, in its opinion, assist to deal effectually with a dispute, even if they are not relevant or admissible under the Indian Evidence Act, 1872.[176] But how far it can go beyond the strict rules and procedure of the Indian Evidence Act, 1872 is a matter of concern. Have the courts put this provision into service positively to take recourse to shift away from the dry and doctrinaire approaches? Or was it employed to reinforce the patriarchal values within the family and marriage? It is also important to enquire whether this unfettered power had enabled the family courts to make use of such items that had been prohibited by the law of evidence.

The Family Courts Act also permits the court to adopt its own procedure for the purpose of settlement.[177] This is a very unique feature with no similar provisions in other laws. But it can act dubiously as well. While the courts with gender sensitivity will be able to put this into practice in a positive sense, it will be a dangerous tool in the hands of those courts with orthodox approaches. It would be advisable to investigate into the independent procedures adopted by the courts for the settlement of disputes. How far this enabling provision has helped the courts to develop indigenous

[176] Sec. 14, Family Courts Act, 1984
[177] Sec.9, Family Courts Act, 1984

procedures and whether they have helped to make the procedures less complex and less traditional?

How far the Family Court system has achieved the objective of delivering gender justice is a point that demands serious examination. However, there are fewer empirical studies on the functioning of family courts as an alternate system in India and its role to upheld gender justice. Taking stock of the situation at this juncture, when more than two decades have passed since the Family Courts Act came into existence, one notes with dismay that the goals for which the family court project was conceptualized have remained elusive and out of reach of most women litigants.[178] The present study attempts to fill the existing gap in scholarship through an empirical analysis of the working of family court system in Kerala.

It is widely acknowledged that women in Kerala are much better off than their counterparts elsewhere in India and development scholars point to past and current levels of female literacy and education, late age of marriage, declining fertility and greater life expectancy to establish this fact[179]. In spite of all these positive indices of better quality of life, Kerala is the most crime-prone state with high suicide rates. Domestic violence is also high and almost all of them driving towards family courts. Within this atmosphere, the working of family court in Kerala will be better than that of any other states and a critical study on it will reveal the real picture of the country.

[178] F. Agnes, *A study of Family courts Thamilnadu,EKTA Madurai* ,retrieved from http://ektamadurai.org/ on 12/12/2013 at 8.30 hrs

[179] Economic Review,2013

Tools of data collection:

The study is conducted through sample survey method. Irrespective of the literacy rate and difference in cultural and ethnic background, the proportion of cases filed in the Family Courts to the population as per 2011 census has been found uniform in all the districts in the State. District of Wayanad was the only exception to this rule. From the data it can be seen that excluding the district of Wayanad,[180] the number of cases instituted as percentage of population varies from 0.07 to 0.17 and the average is 0.11. Hence, it is presumed that the sample collected from a single district will be capable to represent the whole state. District of Thiruvananthapuram has been selected for survey and five percent of the total cases of the Family Courts in the district have been selected as representative sample of Kerala. There are three Family Courts functioning in Thiruvananthapuram district and sample from all the three courts were collected. Total number of cases pending before the Family Courts in the district as on 31/03/2013 was 8937 and 447 cases were taken for the study.

Scheme of the study

The study is divided into five chapters. The first chapter is the introduction which gives a sketch of the research area. It explains the background of the problem in general and specifically in Kerala. This chapter also states the research questions, objectives and the methodology

[180] Difference in Wayanad district may be attributed to the hostile topography, educational, social, and economic backwardness of the district.

adopted in the study. This chapter also highlights the existing literature including the studies.

The second chapter critically examines the legislative frame work of Family court as a distinct and alternate legal frame work. It also explains the scope of speedy trial and conciliation enunciated in personal laws and a critical appraisal of objects and achievements of Family Courts Act.

Third chapter is the report of the empirical study conducted among women litigants of Family Courts Act and identifying the problems and prospects explains the working of family courts in Kerala and their effectiveness in terms of conciliation, speedy disposal, problems in execution etc. and describes the socio economic profile of litigants.

The fourth chapter explains limitations of the family courts Act in terms of constitutional principle, the lack of substantive rights and the relevance of uniform civil code. The role of judges, social welfare agencies and the different methods adopted for counseling, mediation, adalth are also discussed. The judicial process trial and evidentiary privileges are also discussed in this section.

The final Chapter contains the findings and suggestions of the study. The study revealed that declared objectives of the Family Courts to promote conciliation and secure speedy settlement of disputes relating to marriage and family affairs, based on non-adversarial and multi-disciplinary approach has not been fully achieved. Contrary to the expectations, family

court remained only as a court for filing family disputes. The Family Courts Acts itself require modification to protect the welfare of women and children.

The suggestions include the amendments in the preamble to include protective discriminatory provisions on the basis of constitutional mandate, extension of jurisdiction, provision for time bound disposal and execution, legal representation etc. In order to fulfill the objectives certain administrative reforms could be taken as the starting point, which are important for the just disposal of family disputes and are outside the frame work of personal Law.

In short women and men in Indian society as well as within the institution marriage are not 'equal' in any way. There remains a long and lingering gap in 'equal treatment' of unequal in every sphere of life in the Family Courts Act and which fails to provide gender justice. A women specific and more humane legislation is inevitable to ensure violence free life to women and to ensure them the constitutional right to live with dignity. Along with the procedural limitations the administrative improvements needs serious deliberations to improve its functioning.

Chapter 2

Family Courts Act, a Distinct and Alternate Legal Framework: An Assessment

The Background

Conventional adversary legal systems have been deplored as unsuited for matrimonial disputes primarily due to time consuming procedural intricacies, structural animosity and lack of privileged treatments to women and children involved in the altercations[1]. In the matrimonial cases, an alternative legal system that is capable of addressing these issues was demanded by the activists as well as the policy formulators[2]. There was a great demand for a judicial system in the familial domain that would pursue conciliatory practices and disposes the disputes expeditiously. Such a distinctive and innovative judicial system was also presumed to be proactive

[1] The women organizations that mooted for Family Courts "*strongly recommend the abandonment of the established adversary system for settlement of family problems, and the establishment of family Courts which will adopt conciliatory methods and informal procedure in order to achieve socially desirable results."* The suggestions contained in Chap. IV, "*Women and the Law*" Report of the National Committee on Status of Women in India' Indian Council of Social Science Research.(1971)

[2] It is evident from the Objects and Reasons of the Family Courts Act, 1984 that "Several associations of women, other organizations and individuals, have urged, from time to time, that Family Courts be set up for the settlement of family disputes, where emphasis should be laid on conciliation and achieving socially desirable results and adherence to rigid rules of procedure and evidence should be eliminated." Report of The Law Commission of India,59 (1974) had also stressed that in dealing with disputes concerning the family the Court ought to adopt an approach radically different from that adopted in ordinary civil proceedings and that it should make reasonable efforts at settlement before the commencement of the trial.

in delivering gender justice effectively. [3] Since the early days of independence there was thinking in favour of a judicial system, which deals exclusively with family squabbles and correspondingly there was a great compulsion on the policy makers to set up Family Courts similar to those in other countries[4]. The social and political pressure to modify the ongoing judicial practices in the personal law sector has compelled the legislature to design an alternative dispute resolution system with conciliatory procedures and time bound disposal of family disputes.

However, review of Indian statute books in general and personal laws in particular would show that the concepts of speedy disposal and conciliation process were not totally alien to them.

Speedy trial of cases has been upheld as a fundamental right under Article 21 of the Constitution of India[5] and the same has been incorporated

[3] In *K.A. Jaleel v T.A. Shahida,* the Supreme Court held that "*The Family Court was enacted to provide for establishment of Courts with a view to promote conciliation in, and secure speedy settlement of, disputes relating to marriage and family affairs and for matters connected therewith by adopting an approach radically different from that adopted in ordinary civil proceedings. The said Act was enacted despite the fact that Order XXX11A CPC was inserted by the Amendment Act of 1976, which could not bring about any desired result.*" AIR 2003 SC 2525

[4] The movements for Family Court started in the West. United States was the first to start Family Courts. Such Courts are functioning in Japan since 1948.Around the last decade; these courts have been established in a few commonwealth countries, notably Australia and New Zealand. B.M.Gandhi, *Family Law Volume-II* ,218 (2013) The need to establish Family Court was first emphasized by Late Durgabai Deshmukh after her visit to china in the year 1953, where she had the opportunity to study the working of family courts. She discussed the matter with Hon'ble Justice Mr. Chagla of Mumbai High court , Hon'ble Justice Mr.Gajendra Gadkar the then judge of Mumbai High Court and with the then Prime minister of India Pandit Jawaharlal Nehru. See, official website of Delhi Family Court available at http://delhifamilycourts.gov.in/history.html last seen on 10/2/2014.

[5] *Hussainara Khattoon v State of Bihar*, AIR 1979 SC 1369, *Brij Mohan Lal v Union of India and others*, AIR 2002 SC 2096, *Salem Advocate Bar Association, Tamil Nadu v Union of India*, (2005) 6 SCC 344

in subordinate legislations as well[6].In laws relating to matrimonial disputes, speedy disposal of cases has been prescribed specifically. Section 40B[7] of the Special Marriage Act, 1954 (hereinafter only as 'SMA') and Section 21B[8] of the Hindu Marriage Act, 1955 (hereinafter only as 'HMA') have explicitly provided that every petition under these Acts should be tried as expeditiously as possible and endeavour should be made to conclude the trial within six months from the date of service of notice to the respondent.[9] Similarly, the object of Chapter IX of Code of Criminal Procedure, 1973 (here in after only as Cr. PC) is to provide a speedy remedy by a summary procedure to enforce liability in order to avoid vagrancy[10]. In order to avoid the delay caused by the procedural formalities to come to a final order, the Criminal Procedure Code (Amendment) Act, 2001 was passed which inserted provisions for interim maintenance[11]. The Protection of Women from Domestic Violence Act, 2005 also provides for time bound disposal of

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[6] The Protection of Women from Domestic Violence Act, 2005 and the Marriage Laws Amendment Act, 1976

[7] Inserted by Marriage Laws amendment Act, 1976 with effect from 27-5-1976

[8] Ibid

[9] Wordings of both the sections are same as follows: "(1) The trial of a petition under this Act shall, so far as is practicable consistently with the interests of justice in respect of the trial, be continued from day to day until its conclusion unless the Court finds the adjournment of the trial beyond the following day to be, necessary for reasons to be recorded.
(2) Every petition under this Act shall be tried as expeditiously as possible and endeavour shall be made to conclude the trial within six months from the date of service of notice of the petition on the respondent.
(3) Every appeal under this Act shall be heard as expeditiously as possible, and endeavour shall be made to conclude the hearing within three months from the date of service of notice of appeal on the respondent."

[10] *Bhagwan Dutt v Kanta Devi and another,* AIR 1975 SC 83

[11] As per the amendment, during the pendency of the proceedings, the Magistrate may order payment of interim maintenance and such expenses of the proceedings as the Magistrate considers reasonable and to pay the same to such persons as the Magistrate ma y from time to time direct.

application[12]. It can be noticed that there was a consistent effort by the legislature to ensure the speedy disposal by incorporating appropriate modifications in the existing statutes as well as the new legislations[13].

Same is the case with the principle of conciliation also. Conciliation process has been made obligatory in the suits relating to matters concerning family through amendment of the Code of Civil Procedure, 1908 (hereinafter only as 'CPC') in 1976. Similarly, specific provisions with regard to conciliation have been included in SMA as well as HMA. The CPC has been amended and Order XXXIIA was inserted[14] for adopting a different approach so as to bring about an amicable settlement where matters concerning the family are at issue[15]. For the purpose of Order XXXIIA the term 'Family' has been defined exhaustively under Rule 6[16]. Object of the

[12] As per sub-section (4) of Section 12 of the Protection of Women from Domestic Violence Act, 2005 'The magistrate shall fix the first of hearing, which shall not ordinarily be beyond three days from the date of receipt of application of the Court'. As per Sub-section (5) of Section 12 'the Magistrate shall endeavor to dispose of every application made under sub-section (1) within a period of sixty days from the date of its first hearing'

[13] See, the Sexual harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013

[14] Order XXXIIA was inserted by Act No. 104 of 1976, with effect from 1st February, 1977

[15] Vide Order XXXIIA (1) of the CPC, the subjects brought under the operation are 'validity of a marriage or the matrimonial status of any person, declaration as to legitimacy of any person, guardianship of the person or the custody of any minor or other member of the family, maintenance, validity or effect of an adoption, wills, intestacy and succession.'

[16] Rule 6 of Order XXXIIA runs as "For the purposes of this Order, each of the following shall be treated as constituting a family, namely :-

(a) (i) a man and his wife living together,

(ii) any child or children, being issue of theirs; or of such man or such wife,

(iii) any child or children being maintained by such man and wife;

(b) a man not having a wife or not living together with his wife, any child or children, being issue of his, and any child or children being maintained by him;

(c) a woman not having a husband or not living together with her husband, any child or children being issue of hers, and any child or children being maintained by her;

(d) a man or woman and his or her brother, sister, ancestor or lineal descendant living with him or her ; and

amendment of CPC was to provide a different and special procedure in those cases where affairs of family are in question[17]. Consequent to the insertion of Order XXXIIA in the CPC it has become the duty of the Court to make an endeavor in the first instance to assist the parties in arriving at a settlement in respect of the suits or proceedings relating to family[18]. While interpreting Order XXXIIA of the CPC, the judiciary has time and again emphasized that the approach of a Court of law in matrimonial matters should be positive and sympathetic[19].

(e) any combination of one or more of the groups specified in clause (a), clause (b), clause (c) or clause (d) of this rule.

Explanation-For the avoidance of doubts, it is hereby declared that the provisions of rule 6 shall be without any prejudice to the concept of "family" in any personal law or in any other law for the time being in force.

[17] *"Ordinary judicial procedure is not ideally suited to the sensitive area of personal relationships. Litigation concerning or involving affairs of the family, therefore, seems to require special approach in view of the serious emotional aspects involved. In the circumstances, the objective of the family counseling as a method of achieving the ultimate object of preservation of the family should be kept in the forefront. The new Order XXXIIA 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.*" Statement of objects and reasons of amendment pursuant to Order XXXIIA of the CPC, S.O.R. Clause 80, Gazette of India, 8-4-74. Pt Ii, S. 2 Ext. p. 331.

[18] Rule 3 of Order XXXIIA of the CPC imposes a duty on the Court to make efforts for settlement as follows-"(1) In every suit or proceeding to which this Order applies, an endeavour shall be made by the Court in the first instance, where it is possible to do so consistent with the nature and circumstances of the case, to assist the parties in arriving at a settlement in respect of the subject matter of the suit.

(2) If, in any such suit or proceeding, at any stage it appears to the Court that there is a reasonable possibility of a settlement between the parties, the Court may adjourn the proceeding for such period as it thinks fit to enable attempts to be made to effect such a settlement."

[19] It was held in *Jagraj Singh v Birpal Kaur*, AIR 2007 SC 2083 that *"approach of a Court of law in matrimonial matters is much more constructive, affirmative and productive rather than abstract, theoretical or doctrinaire. Matrimonial matters must be considered by Courts with human angle and sensitivity. Delicate issues affecting conjugal relations have to be handled carefully and legal provisions should be construed and interpreted without being oblivious or unmindful of human weaknesses."* See *Saroj Rani v Sudarshan Kumar Chadha*, AIR 1984 SC 1562, *Roopa Reddy v Prabhakar Reddy*, AIR 1994 Kant 12

It was specifically insisted that the matrimonial matters must be considered by Courts with human angle and sensitivity[20]. The object behind Order XXXIIA of the CPC was construed as to extend all help for the maintenance of marital ties and restoration of peace to the estranged couple [21] . Emphasis is, however, laid that steps for bringing about reconciliation between the parties should be taken by the Court "in the first instance itself."[22] In other words, the endeavor should be made right from the beginning of the case. It is further provided that it shall be proper on the part of the Court to seek the services of welfare experts to assist the parties in arriving at a settlement in respect of the subject matter of the suit[23].

The SMA and HMA since their inception also have contained the provision for conciliation as a procedural requirement in matrimonial disputes. Section 34 of the SMA imposes a duty on the Court to make every endeavour to bring about reconciliation between the parties.[24] Similarly, under Section 23 of the HMA the Court is duty bound to make every attempt

[20] *R.V.S.L. Annapurna v. R. Saikumar*, 1981 Supp SCC 71
[21] *Sushmakumari v Omprakash,* AIR 1993 Pat 156
[22] Sub Rule (1) of Rule 3. *Hina Singh v Sathya Kumar Singh,* AIR 2007 Jhar 34
[23] Rule 4 of Order XXXIIA of CPC runs as follow "4. Assistance of welfare expert- In every suit or proceeding to which this Order applies, it shall be open to the Court to secure the services of such person (preferably a woman where available), whether related to the parties or not, including a person professionally engaged in promoting the welfare of the family as the Court may think fit, for the purpose of assisting the Court in discharging the functions imposed by rule 3 of this Order." *Manju Singh v Ajay Bir Singh,* AIR 1986 Delhi 420
[24] Sub-section (2) of Section 34 of the SMA ordains that before proceeding to grant any relief under the Act "it shall be the duty of the Court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavor to bring about a reconciliation between the parties"

to cause reconciliation between the parties.[25] However, Marriage Laws (Amendment) Act, 1976[26] limited the scope of conciliation under SMA as well as HMA[27]. Comparison of relevant provisions in CPC, SMA and HMA relating to family disputes shows that these enactments have stipulated for alternative dispute resolution and laid down conciliation as mandatory practice in such disputes. Except in the case of seeking assistance of welfare experts under Rule 4 of Order XXXIIA of CPC the provisions relating to familial cases in these enactments are almost similar and comparable. The intention of the provision undoubtedly is to render all possible assistances in the maintenance of the marital bond and if at any stage of the case the circumstances are propitious for reconciliation it would be the duty of the Court to make use of such circumstances irrespective of the stage.[28] While section 23(2) of HMA speaks of reconciliation in the first instance as being the duty of the Court, section 23(3) also speaks of alternate grievance redressal mechanism inaddition to its own duty to resort to the initiation of reconciliation[29]. Same principles are enunciated in section 34(3) of SMA

[25] Sub section (2) of Section 23 of HMA is a replica of Sub-section (2) of Section 34 of the SMA.
[26] Act 68 of 1976 with effect from 01-02-1977
[27] The Amendment Act excluded the operation of Sections 34 (2) of SMA and 23 (2) of HMA from any proceedings wherein relief is sought on any of the grounds specified in clause (c), clause (e), clause (f) clause (g) and clause (h) of sub section (1) of Section 27 of SMA and grounds specified in clauses (ii), (iii), (iv), (v), (vi), or (vii) of sub section (1) of section 13 of HMA.
[28] *Balwinder Kaur v Hardeep Singh,* AIR 1998 SC 764
[29] Sec 23 (3) of HMA says that "For the purpose of aiding the Court in bringing about such reconciliation, the Court may, if the parties so desire or if the Court thinks it just and proper so to do, adjourn the proceedings for a reasonable period not exceeding fifteen days and refer the matter to any person named by the parties in this behalf or to any person nominated by the Court if the parties fail to name any person, with directions to report to the Court as to whether reconciliation can be and has been, effected and the Court shall in disposing of the proceeding have due regard to the report."

also. The Parliament has decisively incorporated section 89 in the CPC for referring disputes to alternate redressal forums[30]. The judiciary has taken a consistent stand in conformity with the spirit of the legislation[31] and has held that even if the dissolution of marriage is sought by joint petition of parties, the Court has to comply with mandatory provisions and to make endeavor to bring reconciliation between the parties[32]. The legislation permits the Courts to adjourn the proceedings for a reasonable period and refer the matter to any person named by the parties or the Court, in bringing about such reconciliation if the parties so desire[33].

The intention of the legislature in enacting special provisions in CPC, SMA and HMA for conciliation in family disputes was to develop a unique matrimonial jurisprudence distinct from ordinary criminal and civil jurisprudences[34]. This has been categorically declared by the judiciary in various cases as well[35]. It can be seen that in other Personal laws that have

[30] Section 89 of the CPC, inserted by Code of Civil Procedure (Amendment) Act, 1999, and brought into effect on 1st July, 2002

[31] *S.K. Salam v Sant Singh,* AIR 1990 Cal 315, *Harender Nath Barman v Suprova Burman,* AIR 1989 Cal 120

[32] *Pramila Bhagat v Ajit Raj Singh,* AIR 1989 Pat 163

[33] Sub-section (3) of Section 23 of HMA and Sub-section (3) of Section 34 of SMA have been added by Act No. 68 of 1976, with effect from 27th May, 1976.

[34] Paras Diwan, *Law of Marriage & Divorce*, 42 (2010)

[35] *Sushmakumari v Omprakash,* AIR 1993 pat 156, *Hina Singh v Satyakumar Singh,* AIR 2007 Jhar 34 *Bini v Sundaran,* AIR 2008 Ker 84 etc.

not expressly provided for conciliation, the gap has been, to a great extent, made good by judicial activism[36].

Notwithstanding specific provisions for alternative dispute resolution mechanisms in the form of reconciliation under the procedural laws relating to family disputes, there is a criticism that the judiciary has not made serious efforts to implement them successfully[37]. In majority of family cases the judicial process was carried on in the same manner similar to the disputes under the adversary legal system[38]. Of course there have been some notable interventions by the judiciary in upholding the conciliation process in the matrimonial cases[39]. Despite the legislative will and occasional judicial intercessions, the desired goals in delivering alternate justice to the parties could not be achieved, primarily due to the inherent and systemic deficiencies in the law[40]. The principal shortcoming was the absence of organizational supports to the judicial establishments which were

[36] For example, even in the absence of a provision for conciliation in the Dissolution of Muslim Marriage Act, 1939 and in the Divorce Act, 1869 the Family Courts, exercising power under the Family Courts Act, used to send the parties for counseling, conciliation and mediation.

[37] *Kamal V.M. Allaudin And Etc. v Raja Shaikh And Etc*, AIR 1990 Bom 299, *Mohd. Sayeed vs Rehana Begum*, I (1996) DMC 626

[38] That is why special procedure has been prescribed under the Family Courts Act, which is different from the procedure prescribed under the Code of Civil Procedure which has been characterized as 'adversary approach'. Supra 37

[39] In *V. K. Gupta v Nirmala Gupta* , Justice V.R. Krishna Iyer. J, emphatically stated that *"it is fundamental that reconciliation of a ruptured marriage is the first essay of the judge, aided by counsel in this noble adventure. The sanctity of marriage is, in essence, the foundation of civilization and, therefore, Court and counsel owe a duty to society to strain to the utmost to repair the snapped relations between the parties."* (1979)RD SC-167 (4th September 1979)

[40] P.M Bakshi, *Family Courts; Some Reflections*, in Kusum (Ed) *Women March Towards Dignity; Social and Legal Perspective*, 33-36 (1993)

indispensable for making the conciliation process a success through extra judicial operations[41].

Although strictly technical and time consuming procedures have been held to be harmful to the sensitive family matters, in the given legal framework, majority of the family disputes could not be fully and finally settled without the decision of a competent civil Court which rigorously follows such procedure[42]. It has been recognized that despite the special procedure in CPC for suits relating to family, the situation has not been progressively modified[43]. Similarly, the provisions for conciliation in SMA and HMA also have not been implemented effectively[44]. Growing dissatisfaction with the adversarial process for matrimonial dispute settlement through ordinary Court with high cost, incessant delay and escalation of conflict and bitterness has compelled to search for effective, expeditious and inexpensive procedures and forums for such cases. The inherent procedural delay and traditional formalities in ordinary Court

[41] Prof. Kusum, *Family Law Lectures*, 421-425(2012).

[42] For example, Even if the entire disputes between the spouses were settled in the adalath, the adalath has no authority to pass a decree by dissolving the marriage or to pass a decree nullifying the marriage or declaring the status of a person.For that the parties are to approach the competent court and a full and final settlement of entire disputes may not be possible through conciliation or adalath.

[43] In *K.A. Jaleel v T.A. Shahida,* Supra 3 it was held that "*the Family Court was set up for settlement of family disputes. The reason for enactment of the said Act was to set up a court which would deal with disputes concerning the family by adopting an approach radically different from that adopted in ordinary civil proceedings. The said Act was enacted despite the fact that Order 32A of the Code of Civil Procedure was inserted by reason of the Code of Civil Procedure (Amendment) Act, 1976, which could not bring about any desired result.*"

[44] *Rosy Kurian Kannanaikal v Joseph Verghese Cheeran,* II (2002) DMC 79

system has made the situation worse and compelled the policy makers to contemplate a system exclusively dealing with family disputes[45].

The Law Commission in its 59th report had stressed that in dealing with disputes concerning the family, the Court ought to adopt an approach radically different from that adopted in ordinary civil proceedings and that it should make reasonable efforts at settlement before the commencement of the trial. The CPC was amended in 1976 to provide for a special procedure to be adopted in suits or proceedings relating to matters concerning the family. However, not much use was made by the Courts in adopting this conciliatory procedure and they continued to deal with family disputes in the same manner as other civil matters and the same adversary approaches prevailed[46]. The need was therefore felt, in the public interest to establish Courts exclusively for family disputes with structural difference and procedural uniqueness[47].

[45] Report of the Workshop on 'Working of Family Courts and Model Family Courts' held on 20 March 2002, at Delhi by National Commission for Women points out that "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." ncw.nic.in/pdf reports /Working %20of%20Family%20courts%20in%20 last seen on 30/05/2014 at 2.30 hrs.

[46] *Sunil Hansraj Gupta v Payal Sunil Gupta,* AIR 1991 Bom 423

[47] '*Several association of women, other organizations and individuals have urges, from time to time that Family Courts be set up for the settlement of family disputes, where emphasis should be laid on conciliation and achieving socially desirable results and adherence to rigid rule of procedure and evidence should be eliminated*.' Statement of Objects and Reasons of Family Courts Act, 1984.

Enactment of the Family Courts Act, 1984

There was a real search for a judicial system that deals exclusively with the family disputes which abides by the principles of alternative dispute resolution and ensures expeditious justice delivery for the hapless victims of matrimonial injustice. Considering the significance of such a system for disposing family disputes with lesser time and more compassion, the Union Parliament has enacted the Family Courts Act, 1984 (No. 66 of 1984) (hereinafter only as 'Family Courts Act') which received the Presidential assent on 14th September, 1984[48]. It contains 23 sections divided into VI Chapters. Deficiencies in the existing judicial practices in the family disputes and the necessity of Courts for speedy settlement of family disputes are evident from the Statement of objects and Reason of Family Courts Act[49]. At the functional level, the Family Courts Act has insisted on promoting conciliation process and secure speedy settlement of cases relating to marriage and family affairs filed under the Act to achieve socially desirable results[50].

[48] It extends to the whole of India except the State of Jammu and Kashmir. It provided for the commencement on such date as the Central Government might, by notification in the Official Gazette, appoint and different dates might be appointed for different States.

[49] Statement of Objects and Reason of Family Courts Act, 1984 states that "*the Code of Civil Procedure was amended in 1976 to provide for a special procedure to be adopted in suits or proceedings relating to matters concerning the family. However, not much use has been made by the Courts in adopting this conciliatory procedure and the Courts continue to deal with family disputes in the same manner as other civil matters and the same adversary approach prevails. The need was, therefore, felt, in the public interest, to establish Family Courts for speedy settlement of family disputes.*"

[50] The Preamble of the Family Courts Act declares that it is "*An Act to provide for the establishment of Family Courts with a view to promote conciliation in, and secure speedy settlement of, disputes relating to marriage and family affairs and for matters connected therewith.*"

Jurisdiction

Family Courts are vested with the jurisdiction of a District Court or any subordinate Civil Court under any law for the time being in force in respect of certain suits and proceedings[51]. Explanation to Section 7 (1) enlists the suits or proceedings on which the Family Courts can exercise jurisdiction[52]. These, *inter alia,* relate to suits between parties to a marriage or for a declaration as to validity of marriage or a dispute with respect to the property of parties, maintenance, guardianship etc. The jurisdiction exercisable by a First Class Magistrate under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974) relating to the order for maintenance to wife, parents and children has also been conferred upon the Family

[51] *Section 7 of the Family Courts Act stipulates that "(1) Subject to the other provision of this Act, a Family Court shall-*
(a)have and exercise all the jurisdiction exercisable by any district Court or any subordinate civil Court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the Explanation; and
(b) be deemed, for the purposes of exercising such jurisdiction under such law, to be a district Court or, as the case may be, such subordinate civil Court for the area to which the jurisdiction of the Family Court extends."

[52] Family Courts can exercise jurisdiction on following suits or proceeding as given in Explanation to Section 7(1);

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

Courts[53]. There is also an enabling provision that the family Courts might exercise such other jurisdiction as may be conferred on them by any other enactment[54]. Provision has also been made to exclude jurisdiction of other Courts in respect of matters for which the Family Court has been conferred with jurisdiction[55].

Even though the declared aim of the Family Courts Act was '*settlement of disputes relating to marriage and family affairs and for matters connected with it',*[56] the disputes other than the categories of proceedings relatable to matrimonial affairs, the Family Court will have no jurisdiction. While the provisions of the Family Courts Act are for the purpose of settling the issues with regard to guardianship of a person or access to any minor, which is also for the purpose of declaration as to the legitimacy of any person, the concept of adoption is outside the purview of the Family Courts Acts. Although the dowry and related issues are outside the purview of the Family Courts,[57] it has wider jurisdiction to decide the wife's claim to *Stridhana* under Section 7 (1) (c) of the Family Courts Act.[58] Since the transaction arose in circumstances arising out of the marital

[53] *Sub Section (2) (a) of Section 7 of the Family Courts Act,1984*
[54] *Sub Section (2) (b) of Section 7 of the Family Courts Act,1984*
[55] *Section 8 of the Family Courts Act declares that "Where a Family Court has been established for any area,-*
(a) no district Court or any subordinate civil Court referred to in sub- section (1) of section 7 shall, in relation to such area, have or exercise any jurisdiction in respect of any suit or proceeding of the nature referred to in the Explanation to that sub- section;
(b) no magistrate shall, in relation to such area, have or exercise any jurisdiction or powers under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974 .)"
[56] Preamble of Family Courts Act,1984
[57] The Jurisdiction lies with the Dowry Prohibition Officer and the Magistrate of First Class under section 8B of The Dowry Prohibition Act 1961
[58] *Sangeeta B Kadam v Balakrishna Ramchandra Kadam,* AIR 2005 Bom 262

relationship between the parties, claim for recovery of money, gold ornaments given by the parents of the wife or its value, will be within the jurisdiction of the Family Court[59]. Though, the Family Court has no jurisdiction in suits for partition between the family members,[60] joint property presented at or about the time of marriage has been treated as exclusive properties of the spouses and disputes relating to such properties have been brought well within the jurisdiction of the Family Courts[61]. Presence of a stranger in the suit *ipso facto* does not take away the jurisdiction of the Family Courts to try the dispute between the husband and wife with regard to property[62].

Paradoxically, matters of serious economic consequences that affect the family, such as testamentary matters, are not within the purview of the Family Courts[63]. Similarly, the Family Courts have no jurisdiction to appoint a guardian or a manager in respect of minor's property but it can appoint the

[59] *Jacob Kuruvila and others v Merly Jacob and others,* 2010(1) KLT 503; *Muhammad Davood and another v Hafsath and another* AIR 2010 Ker.21

[60] *Srihari v Sukunda,* 2001 (1) KLT SN 101

[61] *Hemant Kumar Aagarval v Lakshmi Devi* AIR 2004 All 126

[62] The Kerala High Court in Shiny *v George and another* held that "*When a wife sues her husband for recovery of her property or which she claim to be her property, obviously the suit could be tried and disposed of only by the Family Court and when in such a suit the wife is obliged to add a close relative of the husband or even a stranger on the allegation that the husband had made over the property to that close relative or stranger, it will be too much to hold that the jurisdiction of the Family Court is ousted to deal with the claim of the plaintiff in view of the mere presence of the stranger or the close relative of the husband."* AIR 1997 Ker, 231

[63] Family Court has no jurisdiction in disputes between family members concerning property. If parties to the marriage are not party to the litigation, the suit will not be considered as the cause falling within the realm of Family Court. The essential ingredient should be a dispute between the husband and the wife and the said dispute can be with regard to their marital property sharing. *Srihari V Sukunda,* 2001 (1) KLT SN 101

guardian of a minor[64]. The suits for declaration as to the marital and paternal status and suit or proceeding arising out of marital relationship (but not necessarily between spouses) will be within the ambit of the Family Courts[65]. As per Section 7(d), the words "in circumstances arising out of a marital relationship" apply to a suit or proceeding for an order or injunction. Meaning of the expression "circumstances arising out of the marital relationship" has, however, not been explained anywhere in the Act. In *Leby Issac v Leena M. Ninan*,[66] it was made clear that

> "*the expression 'in circumstances arising out of marital relationship' thus means not only those occurrences which transpired during marital life, but those also include such circumstances which led to the marriage, which developed thereafter, which took place during marital life, which resulted in breaking down of marriage and also those which 'closely' followed as a consequence of all these.*"

The approach of the judiciary was that the wordings *'disputes relating to marriage and family affairs and for matters connected therewith'* in the preamble, must be liberally construed[67]. It was held that the Family

[64] *Vimalashram Gharkul v Smt Jyoti Banon Joseph,* 2007 (1) KLT SN13
[65] *Syamala Devi v Saraladevi,* AIR 2009 Ker. 138
[66] 2005(3) KLT 665
[67] It is observed by the Supreme Court in *K.A. Abdul Jaleel v T.A. Shahida*, that '*It is now a well-settled principle of law that the jurisdiction of a court created especially for resolution of disputes of certain kinds should be construed liberally*' AIR 2003 SC 2525

Courts do have jurisdiction to decide disputes relating to properties claimed by the parties irrespective of whether the marriage is subsisting or not[68].

There were different views and demands from the women organizations that besides the said matters, the problems regarding dowry, inter-spousal assaults criminal matters between spouses and children and inter familial contracts should also come within the sway of the Family Court[69]. At present the victim of domestic violence has to approach different judicial forums for getting her rights enforced. For example a woman has to go to the Court of Judicial Magistrate of First Class for her immediate protection from domestic torture and to the Family Court for getting divorce for putting an end to the torture permanently[70]. Requirement of approaching multiple judicial forums for establishing different matrimonial rights questions the very purpose of enacting the Family Courts Act.

Objects and Achievement - A Critical Appraisal

The declared objects, as evident from the Preamble of the Act, are 'to establish family Courts' that 'promote conciliation among the parties to the case' and 'secure speedy settlement of the disputes.' Attempt is made here to evaluate the functional efficacy of the Act in achieving its declared objects. How far the provisions of the Act have been pressed into service to attain

[68] *Ibid.* In *Sumita Singh v Kumar Sanjay and Anr*, AIR 2002 SC 396, the Court held that such practices will be for ensuring maximum welfare of society and dignity of women.
[69] B.M. Gandhi, *Family Law Vol. II*, 221(2013)
[70] For protection from domestic violence, the remedy available under the Protection of Women from Domestic violence Act, 2005 for which she has to approach the Magistrate concerned and to get rid of permanently from the marital bond and violence, she has to approach the Family Court concerned.

faster disposal of family disputes through alternative dispute resolution is analyzed here. The study is with special reference to the functioning of Family Courts in the State of Kerala.

A. Establishment of Family Courts

Section 3 of the Family Courts Act confers power upon the State government to establish Family Courts in a city or town in the State where the population exceeds one Million[71]. State government is empowered to establish Family Courts in other areas also which do not satisfy the population criteria if it is deemed necessary[72]. In both cases, consultation with the appropriate High Court is mandatory. The State government can also alter or vary the territorial jurisdiction of the family Court[73]. The demographic rationale behind the establishment of family Court is the statistics of pending cases relating to family disputes in various Courts situated in such cities or towns. Therefore, the classification based on population has been held as constitutional and not irrational, nor arbitrary[74].

[71] *Section 3 runs as "3.Establishment of Family Courts.- (1) For the purpose of exercising the jurisdiction and powers conferred on a Family Court by this Act, the State Government, after consultation with High Court, and by notification,-*
(a) shall, as soon as may be after the commencement of this Act, establish for every area in the State comprising a city or town whose population exceeds one million, a Family Court;
(b) may establish Family Courts for such other areas in the State as it may deem necessary.
(2) The State Government shall, after consultation with the High Court, specify, by notification, the local limits of the area to which the jurisdiction of a Family Court shall extend and may, at any time, increase reduce or alter such limits."

[72] Ibid

[73] Ibid

[74] *Lata Pimple v Union of India,* AIR 1993 Bom. 255

i. In sufficient Number

At present 410 Family Courts are functioning across the country and the Parliamentary Committee on Empowerment of Women has recommended establishing Family Courts in each district[75]. But, yet no family Courts have been set up in the States of Punjab, Arunachal Pradesh, Meghalaya, Goa, Jammu & Kashmir and Andaman &Nicobar Islands[76]. State wise details of Family Courts are given as Appendix I.

Though the Family Courts Act envisaged the establishment of Family Courts in all cities with a population exceeding one million, there is a need to establish such Courts in each district of India and more particularly in Kerala in view of the prevailing conditions of increasing incidences of marital discord and divorce[77]. The minimum number of Family Courts required in Kerala as per 2011 census is 33 but only 28 Family Courts have been established so far. Establishment of Family Courts in the State was started in 1992 and during that year one Family Court each was established in Thiruvananthapuram, Ernakulum and Kozhikode[78]. Similarly, one Family Court each was set up in Thrissur in 1994[79] and in Kottayam in 1998[80].

[75] Department of Justice, Government of India, *http://doj.gov.in.* last visited on 16-12-2014

[76] Department of Justice, Government of India, '*The Family Courts Scheme*' last visited on 31-10-2014 from *http://doj.gov.in*

[77] Around 20 years back India had a negligible divorce rate of around 5% than today. In Delhi, the capital city of India, over the past four years the number of divorces has doubled (12,000 in 2008). Bangalore, the IT hub of India has recorded 1,246 cases of divorce pertain to IT sector exclusively. Kerala, the most literate state has experienced an increase of divorce rate by 350% in the last 10 years. Divorce-rate-in-India.html (accessed on 29/05/2014)

[78] As per SRO No.693/1992, the Government of Kerala after consultation with the High Court of Kerala established three family courts within the state at Thiruvananthapuram, Ernakulum and Kozhikode. Notification issued in G.O. (MS) No. 117/1992/Home dated 6th June 1992.

[79] SRO No.1179/1994 as per notification, No.4706/C3/94/Home dated 9-8-1994

After one year another one was set up in Manjeri for Malappuram district in 1999[81] and Thiruvalla for Pathanamthitta district in 2003[82]. Subsequently, from time to time, Family Courts were set up in different districts and by 2013; the number has been increased to 28.

However, considering the population and the statutory prescription, the State is still shortage of seven Family Courts. Table I gives the district wise details of population as per the 2011 Census and the number of Family Courts in each district. It can be seen that 6 districts have lesser number than the statutorily required number of Family Courts. Districts of Pathanamthitta and Idukki are having one Family Court extra than the legally prescribed number. This may be due to the hilly terrain and hostile topography of these districts. Financial assistance is provided by the Department of Justice, Government of India, for setting up of the Family Courts[83].

It is evident that in spite of financial support from the Government of India, there is laxity on the part of the State governments in establishing sufficient number of Family Courts in the State. Even after the lapse of 30 years since the Family Court Act has come into operation, women and children of the rural areas are deprived of its benefits because of financial constraints and their inability to reach the Courts, which are situated at the district level.[84]

[80] SRO No.806/1998 as per notification, No. 1706/C3/98/Home dated 19-9-1998 .
[81] SRO No.91/99,as per notification No.12/1999/Home dated 30/01/1999.
[82] SRO No.126/2003 as per notification, No.33/2003 /Home dated 13/02/2003.
[83] Details of funds released under Plan for meeting recurring expenditure on Family Courts is available at *http://doj.gov.in* last seen on 29/05/2014
[84] In States like Manipur, Sikkim and Pondicherry there is only one family Court in the state. Many victims of domestic violence or injustice are unable to approach the Court mainly due to the long

Table I

Family Courts Established vis a vis Required vide 2011 Census

Sl. No	District	Population (Census - 2011)	Number of Family Courts in January 2014	Number of Family Courts required as per 2011 Census	Difference
1	Thiruvananthapuram	3307284	3	3	0
2	Kollam	2629703	3	3	0
3	Pathanamthitta	1195537	2	1	-1
4	Alappuzha	2121943	2	2	0
5	Kottayam	1979384	2	2	0
6	Idukki	1107453	2	1	-1
7	Ernakulam	3279860	2	3	1
8	Thrissur	3110327	2	3	1
9	Palakkad	2810892	2	3	1
10	Malappuram	4110956	2	4	2
11	Kozhikode	3089543	2	3	1
12	Wayanad	816558	1	1	0
13	Kannur	2525637	2	3	1
14	Kasaragod	1302600	1	1	0
	Total	**33387677**	**28**	**33**	**5**

While this situation has affected both men and women adversely, in any given situation women who lack exposure and experience in dealing with public institutions are the worst sufferers.

distance that they have to travel for conducting the case. The workload of the Family Court is also very high as the matters hitherto dealt by more than 4-5 magistrates and 2-3 sub judges have accumulated in one Court.

Even if Kerala has considerably more advantages than those of its counterparts in India, in most of the cases a woman with or without child has to travel nearly 1-2 hours to reach a court and needs nearly Rs.200/- to Rs.400/- as travelling expense alone. The situation is worse in the case of geographically hostile locations. For example, the Family Court of Wynad district is located at Kalpetta, which requires more than 2 hours journey by public transport system from places like Mananthavadi, Pulpally etc. The Family Court of Kasargod district is located in Kasargod town, which require around 3 hours journey from remote places such as Eleri, Cheruvathur etc. Women from these places have to travel nearly 60-80 K.M on every posting. The people from hilly terrains like Idukki, Wynad,Palakkad, Pathanamthitta etc., have no proper transportation facility. Even if three Family courts are operating in Trivandrum district, a lady from remote and faraway places such as Amboori or Parassala or Bonacaudu has to travel more than 2-3 hours to reach the Court. Women are often accompanied by parents or children and they have to bear the expenses of at least two persons, which will cost around Rs.300/- to 500/-. Before the establishment of Family Courts, since there were Magistrate Courts in every area, women could file an application in such courts which were nearer than the present Family Courts. Efforts to get justice from Family Courts have undoubtedly become expensive and time consuming.

ii. Procedure

Litigation concerning or involving family matters requires special approach in view of the serious social, financial and emotional repercussions. For handling this sensitive area of personal relationships, ordinary court procedures are ill suited.[85] Hence it has become imperative to design and develop a distinctive procedural structure exclusively for familial disputes.

From the specific provisions of the Family Courts Act, the intention of the legislature to provide unique procedure for family cases is clear and evident. It is the duty of the Family Courts to assist and persuade the parties in arriving at settlement of their problems[86]. In any suit or proceeding, at any stage, if it appears to the Family Court that there is a reasonable possibility of a settlement between the parties, the Family Court may adjourn the proceedings for such period, as it thinks fit to enable attempts to be made to effect such a settlement[87]. If the cases are not settled through the counseling or conciliation, the trial will be started and for that the provisions of the CPC shall apply and a Family Court shall be deemed to be a Civil Court and shall have all the powers of such Court[88]. For the purpose of maintenance cases

[85] It was pointed out in the 54 Report of Law Commission on the Code of Civil Procedure, 1973 that "In *the administration of justice in disputes relating to family, one has to keep in mind the human relationships with which one is dealing. Object of family counseling as a method of achieving ultimate object of preservation of family, is to be kept in the forefront."*

[86] Sec.9 of Family Courts Act. See also *Leela Mahadeo Joshi V Mahadeo Sitharam Joshi* AIR 1991 Bom.105

[87] Sec 9 (2) of the Family Courts Act,1984

[88] Sec.10(1) of Family Courts Act, *Lata Pimple V Union Of India* AIR 1993,Bom 255

under the provisions of the Code of Criminal Procedure, 1973, proceedings under Chapter IX of the Code would apply[89].

The Family Courts are free to lay down their own procedure with a view to arriving at a settlement in respect of the subject-matter of the suit or proceedings or at the truth of the facts alleged by one party and denied by the other[90]. In every suit or proceedings to which the Family Courts Act applies, the proceedings may be held in camera if the Family Court so desires and shall be so held if either party so desires.[91]

The Family Court can also secure the service of a medical and welfare expert to assist it[92] for the purpose of discharging the functions imposed on it by the Family Courts Act. Beyond this the section does not give any categories of persons whose services are to be utilized by the Family Court. The difference of opinion that referring to a medical and welfare expert is as part of counseling or not is clarified by the High Court of Kerala and declared that in the total absence of enabling provisions the report of the

[89] Sec 10 (2) the Family Courts Act,1984

[90] As per Sub-section (3) of Section 10 of Family Courts Act,1984 "*Nothing in sub-section (1) or sub-section (2) shall prevent a Family Court from laying down its own procedure with a view to arrive at a settlement in respect of the subject-matter of the suit or proceedings or at the truth of the facts alleged by the one party and denied by the other."*

[91] Sec 11 of the Family Court provides as follows: *"11.Proceedings to be held in Camera.-In every suit or proceedings to which this Act applies, the proceedings may be held in camera if the Family Court so desires and shall held if either party so desires."*

[92] Sec 12 of the Family Courts Act, 1984 reads as *"12.Assistance of medical and welfare experts.-In every suit or proceedings, it shall be open to a Family Court to secure the services of a medical expert or such person (preferably a women where available), whether related to the parties or not, including a person professionally engaged in promoting the welfare of the family as the Court may think fit, for the purposes of assisting the Family Court in discharging the functions imposed by this Act."*

Medical and welfare expert can be accepted in evidence after examining the expert concerned[93].

Law of evidence is not strictly applied in the Family Court. It may receive as evidence any report, statement, document, information or any matter that may, in its opinion, assist it to deal effectively with a dispute, whether or not the same would be otherwise relevant or admissible under the Indian Evidence Act, 1872[94]. The permission to receive as evidence any documents, information or matter, seems to broadly expand the area of relevant facts, as envisaged in the Evidence Act, 1872, particularly because of the words "whether or not the same would be otherwise relevant or admissible under the Indian Evidence Act, 1872", which occur towards the end of the Section 14 of the Family Courts Act. Section 14 of the Family Courts Act, practically abolishes the distinction between 'legal' relevancy and 'logical' relevancy. One can say that Section 14 of the Family Courts Act even goes beyond the strict concept of logical relevance in the objective sense.

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[93] In *Pradeep Kumar A.V v Sindhu. C.K* it was held that *"It is true that the parties were referred to the expert by the Family Court on its own to effectively discharge its duties as a Family Court under the Act. But admittedly, this was not done as part of the counseling proceedings. Admittedly, such course was resorted to by the court to enable it to come to a correct conclusion on the dispute before it. In the total absence of any provisions justifying the rejection of such evidence or the prayer to introduce such evidence, we are satisfied that the court below was not justified in not permitting the petitioner to adduce such evidence of the medical expert*."2009 (4) KLT 501

[94] Sec 14 of the Family Courts Act, 1984, prescribes the application of Indian Evidence Act, 1872 in the procedure of Family Courts. It runs as "*A Family Court may receives as evidence any report, statement, documents, information or matter that may in its opinion, assist it to deal effectually with a dispute, whether or not the same would be otherwise relevant or admissible under the Indian Evidence Act,1872 (1 of 1872)*". See, Jacob *Kuruvila and others v Merly Jacob and others* 2010(1) ILR 503

The Family Courts Act has tried to dilute the strict traditional concept of recording evidence and declares that it would not be necessary to record the evidence of witnesses at length. But the Judges, as the examination of each witness proceeds, should record or cause to be recorded; a memorandum of the substance of what the witness deposed, and such memorandum should be signed by the witness and the Judge and should form part of the record[95]. But from the execution point of view the order of the Family Court is as rigid as a civil decree or order.[96]

Notwithstanding the less formal and less technical procedure, the alternative system is not effectively implemented due to lack of uniformity of procedure among the courts working even in the same state and districts.[97] The rules laid down by the state governments did not simplify

[95] Sec 15 of the Family Courts Act,1984 provides *"Record of Oral Evidence.-In suits or proceedings before a Family Court, it shall not be necessary to record of the evidence of witness at length, but the Judge, as the examination of each witness proceeds, shall, record or cause to be recorded or a memorandum of the substance of what the witness deposes, and such memorandum shall be signed by the witness and the Judge and shall form part of the record"*.

[96] Sec 18 of the Family Courts Act, 1984 provides *" Execution of Decree and Orders.-(1) .A decree or an order (other than an order under chapter IX of the Code of Criminal Procedure ,1973,) ,passed by a Family Court shall have the same force and effect as a decree or order of a Civil Court and shall be executed in the same manner as is prescribed by the Code of Civil Procedure 1908, for the execution of decree and orders"*.

(2) An order passed by a Family Court under Chapter IX of the Code of Criminal Procedure, 1973 shall be executed in the manner prescribed for the execution of such order by that court.

(3) A decree or order may be executed either by Family Court, which passed it or by the other Family Court or ordinary Civil Court to which it is sent for execution, *Narayanan Namboothiri v Sarswathy and others,* AIR 2010 Ker.42

[97] The different courts follow different procedures. Uttar Pradesh state government has not made the rules so far. Rajasthan state government has not appointed counselors although the rules have been framed. The same rules are silent on the qualifications and method of appointment of these counselors**.** In Tamil Nadu and Karnataka too the rules have been framed shoddily. There is no proper criterion for the selection of Judges**.** It is only in Maharashtra that there has been some improvement in the manner in which the counselors are appointed and prescribing the qualifications for the same. Being made equal to the permanent employees and due to special training at the Tata Institute of Social Sciences on the recommendation of the Bombay High Court, these counselors are

procedures but merely reproduced CPC with the minor addition that parties should be present in person.

iii) Absence of Advocates

No party has a right to be represented by a legal practitioner in a Family Court but the Court, in the interest of justice, may seek the assistance of a legal expert as 'amicus curiae'[98]. But the role of '*Amicus Curiae*'[99] cannot be equated with that of an Advocate retained by a party to conduct the case on his/her behalf. *Amicus curiae* are a friend of the Court who assists the Court by putting forth an aspect of the case not properly represented. He has no authority to cross examine the adversary[100].

A bare reading of Section 13 of the Act of 1984 shows that a Lawyer has no absolute right to appear on behalf of the party before the Family Court[101] but it is in the discretion of the Family Court to permit the Lawyer to appear. The use of words "as of right" in Section 13 is of significance. If

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a lot more competent at least in terms of their qualifications to handle different disputes that may arise in front of them. The Report of Workshop on Family Courts held on 20 March, 2002. Available at *http://ncw.nic.in/pdf reports*/Working of Family courts in India last seen on 3/04/2014

[98] As per Section 13 of the Family Courts Act, 1984 '*Notwithstanding anything contained in any law, no party to a suit or proceeding before a Family Court shall be entitled, as of right, to be represented by a legal practitioner: Provided that if the Family Court considers it necessary in the interest of justice, it may seek the assistance of a legal expert as amicus curiae'.*

[99] The law Lexicon edited by .Y.V. Chandrachud describes '*amicus curiae'* as a friend of the Court. It says that amicus curiae is one to volunteer or on invitation of the Court on a matter of law concerning which the later is doubtful or mistaken, or informs his on facts, a knowledge of which is necessary for a proper disposition of the case. Chambers' 21st Centuary Dictionary describes 'amicus curiae' as a person not directly involved in a cause but who gives advice about it and otherwise means, friend of the Court.

[100] *Amicus Curiae v. Prashant Bhushan and another,* (2010) 7 SCC 592

[101] It runs counter to Section 30 of the Advocates Act, 1961 which enables the lawyers to practice in any Court, before any Tribunal or quasi judicial authority all over India.

the intention of the Parliament was to debar the Advocates absolutely from appearing in the proceedings of the Family Courts, the words "as of right" would not have been there[102]. It has been left to the discretion of the Family Court to allow lawyers to appear or not. The presence of lawyers in Family Court has been pointed out as counterproductive and an impediment to the smooth conciliation process[103]. Another argument for excluding the lawyers from the Family Court is that lawyers, if allowed, would increase litigations.[104] However, these arguments appear to be without much content. On the contrary, presence of lawyers would be helpful in reducing the intricacies involved in the cases. The facts and laws that arise in a dispute are often of complex character and lawyers would be professionally equipped to formulate these issues with precision and distinguish between the relevant and the irrelevant, which the parties might not be able to do.

Though there is a strong opinion of activists for the exclusion of lawyer's services in a Family Court,[105] it has been argued with equal strength that in complicated family cases a lawyer's services cannot and should not be dispensed with altogether[106]. It has been pointed out that the Family Courts Act and Rules made there under have excluded representation

[102] *Laxmi Kanwar v Laxman Singh,* I (2005) DMC 745.
[103] *"In a proceedings before the Family Court, the court is to make all attempts to conciliate and settle the dispute. Presence of a person alien to the matrimonial relationship may, it is reasonable to assume, impede the attempt to conciliate and settle the dispute. Nor that such presence must in every case be counterproductive to the journey to the destination of a settlement…." Moideen Bava v Shahida* AIR 2006 Ker 362
[104] B.M Gandhi, Supra 200 ,p 223
[105] Ibid
[106] Paras Diwan, *Law of Marriage and Divorce*, 881 (2000), See also *Lata Pimple V Union Of India,* AIR 1993, Bom 255

by lawyers, without creating any alternative and simplified rules[107]. A cursory observation of the functioning of the Family Courts would show that the observations about the proceedings as conciliatory and non- adversarial is not fully correct. In fact the situation is worse 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 consequences of the suggestions made by Court officials[108].

All the technicalities of a civil suit are strictly followed by family Courts not only in trial[109] but in execution also[110]. As long as the substantive law[111] and the technicalities of the CPC are strictly followed, the need for lawyers cannot be undermined. For a lay person who is not familiar with legal intricacies, it is extremely difficult to follow the procedure. The mere saying that the proceedings are conciliatory and not adversarial does not actually make them so. At present the Family Courts Act doesn't make any difference with civil suit in procedural law unless and otherwise the cases are settled.

[107] *Kailash Bhansali v surrender Kumar* AIR 2000 Raj 300

[108] F. Agnes, *Family Courts: From Frying pan into Fire*, in *Women's Studies in India* (Edited by Mary E John) 272 (2008)

[109] Subsection 1 and 2 of Section 10 of Family Courts Act, 1984.

[110] As per Sec 18 of the Family Courts Act, 1984, decree or order passed by the Family Court shall have the same force and effect as a decree or order of a civil court and shall be executed in the same manner as prescribed by the CPC for the execution in civil matters. Similarly the orders under the provisions of 125 Cr. PC shall be executed in the manner prescribed for the execution under 128 Cr PC.

[111] Personal law are based on religion which is diverse, complex and confusing

Exclusion of advocates from the Family Courts does have a very adverse impact on the development of Family Court judiciary. If lawyers are not allowed in these Courts there will not be any scope for development of Family Court Bar and subsequently the main source of recruitment to the Family Court Judiciary will not develop[112].

The Supreme Court of India held that Section 30 of the Advocates Act 1961[113] confers a right on every Advocate whose name is entered in the roll of the Advocates maintained by a state Bar Council to practice in all the Courts in India including the Supreme Court[114]. Bar is one of the main wings of the system of justice. An Advocate is the officer of the Court and is hence accountable to the Court. The High Court of Kerala also held that the litigant is open for any lawyer of his choice to appoint him before the Family Court[115]. Now it is thus very much clear that the litigant can pursue the Family Court engaging his/her lawyer of choice and such lawyer is entitled to present the matter before the Family Court as a matter of Right. However,

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[112] As per subsection 3 Section 4 "(3) *A person shall not be qualified for appointment as a Judge unless he-" (a) has for at least seven years held a judicial office in India or the office of a Member of a Tribunal or any post under the Union or a State requiring special knowledge of law ; or" (b) has for at least seven years been an advocate of a High Court or of two or more such Courts in succession; or (c) possesses such other qualifications as the Central Government may, with the concurrence of the Chief Justice of India, prescribe."*

[113] As per Section 30 of The Advocates Act,1961 *"Right of Advocates to practice :Subject to the provisions of this Act, every Advocate whose name is entered in the state roll shall be entitled as of right to practice throughout the territories to which this act extends :*
(i)in all courts including the Supreme Court;
(ii)before any Tribunal or person legally authorized to take evidence and
(iii) before any other authority or person before whom such advocate is by or under any law for the time being in force entitled to practice.

[114] *T.C.Mathai & Another v District and Sessions Judge* AIR 1999 SC 1385

[115] *C.P.Saji v Union of India* AIR 2012 Ker, 23

the Lawyers being the officers of the Court must keep in mind to cooperate and settle the matters if it is so possible.

There are some systemic deficiencies and limitations in Family Courts Act to make it an adversarial and informal system. Along with limited jurisdiction, absence of adequate number of Family Courts to cope with the demands of the litigant public is there. Though some special powers for the purpose of settlement and truth finding are given to Family Courts, they could not be made effective so as to make changes in appointing judges of the Family Court. The judges of the Family Court do not possess any experience in dealing with family cases or gender issues.

B. Conciliation

'Conciliation' is the 'process of adjusting or settling disputes in a friendly manner through extra judicial means'[116]. It means the bringing of two opposing sides together to reach a compromise in an attempt to avoid taking a case to trial. The Family Courts Act declares that the Courts established under the Act should promote conciliation[117]. The word 'promote' means '*to support or actively encourage (a cause, venture etc.), further the progress of etc*'[118]. It can be deduced from the language of the enactment that the legislature has intended the Family Courts to support or encourage the process of adjusting or settling disputes in a friendly manner through extra judicial means. It was also envisaged that the Family Court

[116] *http://legal-dictionary.thefreedictionary.com* last seen on 30/05/2014
[117] Preamble of the Family Courts Act, 1984
[118] Oxford Dictionary of English (3rd edition 2010)

should adopt a human approach, an approach radically different from that adopted in ordinary civil proceedings, and that the Court should make reasonable efforts at settlements before commencement of trial[119].

Along with the demand for establishment of Family Courts, the emphasis on conciliation was also raised[120] and accordingly the Family Courts Act has provided that the Family Courts would adopt an approach different from what has been followed by the ordinary civil Court and would take concrete steps for conciliated settlement[121]. It can be seen that in some cases the Family Courts have taken a more activist role for settlement of matrimonial disputes. Many of such settlements have not been necessarily based on the legal grounds and, on the contrary, more on what the parties to the case perceived as reasonable and based on mutual consensus[122].

Chapter IV of the Family Courts Act which contains Sections 9 to 18 prescribes the procedure to be followed by the Court in the cases brought before it. Section 9 (1) stipulates the efforts to be taken by the Court for the settlement of the case. It specifies that in every suit or proceeding, endeavor should be made by Family Court in the first instance, to assist and persuade the parties in arriving at a settlement in respect of the subject matter of the

[119] *Report of the Law Commission*, Government of India, March 1974, No.59

[120] The women organizations that mooted for Family Courts "*strongly recommend the abandonment of the established adversary system for settlement of family problems, and the establishment of family Courts which will adopt conciliatory methods and informal procedure in order to achieve socially desirable results." S*uggestions in Chapter IV, '*Women and the Law' in the* "Report of the National Committee on Status of Women in India', 1971, Published by Indian Council of Social Science Research.

[121] Sec.9 of the Family Courts Act, 1984 makes it mandatory that Court is duty bound to make efforts for settlement.

[122] *Bini v Sundaran K.V,* 2008 (1) KLT 331

suit or proceeding. And for this purpose a Family Court may, subject to any rules made by the High Court, follow such procedure as it may deem fit[123]. In any suit or proceeding, at any stage, if it appears to the Family Court that there is a reasonable possibility of a settlement between the parties, the Court may adjourn the proceedings for such period, as it thinks fit to enable attempts to be made to effect such a settlement[124].If the cases are not settled through the counseling or conciliation, the trial will be started and for that the provisions of the CPC shall apply and a Family Court shall be deemed to be a Civil Court and shall have all the powers of such a Court[125].

Conciliation and mediation being recognized as two important and effective modes of alternative dispute resolution system, the Family Courts Act permits the Court to adopt its own procedure for the purpose of settlement also. For conciliation and settlement, a knit of legal fraternity including advocates, [126] mediators and counselors [127] is working and assistances of medical experts [128] is also being sought.

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[123] As per Section 9 of Family Courts Act,1984 *"Duty of Family Court to make efforts for settlement.- (1) In every suit or proceeding, endeavour shall be made by the Family Court in the first instance, where it is possible to do so consistent with the nature and circumstances of the case, to assist and persuade the parties in arriving at a settlement in respect of the subject- matter of the suit or proceeding and for this purpose a Family Court may, subject to any rules made by the High Court, follow such procedure as it may deem fit."*

[124] Sub section (2) of section 9 ordains that *"If, in any suit or proceeding, at any stage, it appears to the Family Court that there is a reasonable possibility of a settlement between the parties, the Family Court may adjourn the proceedings for such period as it thinks fit to enable attempts to be made to effect such a settlement."*

[125] *Lata Pimple v Union of India* AIR 1993, Bom 255

[126] *Vineet T v Manju S Nair*, 2008(2) KLT SN2 (DB)

[127] *Karunakaran M v Vasanthi. K and Others*, 2009 (1) KLT 768

[128] As Sec. 12 of Family Courts Act,1984 the family court is empowered to secure the service of a medical expert or such person, preferably women, whether related to the parties or not, including a

The intention of the Family Courts Act is to give a new shape to the procedure to be followed in resolving family and matrimonial disputes to which the Act applies. Courts have opined that conciliation is the distinct procedure prescribed by the Act[129]. As the fundamental aim of the Family Court Act is settlement of cases and preservation of family as an institution, it stipulates that in every suit or proceeding, endeavor should be made by Family Court in the first instance,[130] to assist and persuade the parties in arriving at a settlement in respect of the subject matter of the suit or proceeding[131].

Conciliation has been made mandatory under the HMA [132] and the SMA.[133] Indian matrimonial statutes, other than SMA and HMA, do not provide for conciliation and hence there is no statutory mandate to attempt settlement in cases under these personal laws. However, since these Acts are enforced by the Family Courts and the relevant laws prescribe conciliation

person professionally engaged in promoting the welfare of the family for the purpose of assisting the family court in discharging the functions imposed on it.

[129] In *Kamal V.M. Allaudin v Raja Shaikh* AIR 1990, Bom 299, the Bombay High Court held that *"the intention, as can be deduced from the Statement of Objects and Reasons of the Act arid its preamble, is clearly to give a new shape to the procedure to be followed in resolving family and matrimonial disputes to which the Act applies, the emphasis being on simplification and conciliation. This new procedure displaces to its extent the existing procedure applicable to ordinary suits which by its very nature is dilatory and litigatory in character. It will be in the fitness of things to briefly note the procedure prescribed under the Act which would demonstrate that the emphasis placed by the legislature is upon conciliation and speedy settlement of the disputes."*

[130] *Balwinder Kaur v Hardeep Singh*, AIR 1998 SC 764

[131] *Jagraj Singh v Bripal Kaur*, AIR 2007 SC 2083

[132] Section 23 (2) of the Hindu Marriage Act, 1955 states that before proceeding to grant any relief under it, there shall be a duty of the Court in the first instance, in every case to make every endeavor to bring about reconciliation between parties where relief is sought on most of the fault grounds for divorce specified in Section 13. Section 23 (3) of the Hindu Marriage Act, 1955 makes a provision empowering the Court on the request of parties or if the Court thinks it just and proper to adjourn the proceedings for a reasonable period not exceeding 15 days to bring about reconciliation.

[133] Sections 34 (2) and 34 (3) of the Special Marriage Act, 1954.

as a mandatory requirement, the courts follow the procedures of conciliation even in those cases under the personal laws in which the conciliation requirements are absent. However, it has been held that notwithstanding the legal compulsion for conciliation, the verdict of a Family Court cannot, *ipso facto*, be invalidated on the ground that attempts for conciliation had not taken place[134]. Generally the approach of the judiciary is also positive towards conciliation[135] and it has been held that an attempt for conciliation can be made at the appellate stage as well[136]. It is the duty of the Court to assist and persuade the parties in arriving at settlement of their problems[137]. For this purpose a Family Court may, subject to any rules made by the High Court, follow such procedure as it may deem fit.

The Family Courts Act enables the government to allow institutions engaged in promoting welfare of families, especially of women and children, or working in the field of social welfare, to associate themselves with the Family Courts in exercise of its functions[138]. Notwithstanding such statutory

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[134] *James K Avaran v Jancy Ritamma George* 2000 (3) KLT 786. This case has been under the Divorce Act, 1869.

[135] *Sarada Sharma v Santhosh Sharma*, AIR 2007 (NOC) 1407, *S.K.Salam v Sant Singh*, AIR 1990 Cal 315.

[136] *Sushama Kumari v Omprakash*, AIR 1993 Pat 156.

[137] *Leela Mahadeo Joshi v Mahadeo Sitharam Joshi* AIR 1991 Bom.105.

[138] Section 5 of Family Courts Act, 1984 provides for Association of social welfare agencies, etc,. as *"The State Government may, in consultation with the High Court, provide, by rules, for the association, in such manner and for such purposes and subject to such conditions as may be specified in the rules, with a Family Court of-*
" (a) institutions or organizations engaged in social welfare or the representatives thereof;"
(b)persons professionally engaged in promoting the welfare of the family;
(c)persons working in the field of social welfare; and
(d)any other person whose association with a Family Court would enable it to exercise its jurisdiction more effectively in accordance with the purposes of this Act.

prescriptions, no attempt has been so far made for associating social welfare agencies with the Family Courts in the State.

The Rule making power under the Family Courts Act is vested with the High Courts and one of the areas on which the Rules are to be framed is *"efforts which may be made by, and the procedure which may be followed by, a Family Court for assisting and persuading parties to arrive at a settlement"* [139]. In spite of the clear legislative mandate, only negligible efforts have so far been made by the High Courts to make rules regarding the methods to be adopted by the Family Court to encourage or persuade the parties to reach a settlement. It is really a serious omission on the part of the judiciary[140]. In the absence of proper rules, Family Courts have exhibited tendencies to exercise discretion regarding the procedure to persuade the parties to arrive at mutual settlement.

As per Section 89 of the CPC, which was inserted in 1999 and came into effect in 2002, the courts have power to refer a dispute for arbitration, conciliation, Lok Adalat or mediation if the court feels that the dispute could be settled outside the court. Drawing power form the Legal Service Authorities Act, 1987 *adalats* are being organized to settle the disputes fully and finally [141]. Though there was no mediation forum for matrimonial dispute resolution in India till the end of 2004, the gap was filled by the

[139] Section 21 (c) of Family Courts Act, 1984
[140] P.M.Bakshy, *Family Court; Some Reflections* in Women, March Towards Dignity: Social and Legal Perspectives (Edited by Prof. Kusum) pp 36-40
[141] Chapters V and VI A of Legal Service Authorities Act, 1987

initiatives of the apex court and a new project was implemented throughout the country[142]. The Kerala State Mediation and Conciliation Centre is an initiative of the High Court of Kerala. It has been conceived as a project for giving effect to Section 89 of the CPC which provides for Mediation as an Alternative Dispute Resolution mechanism[143]. The project is implemented with the support and guidance of the Mediation and Conciliation Project Committee (MCPC) of the Supreme Court of India. In Kerala, a Mediation Centre is functioning in the High Court, with 491 mediators who have been trained by the MCPC[144].

Arbitration has become very popular these days as one of the most important methods for settlement of commercial disputes. However, in family proceedings, it has not become very common. Issues which affect the status of marriage and children have not been viewed as suitable for arbitration on the ground of public policy[145].

The conciliation and counseling in family Court were committed to preserving the institution of marriage and even the selection of presiding

[142] To give momentum to the alternate dispute resolution a 'Mediation and Conciliation Project Committee' (MCPC) was constituted by the then Chief Justice R.C. Lahoti on 9th May 2005, under the chairmanship of Justice N. Santhosh Hegde. Subsequent to his retirement, Justice Sinha was made as its chairman. Presently Justice Surinder Singh Nijjar is the chairman of MCPC with members Justice Madan B. Lokur (Judge Supreme Court of India), Mr. P.P. Rao (Senior Advocate, Supreme Court of India), Smt. Asha Menon (Member Secretary, National Legal Services Authority) and Smt. Nisha Saxena (Member Secretary & Additional Registrar, Supreme Court of India)

[143] *http://Kerala mediation.gov.in* last seen on 31/05/2014

[144] Ibid

[145] Prof.Kusum, *Family Law Lecture* , 423(3rd Edn.2012)

officers of the Family Courts had considered this aspect[146]. Still further, stressing the need to treat the cases pertaining to family matters in a humanitarian way, the Supreme Court of India laid down that "*stress should always be on preserving the institution of marriage*"[147] . Such a position has been described as the requirement of law[148]. The Supreme Court has held that the emphasis should be on saving of marriage and not breaking it[149].

Growing dissatisfaction with adversarial processes for matrimonial dispute settlement through ordinary courts with its high cost, incessant delay, escalation of conflict and bitterness impels one to search for effective, expeditious and inexpensive procedures and forums for disposal of such cases. Strict, technical and time consuming procedures are definitely not desirable for these categories of cases. Conciliation has been made part of the procedure to provide a different and effective system for the settlement of matrimonial disputes.

[146] As per sub-section (4) (a) of Section 4, an important indication is made by providing that in selecting persons for appointment of Judges -"*every endeavor shall 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 counseling are selected*."

[147] *Baljinder Kaur v. Hardeep Singh*, AIR 1998 SC 764

[148] Anil Malhotra and Ranjit Malhotra, *Alternate Dispute Resolution in Indian Family Law - Realities, Practicalities and Necessities. www.iaml.org* last seen on 1-2-2014 at 16 hrs.

[149] It was held that *"effort should be to bring about conciliation to bridge the communication gap which leads to such undesirable proceedings. People rushing to courts for breaking up of marriage should come as a last resort, and unless it has an inevitable result, courts should try to bring about conciliation. The emphasis should be on saving marriage and not breaking it. As noted above, this is more important in cases where the children bear the brunt of dissolution of marriage." Gaurav Nagpal v Sumedha Nagpal*, AIR 2009 SC 557.

C. Speedy disposal

The right to speedy trial has been held to be a part of right to life or personal liberty by the Supreme Court of India[150]. Despite the constitutional mandate for speedy trial, inordinate delay in disposing the cases has become the rule of Indian legal system[151]. Considering the level of damage the judicial delay can cause to the society, the Law Commissions of India in their reports have made focused suggestions and recommendations for the elimination of the delay factor[152]. It goes without saying that speedy disposal of cases is the desirable goal and undue delay will surely defeat the ends of justice [153] . Notwithstanding the repeated instructions by the Law Commission and the apex court, the courts have not succeeded in achieving the object of speedy trial. The adverse effect of delayed disposal was felt more in the field of matrimonial cases for they were dealing with most crucial issues affecting the lives of the victims and those associated with them. It was due to this reason, the Family Courts Act has made speedy

[150] This is to redress that mental agony, expense and strain which a person proceeded against in litigation has to undergo and which, coupled with delay, may result in impairing the capability or ability of the party to defend himself effectively, *Hussainara Khatoon and others v Home secretary, State of Bihar,* AIR 1979 SC 1377.Supra 5 at page

[151] S.N. Sharma, *'Inordinate Delay Versus Speedy Trial, an Indian Experience'*, 31,Banarus Hindu University Law Journal, 174-183(2002)

[152] This aspect has been highlighted by the Law Commission of India in its Reports Nos. 14, 27, 37, 41, 77 and 79. The Law Commission of India in its Seventy - Seventh Report has observed that *"Long delay in the disposal of cases has resulted in huge arrears and a heavy backlog of pending files in various courts in the country. A bare glance at the statements of the various types of cases pending in different courts and of the duration for which those cases have been pending is enough to show the enormity of the problem."* Seventy Seventh Report, the Law Commission of India, 1978, 1

[153] Considering the importance of speedy disposal it is commonly said that "justice delayed is justice denied or 'delay defeats justice' etc.

disposal as mandatory by inserting the words 'secure speedy settlement' in the Preamble. In common parlance, the word 'secure' means 'to obtain or achieve'[154] something. Since the Family Courts are dealing with critical issues like maintenance, marriage expense, divorce, custody of children, restitution of conjugal rights etc, it is all the more important to have time bound orders and immediate execution[155]. Delay in awarding these remedies is unaffordable and will defeat the purpose of the cases[156].

Generally when a case is filed before a Family court it will be taken into file and will be posted after two three months for return of notice. In case of appearance of opposite parties after serving notice, the parties will be referred for counseling. On getting the report of the counselor, the court will direct the opposite party to file his/her objections if any and then the trial will start. In the meantime there may be attempts for conciliation such as adalat and mediation. If it is not settled the evidence will be recorded and orders will be passed. On getting the copy the decree holder can file execution petition if any and proceed with it as per Order 21 CPC or Section 128 Cr. P C.

Despite the clear legislative will of speedy disposal of matrimonial cases as depicted in the Preamble of the Family Courts Act, the courts have

[154] Webster's Dictionary

[155] In contesting cases like, maintenance marriage expense, the petitioner will get the decree amount after 8-15 years and by that time the purpose will not be served. If those orders are execution within one or two years it will be benefited for the victim.

[156] In *Sangeetha Piyush Raj v Piyush Chathurbhuj Raj* , AIR 1998 Bom 151, it was observed that *"if a deserted wife, widowed daughter-in-law, minor children and aged parents are not provided with interim maintenance, it would cause lot of hardship for a long period. The entire purpose of the enactment would be defeated because of the proverbial delays in disposal of cases resulting in grave hardship to the applicants who may have no means to survive until final decree is passed."*

not fully succeeded in deciding the cases expeditiously. This aspect has been elucidated in various studies and reports[157]. It was opined that it would, however, be very useful if the Family Courts were to bear in mind the need for utmost expediency while dealing with this branch of litigation[158].

The Family Courts could not achieve the desired goals mainly due to the absence of specific provisions in the Statute for speedy disposal of cases and absence of direction for time bound disposal of cases in the substantive laws that are being administered by them.

Merits and Constraints

The above discussion evinces that notwithstanding specific statutory provisions, prior to the enactment of the Family Courts Act for alternative dispute resolution, the judiciary in general has not made use of the provisions effectively. The feeble victims of family altercations and injustices did suffer the misdemeanours of adversary legal system and found themselves with no way out. The Family Courts Act was enacted for establishing a network of courts exclusively dealing with family disputes. It was also intended to eliminate specific issues of conventional legal system from the realm of familial cases. A careful analysis of the provisions of the Family Courts Act and the modalities of its operations will show that despite

[157] Family Court in Varanasi, A case study, (2007) National Institute of Public Cooperation and Child Development, A study of Family Courts Tamil Nadu, (2008) EKTA- Resource Centre for Women,

[158] N. Jamwal, *Have Family Courts lived up to Expectations*? Mainstream, XLVII No 12, (2009). P.K.Bandhyopadhaya, *Functioning of the Family Court in Rajasthan*,5:2 Central India Law Quarterly, 259 289, (2010) Family Courts, Report of Workshop held on 20th March 2002, conducted by National Commission for Women, New Delhi,Supra 44

unique positive aspects, the law and the practice do suffer from some serious deficiencies. The Family Courts Act demands fundamental modifications for becoming progressive welfare legislation.

Setting up of Family Courts was undoubtedly a meaningful attempt to put in place an alternate dispute resolution system in one of the very sensitive areas of social life to bring justice within the easy reach of people. The Family Court was established to resolve family disputes, primarily between spouses and the structure established was without frills and excessive legalese[159]. The most unique aspect regarding the proceedings before the Family Court is that they are first referred to conciliation and only when the conciliation proceedings could not resolve the issues, the matter is taken up for trial by the Court[160]. Special emphasis is put on settling the disputes by mediation and conciliation to ensure that the dispute is resolved by an agreement between the parties and the chances of any further conflict or further litigation by way of appeal or revision are reduced.

The Family Courts Act also brought large part of civil and criminal jurisdiction relating to family under one roof[161]. The maintenance cases

[159] Statement of Objects and Reasons of Family Courts Bil**l**, 1984 Published in Gazette of India, Part IIS.2.Ext.No.47,Bill No.21/84,Supra 49

[160] It is observed in *Bini v Sundaran,* that *"Thus though under the Hindu Marriage Act, 1955 no endeavour for reconciliation need be made in a petition for divorce on the ground of conversion to another religion, or other grounds excepted under Section 13(1) of the Hindu Marriage Act or on similar or other grounds available under any other law also, after the introduction of the Family Courts Act, 1984, the Family Court is bound to make endeavours for reconciliation and settlement. The requirement is mandatory. That is the conceptual change brought out by the Family Courts Act, which is a special statute."* AIR 2008 Ker 84

[161] Maintenance, Divorce, Restitution of Conjugal Rights, child custody etc are within the jurisdiction of family Courts.

under the provisions of section 125 Cr.PC, 1973 which had been tried by the Magistrate Court along with other criminal cases also have been shifted to the Family Courts which are having a congenial atmosphere in which family disputes are resolved amicably. The cases are rescued from the intricacies of a formal legal system and its far reaching social consequences[162]. However, there are chances for some 3rd Edn related cases being tried in other courts simultaneously[163].

Although the apparent goal of the Family Courts Act is a remarkable shift from the conservative legal system with potentials to advance gender justice irrespective of caste, creed and community,[164] in practice the Family Courts continue to deal with family disputes in the same manner as other civil matters and the same adversary approach prevails[165]. It is reported in the family courts are just and extension of the normal sessions courts, where no trial are ever held in camera[166].

Since the Family Courts Act is only a procedural law it does not in any way alter the substantive law relating to marriage, property rights,

[162] The shackles of formal legal system and regular process of adjudication causes unnecessary delay of the matter and the dispute can worsen over time. This can be very traumatic experience for the families and result into personal and financial losses that can have devastating effect on human relations as well. A.Agnihotri & M. Srivastava, *Family Courts in India - An Overview,* available at *http:/ www. Legal services india.com* last seen on 01/02/2014 at 8.30 hrs.

[163] Protection from domestic violence, dowry harassment, maintenance of divorced Muslim wives etc., still remains in the Magistrate of Judicial First Class.

[164] Although the Act doesn't contain any provision directly enabling the Court to take a stand in favour of women victims, nothing prevents the Court from initiating a gender favour approach. In fact, an overall reading of the Act shows that such a stand is expected from the judiciary.

[165] The Report of Workshop on Family Courts held on 20 March, 2002. Supra 95

[166] The report of all India meeting of chief justices of high courts on women empowerment vis-a-vis legislation and judicial decision, 9 available at *http://ncw.nic.in/pdfreports/* All India Meeting of chief Justice .pdf last seen on 24/4/2014.

inheritance and the legal status of women. It is a known fact that in the personal laws of all the communities gender injustice is inbuilt[167]. Women do undergo many difficulties and experience severe trauma in matters concerning their marriage, divorce and inheritance. Polygamy, desertion, triple divorces are some of the methods of cruelty to the women. The personal laws perpetuate such atrocities. Although the Indian women have been formally granted equal political rights through the Indian Constitution, they are subject to inequality, deprivation and violence under different personal laws[168]. The Family Courts are established mainly to administer these personal laws which are conspicuous for their anti-women postures.

Another limitation is about the multiple legal actions in different Courts that involve several judges and lawyers. It causes serious delays in the final determination of the issues[169]. Sometimes, a woman in distress has to approach different courts for reliefs like maintenance, divorce, residence right and protection from harassments. A major drawback of the Family Courts Act is that it doesn't explicitly empower the Courts to grant injunctions to prevent domestic violence. A woman victim has to approach so many judicial and quasi judicial forums for ensuring protection for a violence free life. Due to the problems of jurisdiction as per the substantive

[167] F. Agnes, *Women and Law in India,* 77 (2004)

[168] Despite a socialist, secular and democratic Constitution which informs equality as a fundamental principle of governance, discrimination against women on the basis of sex and religion is allowed to continue in the domains of personal laws. It appears absurd that when all are equal citizens of India, the difference in their personal laws gives different kinds of status to different women. S.Arya, Women, *Gender Equality and the State*, 6 (2000).

[169] G. Ramaseshan, Report of Workshop on Women and Law, organized by NUALS, Kerala State Planning Board and Indian law Institute , Kerala Branch on 4-9 July 2009

law, parties have to approach different courts at a time[170]. Multiple actions and multiple judges can produce inconsistent decisions which will have severe impacts not only on the parties of the case but also on their children[171]. Inconsistent determinations also result when different judges hearing similar cases review the applicable law but arrive at contradictory interpretations[172].

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 procedure. However, this lack of uniformity could also be one of the reasons behind the fact that some areas of family laws are still being heard by civil courts. Lastly, many studies reported the difficulty of implementing Court sentences because of the lack of well-trained and competent law enforcement agencies[173].

The people, who are parties before the Family Courts, are almost all the unfortunate lot in the society who are on the brink of the collapse of their

[170] For getting the custody or guardianship of the child, the petitioner has to approach the court, where the child ordinarily resides. For declaration or recovery of property jointly acquired the parties are to approach the court where the property lies. For dissolution of marriage the jurisdiction is within the limits of the court where the marriage took place or where they last resided together as husband and wife.

[171] For example, in an abuse case the judge may have determined that a father has sexually abused his daughter and prohibited his future contact with the daughter. However, in the concurrent dissolution of marriage action between the child's parents, a second judge may have excluded evidence of the father's sexual misconduct and ultimately ordered visitation between the father and daughter.

[172] Barbara A. Babb, *Where We Stand: An Analysis of America's Family Law Adjudicatory Systems and the Mandate to Establish Unified Family Courts*, 32 Family Law Quarterly, 35 37 (1998)

[173] Family Court in Varanasi, A case study, (2007) National Institute of Public Cooperation and Child Development, A study of Family Courts Tamil Nadu, (2008) EKTA- Resource Centre for Women, Supra 154

marital lives. Unless, the stake holders in this system show more concern, going by the huge pendency of the cases in the Family Courts, it is sure that speedy settlement of family disputes, as aimed at by the Act, will only be a mirage. It is high time for the Government to establish more Family Courts in the metro cities and other places as early as possible so as to instill a ray of hope in the minds of the litigant public that speedy settlement of Family disputes by the Family Courts is a reality.

The Family Courts Act 1984 was part of the trends of legal reforms concerning women[174]. The Act was expected to facilitate satisfactory resolution of disputes concerning the family through a forum expected to work expeditiously in a just manner and with an approach ensuring maximum welfare of society and dignity of women. Overall, it may be said that the family Courts though started with the motive to provide speedy justice had failed to achieve its mission. Thus, the very purpose of formulating this `special' forum is hardly being served.

[174] The women organizations that mooted for Family Courts "*strongly recommend the abandonment of the established adversary system for settlement of family problems, and the establishment of family Courts which will adopt conciliatory methods and informal procedure in order to achieve socially desirable results."* Suggestions in Chapter IV, '*Women and the Law' in the* "Report of the National Committee on Status of Women in India', 1971, Published by Indian Council of Social Science Research, Supra 117

Chapter 3

FAMILY COURTS IN PRACTICE: AN ANALYSIS

The main purpose of the Family Courts is to secure smooth and speedy disposal of cases relating to family matters through conciliation.[1] This innovative experiment in dispute resolution was of immense value for women who were burdened under the stress of lengthy, technical and expensive legal battles for enforcing their rights to dignified living. Certain studies have pointed out that by the establishment of Family Courts, the aspiration for a less formal, less technical and women friendly environment has not been successfully attained.[2] Hence, it has become necessary to probe into the efficacy of the performance of the Family Courts to suggest required modifications in the present system for achieving the object of the legislation.

This chapter attempts to analyze the functioning of the Family Courts and examine how far the supposed benefits of speedy disposal and conciliation have been extended to the women litigants. The study is confined to the Family Courts in Kerala for it being the State with high social development indices.[3]

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[1] The Preamble of the Family Courts Act declares that it is "*An Act to provide for the establishment of Family Courts with a view to promote conciliation in, and secure speedy settlement of, disputes relating to marriage and family affairs and for matters connected therewith.*"

[2] *Family Court in Varanasi, A case study* ,National Institute of Public Cooperation and Child Development, (2007), EKTA- Resource Centre for Women, Madurai

3 K.K. George, *Limits To Kerala Model of Development: An Analysis of Fiscal Crisis and its Implication* 128 (1999)

Literacy, together with non-domestic employment, which gave women access to independent sources of income, has been regarded as important Indicators of women's 'status', which affected fertility and mortality outcomes.[4] Since women in Kerala have, on average, been the most literate when compared with women in other states of India[5], much has been written about their 'high status' and their central role, historically, in social development.[6] However, there is a growing uneasiness with Kerala's social development outcomes linked to non-conventional indicators like the rising visibility of gender based violence, mental ill health among women, and the rapid growth and spread of dowry and related crimes.[7]

The efficacy of any Family Court depends on the speedy disposal of cases by providing justice to the aggrieved parties, especially through conciliation. The present work analyses the alternate justice delivery mechanism in Family Courts from the perspective of women litigants. It also attempts to highlight the issues related to the effectiveness of the procedure of conciliation and speedy disposal adopted in Family Courts.

Methodology

The study is conducted through sample survey method. Irrespective of the literacy rate and difference in cultural and ethnic background, the

[4] ibid
[5] Same could not be said of female work-participation rates. While the literacy rate of is 88 percent, the rate work participation of women is only 13 percent.
[6] Supra 3
[7] M. Eapen and P.Kodoth, *Family Structure, Women Education and Work: Re-examining the High Status of Women in Kerala,* CDS, (2002)

proportion of cases filed in the Family Courts to the population as per 2011 census has been found uniform in all the districts in the State. The district of

Table-I

Number of cases instituted Vis a Vis Population as per 2011 census

Sl. No	District	Population (Census - 2011)	No. of Cases Instituted	No. of Cases Instituted as % of population
1	Thiruvananthapuram	3307284	5785	0.17
2	Kollam	2629703	4308	0.16
3	Pathanamthitta	1195537	1952	0.16
4	Alappuzha	2121943	2359	0.11
5	Kottayam	1979384	2584	0.13
6	Idukki	1107453	1063	0.10
7	Ernakulum	3279860	3530	0.11
8	Thrissur	3110327	4136	0.13
9	Palakkad	2810892	2593	0.09
10	Malappuram	4110956	3732	0.09
11	Kozhikode	3089543	3316	0.11
12	Wayanad	816558	260	0.03
13	Kannur	2525637	3263	0.13
14	Kasaragod	1302600	971	0.07
	Total	**33387677**	**39852**	

Wayanad was the only exception to this rule. Details of district wise population and number of cases in Family Courts are given in Table I.

It can be seen that excluding the district of Wayanad,[8] the number of cases instituted as percentage of population varies from 0.07 to 0.17 and the average is 0.11. Hence, it is presumed that the sample collected from a single district will be capable to represent the whole state. The district of Thiruvananthapuram has been selected for survey and ten percent of the total cases of the Family Courts in the district have been selected as representative samples of Kerala .There are three Family Courts functioning in Thiruvananthapuram district and sample from all the three courts were collected. Total number of cases pending before the Family Courts in the district as on 31/03/2013 was 8937 and 894 cases were taken for the study

I. General information

General information is divided into three heads such as 'General Profile', 'Economic Status' and 'Nature of Cases'. The categorization is made mainly to identify the social, educational and economic status of the women litigants approaching the Family Courts for enforcing their rights.

a. **General Profile:** General Profile is divided into
    i. Religious Denomination,
    ii. Age Group

[8] Difference in Wayanad district may be attributed to the hostile topography, educational, social, and economic backwardness of the district.

iii. Educational Status

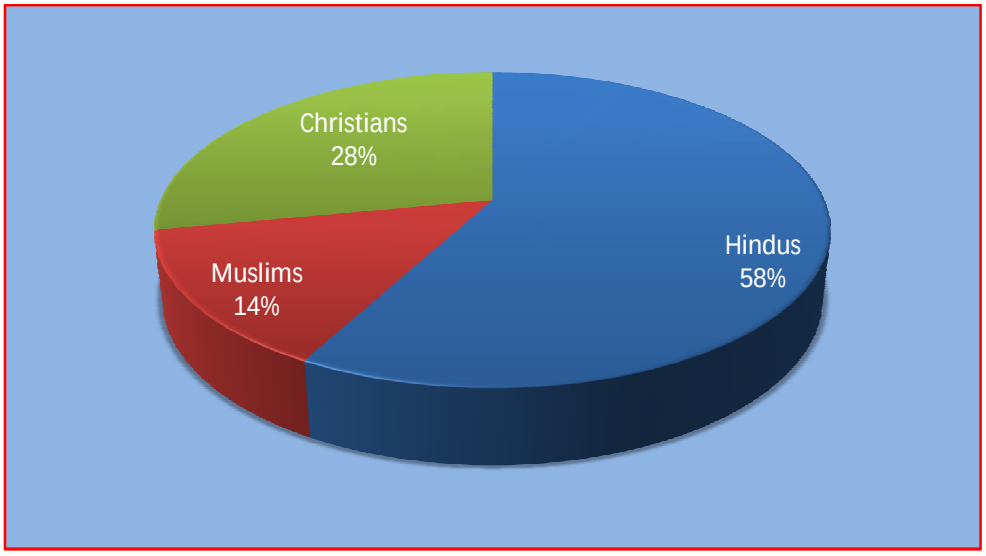
iv. Employment Status

i. Religious Denomination

Religious denomination of the population of Thiruvananthapuram district as per Census 2001 is Hindus – 68.09 percent, Muslims – 13.34 percent and Christians – 18.41 percent of the total population of 3234356 of the district.[9] Figure -I gives the religious status of the litigants. It can be seen that the majority of respondents, i.e. 58 percent, were Hindus, 14 percent were Muslims and 28 percent were Christians.

Figure-I

Religious Denomination of Litigants



The percentage of the respondents is not corresponding to the religious denomination of the population. While the percentage of litigants in Muslim

[9] Data of the religious denomination vide Census 2011 has not been published.

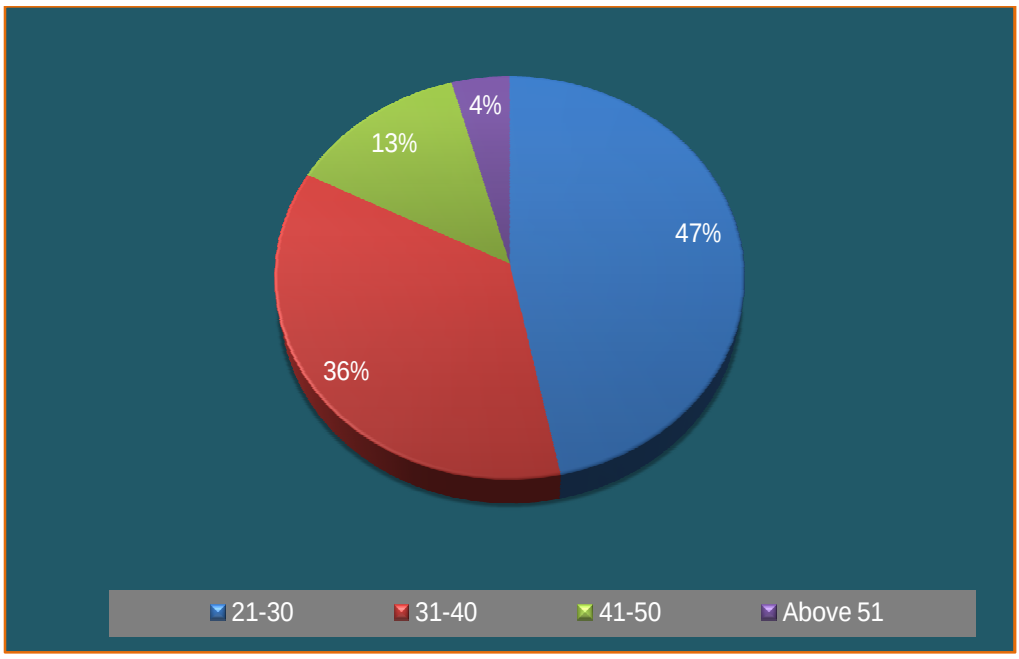
community is in conformity with the demographic status, there is a variation of 10 percent from the population status in the case of Hindus and Christians.[10]

ii. Age group of the Litigants

Figure II shows the age group of the litigants. It can be seen that 47 percent of the respondents are from the age group of 21-30. 36 percent of the respondents belong to the age group of 31 -40. Only 13 percent are between 41 -50 age groups. The percentage of victims above the age of 50 is only 4 percent. More than 80 percent of the women litigants are in the age group of 21-40.

Figure-II

Age Group of the Litigants



[10] Correspondingly reduced number of cases from the Muslim community may be attributed to the jurisdiction of the Magistrate of First Class to try the petitions under the Muslim Women (Protection of Rights on Divorce) Act, 1986 and absence of petitions for divorce except in the cases of petitions by the wives.

Considering the average age of marriage of women in Kerala which is between 21 to 25, the finding is a crucial indicator of the present state of marriage and family. It indicates that a greater number of family disputes are taken to the court during the initial stages of marriage.

iii. Educational Status

Table II indicates the educational qualifications of the litigants. It may be seen that large majority of litigants are educationally above average. 72.71 percent of the respondents possess graduation, post graduation and professional degrees. 9.61 percent of the litigants are either illiterate or below SSLC.

Table -II

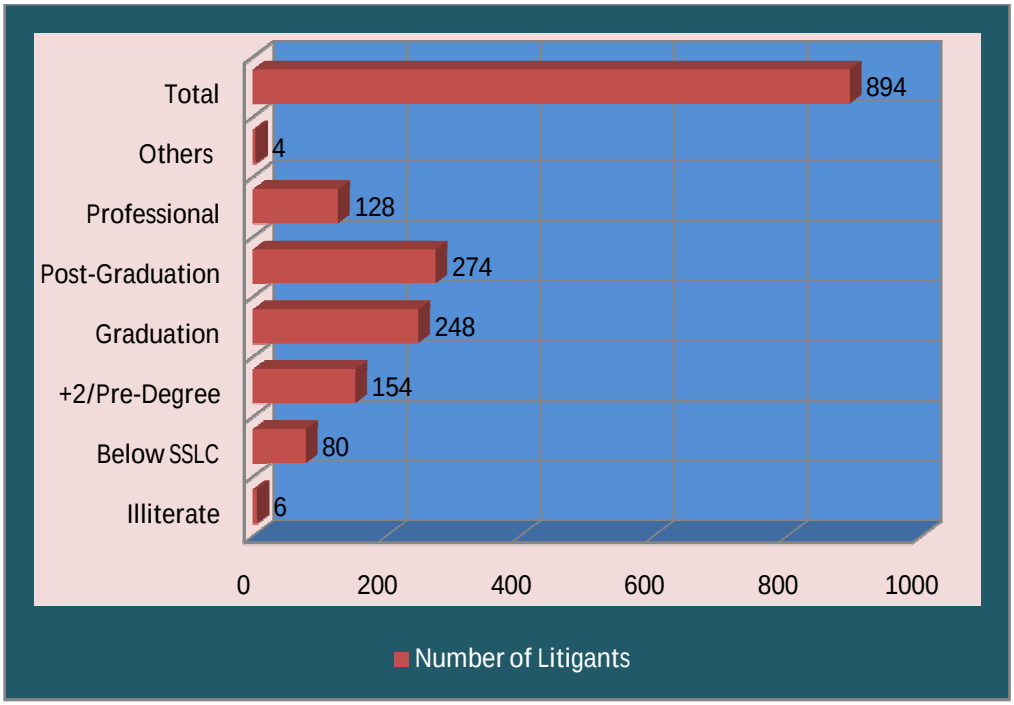
Educational Qualification of the Litigants

Sl. No	Educational Qualification	Number of Litigants	Number of Litigants as % of Total
1	Illiterate	6	0.66
2	Below SSLC	80	8.95
3	+2/Pre-Degree	154	17.23
4	Graduation	248	27.74
5	Post-Graduation	274	30.65
6	Professional	128	14.32
7	Others	4	0.45
	Total	894	100.00

The data indicates that education does not seem to protect women from domestic violence, but, at the same time, it helps them to seek alternatives to escape from the clutches of violent atmosphere or to gain autonomy to take decisions, which, at times, are against the traditional norms.

Figure-III

Educational Qualification of the Litigants



iv. Employment Status

Table-III

Occupation of the Litigants

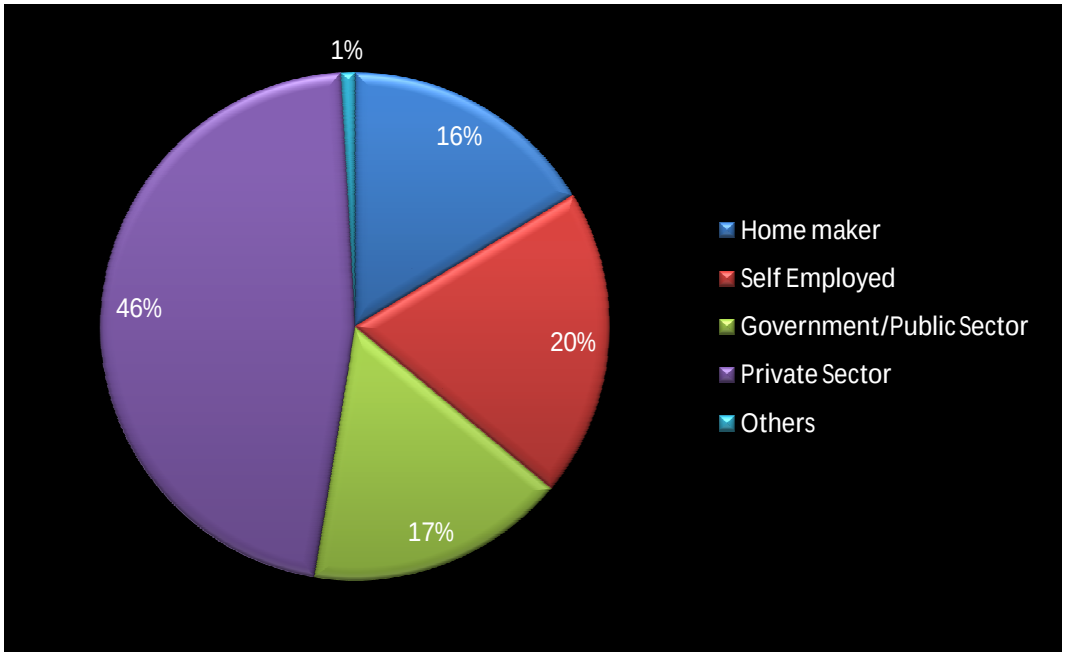
Sl. No	Occupation	No. of Litigants	Number of Litigants as % of Total
1	Home maker	146	16.34
2	Self Employed	176	19.69
3	Government/Public Sector	148	16.55
4	Private Sector	416	46.53
5	Others	8	0.89
	Total	**894**	**100.00**

Table III and figure IV elucidates the employment status of the litigants. Of the total litigants, 83.66 percent were employed out of which 46.53 percent

were in the private sector while 19.69 percent were self employed like tailors, beauticians, tuition teachers, maids, vegetables vendors etc. 16.55 percent were in the Government/Public Sector while 16.34 percent were home makers.

Figure-IV

Employment of status of the Litigants



A correlation is thus visible between employment and women's decision to seek justice. It may be said that either employed women suffer more hardships or alternatively they are more willing to register their protest against domestic injustices because of their economic independence. Another possibility is that the women, due to strained family atmosphere, were compelled to take up employment mainly for looking after themselves and their children.

b. Economic Status

Economic Status is classified into 'Income', 'Assets', 'Property Acquired after Marriage', 'Property Lost after Marriage' and 'Dependency'.

i. Income

Details of monthly income of the litigants are given in Table IV and figure V. It may be seen that 26.85 percent of the litigants are having income between Rs. 5001/-to Rs. 10000/- and 24.83 percent have income between Rs. 10,001/- to 15,000/-. 13.21 percent of the litigants have no income and the income of 7.38 percent litigants is negligible. When taken together, 91.73 percent of the litigants either do not have any income or their income is below Rs. 25000/- per month.

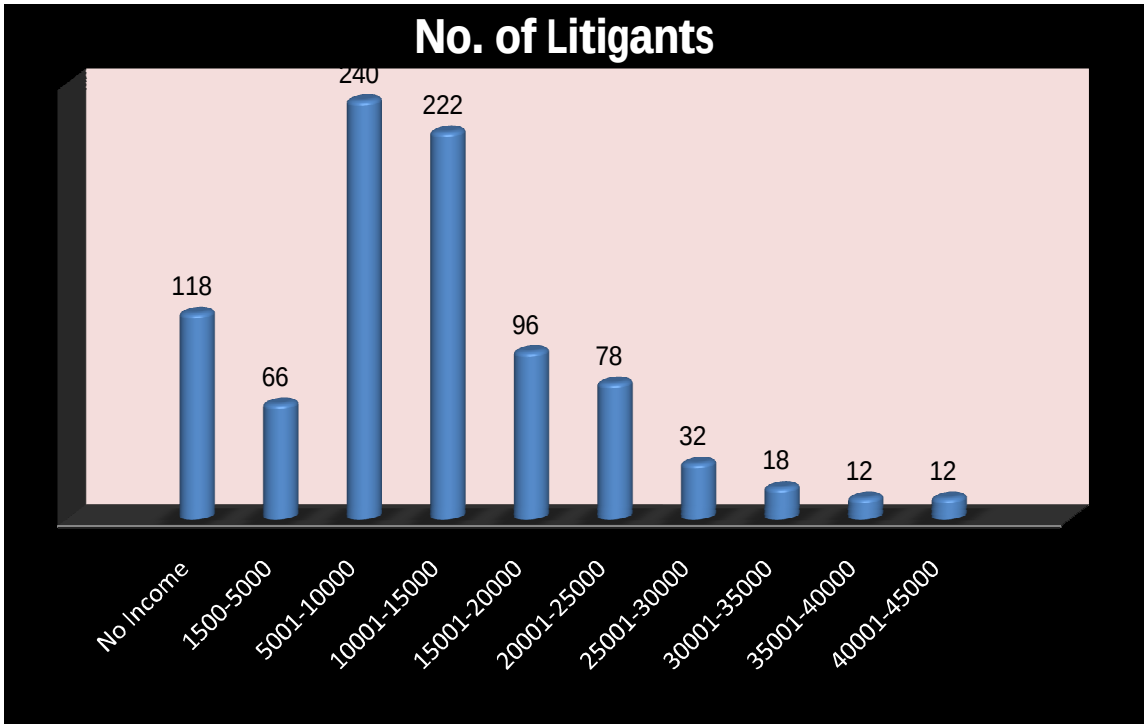
Table-IV

Income Slab of the Litigants

Sl. No	Income Slab (In Rs)	No. of Litigants	No. of Litigants as % of Total
1	No Income	118	13.21
2	1500-5000	66	7.38
3	5001-10000	240	26.85
4	10001-15000	222	24.83
5	15001-20000	96	10.74
6	20001-25000	78	8.72
7	25001-30000	32	3.58
8	30001-35000	18	2.01
9	35001-40000	12	1.34
10	40001-45000	12	1.34
		894	**100.00**

Figure-V

Income Slab of the Litigants



A significant number of stakeholders, in particular advocates, judges and media, hold the view that it is women's education cum economic independence and their intolerance of in-laws which is contributing to martial breakdown. But when considering the socio economic profile women litigants are not belonged to higher income groups. It indicates that in spite of vulnerable economic position and absence of any guarantee about the future economic well being, women are forced to approach the court due to the bitter and traumatic experiences they are subject to in the matrimonial outfit.

ii. Assets of Litigants

Table V and figure VI shows the assets of litigants in terms of money.

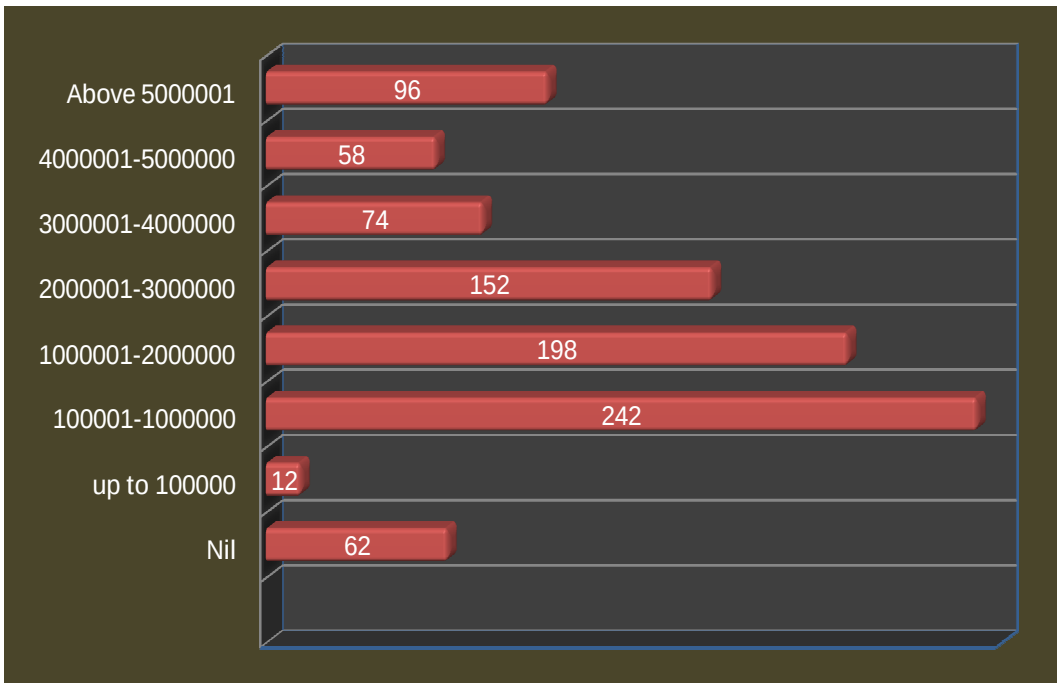
Table-V

Movable and Immovable Assets of Litigants

Sl. No	Assets – Movable and Immovable	Number of Litigants	Number of Litigants as % of Total
1	Nil	62	6.94
2	up to 100000	12	1.34
3	100001-1000000	242	27.07
4	1000001-2000000	198	22.15
5	2000001-3000000	152	17.00
6	3000001-4000000	74	8.28
7	4000001-5000000	58	6.49
8	Above 5000001	96	10.73
	Total	**894**	**100.00**

Figure-VI

Movable and Immovable Assets of Litigants



More than one-fourth (27.07 percent) of the litigants have assets between Rs.100001-1000000. That may be two or three cents of property or

its undivided share. A considerable group of respondents (6.94 percent) have no assets. Persons having assets above 50 lakhs are 10.73 percent

iii. Acquisition of Property after Marriage

In Kerala there is practice irrespective of caste and class to give gold ornaments, money, movable properties including vehicles and other household articles to the women at the time of marriage. In the southern part of the State there is also a practice of giving immovable properties to the spouses jointly at the time of or after marriage by the parents of the wife.

Figure-VII

Acquisition of Property after Marriage

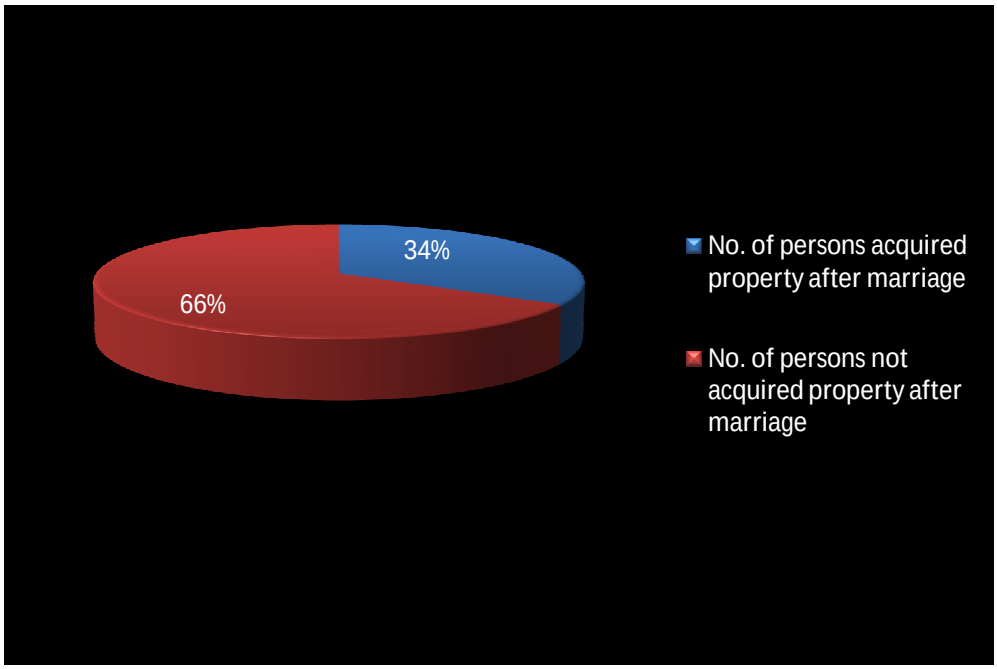
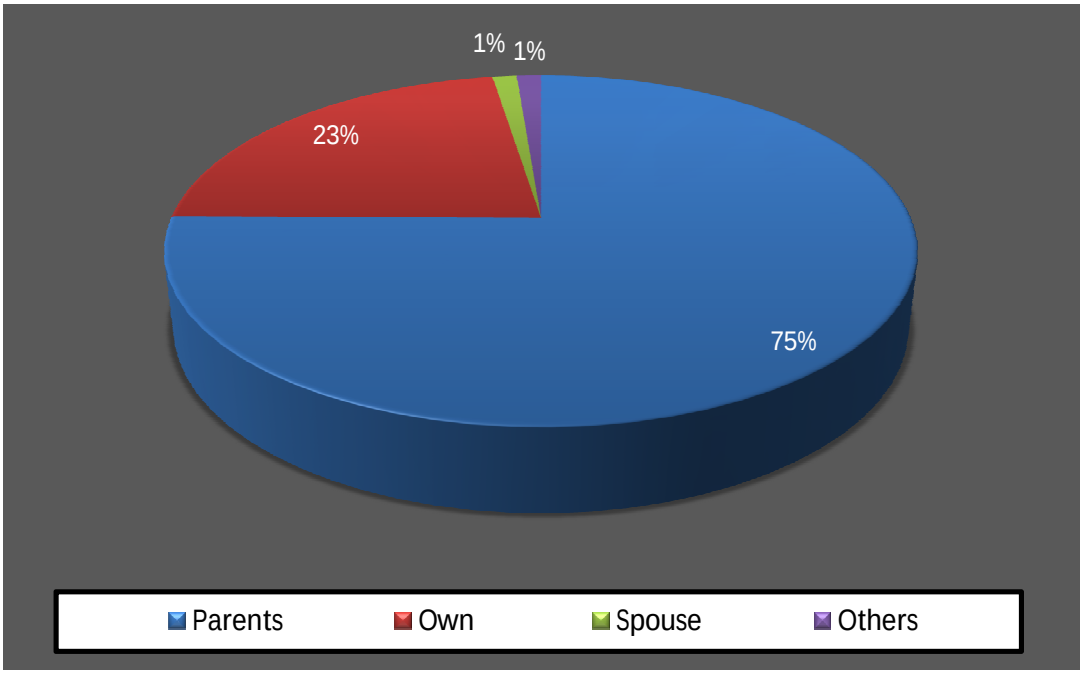


Figure VII shows the percentage of wives who have acquired property after marriage. 66 percent of the respondents have not acquired any property after their marriage, while 34 percent have acquired property after their

marriage. Figure VIII shows the source from where the property has been acquired after marriage.

Figure-VIII

Acquisition of Property after Marriage - Source of



It may be seen that 75 percent of the wives who have acquired property after marriage received it from parents and 23 percent have acquired property from their own resources. That may be by selling other property or gold ornaments or availing loan from financial institutions. Acquisition of property out of the source of the spouse is only for 1 percent and the other 1 percent has received properties from sources like LSGs and some other welfare schemes.

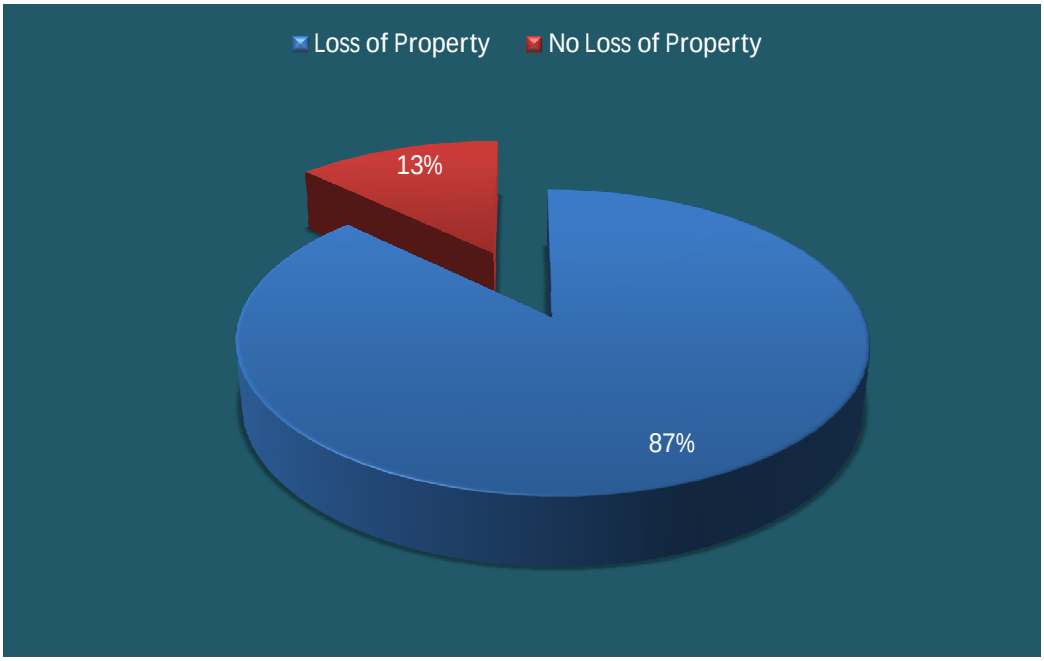
iv. Loss of Property after Marriage

Figure IX shows the percentage of women litigants who have lost property after their marriage. 87 percent of the litigants have lost their property after

marriage. It may be due to the development of an ostensible ownership acquired by the husband over the property of the wife.

Figure-IX

Loss of Property after Marriage (% of Litigants)



The market value or amount of property lost after marriage is given in Figure X. It can be seen that 45.64 percent of litigants have lost property worth Rs.10, 00,001 to 50, 00,000/-. The next largest group of litigants is 21.80 percent, who lost property worth Rs.50, 00,001 to 10, 00,000/- . Majority of these groups lost their gold ornaments or property given by their parents.

Figure-X

Value of Property lost after Marriage

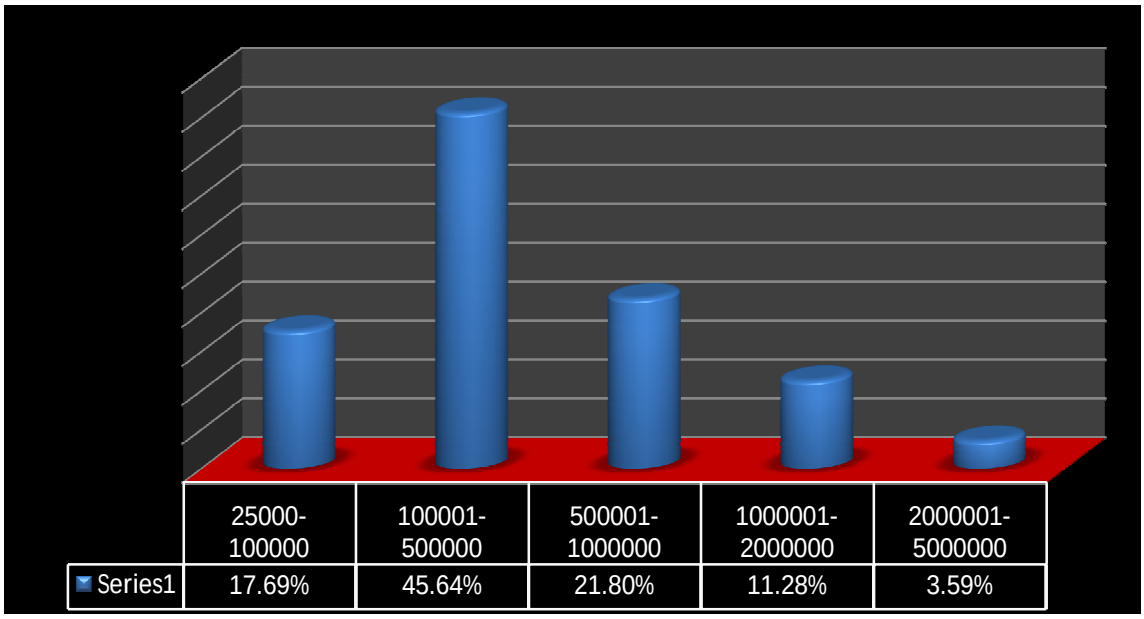
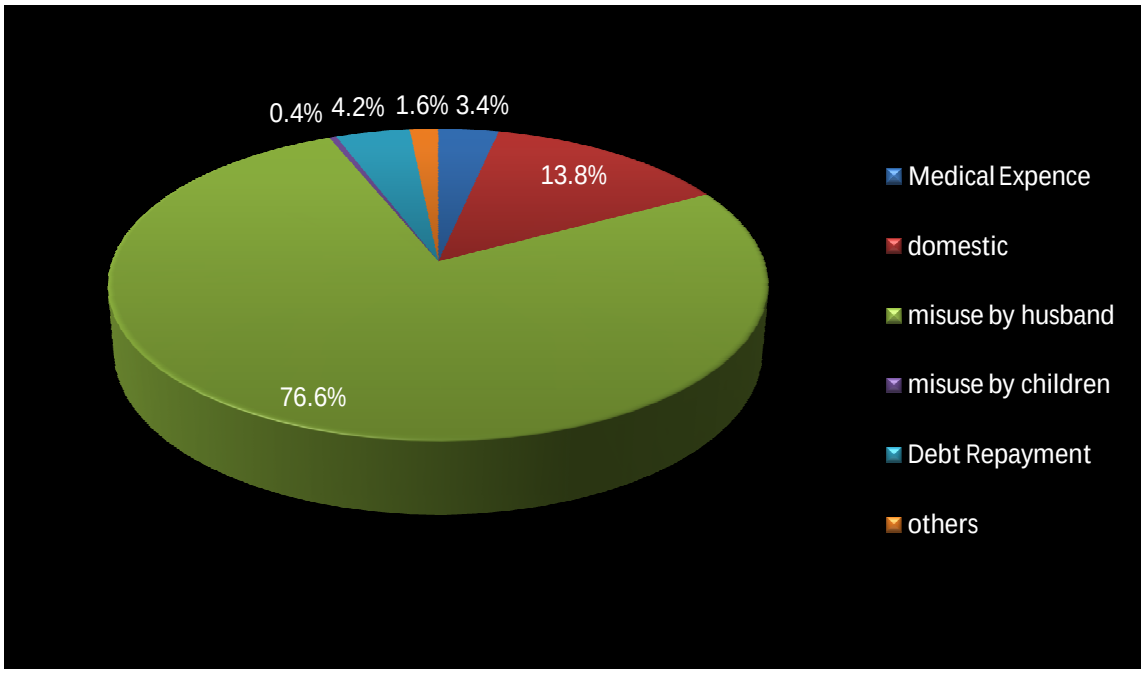


Figure-XI

Reasons for Loss of Property



Out of 894 litigants 780 have reported to have lost their property after marriage. The losses were mainly attributable to medical expenses, domestic

expenses, misuse by husband/husband's family, misuse by children and debt repayment. Figure XI depicts the percentage of losses on various grounds. It may be noted that 76.6 percent of loss is due to misuse of property by the husband or husband's family.

v. Dependency

Figure XII shows the details of the dependency of the litigants. Out of the 894 litigants, 48 percent have reported as dependants. It can be presumed that in spite of dependency the women are opting for enforcing their personal rights, probably due to the bitter experience in the matrimonial relations.

Figure-XII

Dependency of the Litigants

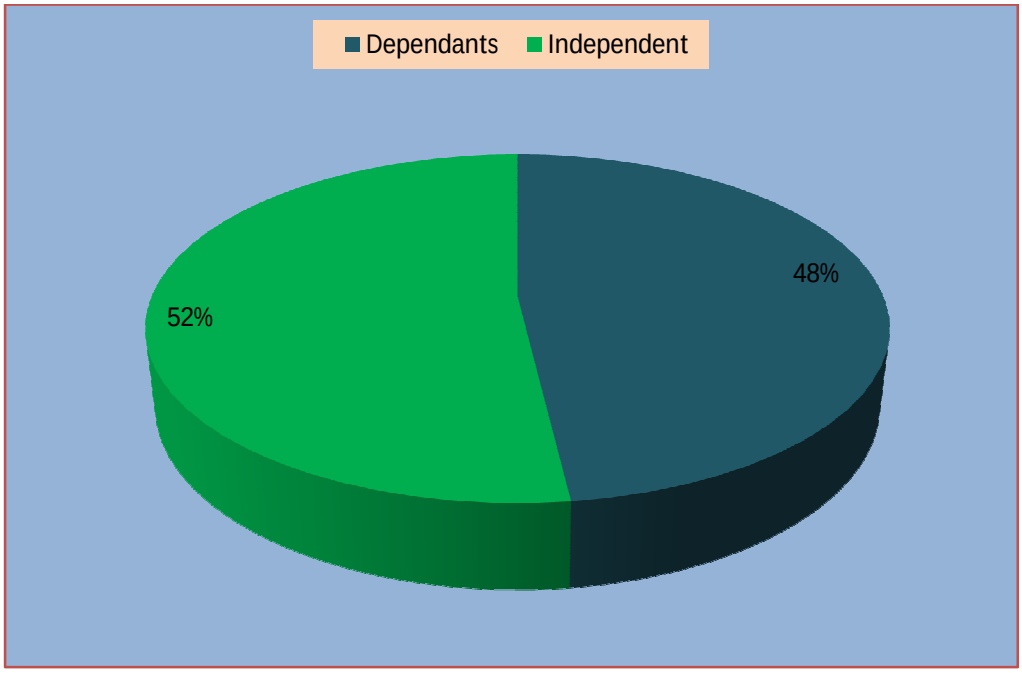


Figure XIII shows the details of persons on whom the litigants are depending upon. Consequent to the breakup of matrimonial homes, 92 percent of women are the dependants of their parents.

Figure-XIII

Persons on Whom Litigants are Dependent

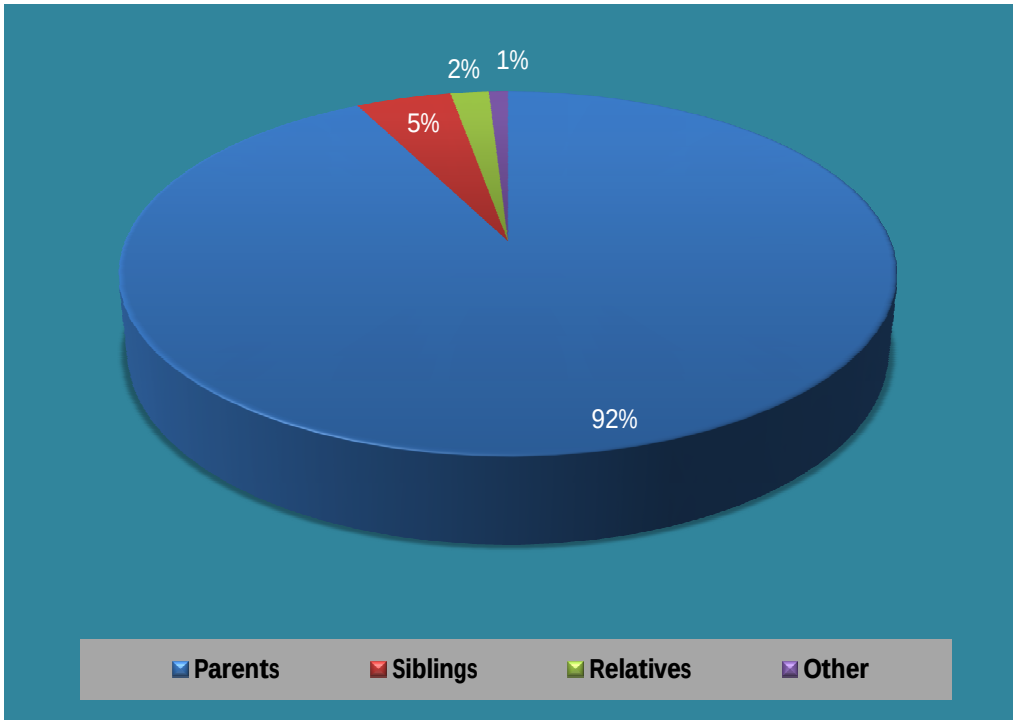


Figure XIV

Litigants with Dependents

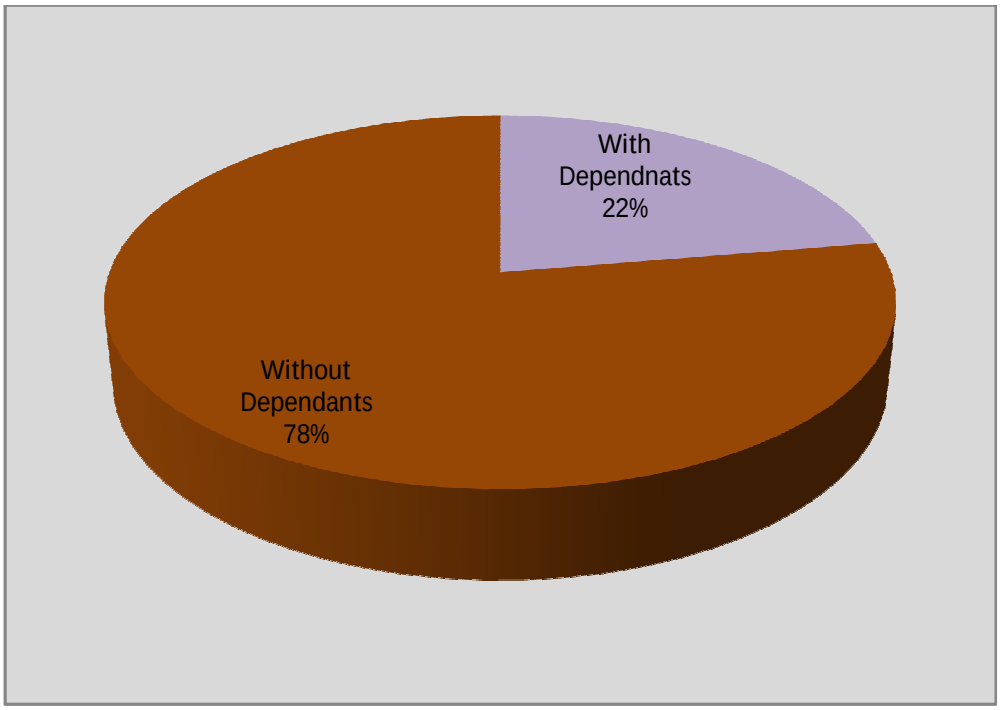


Figure XIV gives the details of litigants with dependants. 22 percent of the litigants have dependants to look after.

Figure XV

Categories of Dependents – Percentage

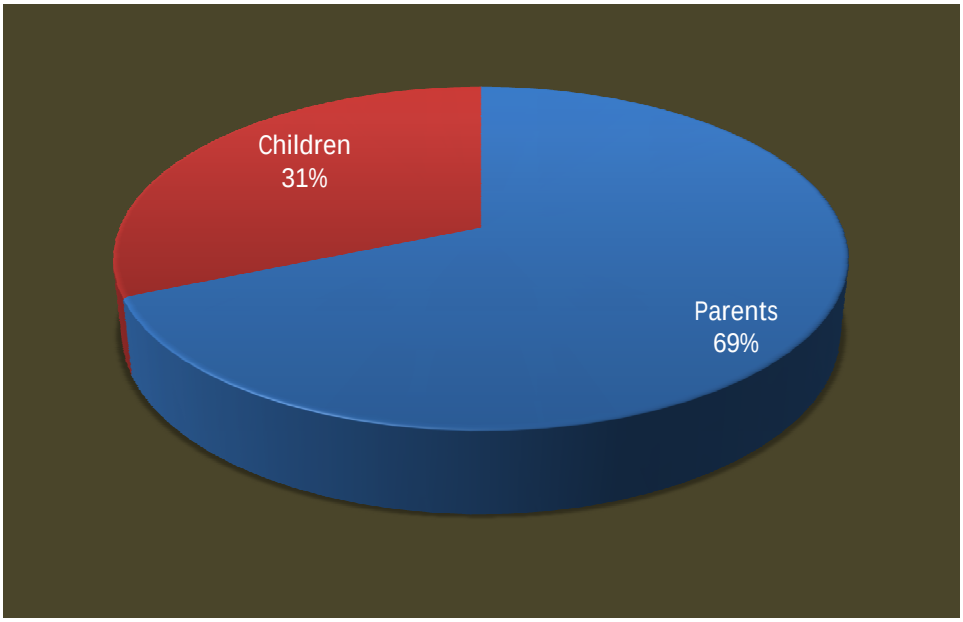


Figure XV shows the category of dependants. It can be seen that parents constitute 69 percent of the dependants while 31 percents of dependants are children.

Economic status of the respondents shows that above half (51.68 percent) of the respondents belong to the income slab of Rs. 5001 – 15000. Only 8.27 percent of the litigants have monthly income above Rs. 25000/-. Considering the current value of movable and immovable properties, it can be seen that majority of the litigants do not belong to affluent class. 27.07 percent litigants has assets between Rs. 100000/- and 1000000/- while 22.15 percent has assets between Rs. 1000001/- and 2000000/- However, even those persons with higher income and assets will not be able to lead an affluent life mainly due to the expenses related to the maintenance of their dependents. As a general rule, the wives do not acquire properties from their spouses. On the

contrary, majority of them loses the property after the marriage at the hands of their spouses.

c. Nature of cases.

Natures of cases filed in the Family Courts have been analyzed for identifying the major litigants and the reliefs sought for. It is analyzed under two heads viz., 'Parties to the Case' and 'Nature of Reliefs'. Table VI shows the percentage of cases filed by various parties.

Table VI

Filing of Cases: Number of Parties and %

Sl No.	Petitioner	Number of Cases	% of Total
1	Women	700	78.30
2	Husband / Male Partner	192	21.48
3	Parents	2	0.22
	Total	**894**	**100**

78.3 percent cases are filed by the women, 21.48 percent cases are filed by the husband/male partner and only 0.22 percent cases are filed by parents. It can be seen that the majority of litigants in the Family Courts are the women victims of matrimonial violence.

Table VII and figure XIV show the nature and number of cases of the women litigants. It shows that the highest number of cases, i.e. 39.07 percent, was filed for Dissolution of Marriage. The second highest at 25.73 percent was filed for maintenance under

Table -VII

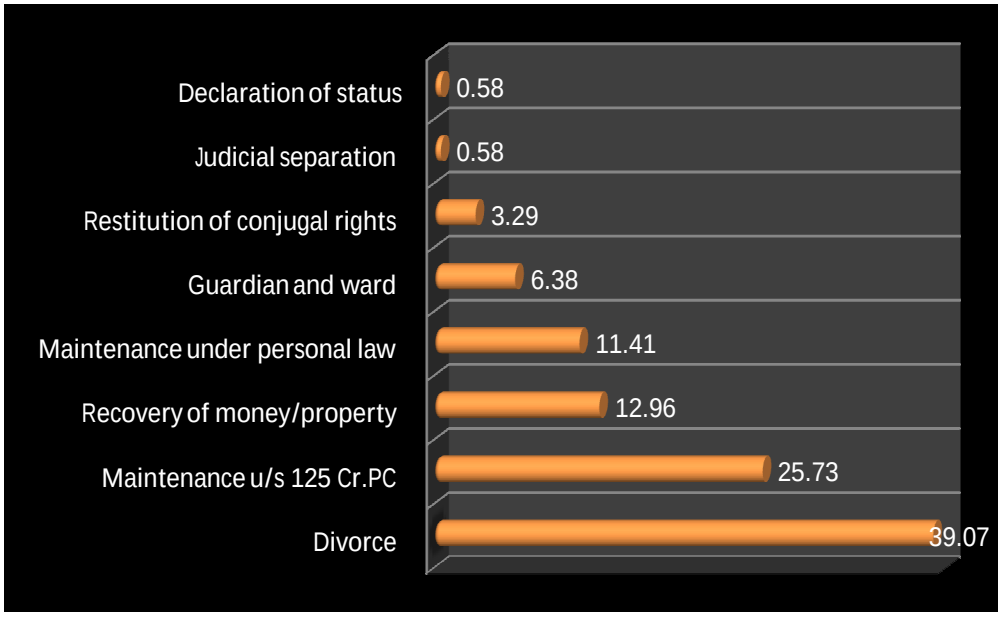
Number of Cases and Relief Sought

Sl. No	Relief Sought	Number of Cases*	Number of Cases as % of Total
1	Declaration of status	6	0.58
2	Judicial separation	6	0.58
3	Restitution of conjugal rights	34	3.29
4	Guardian and ward	66	6.38
5	Maintenance under personal law	118	11.41
6	Recovery of money/property	134	12.96
7	Maintenance u/s 125 Cr.PC	266	25.73
8	Divorce	404	39.07
	Total	**1034**	**100**

*Since multiple reliefs are sought by a single applicant, the number of cases is more than the total number of litigants. Each relief is considered as a case

Figure-XVI

Number of Cases and Relief Sought



Section 125 of the Cr. PC. 11.41 percent of cases are for getting maintenance under the personal laws. When these cases are taken together, it can be seen that 37.14 percent are for realization of maintenance. 12.96 percent of the cases

were for recovery of money or property and 6.38 percent was for the custody of wards/ children.

The survey reveals an alarming trend in Kerala society regarding divorce. Out of the total litigants, around 40 percent have sought for dissolution of marriage. On the contrary, 0nly 3.29 pursued restitution of conjugal rights.[11] From the above figures it can reasonably be inferred that frustration with the violent experiences within the conventional marriage and family system is increasing.

Table-VIII

Age wise distribution of Divorce Petitioners

Sl. No	Age Group	No. of Divorce Petition	Divorce Petitions as % of Total Cases
1	21-25	34	8.42
2	26-30	148	36.63
3	31-35	102	25.25
4	36-40	58	14.36
5	41-45	32	7.91
6	46-50	12	2.97
7	Above 50	18	4.46
8	**Total**	**404**	**100.00**

Age wise distribution of litigants seeking divorce is given in Table VIII and figure XVII. It can be seen that 36.63 percent of the litigants seeking divorce are of ages of 26 to 30. The next largest group (25.25 percent) is of the age of 31-35. Considering the average age of marriage in Kerala,[12] i.e. 22.7, it

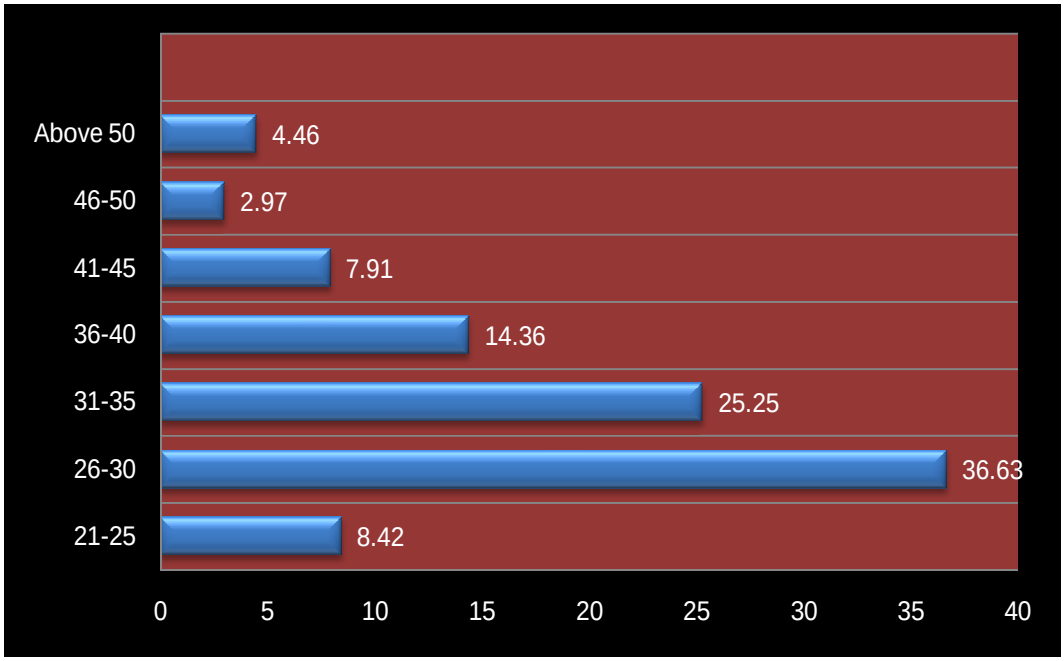
[11] Intention behind some of the cases for restitution of conjugal rights was to circumvent the matrimonial liabilities like maintenance or returning of properties received at the time of marriage.

[12] As per the Report of WHO and Ministry of Health and Family Welfare in India- 2011, the average age of marriage in Kerala is 22.7. See http://www. *medindia.net/ health statistics/general/marriage age* last seen on 26/07/2014

can be presumed that within 2 to 3 years of marriage, wives are pursuing dissolution of marriage.

Figure-XVII

Age Wise Distribution of Divorce Petitioners (%)



The alarming rate of divorce cutting across all classes and castes further makes it clear that the high social status of women, higher level of civil society activism and media vigilance in Kerala society are not reflected in the gender question in Kerala. The ever increasing domestic violence, divorce rate, sexual abuses etc are testimony to this.

While analyzing the general profile of women litigants of Family Courts, it can be said that more young educated women are approaching the courts to establish their personal and social rights than those of women from other strata. From the point of financial status also it can be seen that the

women are losing assets after marriage irrespective of their social, educational and economic status. This loss can primarily be attributed to the misuse of their husband or his family. Of late, sharp responses from the women victims could be noticed to protect their rights. It can be inferred that education has helped women to seek alternatives in order to escape the clutches of violent relationship or might have helped them to gain autonomy to take decisions, which, at times, must have been against the conventional practices. Growing social awareness, increased social services designed to support and assist women victims and enactment of pro-women social legislations have encouraged the women in Kerala to come out and respond against the violent treatments within the conjugal outfits.

II. Speedy Disposal

The empirical study clearly reflects that the rhetoric about speedy disposal of cases and needy justice to the victim is still remaining as a distant dream for the litigants who approach family courts. More importantly, majority of the cases pending were for claiming divorce and maintenance. As majority of the women victims belong to the lower middle class with no or limited assets to live with their children the delay in granting reliefs will indeed affect their life and livelihood.

Table IX shows the number of visits paid by the litigants. The total number of cases on the basis of the number of court visits can be divided into three such as 1999-2007, 2008-2011 and 2012-2014. In the first category, i.e.,

1999-2007, the total number of cases is 14 which constitute 3.13 percent of the total number of cases. In the second category, i.e., 2008-2011, the total number of cases is 56 which is 12.53 percent of the total number of cases.

Table-IX

Number of Court Visits

Year	No. of Cases	Average No. of Court Visit
1999	2	62
2005	2	70
2006	12	57.7
2007	12	55
2008	8	37.25
2009	18	36.44
2010	46	35.65
2011	40	26.65
2012	660	7.73
2013	86	4.91
2014	8	7.75

Similarly, the third category 2012-2014 contains 377 cases which is 84.34 percent of total cases. In the first category, the average number of court visits is 61.18 while the average number of court visits in the second category is 34. In the case of the third category, the average number of court visits is 6.8. Important points that can be inferred from the above are (a) during the first three years of the filing of case, no substantial judicial intervention is taking

place. This may be due to the procedural stipulation of counseling at the first instance which takes some time to complete. (b) Only from the fourth year of the filing of case, frequent postings of the cases take place. Between the fourth and seventh year of the case, the litigants are directed to appear continuously. (c) In spite of statutory mandate of speedy disposal of cases, there are some cases which are as old as more than seven years and the number of court visits made by the litigants is 55 and above.

Table-X

Present Status of the Case

Year	Case Filed	Notice Served	Counter Filed	Trial Started	Evidence Completed
1	**2**	**3**	**4**	**5**	**6**
1999				2	
2005					2
2006				2	10
2007				8	4
2008				4	4
2009			2	6	10
2010			6	40	
2011		2	14	24	
2012		142	506	12	
2013	2	60	24		
2014		2	6		
Total	**2**	**206**	**558**	**98**	**30**

Table X shows the present stage of the cases. Column 6 shows the number of cases in which the evidence is completed. It may be seen that minimum period for completing the evidence is five years from the date of filing of case. It may be noticed from column 5 that after the lapse of two years only the trial of the cases begins and it may be extended up to eight years (the case of 1999 is

considered to be an abnormal one). In maximum number of cases the counter has been filed. The details of such cases are given in column 4. From the figures, it can reasonably be inferred that two to five years from the date of filing of the case are taken for filing the counter. It is clear from column 2 that one to three years is taken for the serving of notice. The data reveals that the amendment in CPC[13] with regard to the time limit for filing written statement has not brought any positive change in Family Court cases.

Figure-XVIII

Litigants who have been granted Interim Relief (%)

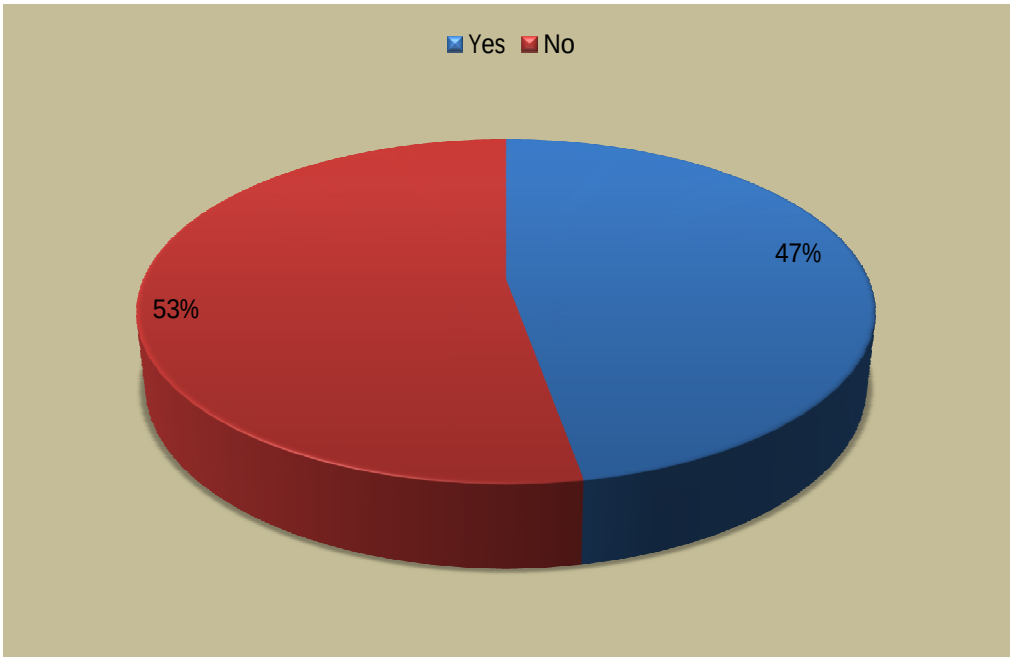


Figure XVIII shows the percentage of litigants who have been granted interim reliefs. It can be seen that majority of the litigants (53 percent) have not

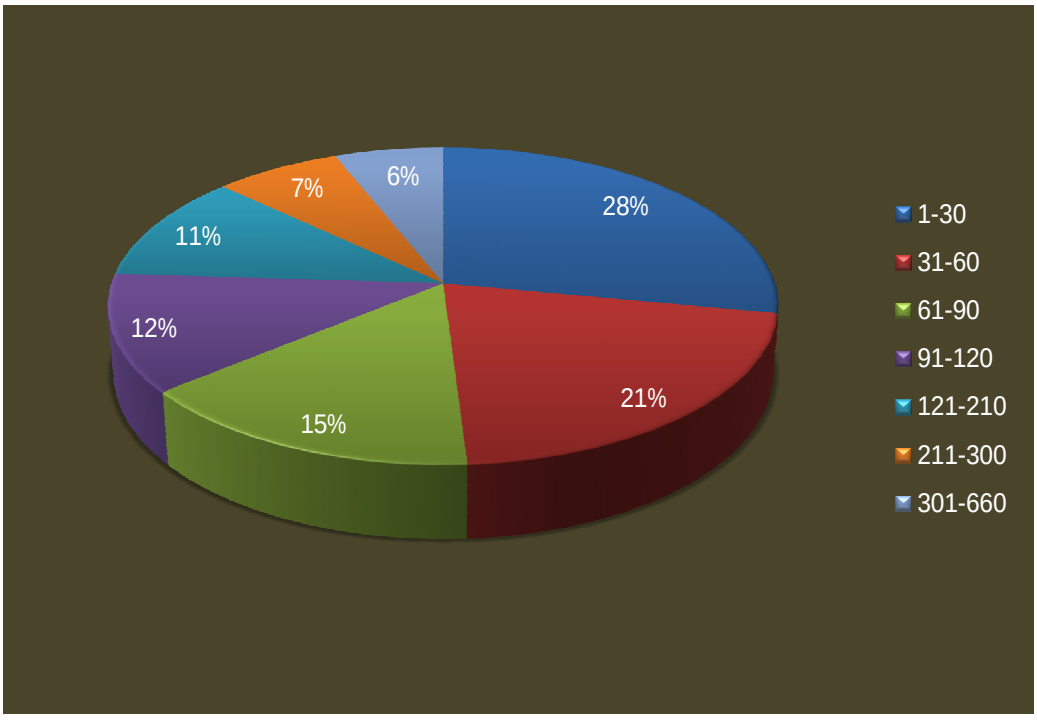
[13] As per the Code of Civil Procedure (Amendment) Act, 1999 *"defendant shall, within thirty days from the date of service of summons on him, present a written statement of his defense."* The said amendment could, however, due to resistance from the members of the Bar, not be enforced. The text of the provision as amended by the 1999 Amendment in the present form has been introduced by the 2002 Amendment with effect from 01.07.2002.

been provided with any interim relief and only 47 percent of litigants have been awarded with some sort of interim relief.

It may be seen that it takes months to dispose an application for interim relief. Figure-XIX shows the time taken for disposing the application for interim relief. This finding is crucial in view of the lengthy period taken for the final disposal of the case. It may be seen that out of the 422 litigants who got interim relief, 28 percent of them were awarded within one month.

Figure- XIX

Time Taken for Disposing Interim Application



However, 21 percent of them were disposed of in 31 to 60 days, 24 percent after 4 months. There were cases in which the litigants got interim relief after 1- 1 ½ years and the very purpose of the interim relief is thus defeated.

Delay is not only in passing the interim order but also in receiving the copy of the order. Table XI shows the time taken to get the copy of order of interim relief. It can be seen that in the case of majority of the beneficiaries it takes more than 21 days for receiving the copy of orders. In some cases it can be noticed that more than two months are taken for receiving the copy of the interim relief order.

Table-XI

Time taken to get the copy of order of interim Relief

Sl. No	No. cases	No of days taken to get the copy of order of interim relief
1	34	1 -11
2	18	11-20
3	278	21-30
4	56	31-40
5	16	41-50
6	18	51-60
7	2	61-70

Mere passing of orders of interim relief does not ipso facto grant the relief to the victim. It demands efficient execution as well. However, there is a serious lapse in this area.

Figure XX shows the rate of execution of interim releif. It can be seen that only 52 percent of the orders are fully executed and 43 percent of the orders are partially executed. Five percent of orders are not at all executed

Figure XX

Rate of Execution of orders on Interim Relief

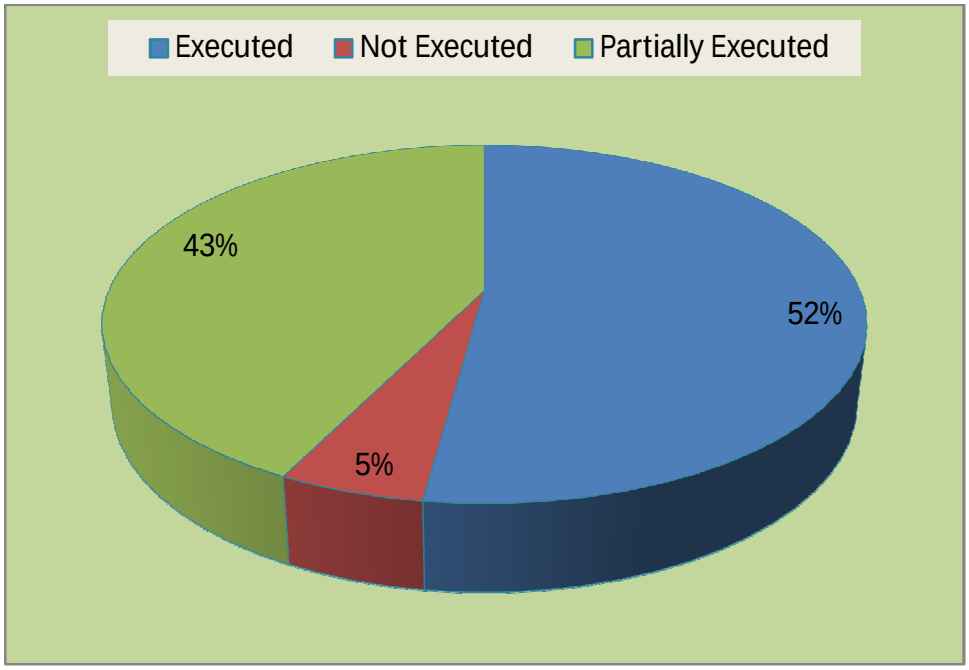


Table XII shows the time taken to execute the order of interim relief. Figure XXI describes the percentage of cases and the required time for execution of the interim relief orders.

In 37 percent of cases it has taken 1-30 days for the execution of the orders of interim reliefs while time taken for the execution was 31-60 days in 33 percent of cases. Interim relief orders in 18 percent of cases were executed within a period of two to three months whereas 5 percent of them required 4 months for execution. In seven percent of cases, interim orders were executed after four months. It can be seen that in some cases the period for the execution was inordinately long, which makes the interim relief meaningless. Even though the Family Courts have been established for the speedy settlement of family disputes, it is evident from the above discussion that the desired level at

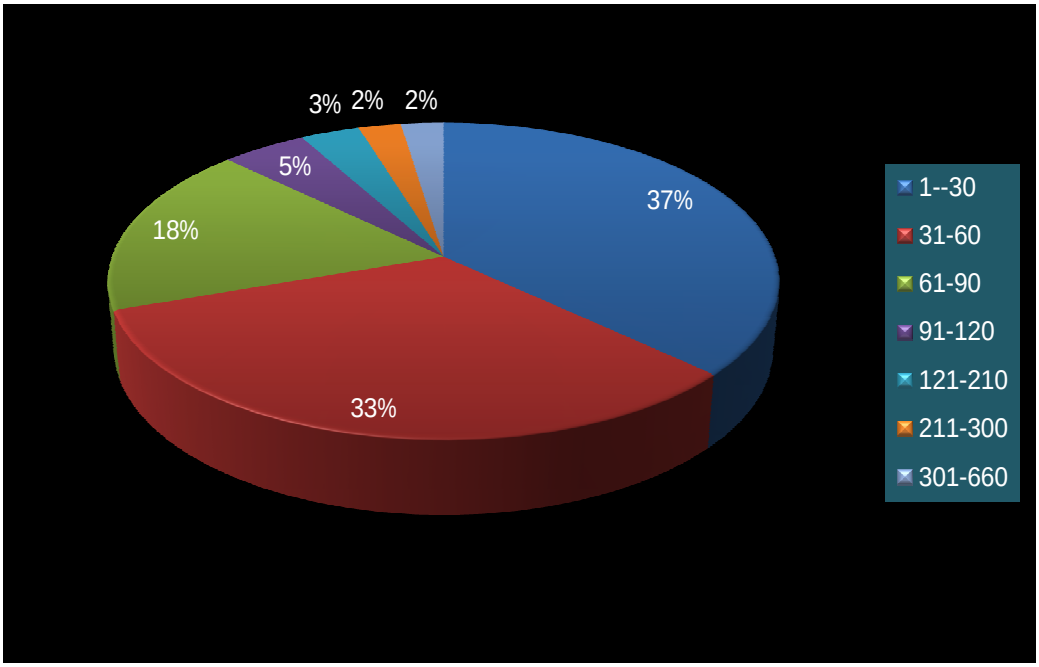
Table-XII

Time Taken to Execute Order of Interim Relief

No of days taken to execute the order of interim relief	No of cases	Percentage of Cases to the Total
1 - 30	156	37
31 - 60	138	33
61 - 90	74	18
91 - 120	20	5
121 - 210	14	3
211 - 300	10	2
301 - 660	10	2

Figure XXI

Time Taken to Execute Interim Relief Orders (%)



which the cases were expected to be disposed has not been achieved. Even in

the cases of interim relief delay could be noticed not only in awarding it but also in the execution of the order.

Conciliation

The Family Courts are free to evolve their own rules of procedure,[14] and once a Family Court does so, the rules so framed override the rules of procedure contemplated under the Code of Civil Procedure. Special emphasis is put on settling the disputes by mediation and conciliation.[15] This ensures that the matter is solved by an agreement between both the parties and reduces the chances of any further litigation on the same subject matter. The aim is to give priority to mutual agreement over the usual process of adjudication. In short, the aim of these courts is to form a congenial atmosphere where family disputes are resolved amicably. The cases are thus salvaged from the complexities of a formal legal system. Hence while analyzing the theory and practice of Family Courts Act, it is indispensible to check the effectiveness of alternate dispute resolution mechanisms of counseling, adalat and mediation.

Conciliation is studied under the heads 'Counseling', 'Adalat' and 'Mediation.'

[14] Subsection (3) of Section 10 of the Family Courts permitting the Family Courts to lay down its own procedure with a view to arrive at a settlement in respect of subject matter of suit or proceedings or at the truth of the facts alleged by one party and denied by the other. As per subsection (3) Sec 10 '*Nothing in sub section (1) or sub section (2) shall prevent a Family Court from laying down its own procedure with a view to arrive at a settlement in respect of the subject- matter of the suit or proceedings or at the truth of the facts alleged by one party and denied by the other'.*

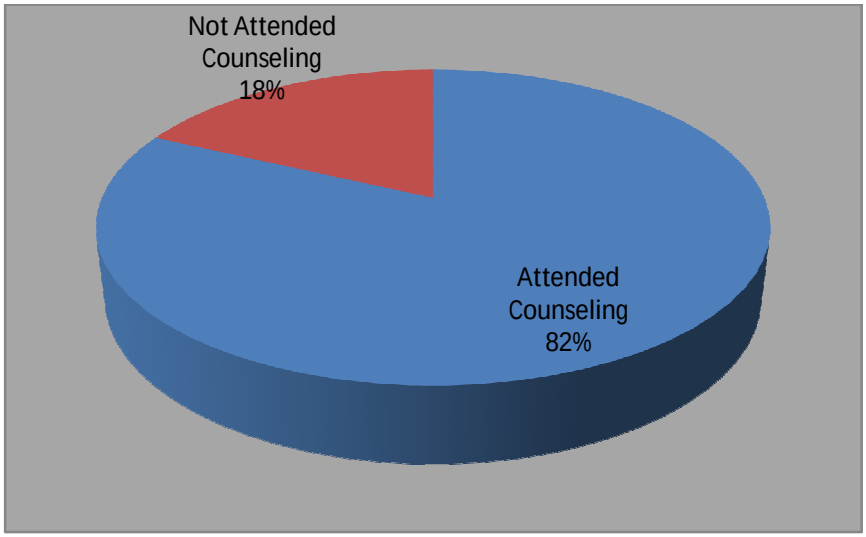
[15] As per Section 9 of the Family Courts Act it is the duty of the Family Court to assist and persuade the parties in arriving at a settlement. '*The Family Court was enacted to provide for the establishment of Family Courts with a view to promote conciliation in, and secure speedy settlement of , disputes relating to marriage and family affairs and for the matters connected therewith by adopting an approach radically different from that of the ordinary civil proceedings.*' *P. Jayalekshmy v Revichandran,* AIR 1992 AP 190

i. Counseling

Figure XXII shows the percentage of litigants who had attended the process of counseling. 82 percent of the total litigants have undergone counseling whereas 18 percent of the litigants have not been subjected to counseling.

Figure XXII

Percentage of Litigants who have undergone Counseling



It is evident that all cases filed in a Family Court are not referred for counseling at the first instance as stipulated by the Family Courts Act.[16] The counseling is not only for reuniting the spouses with strained relations but for settlement of disputes between the parties to other cases also.[17] Hence cases of every nature require counseling or conciliation which is not taking place now. Vide Family Courts (Kerala) Rules, 1989 every court in the State should have a Principal Counselor possessing Masters Degree in Social Work or who must

[16] As per section 9 of the Family Courts ' *In every suit or proceeding, endeavour shall be made by the Family Court in the first instance where it is possible to do so consistent with the nature and circumstance of the case, to assist and persuade the parties in arriving at a settlement in respect of the subject matter of the suit or proceeding and for this purpose a Family Court may, subject to any rules made by the High Court, follow such procedure as deem fit'*

[17] Sec.35 and 37 of The Family Court (Kerala) Rules ,1989

have done his or her Post graduation in Psychology with minimum experience of 2 years in Family Counseling.[18]

Out of the total 28 Family Courts in Kerala only 14 Family Courts have permanent principal counselors and in 14 Family Courts the functions of the Counselors are entrusted to persons on contract basis. The system of contract counselors affects the quality of counseling.

Table XIII

Litigants *vis – a- vis* Counselors

Person Conducting Counseling	Number of Cases	Percentage of Total
Principal Counselor	524	65.01
Other Counselor from Court	270	33.5
Counselor from outside the Court	02	0.25
Principal Counselor & Other	10	1.24
Total	**806**	**100**

Table XIII shows the number of persons who have attended counseling with various Counselors. However, 65.01 percent of counseling was done by the Principal Counselor. For 33.5 percent of cases, counseling is done by the other counselors appointed by the Court on contract basis. It is also clear that the service of Counselor from outside the Court is negligible. Data for the study is taken from the Family Court which has a Principal Counselor. In the case of other Family Courts where Principal Counselors are not appointed, a large part of the counseling must be done by counselors appointed on contract basis. Principal counselors in Kerala have wider powers than their counterparts in other States.[19] But, in many courts, due to unbearable workloads and lack of

[18] Rule 18 of the Family Courts (Kerala) Rules, 1989

[19] Rule 36 of the Family Courts (Kerala), Rule, 1989 empowers the counselors to make home visits to ascertain the standard of living of the spouses and their relationship with children, seek information

infrastructure, these powers are not being properly utilized. On the other hand, the counselors are forced to preserve the institution of marriage, in disregard to the well being of the women litigant. There may be circumstances in which the parties have to attend the counseling for more times than needed normally.

Figure-XXIII

Percentage of cases and the number of Sessions of Counseling attended

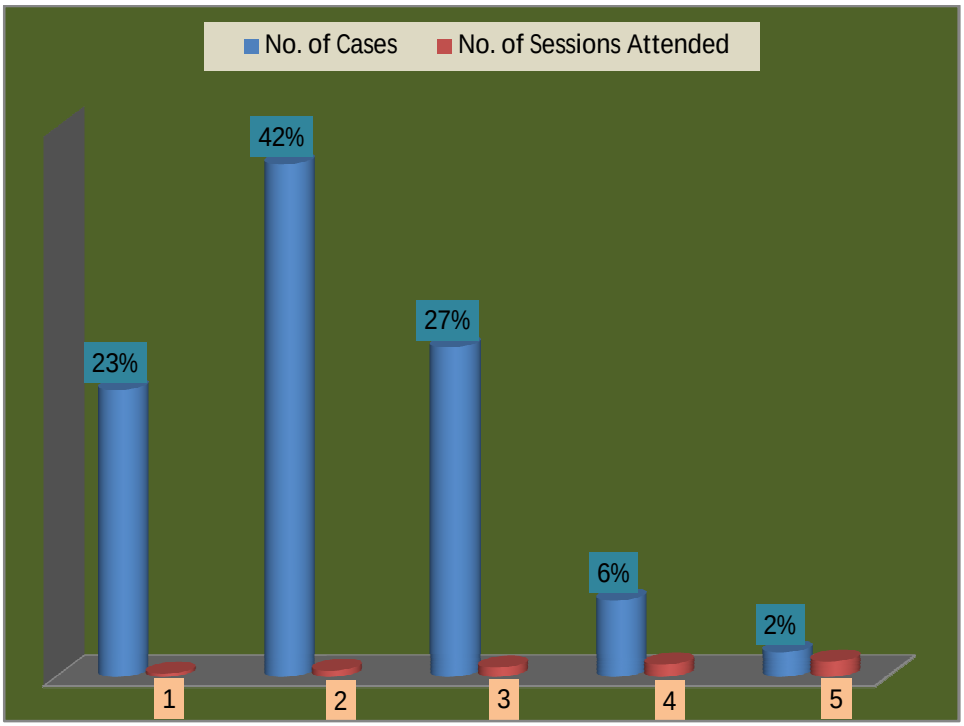


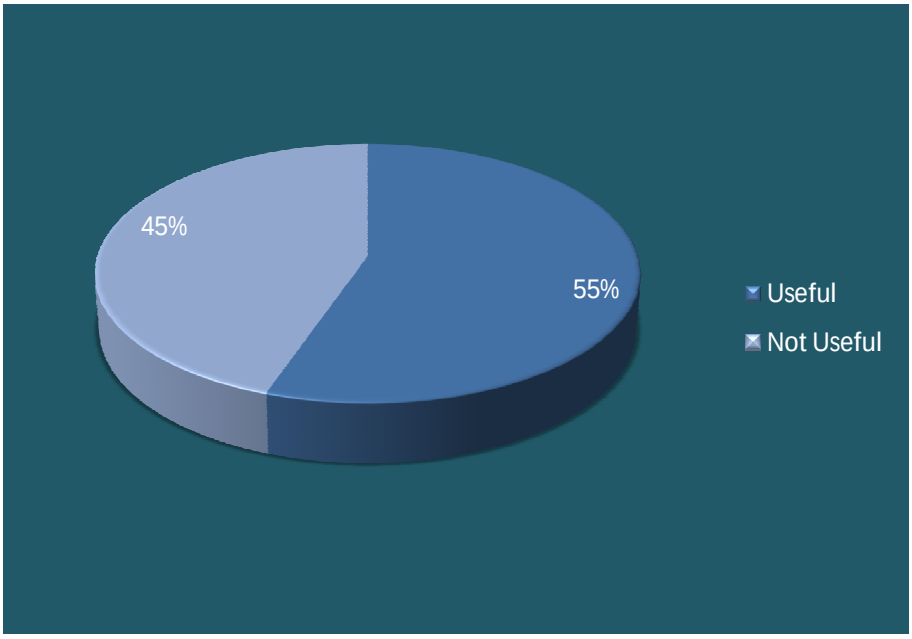
Figure XXIII shows the details of number of sessions of counseling attended. Total number of persons who attended counseling amounts to 403 out of which 23 percent attended the counseling only once. 42 percent of persons attended two sessions of counseling while it was three times in the case of 27 percent. However, 6 percent of litigants attended four sessions while 2 percent attended 5 sessions. It could be inferred that the counseling was not very effective in these cases since the parties were continuing with the litigations.

from employer etc. Counselor's has also been entitled to supervise/guide and /or assist reconciled couple although the matter is no longer pending in the Court. Such provisions are absent in Rules framed by other states.

Opinion of litigants about the usefulness of counseling is given in Figure XXIV.

Figure-XX IV

Usefulness of Counseling



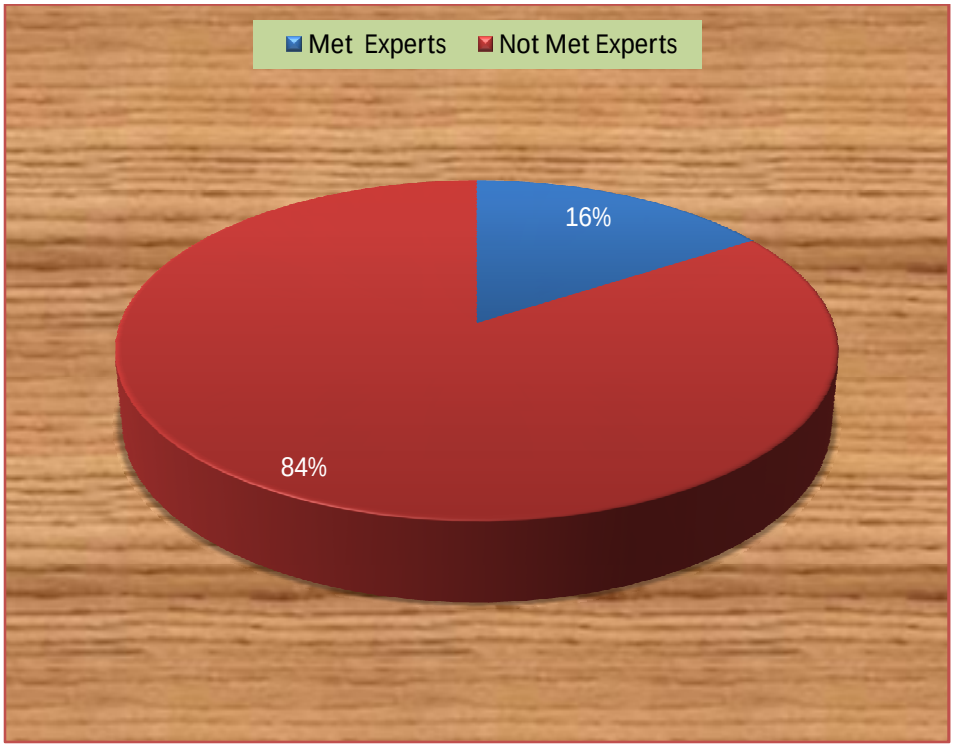
It can be seen that more than half of the respondents (55 percent) were satisfied with the effectiveness of the counseling even if the disputes have not been settled. 45 percent of the respondents felt that counseling was not useful to them. If 45 percent of litigants were not satisfied with the execution of statutory stipulation of counseling that aspect needs serious consideration and appropriate policy intervention is imperative.

For the purpose of assisting the Family Court in discharging the functions imposed by the Family Court Act, it shall be open to the Court to secure the services of medical experts or such persons professionally engaged in promoting the welfare of the family as it thinks fit.[20] Figure XXV shows the

[20] Sec 12 of Family Courts Act,1984

Figure-XXV

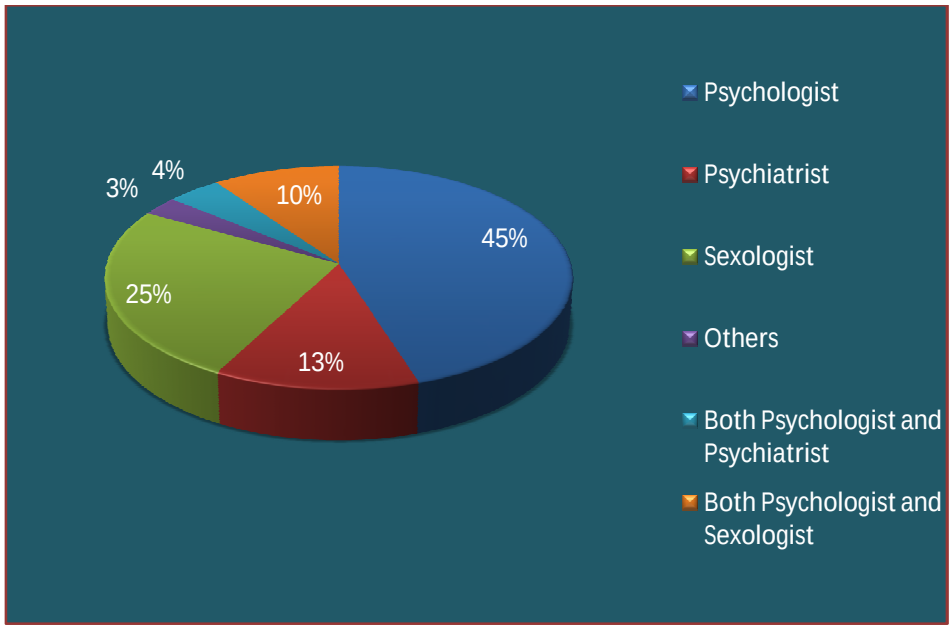
Met any other expert counselor



details of litigants who have met other experts. It may be seen that involvement of such other experts was negligible**.** Only 16 percent of the total

Figure-XXVI

Details of Experts



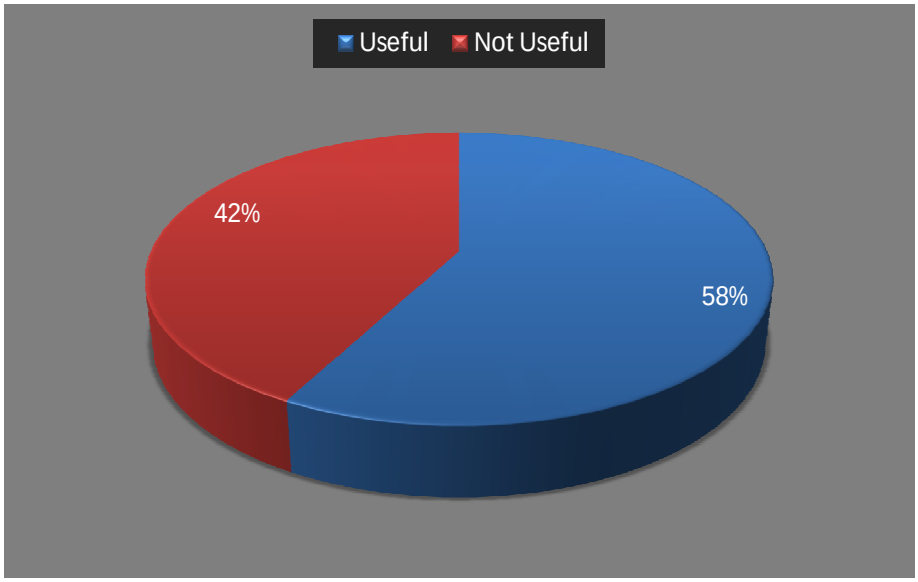
number of litigants had the opportunities to meet the experts and 84 percent of litigants were not referred for expert counseling or consultation.

The experts other than the counselors may be psychologists, psychiatrists, sexologists etc. Figure XXVI shows the details of experts to whom the litigants have approached. Out of the total 142 litigants who have met the experts for counseling 64 persons (45%) met psychologists and 36 persons (25%) consulted sexologists. 18 persons (13%) met the psychiatrist.

Although only 16 percent of the litigants have undergone expert counseling, majority of them have opined affirmatively about the usefulness of such counseling. Figure XXVII shows the opinion about expert counseling. While 58 percent of the persons who have undergone the expert counseling expressed positive remarks about such counseling, 42 percent did not agree to that opinion.

Figure-XXVII

Usefulness of Expert counseling



From the field study it is evident that the tension between the objective of dealing with unequal power relations between men and women through alternative procedures and the objective of conciliation particularly in reconciliation and preserving the institution of marriage continues to be reflected in the attitudes of some of the counselors. The entire litigants are not found attending the counseling and only around eighty two percent do go for this conciliatory practice. It has been noticed that 45 percent of the litigants who have undergone counseling was not satisfied with it. This should be taken as a matter of serious concern.[21] Similarly, it has been noticed that only 16 percent of litigants have been referred to experts like psychologists, psychiatrists, sexologists etc. This also reduces the role of conciliatory practices in the whole process. A need to revamp the system of counseling with experts is necessary as counseling is one of the important techniques of conciliation.

ii. Adalat

Adalat is the dispute resolution forum that is presided over by a sitting or retired judicial officer, with two other members, usually a lawyer and a social worker. Adalat is conducted as per the provisions of Section 89 of CPC[22]. In

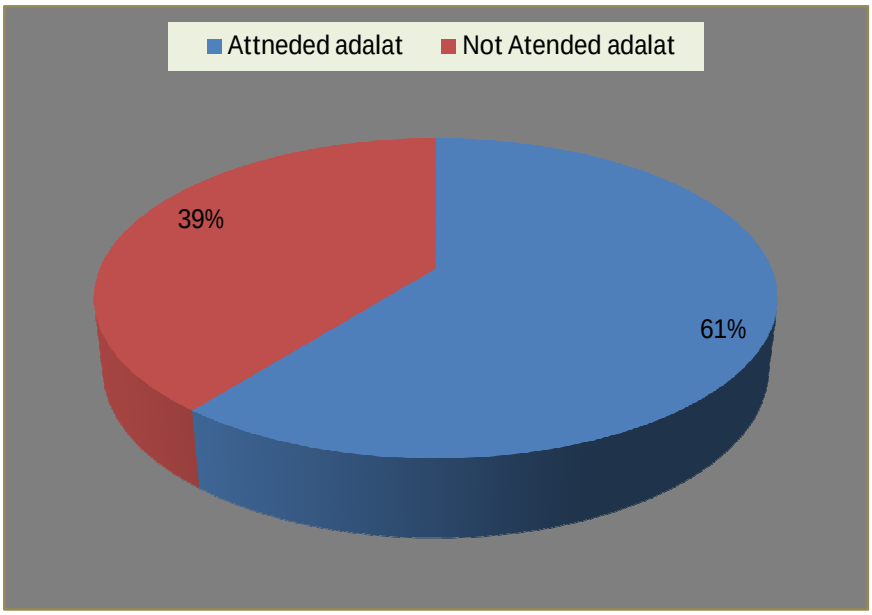
[21] The matter is more of grave nature especially when the study was conducted in a district that has three courts with principal counselors in each court and having elaborate provisions for the procedure, duties, functions, privilege and role of councilors as per Rule 24 to 38 of the Family Court (Kerala) Rules, 1989 which describes the Counseling Procedure.

[22] As per Section 89 of CPC, Settlement of disputes outside the Court.(*1) Where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observation of the parties, the court may reformulate the terms of a possible settlement and refer the same for-(a) arbitration;(b) conciliation(c) judicial settlement including settlement through Lok Adalat; or(d) mediation.(2) Where a dispute had been referred-(a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act.(b) to Lok*

the *adalat*, the provisions of procedural laws and the Indian Evidence Act, 1872 (Act No.1 of 1872) are not strictly complied with for settling the disputes. When no compromise or settlement is accomplished, the case is to be returned to the court which has referred it to the *adalat*. Once the case is remitted back, it will proceed in the court from the stage immediately before the reference. Figure XXIX shows the percentage of litigants who have attended the adalat. Out of the total respondents only 61 percent have attended *adalat* while 39 percent have not attended it.

Figure XXIX

Litigants Attended *adalat*



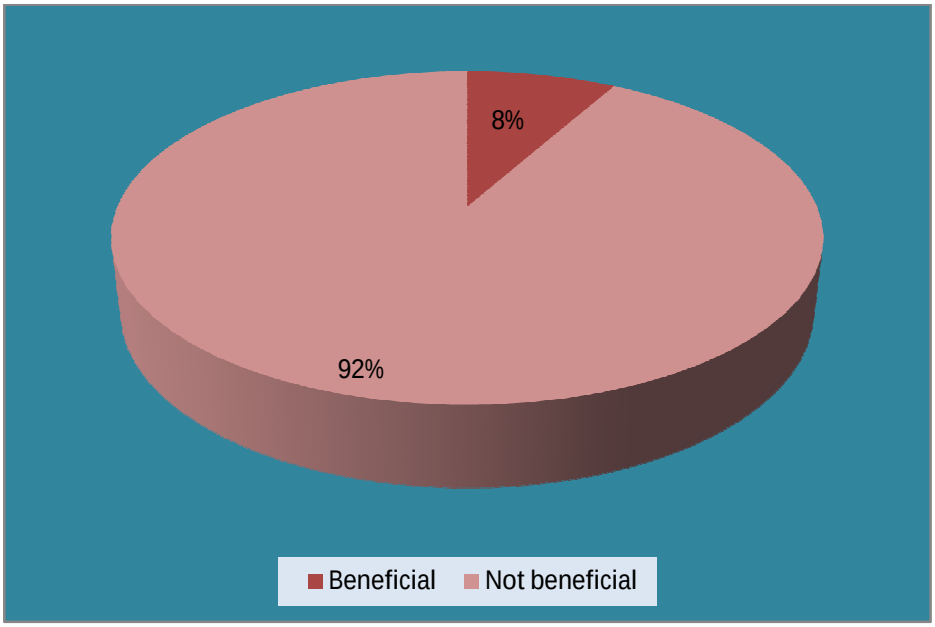
Even though *adalat* is supposed to act as an effective mechanism of alternate dispute resolution, opinion of the attendees of adalat has not been very affirmative.

Adalat, the court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of section 20 of the Legal Services Authority Act, 1987 and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;(c) for judicial settlement, the court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;(d) for mediation, the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.

Figure XXX shows the opinion of litigants about the effectiveness of adalat. 92 percent of litigants have found that the adalat was not beneficial to them. Only a small percent have found it meaningful and beneficial. In fact that a large number of litigants express their dissatisfaction shows that it needs immediate intervention and restructuring. All the *adalats* that are attached to the Family Courts are presided over by a retired Judicial Officer[23] along with two other members, an advocate from the Legal Services Authority and the other a Social Worker.

Figure-XXX

Usefulness of *Adalat*



The main issue is that the present set up does not convince the litigants about its informal nature but follows the formalities like roll call etc. The presence of advocates along with the parties may sometimes results heated arguments

[23] Although the Legal Services Authorities Act, 1987 prescribes that the Chairman of the adalat should be either a retired or serving judicial officer, in practice, the adalats held in relation to Family Courts are presided over by retired judicial officers.

based on legal provisions rather than an amicable settlement. It ultimately results in an inefficiently performing system.

iii. Mediation

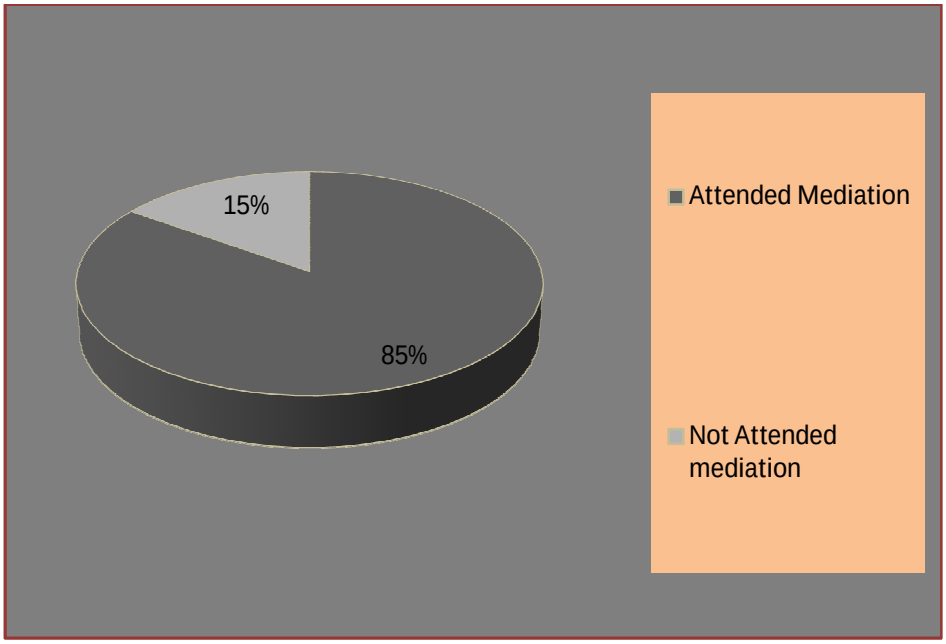
Mediation is another Alternative Dispute Resolution mechanism constituted as per Section 89 of the CPC.[24] Mediation involves an independent third party - a mediator - who helps both sides come to an agreement. The role of the mediator is to help parties to reach a solution to their problem and to arrive at an outcome that both parties are happy to accept. Mediators avoid taking sides, making judgments or giving guidance. They are simply responsible for developing effective communications and building consensus between the parties. The focus of a mediation meeting is to reach a commonsense settlement agreeable to both parties in a case. Mediation is a voluntary process and the court will direct the parties to mediation only if both parties agree. It is a confidential process where the terms of discussion are not disclosed to any party outside the mediation hearing. If parties are unable to reach agreement, they can still go to court. Details about what went on at the mediation will not be disclosed or used at a court hearing. So parties used to reveal the problems as well as their requirement without fear. Figure XXXI shows the details of persons who attended mediation. 85 percent of litigants attended mediation while 15 percent had not attended. From the number of

[24] Ibid

parties who have attended the mediation, it can be inferred that the Family Courts are exploring all possibilities for amicable settlements of the disputes.[25]

Figure-XXXI

Persons attended mediation - %



Mediation will be done by the judge directly or the advocate appointed from the mediation cell. Figure XXXII shows the persons with whom mediation was done. Only 17.94 percent of litigants have undergone mediation with the judge of the Family Court and 81.53 percent of cases were mediated by the Advocate from the mediation cell. Only 0.53 percent of cases were mediated by both judges and advocates.[26] From the data it can be inferred that an amicable settlement is possible through an assisted negotiation. Mediation addresses both the factual as well legal issues and the underlying causes of a dispute. Thus,

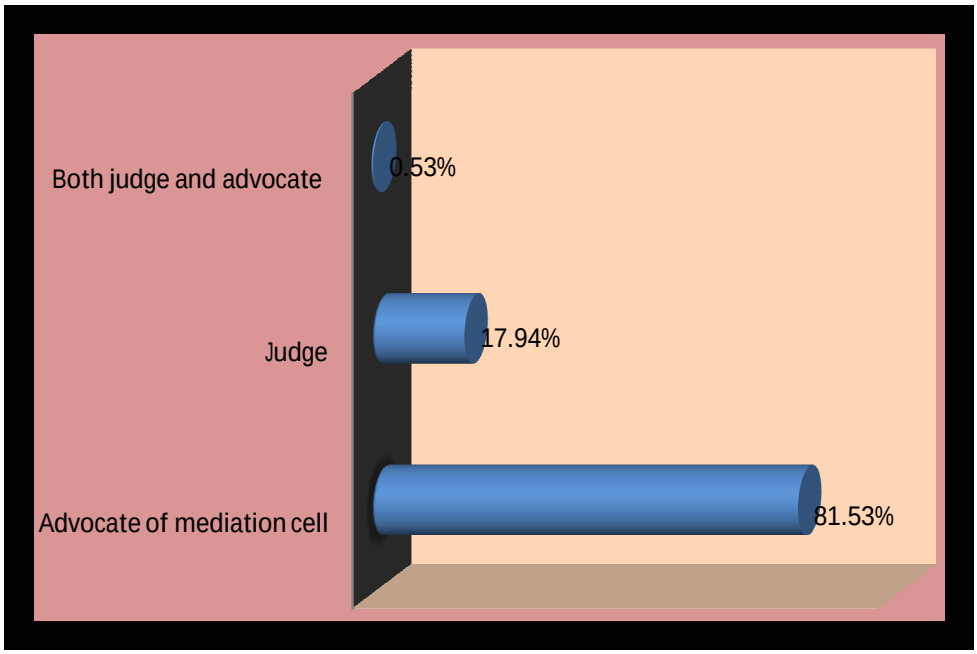
[25] It is a positive aspect on the part of the Family Courts in Kerala that large numbers of cases are referred to mediation even in the absence of any statutory prescription.

[26] Subsequent to the strengthening of the Mediation Cell, it has been observed that the number of cases mediated by the judges of Family Courts have further come down.

mediation is broadly focused on the facts, law, and underlying interests of the parties, such as personal, family, social and community interests. The goal of mediation is to find a mutually acceptable solution that adequately and legitimately satisfies the needs, desires and interests of the parties.

Figure-XXXII

Percentage of litigants who undergone mediation under various authorities



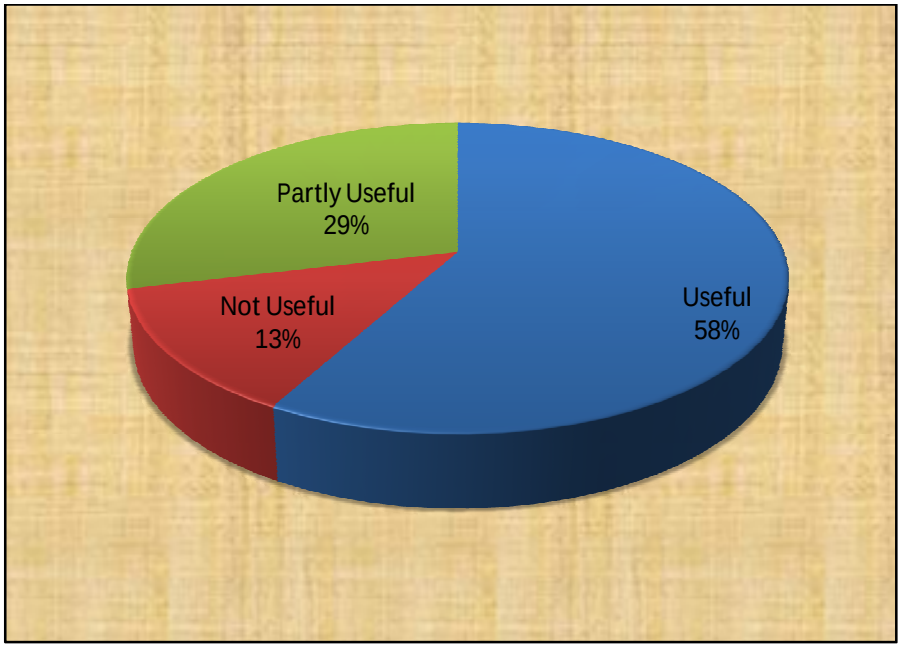
Enquiry has been made about the usefulness of mediation among the persons who have undergone mediation and Figure XXXIII gives the details. It can be seen that 58 percent of the litigants were of the opinion that mediation was useful while 29 percent found it partly useful. Only 13 percent of the litigants expressed that the mediation was not useful.It was stipulated by the Family Courts Act that more importance should be attributed to the preservation of the institution of marriage and family.[27] In many cases, it has

[27] Supra 1

been noticed that the sustenance of marriage and family was achieved at the cost of dignified living of women

Figure-XXXIII

Usefulness of mediation



They have been forced to suffer domestic violence, both physical and mental, for the sake of protecting the institutions of marriage and family. Enquiry was made to elicit whether the female parties to the cases were forced to compromise with the domestic violence.

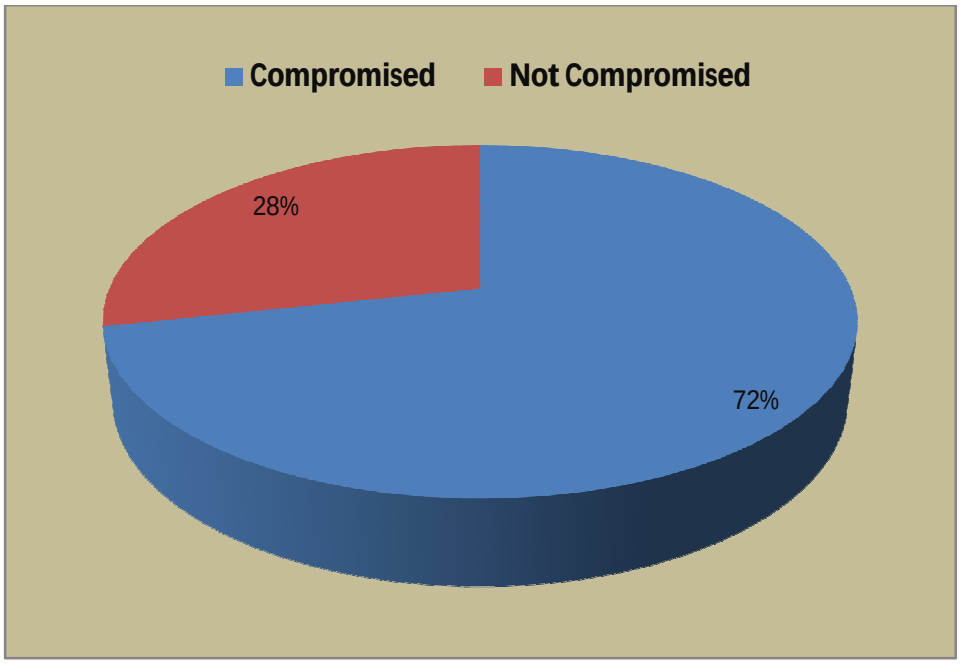
Figure XXXIV shows that 72 percent of the litigants had been compelled to compromise on domestic violence for the sake of marriage and family. The data corresponds to the statistics of national level statistics that overall, one-third of women age 15-49 have experienced physical violence and about 1 in 10 have experienced sexual violence[28]. It can be inferred from the

[28] Chapter 15 in the NFHS-3 final report.

above finding that the literacy, laws and social welfare measures have not largely helped the Kerala women to save themselves from domestic violence as the statutory importance was to preserve the establishment of marriage and family

Figure-XXXIV

Compromise on Domestic Violence



Conclusion

From the above analysis, it can be inferred that the aims and objectives for which the Family Courts Act has been enacted, have not been achieved in its full sense. However, the relevance and importance of Family Courts are gradually increasing as the matrimonial altercations are on the ascending order.[29] More importantly, majority of the litigants are young educated women,

[29] Many reasons may be attributed to the increasing number of divorce cases in Kerala. Since that topic is not within the scope of this study, the researcher has not probed into it. The idea is only to show that there is a growing aversion to the marriage and family system in Kerala especially among the younger

which implies that the new generation is less likely to compromise on their matrimonial rights. On the other hand, the increase in the incidence of familial violence also can be attributed to the increasing number of cases in the Family Court. Ranking of cases shows that petition for dissolution of marriage stand first. From the point of financial status also it can be seen that the women are losing assets after marriage irrespective of their social, educational and economic status.

From the analysis it can be said that the very aim of speedy disposal and conciliation has not been successfully achieved by the Family Courts. The data indicates that for the first three years of filing the cases, no serious judicial intervention has happened. Serious judicial intercessions, mediation, *adalat* and trial have taken place only after 3-4 years of filing a case. In the meantime only in 47 percent of cases some interim reliefs were awarded. But all of them have not been executed and also there is considerable delay in the execution of interim reliefs.

The various methods for conciliation were also not very satisfactory. In practice, all the litigants were not undergoing counseling in the first instance although the same has been statutorily stipulated. Lack of adequate number of permanent counselors and absence of infrastructure have badly affected the counseling. Information regarding *adalat* that 92 percent of the litigants observed it as 'not useful' is to be viewed seriously. The procedure and

generation.

formalities keeping *adalat* and appearance of advocates make it only a court proceeding rather than an alternate mechanism of settlement of dispute. Comparatively mediation is seen more effective than that of other measures. The alternate methods now adopted in family courts such as counseling, adalat and mediation is to be viewed significantly as the very aim of Family Courts Act in providing speedy and conciliatory resolution of conjugal disputes is now working only on these mechanisms.

Chapter 4

LAW AND LIMITATIONS: AN ANALISIS

Even though the demand of Women's movement for a uniform, secular and non sexist code was not conceded, the Family Court Act was seen as a positive step, at least where procedural law is concerned, because large variety of the problems which the women face are located in substantive laws.[1] Some of the problems are located in procedural laws and the hostile and intimidating atmosphere within the courts. Family Courts Act focuses on a non-adversarial and multi-disciplinary approach and it envisages that the family courts would adopt an approach radically different from that of the ordinary civil court and would make concrete steps for conciliated settlement.[2] As an alternate and distinct legal frame work, the Family Courts Act lacks some limitations in its origin.

Article 14 of the Constitution[3] outlaws discrimination and ensures equality before law to all persons. The importance attributed to the concept of

[1] F.Agnes *Family Courts: From the Frying Pan into the Fire?*, in *Women's Studies in India* (Edited by Mary E John) 272-273(2008)

[2] *Towards Equality*-Report on committee on the status of Women, Government of India,1974

[3] Article 14 of the Constitution provides "*14.Equality before Law.*-The state shall not deny to any person equality before the law or equal protection of the laws within the territory of India."

equality in the constitution has time and again been asserted by the judiciary.[4] In *Maneka Gandhi V. Union of India*[5] it was held that

"Article 14 is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic and, therefore, it must not be subjected to a narrow, pedantic or lexicographic approach.…….Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits."[6]

It was held by a Constitution Bench that equality is a basic feature of the Constitution and although the emphasis in the earlier decisions evolved around discrimination and classification, the content of Article 14 got expanded conceptually and has recognized the principles to comprehend the doctrine of promissory estoppels, non-arbitrariness, compliance with rules of natural justice eschewing irrationality etc.[7] It was consistently held that equality and arbitrariness are sworn enemies and Article 14 strikes at arbitrariness in state action and ensures fairness and equality, of treatment. The principle of reasonableness which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence.[8]

[4] *Indra Sawhney V. Union of India* AIR 1993 SC 477 "Equality is one of the magnificent cornerstones of Indian democracy"
[5] AIR 1978 SC 597
[6] *E.P. Royappa V. State of Tamil Nadu,* AIR 1974 SC 555
[7] *M. Nagaraj V. Union of India* AIR 2007 SC 71
[8] *Maneka Gandhi V. Union of India* AIR 1978 SC 597

Two concepts are involved in Article 14; 'equality before law' and 'equal protection of laws.' Equality before law is a negative principle which ensures that there will be no special privilege in favour of any one and all will be equal before the law of the land. 'Equal protection of laws', on the other hand, is a positive concept which postulates application of same laws alike and without discrimination to all persons similarly situated.[9] The principle of equality of law thus means that *"equals should not be treated unlike and un-likes should not be treated alike. Likes should be treated alike."*[10] Prof. Willis in his famous book on Constitutional Law describes that 'the guaranty of the equal protection of the laws means the protection of equal laws. It forbids class legislation, but does not forbid classification which rests upon reasonable grounds of distinction. It does not prohibit legislation, which is limited either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions both in the privileges conferred and in the liabilities imposed.'[11]

The equal protection of the laws is a pledge of the protection of equal laws. But courts have resolved the contradictory demands of legislative specialization and constitutional generality by the doctrine of reasonable

[9] See *Sri Srinivasa Theatre V. Government of Tamil Nadu* AIR 1992 SC 1004; *Bannari Amman Sugars Ltd. V. CTO* (2005) 1 SCC 625
[10] *Gouri Shankar V. Union of India* AIR 1995 SC 55
[11] Prof. Willis, *Constitutional Law*, 578(1st Edition 1995); quoted in *State of Bombay V. F.N. Balsara,* AIR 1951 SC 318

classification. A reasonable classification is one which includes all who are similarly situated, and none who are not, with respect to the purpose of the law. A classification is under-inclusive when all who are included in the class are tainted with the mischief, but there are others also tainted whom the, classification does not include. A classification is over-inclusive when it includes not only those who are similarly situated with respect to the purpose but also others who are not so situated. A reasonable classification is one which includes all who are similarly situated and none who are not. The question then is what does the phrase 'similarly situated' mean? The answer to the question is that we must look beyond the classification to the purpose of the law. A reasonable classification is one which includes all persons who are similarly situated with respect to the purpose of the law. The purpose of a law may be either the elimination of a public mischief or the achievement of some positive public good.[12]

Regarding the conditions that are to be satisfied for a valid classification, the Court in *State of West Bengal V. Anwar Ali Sarkar*[13] held that

"the classification must not be arbitrary but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. In order to pass the test, two

[12] *State of Gujarat And Another V. Shri Ambica Mills Ltd.* AIR 1974 SC 1300
[13] AIR 1952 SC 75

conditions must be fulfilled, namely, (1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and (2) that that differentia must have a rational relation to the object sought to be achieved by the Act. The differentia which is the basis of the classification and the object of the Act are distinct things and what is necessary is that there must be a nexus between them."

It has been emphatically stated that Article 14 "*forbids class legislation in the sense of making improper discrimination by conferring privileges or imposing liabilities upon persons arbitrarily selected out of a large number of other persons similarly situated in relation to the privileges sought to be conferred or the liability proposed to be imposed……*"[14]

In *Kathi Raning Rawat V. State of Saurashtra*[15] while upholding reasonable classification for the purposes of legislation the court cautioned that

"*to pass the test of permissible classification, two conditions must be fulfilled, namely, (i) that the classification must be rounded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and (ii) that that differentia must have a rational relation to the object sought to be achieved by the Act."*

The laws which do not satisfy these conditions must be held as invalid and non-operative. When an ordinary law seeks to make a

[14] Ibid
[15] AIR 1952 SC 123

classification without any rational basis and without any nexus with "*the object sought to be achieved*", such ordinary law could be challenged on the touchstone of Article 14 of the Constitution. Article 14 would apply when invidious discrimination is meted out to equals and similarly circumstanced without any rational basis or relationship in that behalf.[16] When an impugned Act creates a classification without any rational basis and having no nexus with the objects sought to be achieved, the principle of equality before law is violated undoubtedly. Such an Act can be declared to be violative of Article 14.[17] Discrimination presupposes classification of similarly situated persons into different groups without any reasonable basis, for extending dissimilar benefits or treatment.[18]

However, the Family Courts Act has not taken the gender issues seriously and no provision has been incorporated in the Act to provide privileged treatment to the women. This is improper in view of Article 14 and Article 15(1) [19] of the Indian Constitution. Article 14 of the constitution

[16] *State of Haryana V. Ramkumar* (1997) 3 SCC 321
[17] *Glanrock Estate (P) Ltd V. The State Of Tamil Nadu* (2010) 10 SCC 96
[18] *State of Himachal Pradesh V. Anjanadevi* (2009) 5 SCC 108
[19] Article 15 of the Constitution provides *"Art 15. Prohibition of discrimination on the grounds of religion, race, caste, sex or place of birth.-*(1*) The state shall not discriminate against any citizen on grounds only for religion ,race, caste, sex, place of birth or any of them.*
(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to –
(a) access to shops, public restraints, hotels and places of public entertainments; or
(b) the use of wells, tanks, bathing Ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of general people.
(3) Nothing in this article shall prevent the State from making any special provisions for women and children
(4) Nothing in this article or in clause (2) of Art.29 shall prevent the State from making any special provisions for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

embodies the general principles of equality before law and prohibits unreasonable discrimination between persons. Article 15(1) prohibits gender discrimination and Article 15 (3) lifts that rigor and permits the state to positively discriminate in favour of women to make special provisions to ameliorate their social condition and provide social, economic and political justice.[20] In *Madhu Kishwar v State of Bihar,*[21] it was observed that

> "*Covenants of the United Nations add impetus and urgency to eliminate gender-based obstacles and discrimination. Legislative action should be devised suitably to constitute economic empowerment of women in socio-economic restructure for establishing egalitarian social order."*

The state, in the field of criminal law,[22] labour law[23] and other welfare legislations [24] has resorted to Article 15(3) and the courts also have upheld the validity of these protective discriminatory provisions on the basis of constitutional mandate.[25] But the legislature had not made such a wisdom or gender conscience in case of Family Courts Act. There is considerable

[20] *Githa Hariharan v RBI,* AIR 1999 SC 1149

[21] AIR 1996 SC 1864.

[22] Section 497 of Indian Penal Code, 1860 that provide for the special protection of women victims and which punishes only male participant in the offence of adultery and exempts the woman from punishment. The Supreme Court upheld the validity of the provision in, *Yousaf Abdul Azis v State of Bombay*, AIR 1954 SC 321, and *Sowmithri Vishnu v Union of India*, 1985 SCC (Cri) 325.

[23] Provisions in the Factories Act 1948, Mines Act,1 952,The Beedi and Cigar Workers(Conditions of Employment) Act,1966, The Plantation Labour Act,1951 etc provides for special treatment for women workers.

[24]Maternity Benefit Act, 1961, The sexual Harassment of Women at Workplace (Protection, Prohibition and Redressal) Act 2013 etc are the legislations only to protect the women employees.

[25] The Immoral Traffic (Prevention) Act, 1956, The Dowry Prohibition Act, 1961, The Indecent Representation of Women (Prohibition) Act 1986, The Commission of Sati (Prevention) Act, 1987, The Protection of Women from Domestic Violence Act, 2005, The sexual Harassment of Women at Workplace (Protection, Prohibition and Redressal) Act 2013 are women specific legislations.

gap between constitutional rights and their application in the Family Courts Act in incorporating protective measures for women within the families, which have been, hitherto, exclusively masculine domains.

The argument that the women are secured or protected in the matrimonial home proves to be baseless. Studies show that one third of women at the age of 15-49 have experienced physical violence and one out of ten victims has experienced sexual violence also. In total, 35 percent have experienced physical or sexual violence.[26] This figure translates into millions of women who have suffered, and continue to suffer, at the hands of husbands and other family members. National Family Health Survey-3 findings underscore the extent and severity of violence against women in India, especially married women. It has been noticed that one out of four married women have experienced physical or sexual violence by their husband in the 12 months preceding the survey.

It was observed by the Supreme Court in *Danial Latifi v Union of India*[27] *that*

> *"In our society, whether they belong to the majority or the minority group, what is apparent is that there exists a great disparity in the matter of economic resourcefulness between a man and a woman. Our society is male dominated both economically and socially and*

[26] The report of National Family Health Survey, India-3 available in http/ het.org/India /NFHS-3 accessed on 1/06/2014 at 3 pm.
[27] (2001) 7 SCC 740

women are assigned, invariably, a dependant role, irrespective of the class of society to which she belongs."

Article 16 of the constitution provides equality of opportunities for all and prohibits discrimination against women[28].The Constitution provides equal opportunities for women implicitly as they are applicable to all persons irrespective of sex. However, these articles reflect only in de jure equality to women and they have not been able to accelerate de factor equality to the extent the constitution intended. It was observed in *Dimple Singla v Union of India* [29]that

"Unless attitudes change, elimination of discrimination against women cannot be achieved. There is still a considerable gap between the constitutional rights and their application in the day-to-day lives of most women. At the same time, it is true that women are working in jobs which were hitherto falling in masculine fields. But there are instances which exhibit lack of confidence in their capability and efficiency. There is still a long and lingering suspicion regarding their capacity to meet the challenges of the jobs assigned to them".

Legislative Action should be devised suitably to constitute empowerment of women in socio economic restructure for establishing

[28] Art 16 of the Constitution provides: *Equality of opportunity in Matters of public employment :- (1)There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State*

[29] 94 (2001) DLT 917

egalitarian social order[30].This being the position the person who has inflicted the violence and the person who has been subjected to violence are to be treated differently. A gender neutral legislation dealing the two sections alike is unscientific and not in conformity with the constitutional prescriptions.

In short women and men in Indian society as well as within the institution of marriage are not 'equal' in any way. There remains a long and lingering gap in 'equal treatment' of unequal in every sphere of life in the Family Courts Act and which fails to provide gender justice. A women specific and more humane legislation is inevitable to ensure violence free life to women and to ensure them the constitutional right to live with dignity.

Ideological Dichotomy

Nevertheless critics often comment that though the Family Courts Act is a radical shift from the conservative approach and mechanism which prevailed in our family law regime for long, it still lacks essential spirit to ensure gender justice.[31] The system has given rise to anger, frustration and resentment over its functioning.[32] It has persistently directed that women should go back to the husband simply because counselor and mediators have opined so. Every time the women were reminded that it was

[30] *Madhu Kishore v State of Bihar*,AIR 1996,SC 1864.
[31] A. Falvia,274, Supra 1
[32] Ibid, p 277

the wife's duty to obey the husband and any deed opposed to it could be detrimental to the interest of the family. [33]

There is another saying, without any legal or factual basis that the welfare of the children rests wherever the parents reside together.[34] But the continuation of an unhappy family life, witnessing cruelties of parents for a fairly long period[35] would destruct the peaceful life of children and violence free life will be more comfortable to children than that of fighting parents. Conciliation should be seen as a solution and an escape route out of a difficult situation. Such a solution is unconcerned with the wrongs of the past, but is concerned with bringing the parties and the children to terms with the new situation and developments by working out the most satisfactory basis upon which they may regulate their relationship in the changed circumstances.[36]

It can be deduced that the law considers the institution of marriage as sacrosanct and extends the same sanctity to all marriages which is

[33] In cases of wife's employment Vis-à-vis husband's conjugal rights, the trend of the judiciary is against the women. See, *Swaraj Garg v K.M. Garg*, AIR 1978 Del 249, *Ananta v Ramchander,*AIR,2009 Cal 167

[34] Report of the study by Manas Foundation, *www.manas.org*. Retrieved on 31/5/2014

[35] 'Most delinquent come from broken families', Times of India, Delhi,7 February 2013 .See *Sanghamitra Ghosh v Kajal Kumar Ghosh*, 2007(2) SCC220, *Samar Ghosh v Jaya Ghosh, 2007(4) SCC511.*

[36] As rightly pointed by the Law Commission of India "*The marriage has all the external appearances of marriage, but none of the reality. As is often put pithily, the marriage is merely a shell out of which the substance is gone. In such circumstances, it is stated, there is hardly any utility in maintaining the marriage as a facade, when the emotional and other bounds which are of the essence of marriage have disappeared. After the marriage has ceased to exist in substance and in reality, there is no reason for denying divorce."* Seventy-first Report of the Law Commission of India dated 7/04/1978

ideologically erroneous and factually incorrect. It was observed in *Naveen Kohli v Neelu Kohli* [37] that

> *"Public interest demands not only that the married status should, as far as possible, as long as possible, and whenever possible, be maintained, but where a marriage has been wrecked beyond the hope of salvage, public interest lies in the recognition of that fact*."

It underscores, to a great extent that the primary object of the law is to preserve and protect all marriages irrespective of the mishaps within the institution. Such a theoretical position, however, is not gender positive. It has been pointed out that a judge who possesses gender perspective ideas and thoughts can play a proactive role to maintain gender justice even in the midst of all limitations.[38] Regarding the qualification of the persons who may be appointed as judges of the Family Courts, it has been provided that they should have the commitment to the need to protect and preserve the institution of marriage.[39] But while selecting the judges of family courts no priority or recognition is giving to qualification and experience. It should have been desirable if a provision in the law insisted that reconciliation should be attempted only by persons committed to protect women's rights

[37] (2006) 4 SCC 558

[38] A.S. Anand, Chief Justice, *Justice for Women – Concerns and Expressions*, 31(2008)

[39] As per Sub section 4 (a) of Section 4 Of Family Courts Act, In selecting persons for appointment as Judges , every endeavor shall be made to ensure that persons committed to the need to protect and preserve that 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 counseling are selected

and gender justice. But such a prescription is absent in the Family Courts Act.

Substantive Rights

The Family Courts Act is not a self contained Act. It is to be read along with other laws. The setting up of family courts does not in any way alter the substantive law relating to marriage. It is imperative to reform the personal laws in conformity with the noble principle of equality enshrined in the Constitution or enact a Uniform Civil Code as directed by the Constitution.[40] This is indispensable not only to ensure equality between men and women but also to bring about gender justice.

Amidst the increasing number of desertions there is no law to ensure that the property accumulated by the couple after marriage would be in both names or both husband and wife should have equal rights. At present such property is invariably claimed by the male as he is often the earning member[41]. The law for joint matrimonial property requires recognition for the unpaid work being done by the women within the household as being equally important for the survival and welfare of the family. In the socio-economic situation prevailing in our country the contribution of the wife to the family's economy is not recognized. A large number of them participate in the family's effort to earn a livelihood as unpaid family workers. Even when they do not do so the economic value of their effort in running the

[40] Art 44 of the constitution provide that the state shall endeavor to secure for the citizens a uniform civil code.

[41] B. Karat, *Survival and Emancipation, Notes From Indian Women's Struggles* Three Essays Colective,166,(2005) 1

house, assuming all domestic responsibilities, thus freeing the husband for his avocation is not accepted in law either directly or indirectly. Married women who do not have independent source of income or give up employment after marriage to devote their full time in family obligations are economically dependent on their husbands. In majority of cases, movable and immovable properties acquired during marriage are legally owned by the husband, since they are paid for out of his earnings. The principle of determining ownership on the basis of financial contribution works inequitably against w omen[42]. In case of divorce or separation, women without any earnings or savings of their own are deprived of all property which they acquire jointly[43]. Even property received by them at the time of marriage from the husband or his family is denied to the woman is some communities. The fear of financial and social insecurity prevents them from resorting to separation or divorce even when the marriages are unhappy. It is necessary to give legal recognition to the economic value of the contribution made by the wife through house work for purposes of determining ownership of matrimonial property, instead of continuing the archaic test of actual financial contribution[44].

[42] Equal justice to women: Role of courts and judges being a proposal for gender sensitization of judicial officers recommended to judicial academies and training institution available at *http:// ncw.nic.in /pdf reports*. Gender sensitation

[43] P.Adwani, *The national commission for women and gender sensitization,* Course Curriculum on Gender Sensitization of Judicial Personnel ,A Training Manual including Objects, Methods and Materials, 15 (2001)

[44] K.Singh, *Economic Rights of Deserted Women*, Report of Seminar conducted by Economic Research Foundation, Delhi, 87 (2007)

Divorce disentitles a woman to the matrimonial home. Apart from the uncertain right of maintenance women, regardless of the community they belong to have no right to marital property and there is no recognition of the economic content of women's house hold work in the law.[45] The right to community of matrimonial property would be the first step in ensuring security for women.[46] 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. Such a law will allow transfer of 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.[47] 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.[48]Hence there is an urgent need to introduce the law for recognition of marital property as joint property of both and there should be a provision for equitable sharing on separation.

Maintenance

Whether or not she gets maintenance during a separation or after divorce depends on her ability to prove her husband's means[49]. In a situation where women are often unaware of their husband's business dealings and sources of income, it is difficult, to prove his income, which is highly

[45] B.Sivaramayya,*Matrimonial Property law in India*, 121 (1999)
[46] F. Agnes, *The Lawyers Collective* ,April 12,(1994)
[47] K.Singh ,Supra 112
[48] V. Mazumdar, K. Sharma, *Persistent inequalities: Women and world development*, 152-157(1997)
[49] *Minakshy Gaur v Chitaranjan Gaur*, AIR 2009 Sc 1377

essential to get adequate maintenance.[50] To make matters worse, the existence of parallel black economy makes it impossible to identify the legal source of income.[51] In such a situation if the court would have sufficient power of investigation, it would help women at least in maintenance cases.

Maintenance provisions under S. 125 Cr PC is a comprehensive scheme for the maintenance of wife, children and aged parents. The very purpose of making anti-vagrancy maintenance provisions as part of the criminal code was to ensure uniform applicability of the provision irrespective of the personal laws of the parties. In *Bhagwan Dutt V. Kanta Devi*[52] the court remarked that

> *"These provisions are intended to fulfill a social purpose. Their object is to compel a man to perform the moral obligation which he owes to society in respect of his wife and children. By providing a simple, speedy but limited relief, they seek to ensure that the neglected wife and children are not left beggared and destitute on the scrap-heap of society and thereby driven to a life of vagrancy, immorality and crime for their subsistence."*

The proceedings under S. 125 are not punitive but of civil nature and the remedies provided under this section are in the nature of civil rights.[53] *"This provision is a measure of social justice and specially enacted to*

[50] As per sec. 125 Cr.PC the burden of proving the means of the husband is upon the petitioner.
[51] K..Singh, Report of Seminar conducted by Economic Research Foundation,Delhi,2007
[52] AIR 1975 SC 83
[53] *Bhupinder Singh v Daljit Kaur*, 1979 AIR SC 442, *Zahid Ali v Fahmida Beegum*,1983 (3) Crimes 373 (Bomb)

protect women and children and falls within the constitutional sweep of Article 15(3) reinforced by Article 39."[54] . State is duty bound to protect the life and personal liberty of the persons and achieve social justice. Since the right to life includes a decent way of life by getting adequate maintenance from the husband, father or from the children, as the case may be, it is to be protected by the State. Hence the State is duty bound to provide the service of Public Prosecutor / Assistant Public Prosecutor to protect the rights of the destitute and vagrant.

Similarly legally wedded wife is entitled to maintenance and sometimes it is very difficult for women to prove the marriage[55] before the court and there were circumstances in which, even the court itself expressed its inability that 'there is no scope for enlarging its scope by introducing any artificial definition to include women not lawfully married in the expression of wife.'[56] Hence certain amendments are also needed in Sec 125 Cr PC and other laws to ensure that maintenance is granted as a matter of right and that the requirement to prove that person is duly married is not an essential requirement to grant maintenance. The law should also not cast the burden of proving the husband's income on the wife.[57]

[54] *Captain Ramesh Chander Koushal v Veena Koushal* Supra
[55] *Dwarika Prasd Satpathy v Bidyut Prav Dixit,* AIR 2000 Cr.LJ
[56] *Savitaben Somabai Bhatiya v State of Gujrath,* AIR 2005 SC 1809,also in *Yamunabai Anantarao Adhav v Anantrao Sivaram Adhav,* AIR 1988 SC 644
[57] K. Singh, *Short Note on Family Law,* paper presented in a Workshop on Women and Law, organized by NUALS, Kerala State Planning and Indian law Institute ,Kerala Branch on 4-9 July 2009

At present there is no enforcement machinery under S. 125 Cr. PC to investigate about the assets and income of the respondents. Had such a system operative, the maintenance orders would have been more righteous and reasonable. It is imperative that appropriate provisions are incorporated in the Cr. PC to make investigations about the assets and income of the respondent's mandatory before passing the order of maintenance.[58]Apart from personal laws, non Muslim women can claim maintenance under sec 125 Cr. PC even after dissolution of marriage.

Uniform civil code

The Family Courts Act brings about a very fine admixture of procedure and partly substantive law but the absence of a uniform secularist code adversely affected the purpose of Family Courts Act. For almost a century Indian citizens have been governed by uniform laws in all other areas like transfer of property, contract, and penal code, civil and criminal procedure. But family law is outside the purview of this. Family law is an area of law dealing with the issues related to family and its members[59]. Family relations including the marriage, divorce, adoption paternity, custody and child support fall under the purview of family law. All these matters are under the purview of their personal law in which the parties belong to and plurality of family laws are there. Since India is a secular state, which is not

[58] F. Agnes ,*Women's Studies in India-A reader* ,278 Supra 1
[59] D.M.Walker, *Oxford Companion of Law* ,(1980),P 460

religious and irreligious[60] and which permits full opportunity[61] to its citizen to profess, practice and propagate religion of their choice.[62]

The spine of controversy revolving around Uniform Civil Code (here in after referred as UCC) has been secularism[63] and the freedom of religion[64] enumerated in the Constitution of India. A secular state shall not discriminate against anyone on the ground of religion and the state has no religion. It does not mean that religion should not interfere with the mundane life of an individual. Secular activities can be regulated by the state by enacting law and it was held that religion is the matter of individual faith and cannot be mixed with secular activities[65].In India there exist a concept of 'positive secularism' as distinguished from the doctrine of Secularism accepted by America and some European states. In India positive secularism separates spiritualism with individual faith but in those countries there is a separation between religion and state. India has not gone through

[60] *Perunchithiranar v State of T.N*,AIR,1986,Mad 83

[61] Ayodhya Ordinance 1993(8 of 1993), B.M.Gandhi, *Legal History*, 577-583 (9th edn 2013)

[62] Dr.S.Radhakrishnan, *Recovery of Faith*,184,(1981).

[63] The preamble of the Constitution states that India is a '*Secular Democratic Republic'*

[64] According to Art 25 :*Freedom of conscience and free profession, practice and propagation of religion.-(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law-(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.*

As per Article 26: *Freedom to manage religious affairs Subject to public order, morality and health, every religious denomination or any section thereof shall have the right (a) to establish and maintain institutions for religious and charitable purposes; (b) to manage its own affairs in matters of religion;(c)to own and acquire movable and immovable property; and (d)to administer such property in accordance with law*

26 of the Constitution guarantee right to freedom of religion.

[65] S.*R.Bommai v Union of India* (1994) 3 SCC1

renaissance, reformation and enlightenment and has the responsibility to remove the impediments in the governance of the state.

Constitution of India guarantees to every person the freedom of conscience and the right to profess, practice and propagate religion[66]. Art.25 empowers the state to regulate or restrict any economic, financial, political or other secular activity, which may be associated with religious practice and also to provide for social welfare and reforms. The protection of Art.25 and 26 is not limited to matters of doctrine of belief but extends to acts done in pursuance of religion and therefore contains a guarantee for rituals and observations, ceremonies and modes of worship, which are integral part of religion.

UCC is also not opposed to secularism or did not violate freedom of religion. Article 44 directs the state to secure for its citizens a uniform civil code applicable throughout the territory of India[67]. It is based on the concept that there is no necessary connection between religion and personal law in a civilized society. Marriage, Succession, Maintenance and like matters are secular in nature and therefore law can regulate them. The UCC shall not and will not result in interference of one's religious beliefs relating, mainly to maintenance, succession and inheritance. In those matters there will be a common law and in short a Hindu will not be compelled to perform the customs of Muslim or Christian and vice versa.

[66] But this right is subject to public order, morality and health and to the other provisions of Part III of the Constitution.

[67] According to Art 44 *"The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India"*

The personal laws of each religion contain different essentials of valid marriage such minimum age of marriage, polygamy, registration and grounds for divorce. In the area of Succession un equal treatment of men and women, will, gift and the provisions of maintenance etc; can be remove by introducing UCC. Its particular goal is towards the achievement of gender justice. Even though it still remains a distant dream, the judiciary has taken note of the injustice done to women in personal matters.[68]Despite a number of directions,[69] the Supreme Court took a view that this was not a matter which fell within the domain of the legislature and that "the court cannot legislate in these matters".[70] In short a common civil code will help the cause of national integration by removing the contradictions based on ideologies[71].

The issue of Uniform civil code has given rise to heated debates and controversies, which touches sensitivities of certain groups, it should not be taken to concede that existing laws should remain untouched. An endeavor should be made to incorporate good points of one system into another and strike down the provisions which are harsh, antiquated and discriminatory.[72] The demand for uniform civil code should be preceded by the slogan of

[68] *Mohammad Ahamad Khan v Shabano Beegum,*1085 (2) SCC 556,*Daniel Latifi v Union of India,*2001 (7) SCC 740

[69] *Jorden Diengdeh v S.S Chopra* AIR 1985 SC935, *Sarala Mudgal v Union of India* 1995 (3) SCC 635,Pragati Varghese v Cyril George Varghese AIR 1997 Bomb 349

[70] In a petition seeking a writ of mandamus against Government of India to introduce a common civil code, the Supreme Court dismissed the petition and made certain observations against the state. *Maharshi Avadhesh v Union of India,*1994 SCC 713

[71] *John Vallamattam v Unionof India*, AIR 2003 SC 2902

[72] Kusum, *Uniform Civil Code-Reforms in the Personal Law,* Marriage and Divorce Law Manual, 162

equal rights, equal laws and these codes should be a part of the restructuring of the entire system towards equality.

As observed by the Supreme Court[73], religion is not an opinion and it has its outward expression in its acts as well. It is a system of utilitarian ethics, seeking to maximize human happiness or welfare quite independently of what may be either religious or occult.[74]Hindus and Muslims maintain that their laws are of divine origin. But present position is that by judicial interpretation, legislative modifications and enactments these laws have undergone such drastic changes that claim of divine origin can hardly be accepted.[75] Other communities do not make a claim for divine origin, but custom plays an important part on this. It is imperative that UCC should be implemented properly and apart from that it should not be able to change the mind setting as to the role model of women in the changed circumstances.

Role of Judges

An important aspect that demands serious attention is about the appointment and the role of judges in the Family Courts as they have some special powers. The applicability of two procedure codes to family Court by virtue of subsections 1 and 2 of section 10 of Family Courts Act is subject to an important provision contained in Sub clause 3 of it.[76] It can prove it to be

[73] *Commr.Hindu Religious Endowments v Sri.Laxmindra Tirtha Swamiar of Sri Shirur Mut,*AIR1954 SC 282

[74] *Ziyavudeen Burhanudeen Bukhari v Brijmohan Ramdas Mehra,*1976(2) SCC 17,32

[75] *Aboobacker Haji v Manu Koya,*1971 KLT 663

[76] As per Section 10 of the family Courts Act,1984 –" *Procedure generally.-(1) Subject to the other provisions of this Act and rules, the provisions of the Code of Civil Procedure, 1908(5 of 1908),*

a highly potent weapon in the hands of the Court/Judge. While it does not give a blank check to disregard or override the Family Courts Act or Rules made there under, in order to achieve the objectives of arriving at a settlement or truth finding, the Family Court may take procedural action which may not be strictly consistent with the procedure laws.[77] The words used is '*laying down its own procedure'* and not '*adopting or following the procedural law*'. This means there will be an individual approach in each Family Court and it is conceivable that the approach may differ from one judge to another. The approach adopted by the judge in one case may differ from that in another case. In short it appears to be the inarticulate major premises of section 10(3) in arriving at a settlement, the personality of the judge should be allowed to play and chances of shifting it from '*adversary system of trial'* to '*judge oriented trial'* and Order 32 A of CPC does not contemplate such a radical transformation of the role of Judge.[78] At the same time there is no positive or express mandate to the judge and preserves his liberty to follow his own procedure in arriving at the settlement or truth.

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and of any other law for the time being in force shall apply to the suits and proceedings other than the proceedings under Chapter IX of the Code of Criminal Procedure, 1973(2 of 1974), before a Family Court and for the purpose of the said provisions of the Code, a Family Court shall be deemed to be a Civil Court and shall have all the powers of such Court.(2) Subject to the other provisions of this Act and the rules, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974), or the rules made there under, shall apply to the proceedings under Chapter IX of the Code before a Family Court.(3) Nothing in sub-section (1) or sub-section (2) shall prevent a Family Court from laying down its own procedure with a view to arrive at a settlement in respect of the subject-matter of the suit or proceedings or at the truth of the facts alleged by the one party and denied by the other.

[77] P.M.Bakshi , "*Family Courts: Some Reflection*s' in '*Women march towards Dignity; Socio Legal Perspective'* Prof.Kusum (edt) 1993 p 35

[78] Ibid p 40

Since the family matters are sensitive in character and the judges of the family Courts have to play a greater participatory role, it is necessary for them to establish good rapport with the parties concerned. The judge of the Family Court is also conciliator of the dispute and she/ he has to talk to the parties and try to bring them together. However, the judge will have to assume a different role when she/ he finally decides the case between the parties on merit.[79] The demand as well as the suggestion of the Law Commission was that the states should think of establishing Family Courts, with presiding officers who are well qualified in law and who have been trained to deal with such disputes in a humane way and all disputes concerning the family should be referred to such Courts.[80]

Section 4 of the Family Courts Act prescribes the qualification and mode of appointment of the Judges.[81] A person who has held a judicial office / office of the member of a Tribunal / any post under the Union or a State requiring special knowledge of law for at least seven years or has practiced as an advocate in High Court for the same period shall be qualified to be appointed as a judge in a Family Court. The Central Government is empowered to make Rules prescribing other qualifications than the above

[79] *Balachandran v Meena* 1999(1)KLT 769

[80] 59th Report of Law Commission of India, 1974

[81] Sub-section (3) of Section 4 of Family Courts Act, prescribes that "A person shall not be qualified for appointment as a Judge unless he-
(a) has for at least seven years held a judicial office in India or the office of a Member of a Tribunal or any post under the Union or a State requiring special knowledge of law; or
(b) has for at least seven years been an advocate of a High Court or of two or more such Courts in succession; or
(c) Possesses such other qualifications as the Central Government may, with the concurrence of the Chief Justice of India, prescribe."

with the concurrence of the Chief Justice of India. Apart from prescribing the qualification of the Judges of Family Courts, the Central Government has no other role to play in the administration of the Family Courts Act.

The Act stipulates that efforts should be taken to ensure that those persons who are committed to the need to protect and preserve the institution of marriage and promotion of the welfare of children and have experience and expertise in settlement of disputes by way of conciliation and counseling should be selected as the judges of the Family Courts. It is further provided that while selecting the judges, preference should be given to women.[82] Other qualifications for Family Court Judges like post graduation in law with specialization in personal laws or post graduation in Social Science are also prescribed in the Rules.[83] But in practice, these provisions have not been properly complied with. It has been revealed that in many states the

[82] Sub-section (4) of Section 4 of the Family Court Act provides that "(4) In selecting persons for appointment as Judges,-
(a) every endeavour shall 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 counseling are selected; and
(b) Preference shall be given to women."

[83] The Family Courts(Other Qualifications for Appointment of Judges)Rule,1894 provides,
(2) Other Qualifications for appointment of a Judge:- A person shall not be qualified for appointment as a Judge of a Family Court unless he fulfills the conditions specified in Clause (a) or clause (b) of sub-section (3) of section 4 of the Family Courts Act,1984(66 of 1984)or possess the following other qualifications, namely:-
(i) A Post Graduate in Law with specialization in personal Laws or A Post Graduate degree in Social Science such as Master of Social Welfare, Sociology, Psychology with a degree in Law;
(ii) At least seven years experience field work/research or of teaching in a Government department or in a College /University or a comparable academic institute, with special reference to problem of woman and children; or seven years experience in the examination and/or application or Central/State laws relating to marriage, divorce, maintenance, guardianship, adoption and other family disputes.

Family Courts do not have a single woman judge.[84] Regarding the qualification of the persons who may be appointed as judges of the Family Courts, it has been provided that they should have the commitment to the need to protect and preserve the institution of marriage.[85]

Studies have revealed that in many cases the judges appointed to the Family Courts do not have any special experience or expertise in dealing with family matters, nor do they have any special skill in settling disputes through conciliation.[86]It has been critically pointed out that the qualifications and expertise of the persons appointed as judges in the Family Courts are not in conformity with the statutory directions and held that they *'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'*.[87] It has been further pointed out that the stipulation in the law that women judges should be appointed and they should have expertise and experience in settling family disputes has remained only on paper.[88] As per the rule a judge of the Family Court shall have a post graduate in Law with specialization in personal laws or a post graduate degree in social science such as master of social welfare, sociology,

[84] In the course of the workshop organized in March 2002 by the National Commission for Women, it was noted that there were only 18 women judges till then in the Family Courts in India out of 84 judges in all the 84 Courts that existed at that time ,Supra 46

[85] As per Sub section 4 (a) of Section 4 Of Family Courts Act, In selecting persons for appointment as Judges , every endeavor shall be made to ensure that persons committed to the need to protect and preserve that 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 counseling are selected

[86] ibid

[87]Report of National Workshop on Family Court held on March 2002,Supra 46

[88] Ibid

psychology with degree in law. Along with that he or she should have at least seven years experience in the field work/research or of teaching in a government department or in a college or university or a comparable academic institute, with special reference to problem of women and children or Seven years experience in the examination and/or application or central/state laws relating to marriage, divorce, maintenance, guardianship, adoption and other family disputes[89]. But all those are only in papers.

As on 31/01/2014, out the 28 Judges of Family Courts in Kerala, 18 were retired District Judges and they did not possess any special knowledge or expertise in family disputes.[90] Other 10 were serving as District Judges. Of the total 28 judges, only 4 were women.[91] Name of courts and name of presiding officers of Family Courts in Kerala are given as Appendix III.Regarding the qualification, only 5 had post graduation in law or other arts subjects as additional academic qualification and all the others possessed only degree in Law.[92]

In the light of experience of past 30 years of their functioning it is clear that no specialty has been attributed to the Family Courts despite the sensitive issues they handle. They have been treated similar to any other District Court. It can be noticed that the Family Court has become a post-retirement refuge for District Judges and an asylum for the underperforming judicial officers. It is reported that in a meeting of Family court Judges

[89] Rule 2 of the Family Courts (Other Qualifications for appointment of Judges) Rules,1984.
[90] Data obtained from the High Court of Kerala on 31-1-2014,
[91] ibid
[92] ibid

conducted by National Commission, a majority of them felt that appointment to family courts was a "punishment posting" for them[93].

Gender sensitive judges can take a more proactive role in the proceedings rather than simply responding to the material presented by the lawyers. Deciding a case in the courtroom involves settlement of the disputes between the parties and a decision about the application of law. Judges have the ultimate control over this process. They determine what evidence can be given under the rules of evidence. An important factor in this behalf is change in the outlook and perception of the Judge.

Evidence

Apart from the procedural aspects, the Family Courts Act make some special provisions relating to evidence relaxing the general laws contained in the Indian Evidence Act, 1872[94] and enlarged the sphere of relevant facts and admissible evidence. The permission to receive any statement, report etc.; undeniably permits here say evidence to be given, particularly because of the overriding liberty given by the words '*..whether or not the same would be otherwise relevant or admissible under the Indian Evidence Act'*.

[93] Report of All India meeting of chief justices of high courts on women's empowerment vis-à-vis legislation and judicial decisions,2 available at *pdf* last seen on 12/3/2014 at 19.30 hrs.

[94] Sec 14 of the Family Courts Act, 1984 contains "Application of Indian Evidence Act, 1872.-A Family Court may receive as evidence any report, statement, documents, information or matter that may, in its opinion, assist it to deal effectually with a dispute, whether or not the same would be otherwise relevant or admissible under the Indian Evidence Act, 1872 (1 of 1872)."

This in fact overrides Section 60[95] of Indian Evidence Act, 1872 and also expands section 32[96] of it in their application to Family Court. The

[95] As per Section 60 of the Indian Evidence Act the oral evidence must be direct and it reads as " *Oral evidence must, in all cases whatever, be direct; that is to say-- if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it; if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it; if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner; if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds: Provided that the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such treatises if the authorize dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable: Provided also that, if oral evidence refers to the existence or condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection'.*

[96] Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant.-Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:-- When it relates to cause of death.- (1) When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into

question. Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question. or is made in course of business; (2) When the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty; or of an acknowledgment written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce written or signed by him; or of the date of a letter or other document usually dated, written or signed by him. or against interest of maker; (3) When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages. or gives opinion as to public right or custom, or matters of general interest; (4) When the statement gives the opinion of any such person, as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it existed, he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom or matter had arisen. or relates to existence of relationship.- (5) When the statement relates to the existence of any relationship 1*[by blood, marriage or adoption] between persons as to whose relationship 1*[by blood, marriage or adoption] the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised. or is made in will or deed relating to family affairs;(6) When the statement relates to the existence of any relationship 1*[by blood, marriage or adoption] between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree, or upon any tombstone, family portrait or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised. or in document relating to

permission to receive as evidence any documents, information or matters also seems to indefinitely expand the area of relevant facts. Accepting of such evidence totally disregarding the Evidence Act would bring evidence of bad character. It is also to be noted that the words used are 'in *its opinion, assist it to deal effectually with a dispute'*. Such a provision leaving matters to the subjective satisfaction of the presiding officer is bound to open an immensely vast zone of inconsistent or different approaches from judge to judge. It will finally lead to undue discrimination, even if an honest variation from case to case. Providing these wider powers in receiving evidence, the Family Courts Act practically abolishes the distinction between 'logical' relevancy and 'legal' relevancy and it can be said that the Family Courts Act even goes beyond the strict concept of logical relevance in the objective sense.

The general and sweeping language used in Sec.14 sometimes prompts that the Family Court is not bound by and can even ignore Sec.112. But it was unequivocally clarified by the Division bench of High Court of Kerala in *Rajesh Francis v Preethy Roslin* [97]that

transaction mentioned in section 13, clause (a); (7) When the statement is contained in any deed, will or other document which relates to any such transaction as is mentioned in section 13, clause (a). or is made by several persons and expresses feelings relevant to matter in question. (8) When the statement was made by a number of persons, and expressed feelings or impressions on their part relevant to the matter in question.

[97] Mat. Appeal .No. 75 of 2008 on 13th day of April 2012 by justice R. Basant and Justice K. Surendra Mohan

"*Section 14 of the Family Courts Act does not permit the Family Courts to ignore the substantive conclusive presumption under Section 112 of the Evidence Act. The Family Courts are also bound by the conclusive presumption under Section 112 of the Evidence Act.*"

There is no direct provision in the section to the effect that either the evidence Act is applicable or not applicable to the Family Courts. But the section assumes that the Evidence Act will apply , but at the same time , gives an overriding power to the judge to receive irrelevant and inadmissible report etc, if he is of the opinion that such a course will effectively disposing the dispute. If one takes the view that evidence act would not apply, then some serious questions are to be answered. Several provisions of the Indian Evidence Act such as, 1) Competence of the witness, 2) the privilege in the law of evidence, 3) order of examination of witnesses, 4) the questions that can be and cannot be asked in chief and cross examination, 5) procedure for contradicting a witness, 6) procedure for refreshing the memory of a witness, 7) judges' power to put questions to a witness, 8) competency of child witness etc., would become inapplicable. The alternate procedure is also absent and there is a huge gap with respect to rules of evidence, which needs urgent remedy. The Family Court Act also simplified the procedure of recording evidence of a witness[98] and permitting to adduce evidence of formal character on affidavit.[99]

[98] Section 15 of Family Courts Act,1984 provides "*Record of oral evidence.-In suits or proceedings before a Family Court, it shall not be necessary to record the evidence of witnesses at length, but the Judge, as the examination of each witness proceeds, shall, record or cause to be*

Counseling

The Family Courts Act empowers the state to determine the categories of counselors, officers and other employees required to assist a Family Court in the discharge of its functions.[100] Counseling and conciliation are the two pillars on which the whole structure of the Family Court has been built.[101] The counselors, their skill and competence have a very important role to play in the whole process. It has been observed that some of the Family Courts do not even have any counselors, and in good number of Courts the counselors keep changing frequently.[102] Many of the counselors are appointed part-time and are not properly trained.[103] Proper selection and training of the counselors are of crucial importance for efficient and competent delivery of justice. The maximum or minimum age

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recorded, a memorandum of the substance of what the witness deposes, and such memorandum shall be signed by the witness and the Judge and shall form part of the record."

[99] Section 16 of Family Courts Act,1984 provides "*Evidence of formal character on affidavit.-(10 The evidence of any person where such evidence is of a formal character, may be given by affidavit and may, subject to all just exceptions, be read in evidence in any suit or proceeding before a Family Court. (2) The Family Court may, if it thinks fit, and shall, on the application of any of the parties to the suit or proceeding summon and examine any such person as to the facts contained in his affidavit."*

[100] As per Section 6 of Family Courts Act (1) The State Government shall, in consultation with the High Court, determine the number and categories of counselors, officers and other employees required to assist a Family Court in the discharge of its functions and provide the Family Court with such counselors, officers and other employees as it may think fit.(2) The terms and conditions of association of the counselors and the terms and conditions of service of the officers and other employees. referred to in sub-section (1), shall be such as maybe specified by rules made by the State Government

[101] Vide Rule 24 of Family Courts (Kerala) Rules, 1989, for every case in the Family Court, counseling is indispensable.

[102] For example, in the family Courts of Tamil Nadu, the counselors are changed every three months. Thus, when cases stretch for a longer period, the woman or the aggrieved person has to adjust with new counselors and their story has to be retold several times, http://ektamadurai.org/ accessed on 31/05/2014

[103] In Kerala there are only 14 courts have principal counselors and other 14 courts have are part time counselors. Kerala gazeteNo.28 dated 14-7-2009

of the counselors is not prescribed in the Act or the Rules. It has been seen that in many cases where counseling has failed at the initial stage, proactive role of the judge has helped in resolving the dispute.[104]

The present rules or practices, however, do not permit the judge to personally counsel the parties when the case has come up for trial.[105] Compared to the rules of other Family Courts in India, wider powers have been given to the principal counselors in Kerala [106] but due to many reasons those powers are not being properly utilized. While a rare and sensitive counselor makes use of this power in the interest of women, more often those powers are used against the women in the interest of the family since it is imbibed into minds of such counselors that their primary commitment is to preserve the institution of marriage rather than the well being of the woman.[107] Further, the reports prepared by the marriage counselors based on their investigations, are not binding on the Court. They have no evidentiary value.[108] The report of the marriage counselor is kept confidential[109] and not made a subject of cross examination.[110]

From the very beginning of the discussions of the Family Courts Act, the suggestions on overemphasis on conciliation was criticized and it was

[104] N. Janval, *Have Family Courts lived up to Expectations*? Mainstream, Vol XL VII No.12, 2009
[105] *Meena Kuruvila v High Court of Kerala*, 2001(3) KLT 293
[106] Rule 36 Family Courts (Kerala), Rule 1989 empowers the counselors to make home visits to ascertain the standard of living of the spouses and the relationship with children, seek information from employer etc.
[107] The duties and functions of a counselor. Rule 26 of Family Courts (Kerala) Rules, 1989 See-Appendix-
[108] *Karunakaran v Vasanthi* 2009(1) KLT 768
[109] Rule 29 of Family Courts(Kerala) Rules 1989, see also Rule 19 of Family Court (Procedure) Rules,1984
[110] Rule 33 of Family Courts(Kerala) Rules,1989

demanded that violence free life should be the aim and not the preservation of the institution of marriage and family.[111] The undue importance to the sustenance of marriage and family was a regressive approach for the preservation of marriage and family could be attained only at the cost of women.[112] Statistical data on incidence of domestic violence in India is scanty and studies which are available indicate that physical abuse of women in their homes is quite rampant.[113] A survey conducted by International Centre for Research on Women (ICRW) spanning across seven Indian cities revealed that 45 percent of the wives surveyed had been subjected to physical or psychological violence.[114]According to the survey 26 percent women were victims of physical violence (though slapping was not included while undertaking the survey) and 45.3 percent of wives were experiencing psychological abuses. Another study reveals that earning wives also were not free from violence and working women were beaten up at home by their husbands.[115]

As rightly observed by Justice Sujata V Manohar,

> *"The National Commission for Women has recommended domestic violence legislation for our country, providing for the*

[111] While participating in the discussion over the Family Courts Bill, Smt. Suseela Gopalan M.P. criticized the undue importance given to the conciliation in the Bill. She also criticized the term "to preserve the institution of marriage and to promote the welfare of children." She was of the opinion that "violence free life should be the aim and not the marriage." Parliamentary proceedings dated 27-8-1984, 16.31 hrs

[112] A. Flavia *Family Courts Act:Pro-family and anti-woman*, in *Women Studies in India-A reader* edited by Mary E John, Penguine Books India,2008 p 273

[113] M. Rao, *Law Relating to Women and Children* 212 (3rd Edn 2012)

[114] The ICRW covered seven cities of Delhi, Luck now, Vellore, Bhopal, Nagpur, Chennai and Thiruvananthapuram available at http://www.icrw.

[115] Physical abuse of Indian Women in Homes is Rampant: Survey, Time of India 25-2-2000

protection orders and a protection officer. But, for women who are faced with chronic abuse, the only viable option is an independent life with decent wages, educational training jobs, child support, a house, an option which gives them the power to stand up inside the home. More women do not have this opinion. And, they do not believe that they can change their situation. Providing a counseling service alone merely provides a place where women can express their distress and possibly derive sufficient energy to cope with the abuse and nothing more.[116]

In short the trend of the judiciary, mediators and counselors giving over emphasize to protect the institution of marriage by putting women in more and more vulnerable situation is to be changed.

Alternative dispute resolution

Section 89 and Order X Rule 1A of Code of Civil Procedure, 1908 require the court to direct the parties to opt for any of the five modes of alternative dispute resolution and to refer the case for Arbitration, Conciliation, Judicial Settlement, Lok *Adalat* or mediation. While making such reference the court shall take into account the option if any exercised by the parties and the suitability of the case for the particular ADR method. In the light of judicial pronouncements a referral judge is not required to formulate the terms of settlement or to make them available to the parties for

[116] J.S. Manohar, "Judiciary and Gender Justice", quoted in Report of Government of India, 'Towards Equality, the Unfinished Agenda-Status of Women in India 2001'.

their observations. The referral judge is required to acquaint himself with the facts of the case and the nature of the dispute between the parties and to make an objective assessment to the suitability of the case for reference to ADR. The widely accepted ADR methods in family disputes are Mediation and A*dalat.*

i. Mediation

Mediation is about communicating, persuading and being persuaded for a settlement. Hence, each party needs to communicate its view to the other party and should be open to receive such communication in return. Both speaking and listening are equally important. The attempt must not be to argue and defeat but to know and inform. Parties may have to change their position and align it with their best interest.[117] If there is no settlement between the parties, the court proceedings shall continue in accordance with law. In order to ensure that the confidentiality of the mediation process is not breached, the referral judge should not ask for the reasons for failure of the parties to arrive at a settlement[118]. The participation of lawyers in mediation is often constructive but sometimes it may be non-cooperative and discouraging. The attitude and conduct of the lawyer influence the attitude and conduct of his client[119]. The court can refer the case for conciliation

[117] Mediation and Training Manual of India, Mediation and Conciliation Project Committee, Supreme Court of India, Delhi 79 (2014)
[118] To protect confidentiality of the mediation process, there should not be any communication between the referral judge and the mediator regarding the mediation during or after the process of mediation, Ibid
[119] Ibid

under section 89 CPC only with the consent of all the parties and in *Jagdish Chander v. Ramesh Chander*[120], the Supreme Court held that

> *"It should not also be overlooked that even though Section 89 of CPC mandates courts to refer pending suits to any of the several alternative dispute resolution processes mentioned therein,there cannot be a reference to arbitration even under Section 89 of CPC, unless there is a mutual consent of all parties, for such reference."*

The absence of consent for reference does not affect the voluntary nature of the mediation process as the parties still retain the freedom to agree or not to agree for settlement during mediation. The Supreme Court laid down a guide line for choice of reference in *Afcons Infrastructure Ltd. and Anr. V Cherian Varkey Construction Co. (P) Ltd* [121]held that

> *"under Section 89 of CPC it is ascertaining whether it is feasible to have recourse mandatory for a civil court to have a hearing, after the completion of pleadings, for the purpose of to refer parties to Arbitration or Conciliation [ADR Process]. However the Supreme Court clearly held that it is not mandatory to refer the Parties to any ADR process in all cases. Where the case falls under an excluded category there need not be reference to ADR Process. In all other cases reference to ADR process is a must."*

[120] 2007 (5) SCC 719
[121] (2010) 8 SCC 24

Even if the parties are not inclined to agree for mediation, the referral judge may try to ascertain the reason for such disinclination in order to persuade and motivate them for mediation. The referral judge should explain the concept and process of mediation and its advantages and how settlement to mediation can satisfy underlying interest of the parties. Even when the case in its entirety is not suitable for mediation a Referral Judge may consider whether any of the issues involved in the dispute can be referred for mediation[122].

Court-annexed Mediation and Conciliation Centres are now established at several courts in India and the courts have started referring cases to such centre. In Court-annexed mediation the mediation services are provided by the court as a part and parcel of the same judicial system as against Court-referred mediation, wherein the court merely refers the matter to a mediator. One feature of court-annexed mediation is that the judges, lawyers and litigants become participants therein, thereby giving them a feeling that negotiated settlement is achieved by all the three actors in the justice delivery system[123]. The litigants are given an opportunity to play their own participatory role in the resolution of disputes. This also creates public acceptance for the process as the same time-tested court system, which has

[122] For example if the disputes regarding dissolution of marriage or nullity of marriage is beyond the scope of conciliation, mediation can be explored in matters concerning, maintenance or return of articles or property to parties concerned.

[123] When a judge refers a case to the court-annexed mediation service, keeping overall supervision on the process, no one feels that the system abandons the case. The Judge refers the case to a mediator within the system. The same lawyers who appear in a case retain their briefs and continue to represent their clients before the mediators within the same set-up.

acquired public confidence because of integrity and impartiality, retains its control and provides an additional service.

Mediation provides an efficient, effective, speedy, convenient and less expensive process to resolve a dispute with dignity, mutual respect and civility but at present the cases for mediation are referred only in a later stage. But considering the possibility of allegations and counter allegations vitiating the atmosphere and causing further strain on the relationship of the parties, in family disputes and matrimonial cases the ideal stage for mediation is immediately after service of notice on the respondent and before the filing of objections/written statements by the respondent.

ii. Lok Adalat

The Lok *Adalat* is an institution settles dispute by adopting the principles of justice, equity and fair play and settles disputes by way of negotiation, persuasion, mediation and conciliation with the actively involvement of the advocates, judges, eminent social workers and concerned parties[124]. It is a known fact that the Indian courts are over burdened with the backlog of cases and the regular courts are to decide the cases involve a lengthy, expensive and tedious procedure. It is also as devise for imparting expeditious and inexpensive justice as an alternative dispute resolution forum. Now, the Lok *Adalat* system has got the statutory recognition under

[124] A.K. Agarwal, "*Strengthening Lok Adalat Movement in India*," AIR 2006 Jour 33.

the Legal Services Authorities Act, 1987[125]. The Lok *Adalats* are neither parallel to, nor meant to replace the existing court system but aimed at reducing the burden of the courts and saving the parties time, expense and trauma of litigation.

Due to the improper working of the system the rate of success of *adalat* is very poor[126]. Among many reasons absence of informal and friendly surroundings is a negative factor for the results of conciliation. The presence of advocate affects the free brain storming and also sometimes there occurs establishment of law and not the basic entitlements of parties. The procedure and formalities in the present system make destroys its informality.

Association of Social welfare Agencies

The Family Courts Act enables the government to associate institutions or organizations engaged in promoting social welfare or persons working in the field of social welfare, to associate themselves with the family courts in the exercise of its functions.[127] The importance of

[125] The object of the Act is to provide free and competent legal system to the weaker section of society to ensure that the opportunities for securing justice are not denied to any citizen by reason of economic and other disabilities, and to organise Lok Adalats to secure that the operation of the legal system promotes justice on basis of equal opportunity

[126] Figure XXIX Supra p 139

[127] As per Sec 5 of Family Courts Act, 1984, "*Association of social welfare agencies, etc.-The State Government may, in consultation with the High Court, provide. by rules, for the association, in such manner and for such purposes and subject to such conditions as may be specified in the rules, with a Family Court of-a. Institutions or organizations engaged in social welfare or the representatives thereof;* b*. persons professionally engaged in promoting the welfare of the family; c. persons working in the field of social welfare; and d. any other person whose association with a Family Court would enable it to exercise its jurisdiction more effectively in accordance with the purposes of this Act"*

associating various agencies has been re iterated by the High Court of Kerala in *Krishnakumari v Venugopal*[128] that

"The *Family Courts Act was brought with a very special and laudable object. The Family Courts were set up mainly for the settlement of family disputes, where emphasis should be laid on conciliation and achieving socially desirable results. Section 5 of the Family Courts Act confers power on the State Government to provide, by rules, for the association with a Family Court with the institutions or organizations engaged in social welfare or the representatives thereof; persons professionally engaged in promoting the welfare of the family; persons working in the field of social welfare; etc. "*

Section 5 of the Act authorizes the State Government to make consultation with the High Court and to provide rules for the association in such manner and for such purposes and subject to such conditions as may be specified in the Rules with a Family Court of-(a) institutions or organization engaged in social welfare, or the representatives thereof; (b) persons professionally engaged in promoting the welfare of the family; (c) persons working in the field of social welfare; and (d) any other person whose association with a family court would enable it to exercise its jurisdiction effectively in accordance with the purposes of the Family Courts Act. While enacting this section, it was not the intention of the legislature that without providing, by Rules, for the association with a Family Court of the persons

[128] 2005 (2) KLT 185

and associations mentioned in clauses (a) to (d) of Section 5 of the Act it will render the functioning of the Court ineffective. It does not say that if the association of the persons mentioned in clauses (a) to (g) of Section 5 of the Act with a Family Court can be permitted in a prescribed manner only when the Rules are framed by the State Government in consultation with the High Court. The use of word '*may*' and the further use of words *'in such manner and for such purposes and subject to such conditions as may be specified in the Rules'* clearly indicate that the provisions of this section are only directory in nature and not mandatory. While enacting the provisions of this section, the intention of the legislature was to render assistance to the Family Courts for more effective functioning[129]. It does not say that if the association of the persons mentioned in Section 5 of the Family Courts Act with a Family Court is not provided then the constitution of the Family Courts will be jeopardized in any way or its functioning will be rendered illegal. When we examine the scheme of the Act and specially the provisions of Section 10 read with Section 12 of the Act, it becomes absolutely clear that even in a sense of such Rules, the Family Courts are not debarred from taking assistance of persons mentioned in clauses (a) to (d) of Section 5 of the Act for its effective functioning. Even in the absence of Rules such powers have been vested with the Judges of the Family Courts to take assistance from suitable persons or institutions for deciding the disputes pending before them for their proper, just and effective functioning.

[129] *Radhey Shyam Soni v The State Of Rajasthan And Ors,* 1992 (3) WLC 661

The persons committed to the social welfare are different than the persons committed to the need to protect and preserve the institution of marriage and promote the welfare of children. The persons or institution committed to the welfare of family or women or children are more suitable than those committed to social welfare. The manner and purposes mentioned in the section are also fuzzy.

The provision was diluted by the State Governments by making rule and the duty to associate such institutions, organizations, agencies or persons was imposed on the counselors and limited the purpose of the same to 'in discharge of his duties'.[130] The authority to prepare list of institutions and to lay down the manner and conditions in which such institutions may associate were also upon the Principal Judge.[131] No such attempt was made for associating social welfare agencies except some notifications.[132]

Assistance Medical and Welfare Experts

It shall be open to the Family Court to secure the service of a medical expert or such person, including a person professionally engaged in

[130] As per sub clause (2)of Rule 28 of the Family Courts(Kerala) Rules,1989 *" The Counselor may take the assistance of such institutions, organizations, agencies or persons in discharge of his duties."*

[131] As per sub clause (1) of Rule 28 of the Family Courts(Kerala) Rules,1989 *" List of institutions, agencies etc.: (1) The Principal Judge in consultation with the Principal Counselor shall prepare a list of Institutions, organizations or agencies working in the field of family Welfare, Child Guidance, Employment in any other field that he may deem fit, in order to enable a counselor or parties to obtain the assistance of such an institution/organization or agency as the case may be and may also lay down the manner in which the conditions, subject to which such institutions, organizations or agencies may associate with a Family Court"*

[132] Government of Kerala, in consultation with the High Court of Kerala approved a list of institutions; organizations engaged in social welfare as per Notification vide Notn. G.O.(Rt) No.502/93/Home dated 29/1/93 published in Kerala Gazette No.9 dated 2/3/93. There after it was not revised.

promoting the welfare of the family as the court thinks fit[133].In the rules it is prescribed that the family court shall maintain a register of medical and other experts and persons and the experts and they will be paid a fee of Rs.100/- per case along with travelling and daily allowances[134].

So far as the medical and welfare experts are concerned, the wordings used in the Act itself require certain refinements. Even though the title is "Assistance of Medical and Welfare Experts", it is contemplated in the Act that they may not necessarily be professional welfare experts. It does not exhaust the categories of persons whose assistance can be taken by the Family Court. The only limitation is that securing of their service must be for the purposes of assisting the Court in discharging the functions imposed on it. In case of 'Medical expert' also the limitation is that the service can be secured for the purpose of assisting the Family court to discharge its function. Beyond that this section does not give any indication of categories of persons whose services are permitted to be utilized by the Family Courts Act but it expands the power of the Family Court, in contrast with other ordinary civil courts and places at its disposal an additional mechanism for the better discharge of its functions. In the absence of such an express provision, it could have been argued that the Family Court like any other

[133] As per Section 12 of the Family Courts Act," *Assistance of medical and welfare experts.-In every suit or proceedings, it shall be open to a Family Court to secure the services of a medical expert or such person (preferably a woman where available), whether related to the parties or not, including a person professionally engaged in promoting the welfare of the family as the Court may think fit, for the purposes of assisting the Family Court in discharging the functions imposed by this Act*"

[134] Rule 7 of the Family Courts (Kerala) Additional Rules, 1990.

civil court is required to follow the ordinary procedure under which the court has to depend almost exclusively on the materials produced by the parties and cannot explores avenues of its own for truth finding.

The Medical and Welfare Experts related to the parties will not render any impartial involvement or assistance to the court in discharging the functions imposed by the Act. The involvements of relatives in judicial proceedings may sometimes result prejudice and it will be against the principles of natural justice.

The assistance of medical and welfare experts such as Psychiatrist, Psychologists, and Sexologist are inevitable for an effective settlement of disputes in some cases. The qualifications of those experts are to be specified either in the Rule or in the Act.

Infrastructure facilities

The Family Court should have infrastructure for counseling, child care, meeting room for couple to talk freely with each other, waiting room, canteen, toilets and drinking water etc[135].When it comes to the infrastructure, all the family courts in India other than the one in Mumbai present a dismal picture[136]. They generally suffer from unsatisfactory conditions. There is no proper space allotted for the children to meet their separated parents. None of the courts in Kerala have proper toilet, rest room, canteen facilities which make it least women friendly irrespective of the vision and mission

[135] Geetha Ramaseshan, *Workshop on Women and Law*, organized by NUALS, Kerala State Planning and Indian law Institute ,Kerala Branch on 4-9 July 2009

[136] Family Courts, Report of Workshop held on 20th March 2002, conducted by National Commission for Women, New Delhi

enshrined in the Act. Due to lack of canteen, drinking water and proper sitting arrangements the litigating parties are subject to endless hardship. Most of the Family Courts are under-staffed too[137]. At some places there is lack of separate room for counseling and reconciliation. 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 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. Here the NGOs can play a vital role and can provide space as well as services of the social workers. 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. In short one separate building should be constructed with all the facilities of family courts, counseling centre, child centre, help desk 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.

[137] ibid

A scheme of Central financial assistance was started in 2002-03 for setting of Family Courts[138]. As per the scheme a non-recurring grant at the rate of Rs. 10 lakh per court is provided by the department of justice for setting up of Family Courts[139]. States have to provide matching share. Under non-plan, grant at the rate of Rs. 5 lakh per court per annum is provided for meeting running expenditure on Family Courts and States have to provide matching share[140]. Even after that also the family courts are in pathetic situation due to the absence of proper implementation and monitoring.

Informal Surroundings

The Family Courts Act was expected to facilitate satisfactory resolution of disputes concerning the family through a forum expected to work expeditiously in a just manner and with an approach ensuring maximum welfare of society and dignity of women. The intimidating atmosphere of normal law courts generally overawes women in social distress seeking judicial relief. The main objective in seeking the establishment of Family Courts was to take family and marital disputes away from the overcrowded[141], intimidating and congested environs of traditional courts of law and bring these to congenial, sympathetic and

[138] A brief write upon centrally sponsored scheme for centrally sponsored scheme for development of infrastructure facilities for the judiciary, available *at http://himachal.nic.in/WriteReadData /l892s/22 _l892s/16-88544269.pdf*

[139] Ibid

[140] Ibid

[141] The Law Commission in its 59th Report (1974) had also stressed that in dealing with disputes concerning the family, the court ought to adopt and approach radical steps distinguished from the existing ordinary civil proceedings and that these courts should make reasonable efforts at settlement before the commencement of the trial. See also Supra

supportive surroundings. The family courts should be located in easily accessible residential colonies where aggrieved women, for whose benefit the courts have been created, may go without hesitation like other countries such as United Kingdom, Australia etc.[142] One separate building should be constructed with all the facilities of family courts, for example, counseling centre, child centre (with recreation facilities), and so on for providing an informal atmosphere for the women litigants and their children, and this should not be within the premises of the District or High Courts[143].The Family Courts were launched almost overnight, without proper and adequate planning and preparation.

Every Family Court should have a Redressal Cell or help desk within its premises. The general public must have easy access to those cells where they can air their grievances, obtain information about the status of their cases, clarifications regarding the judgments passed, etc. There are computerized filing systems in High courts and other district courts; it is alien to the family courts of Kerala. In order to get the status of the case or the adjournments the parties are to come to the court in the evening or the next day.

Legal Aid

The development of legal aid as a fundamental right is an important effort in bridging the gap between the judicial system and the poor

[142] See *www.familylawcourts.gov.au.in.* last accessed on 29/8/2014
[143] N. Jamwal, Supra 103

especially for the women and weaker sections of the society. The traditional concept of legal aid to the poor is based on the reading of a 'due process' clause into Art.21 of the Constitution. The Supreme Court has interpreted Art.21 to include the right to fair trial which includes the right to legal representation[144].While at the outset the right to provide with a lawyer at state expense was seen to be restricted to defense in criminal trials, where issues of personal liberty were involved, today legal aid as a right has been extended to all forms of legal proceedings[145]. Legal aid as conceptualized by the various committees that went into the issue was seen as an important tool for the transformation of civil society and its ultimate goal was distributive justice and the eradication of poverty[146].

The preamble of the Indian constitution aims to secure to the people of India justice – socio economic and political. Article 38[147] and 39A[148] of

[144] *Madhav H.Hoskot vs. State of Maharashtra*, AIR 1978 SC 1948

[145] The legal Services Authority Act, 1987, defines legal service under section 2(c) as "conduct of any case or other legal proceedings before any court or other authority or tribunal and the giving of advice on any legal matter

[146] 222nd Law Commission Report of India, Need for Justice-dispensation through ADR etc,2009

[147] Article 38(1) states that - *state to secure a social order for the promotion of welfare of the people (1) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life (2) The State shall, in particular, strive to minimize the inequalities in income, and endeavor to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations*

[148] Article 39-A of the constitution states that *The State shall, in particular, direct its policy towards securing(a) that the citizens, men and women equally, have the right to an adequate means to livelihood;(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;(c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;(d) that there is equal pay for equal work for both men and women;(e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;(f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom*

the Indian constitution are notable. It is one of the most important duties of a welfare state to provide judicial and non-judicial dispute-resolution mechanisms to which all citizens have equal access for resolution of their legal disputes and enforcement of their fundamental and legal rights. Poverty, ignorance or social inequalities should not become barriers to it[149]. According to Justice V.R.Krishna Iyer,

"*We should expand the jurisprudence of Access to Justice as an integral part of Social Justice and examine the constitutionalism of court-fee levy as a facet of human rights highlighted in our Nation's Constitution. If the State itself should travesty this basic principle, in the teeth of Articles 14 and 39A, where an indigent widow is involved, a second look at its policy is overdue. The Court must give the benefit of doubt against levy of a price to enter the temple of justice until one day the whole issue of the validity of profit-making through sale of civil justice, disguised as court-fee is fully reviewed by this Court*".[150]

The legal aid strives to ensure that the constitutional pledge is fulfilled in its letter and spirit and equal justice is made available to the downtrodden and weaker sections of the society including women[151]. But in spite of the fact that free legal aid has been held to be necessary adjunct of

and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment

[149] *Maneka Gandhi v Union of India* (1978) 1 SCC 248

[150] *State of Haryana v. Darshana Devi*, AIR 1979 SC 855

[151] *Sheela Barse vs. State of Maharashtra,*AIR 1983 Sc 378.

the rule of law[152], the legal aid movement has not achieved its goal. There is a wide gap between the goals set and met particularly regarding Family Courts. The major obstacle to the legal aid movement in India is the lack of legal awareness.

It is suggested that it is the need of the hour that the poor illiterate people more particularly women should be imparted with legal knowledge and should be educated on their basic rights which should be done from the grass root level of the country. The judiciary should focus more on Legal Aid because it is essential in this present scenario where gulf between haves and have not is increasing day by day. Elimination of social and structural discrimination against the poor will be achieved when free Legal Aid is used as an important tool in bringing about distributive justice. There are number of precedents as well as legislations to up hold the right to free legal aid but they have just proven to be a myth for the masses due to their ineffective implementation. Free Legal Services Authorities must be provided in Family Courts under the supervision of District Legal Service Authority with sufficient funds by the State because no one should be deprived of professional advice and advice due to lack of funds.

Conclusion

The very aim of the Family Courts Act needs in depth evaluation. The person who has inflicted the violence and the person who has been

[152] *Suk Das v. Union Territory of Arunachal Pradesh,* AIR 1986 SC 991

subjected to violence are to be treated differently. A gender neutral legislation dealing with the two sections alike is unscientific and not in conformity with the constitutional prescriptions. In short women and men in Indian society as well as within the institution of marriage are not 'equal' in any way. There remains a long and lingering gap in 'equal treatment' of unequal in every sphere of life in the Family Courts Act which fails to provide gender justice. A women specific and more humane legislation is inevitable to ensure violence free life to women and to ensure them the constitutional right to live with dignity. Along with the procedural limitations the administrative improvements need serious deliberations to improve its functioning.

Chapter 5

CONCLUSION AND SUGGESTIONS

The study revealed that declared objectives of the Family Courts to promote conciliation and secure speedy settlement of disputes relating to marriage and family affairs, based on non-adversarial and multi-disciplinary approach have not been fully achieved. The Family Courts are expected to (i) adopt a radically different approach from that adopted in ordinary civil proceedings, and (ii) make reasonable efforts for conciliated settlement before the trial commenced, and during this stage the proceedings are to be informal and iii) speedy settlement in familial disputes[1]. A step forward is thus taken to provide common procedure so that parties belonging to different communities can uniformly benefit from the same, where the emphasis is on conciliation and speedy settlement of disputes, in a more congenial, informal and homely atmosphere as compared to the surroundings and atmosphere in the Courts which by its very nature tends to introduce adversary element in the minds of the litigants. The climate supposed to prevail in the Family Court, the availability of counseling by experts, the presence of qualified Judges interested in preserving the institution of marriage and promoting welfare of the children, absence of legal harangues and technicalities and elimination of

[1] Aims and objectives, supra p 78

delays would have great psychological impact upon the minds of the parties and would greatly contribute towards resolution of the very intimate personal family disputes satisfactorily providing greater opportunity for preserving the institution of marriage and for promoting the welfare of the children rather than drive them in the opposite direction

But contrary to expectations, the family court has remained only as a court for adjudicating civil and criminal matters involving maintenance, dissolution of marriage or nullity of marriage or restitution of conjugal rights, declaration of status and custody of children[2]. The Family Courts Acts itself requires modification to achieve the aims and objective as well as to protect the welfare of women and children.

There is a general perception that being the state at par with developed countries in terms of human development indicators, Kerala society and social institutions reflect gender friendly approach and policies. However, the reality is far from this popular belief. Like other states in India, Kerala also suffer from the socio-political and cultural setbacks created by patriarchal norms and customs.[3] Correction of the societal mindset of its gender bias depends more on social norms, and not merely on legal sanction.[4] The deficiency in this regard has to be overcome by leaders in the society aided by the necessary systemic

[2] N.S.Jamwal, supra p 17
[3] Rachel Kumar, `*Development and women' s work in Kerala: interactions and paradoxes'* , Economic and Political Weekly, V. No 241, 3249-3254, (17-24 December 1999) ,
[4] Report on the Committee on Amendments to Criminal Laws,3 (January 2013)

changes in education, cultural and societal behavior. Failure of good governance is the obvious root cause for the current unsafe environment eroding the rule of law along with needed legislation.

Conclusions.

Against this context the present research is an attempt to critically examine and evaluate the functioning of family Court as alternate and distinct legal frame work in Kerala. Through empirical and analytical methodology, the study analyzed the actual working of family courts in Kerala. The following sections briefly examine the major findings of the study, validate hypotheses on the basis of the findings and suggest some recommendations for the future path of family courts in the state.

Family courts, which were established throughout the country with a view to promoting reconciliation and securing speedy settlements of disputes relating to marriage and family affairs, could not ensure gender justice and equality as expected. The delay in taking decisions, lack of proper infrastructure and informal surroundings, excessive importance to compromise and mediation, patriarchal attitude of judges and counselors, perceiving women litigants from the angle of conventional norms etc have made this innovate institution ineffective in securing justice and equality for women.

1. Absence of adversary approach

The intention of the legislature, as can be deduced from the Statement of Objects and Reasons of the Family Courts Act and its preamble, is clearly to give a new shape to the procedure to be followed in resolving family and matrimonial disputes to which the Act applies, the emphasis being on simplification and conciliation[5]. This new procedure displaces to its extent the existing procedure applicable to ordinary suits which by its very nature is dilatory and litigatory in character. The statement of objects and reasons reveal that one of the objects behind the Family Courts Act is to bring about a material departure in the procedure that is being followed in resolving family disputes. That is why special procedure has been prescribed under the Family Courts Act which is different from the procedure prescribed under the Code of Civil Procedure, which has been characterized as 'adversary approach'.

But in practice the technicalities of a civil suit are strictly followed by family Courts not only in trial but in execution also.[6] As long as the substantive law and the technicalities of the CPC are strictly followed, the 'adversary approach' will remain only in papers. The mere saying that the proceedings are conciliatory and not adversarial does not actually make them so. At present the Family Courts Act doesn't make any difference with civil

[5] Statement of objects and reasons, supra p 68
[6] Application of CPC and Cr.PC are strictly following, supra p 77.

suit in procedural law and following traditional procedure unless and otherwise the cases are settled.

2. **Speedy disposal – a myth**

Speedy disposal is not merely an aspect of right to life with dignity, but is essential for efficacy of law and its desired impact as well as for prevention of its violation. It is revealed from the survey that nearly 5 years are required to take evidence in a case.[7] One to three years are taken to file counter.[8] Thus the findings illustrate that a large number of women had been struggling in courts for more than years. Perhaps, the time consuming court process and procedural lacunae adds on to their misery. The rhetoric about speedy disposal of cases and needy justice to the victim is still remaining as a distant dream for the litigants who approach family courts. More importantly while we analyze the nature of the cases majority of the cases pending in courts were for dissolution of marriage and maintenance[9]. As majority of them are young women[10] who belong to the lower middle class with no or limited assets to live with their children, this delay in procedure indeed affects their life and livelihood.

Speedy justice is the right of every litigating person. In the recent past, litigation has increased immensely. Statements showing the details of filing, disposal and pendency of cases in the Family Courts of Kerala from 2008-09 to

[7] Table -10 ,supra p 125
[8] Ibid
[9] Table VII and Figure XVI. Supra. p 120
[10] Table VIII and Figure XVII. Supra p. 121,122

2012-13 are given as Appendix IV. The delay in dispensation of justice has to be eliminated by taking effective steps otherwise the day is not far when the whole system will collapse. Hence, we can say that family courts failed to achieve its fundamental objective of speedy and easy disposal of cases.

3. **Lack of clarity in procedure**.

There is no uniformity in procedure and different High Courts have laid down different rules of procedure. Though the Code of Civil Procedure was amended to do away with the rigid rules of procedure, the Family Courts, however, continue to deal with the family disputes in the same manner as other civil matters and, by and large, the same adversarial approach prevails. Rules formulated are yet to provide a specific format for the interim applications, summons etc. Now the procedure is according to the discretion of the presiding officer. For example some of the presiding officers are insisting on the appearance of parties on every posting, but some of them don't want the parties in front of them. Likewise some courts want application for interim orders like interim maintenance, interim custody, joint trial etc, but some of them need only a submission.

The need for a set of uniform rules, therefore, has been felt to be imperative. While the Act laid down the broad guidelines, it was left to the State governments to frame the rules of procedure

4**. Improper Conciliation.**

Conciliation should be an effort conducted in an informal, cordial and conducive environment[11] to resolve the problems and it should be a process in which the parties have a direct, active and decisive role in resolving the difference of opinion and final resolution, for which the present enactment and rules are not proper. At times, it is apprehended that through promises, pressures or threats, a mediator may create conditions under which an unwilling party allows himself to be forced to live together and the result is likely to be a temporary reconciliation rather than a true rebuilding of the relationship.[12]

The very aim of conciliation is also not effectively working in the present system. Since the family court system relies heavily on alternative dispute resolution through counseling, mediation and *adalat*, the negative response about *adalat* and counseling gives an alarming signal.[13] Most of the respondents are undergoing all these processes of counseling, adalat and mediation and all these processes are time consuming also. It proves that there are some serious limitations in the existing system of adalat and counseling. The members of the 'adalat', a judicial officer or retired judicial officer, an

[11] *The Mediation Training Manual of India*, Mediation and Conciliation Project Committee Supreme Court of India, Supra p183
[12] Marylyn M Mays, 'Responsibility of the Law in relation to the Family Stability,' International and Comparative Law Quarterly,Vol.25,1976 pp 409,421
[13] Figure –XXII. Supra p 132

advocate deputed by the Legal Services Authority and a social worker, are not providing a informal circumstance to open up and settle grievances.

During the process it was observed that many women were against the notion that family courts should preserve family rather than life and dignity of the individual. Marriage is no longer seen as an institution that provides for financial or other form of security by informants. Possibly, with the altering socio-economic equation, women no longer perceive men as the `providers' of economic or social security. Perhaps, the notion of `protection' in marriage in `physical terms' (presence of a man is perceived to provide protection from other men) is seen as an illusion by these women. They were compelled to compromise on domestic violence for the sake of family and marriage[14].

In practice matrimonial litigation, besides legal rules and principles, is shaped by cultural constructions and social practices. Primacy is given to `reconciliation' or reaching `compromise' without evaluating its consequences on the parties to litigation which often ends up in decriminalizing the process of justice. Majority of women (92%) reported that the court initially persuaded them to `compromise' or to go back to violent situation which they did not want.However, journey to justice again proved to be a long process which often leads them to compromise for settlement

[14]Figure XXXIV, Supra p 145

5. Limited Jurisdiction.

The Family Courts Act was established for 'the *settlement of disputes relating to marriage and family affairs and for matters connected with it'*,[15] the disputes other than the categories of proceedings relatable to matrimonial affairs, the Family Court will have no jurisdiction. The very aim has not been incorporated in Sec.7 of the Family courts Act. The dowry and related issues[16] and testamentary matters among family members are outside the purview of the Family Courts. The Family Courts have no jurisdiction to appoint a guardian or a manager in respect of minor's property but it can appoint the guardian of a minor. For example a woman has to go to the Court of Judicial Magistrate of First Class for her immediate protection from the domestic torture and to the Family Court for getting divorce for putting an end to the torture permanently.[17] Hence the present Family Courts Act failed to bring all the family disputes under one roof.

6. Right to matrimonial property.

The jurisdiction of the Family courts extends to the problems that arise due to the breakdown of a marriage, divorce, restitution of conjugal rights, claims for alimony and maintenance and custody of children and it does not in

[15] Supra p 70

[16] The Jurisdiction lies with the Dowry Prohibition Officer and the Magistrate of First Class under section 8B of The Dowry Prohibition Act 1961

[17] For protection from domestic violence, the remedy available under the Protection of Women from Domestic violence Act, 2005 for which she has to approach the Magistrate concerned and to get rid of permanently from the marital bond and violence, she has to approach the Family Court concerned.

any way alter the substantive laws relating to marriage. It is customary in Indian society for a woman to leave the matrimonial home, and thus she loses residence therein. For her residence, she has to depend upon her parental home or has to look for some other shelter. [18] Also 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 or sources of income, it is difficult, if not impossible, to prove his income.

The study reveals that 66 percent of the women litigants have not acquired any property after their marriage, while only 34 percent have acquired property after their marriage[19]. It is also to be noted that 75 percent of the wives who have acquired property after marriage received it from parents and 23 percent have acquired property from their own resources[20]. Only 1 percentage got it from their spouse[21]. But 87 percent of the women litigants lost their assets after marriage[22] and 76.6 percentages lost their property due to misuse by their spouses[23]. In short majority of women are returning to their parental home after losing their assets along with mental and physical health.

[18] Even though right of residence has now been provided in the newly enacted Protection of Women From Domestic Violence Act, 2005, it is not effectively enforced till now.
[19] Figure No.VII, Supra p 112
[20] Figure VIII , Supra p 113
[21] ibid
[22] Figure IX Supra p 114
[23] Figure XI, Supra p 115

The right to 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 should belong equally to the husband and the wife[24]. Only when based on such modifies laws, the 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.

7. Increase in instances of Domestic violence.

The high social status of women, higher level of civil society activism and media vigilance in Kerala society are not reflected in the gender question in Kerala as domestic violence, divorce rate, sexual abuse etc are increasing at an alarming rate. There have been increasing instances of gender based violence, particularly domestic violence against women in Kerala.[25] 72 percentage of women litigants revealed that they suffered domestic violence for

[24] B.Sivarmayya, *Matrimonial Property law in India*, Oxford University Press,1999 p 32

[25] A study conducted by INCLEN and ICRW on domestic violence in Kerala found that as high as 62.3% and 61.61% of the women in Kerala are subjected to physical torture and mental harassment as compared to 37% and 35.5% at the national level. The same study found that Thiruvananthapuram, the capital of Kerala ranked first among the five cities in India in the prevalence of domestic violence against women (ICRW 2002). A study by Sakhi for the Dept. of Health report 40% violence against women, with an average of 2 women patients coming to the Out Patient Departments (OPD's) with injuries due to violence

the sake of Family.[26] There are increasing reports of dowry related violence, rape and other atrocities against women in Kerala.[27] The myth of the so called high status of women in Kerala is also shattered when one considers that recorded incidences of violence against women have increased 4 fold in the last 10 years. Many of the respondents revealed that women in Kerala experience very high rates of domestic violence too. Although there are a number of mass-based women's organizations, specific gender-related awareness-building and leadership-building are taking place only very slowly.

8. Lack of Infrastructure

It is a fact that all the family courts in Kerala lack basic infrastructure. None of the Family courts in Kerala possess toilets, drinking water, canteen, seating arrangements and stationery store within the court premises which causes hardship to the litigants.

Though the Kerala family court rules and procedure elaborate the role of counselors and access to justice for women, in reality, the infrastructure, location, attitude and culture dominating the procedure are far from gender friendly. When it comes to the infrastructure, family courts in Kerala present a dismal picture. They generally suffer from unsatisfactory conditions. There is no proper space allotted for the children to meet their separated parents. None of the 28 courts have proper toilet, rest room or even a place to sit which make

[26] Table VII and Figure XVI. Supra p 120
[27] Report of State crime Record Bureau, 385 (2013)

them least women friendly irrespective of the vision and mission enshrined in the Act. Usually women litigants are accompanied by their parents or children and the number of persons present before the court may be double than that of the number of cases posted on a day. Almost all the Family Courts are over crowed. There is not even a closed space to feed the children. Since Family Court is situated far beyond the surroundings of the regular court, an applicant loses a lot of time to get his petition ready by his lawyer. Due to lack of canteen, drinking water and proper sitting arrangements the litigating parties are subject to endless hardship. Most of the Family Courts are under-staffed too. At some places there is lack of separate room for counseling and reconciliation. There is no congenial room for the children or aged parents who accompany their parents to the Family Courts.

9. Biased Counseling*:*

Professional counselors are available in all the courts, thanks to the high educational and awareness indices of the state. However, as the very idea behind counseling is preservation of the institution of marriage, often the counseling leads to compromise and settlement against the wishes of the litigants. Most of the counselors met shared that they motivate the parties to resolve their differences and come to a conciliatory arrangement between them. Even in case of adultery, bigamy and cruelty, the litigants are being counseled and proposals to live together are being placed before the women litigants,

often against their wishes. The Family Courts Act lays down that the commitment of the statute is towards the settlement of family dispute. This has been often misinterpreted by a section of judges and counsellors as the primary objective of the law and at times, forces the women for reconciliation with their husbands even at the risk of violation of their human rights.

10. Appointment of Judges:

The judges appointed to the family court do not have any special experience/expertise in dealing with family matters, nor have they any special expertise in settling disputes through conciliation, a requirement prescribed in the Act[28]. Despite the gender mainstreaming efforts and feminist movements to make judiciary more gender sensitive, the family court is still predominantly manned by male judges. This is more significant when we correlate this with the fact that these are relatively backward in terms of social and economic indicators of women. The provision that women judges should be appointed[29] and that the judges should have expertise and experience in settling family disputes, are more honoured in the breach than in the observance. As the implementation of the provisions of the Family Courts Act demands alternative orientation for the Bar and Bench the persons working in both these areas should be specifically selected and trained. But it is not happening and now in Kerala the Family Court has become a post-retirement refuge for District

[28] Subsection 4 of Section 4 of the Family Courts Act.
[29] Ibid

Judges and an asylum for the underperforming judicial officers[30]. A majority of Family Court judges felt that appointment to family courts was a "punishment posting" for them[31].

11. Inadequate mechanism for execution.

A decree or order passed by the Family Court shall have the same force and effect as a decree or order of a civil court and shall be executed in the same manner as prescribed by the CPC for the execution in civil matters[32]. Similarly the orders under the provisions of 125 Cr. PC shall be executed in the manner prescribed for the execution under 128 Cr PC. The most traditional methodology using for execution makes it difficult for litigants enjoy the fruits of the decree. For example if marriage expense for a daughter is allowed at the end of 2 or 5 years lengthy trial , it can be executed even after completing the procedure under Order 21 CPC and the entire decree amount will get the decree holder after further 2-4 years and that too by way of installments.

The insensitivity of the police to deal with family disputes is well known. Due to improper coordination and execution of power with the police, it is difficult for the family court to implement the maintenance order. Hence, majority of women fail to get the benefit of the verdict. The women litigants find it hard to prove the income sources of their spouses and the lengthy cross examination process that takes place before pronouncement of maintenance

[30] Supra p 174
[31] Report of Meeting of Family Court Judges Supra p 183
[32] Section 18 of Family Courts Act,1984, Supra p 60

order creates havoc for them. The next struggle before the women litigant is the execution of the order. If the order of the maintenance passed against the husband is flouted by him, he is not supposed to continue the matters to proceed. But, many a times, the Judges permit the defaulting parties to proceed with the matter. In the present circumstance it is very difficult for a woman to enjoy the fruits of the decree even after years of continuous legal battle.

12. Need of Advocates in family courts:

Unless and until our judicial procedure is too simple to comprehend for a lay person the entry of advocates cannot be denied. Otherwise the poor litigants will be denied access to justice. The data regarding knowledge about court procedure reveal that 57 % of the respondents have no idea or any knowledge regarding the procedure of family courts. This finding points to the need for involving advocates in family courts and their indispensability. The situation proves that the institution of Family Court is not yet developed enough to leave the case entirely on litigants, counselors and judges. The study points to lack of legal literacy and awareness among women. For majority of women law is a `mystique' and a `complex subject' which they fail to understand because it is `too complicated'.

13. Insufficient support mechanism

Though there are NGOs and state led support mechanisms to help the poor and needy, it is interesting to note that the services do not reach the

victims due to several reasons. Even though lists of institutions/ persons/Organizations are notified during 1993[33] it was not yet revised or updated. Many of the persons and institutions do now not exist. Many of the litigants interviewed were not aware of the existence of legal aid and the support provided by government and voluntary agencies. Hence, there is serious gap in outreach and awareness creation. The government and NGOs should use visual as well as print media to create awareness among the people, especially women about the available services and support mechanisms. . Thus, the very purpose of formulating this `special' forum is hardly being served. Women approaching these courts do not just need to talk to vent out their feelings rather they need to address a system, which is prejudiced and complex, has its own dimensions, follow its own practices and its own set of rules. It may be said that these courts do provide a space for women to raise their voice and render them a platform to negotiate their claims as wives, but its biases, lacunae and pitfalls hardly allow them to negotiate on their own terms.

Recommendations

Part-A : Amendments in the Family Courts Act,1984.

1. Women welfare legislation

At present the fundamental mission of the courts is always centered on preserving family and the value system surrounding it and there is no attempt

[33] Supra p 190

to secure gender justice and equality. There should be protective discriminatory provisions on the basis of constitutional mandate.[34] But the legislature has not yet shown such a wisdom or gender conscience in case of Family Courts Act. There is considerable gap between constitutional rights and their application in the Family Courts Act in incorporating protective measures for women within the families, which have been, hitherto, exclusively masculine domains. The Family Courts Act is expected to facilitate satisfactory and gender friendly resolution of disputes concerning the family through a forum expected to work expeditiously in a just manner and with an approach ensuring maximum welfare of society and dignity of women as envisaged in Art 15(3) of the Indian Constitution.

Hence with the present aims and objectives the following words have to be added '*in a women friendly manner'* after the words '*connected therewith'*

2. Appointment of Judges.

The criteria for appointment of Family Court judges are the same as those for appointment of District Judges requiring seven years experience in judicial office or seven years practice as an advocate[35]. It is common knowledge that in establishing the Family Courts, the same judiciary has been incorporated, as it

[34] The Immoral Traffic (Prevention) Act, 1956, The Dowry Prohibition Act, 1961, The Indecent Representation of Women (Prohibition) Act 1986, The Commission of Sati (Prevention) Act, 1987, The Protection of Women from Domestic Violence Act, 2005, The sexual Harassment of Women at Workplace (Protection, Prohibition and Redressal) Act 2013 are women specific legislations.
[35] Section 4 of the Family Courts Act, 1984.

existed in the civil/criminal courts. A change of cadre is yet to be adopted. The Family Courts 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 counseling. The recommendation of the Law Commission was that the states should think of establishing Family Courts, with presiding officers who were well qualified in law and who had been trained to deal with such disputes in a humane way and all disputes concerning the family should be referred to such Courts.[36] A separate cadre of Family Court Judges should be created to ensure particularly 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 counseling are selected in which preference shall be given to women, as enjoined by sub-section (4) of section 4 of the Family Courts Act.

Hence person who have any special experience/expertise in dealing with family matters, or have any special expertise in settling disputes through conciliation, should be appointed as Judges of Family Courts. A minimum of three years should be fixed as the tenure of the Family Court Judges.

Hence a new subsection is to be added to Section 4(3) of the Family Court Act. After subsection (c) of Section 4 (3) include *" and a post graduate*

[36] Report of Law Commission of India, No.59 in 1974.

degree in social science such as master of social welfare, sociology, psychology or at least seven years experience in the field work/research with special reference to problem of women and children or Seven years experience in the examination and/or application or central/state laws relating to marriage, divorce, maintenance, guardianship, adoption and other family disputes"

3. Association of social welfare agencies.

The associations of social welfare agencies are to be replaced with family and women welfare institution s or organization or persons. The purpose of such involvement and the manner in which the association is scheduled is also to be clarified.

Section 5 should be revised as *"5.Association of social welfare agencies, etc.-The State Government may, in consultation with the High Court, provide, by rules, for the association, in such manner and for such purposes and subject to such conditions as may be specified in the rules, with a Family Court of-*

(a) institutions or organizations engaged in the welfare of women and children or the representatives thereof,

(b) persons professionally engaged in promoting the welfare of the family; and

(c) persons working in the field of welfare of women and children".

4. Extension of Jurisdiction:

There were different views regarding the jurisdiction of Family Courts and demands from the women organizations that besides the said matters, the problems regarding dowry, inter-spousal assaults, criminal matters between spouses and children and inter familial contracts should also come within the sway of the Family Court.[37] Requirement of approaching multiple judicial forums for establishing different matrimonial rights questions the very purpose of enacting the Family Courts Act.

Hence for extending the jurisdiction of Family Court the following specific amendments are necessary in Section 7 of the Family Courts Act, 1984.

a. "Include a new sub section to Subsection 1 of Section 7 as "(e) *Suit or proceedings for in relation to partition or declaration of title with respect to the property of parties in a family.*

b. Include a new sub section to Subsection 2 of Section 7 as "(b) *The jurisdiction exercisable by a Magistrate of the First Class or civil judge under the Muslim Women (Protection of Rights on Divorce) Act, 1986.*

[37] B.M. Gandhi, *Family Law Vol. II,* 221 *(*2013)

c. Include a new sub section to Subsection 2 of Section 7 as "(c) *The jurisdiction exercisable by a Magistrate of the First Class under the Protection of Women from Domestic Violence Act, 2005.*

d. Include a new sub section to Section 7 as 3 as "*The jurisdiction exercisable by a Dowry prohibition Officer under the Dowry Prohibition Act, 1961.*"

5. Place of suing

Even though the Act does not travel to the extent of laying down a uniform Civil Code for all the communities and leaves that area untouched, yet, in the matter of procedure it aims at bringing about uniformity. 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. 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 irrespective of the provisions of personal laws.

Include a new section as Section 7A as "7 *A. Court to which petition shall be presented: - Not withstanding anything contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act, every petition under this Act shall be presented to the Family Court within the local limits of whose ordinary jurisdiction –*

i. The marriage was solemnized, or

ii. The respondent at the time of presentation of the petition, resides, or

iii. The parties to the marriage last resided together, or

iv. The petitioner is residing or working at the time of presentation of the petition ".

6. Time Bound disposal:

The findings illustrate that a large number of women had been struggling in courts for years. Perhaps, the time consuming court process adds to their misery. If no settlement is arrived at , then the regular trial follows. The Rules do not simplify the procedures but merely follows the Code of Civil Procedure. Hence, the litigation proceeding prolongs. The backlog of cases consistently increases every year. Thus, the very objective- speedy disposal of cases is not materialized and a specific provision is necessary to cure it.

Include a new subsection to Section 10 as

"(4) The *Judge of the Family Court shall fix the date of counseling immediately on filing the petitions, which shall not ordinarily be beyond 7 days from the date of receipt of the petition by the court*.

(5) The Judge of the Family Court shall endeavour to dispose of every petition within a period of six months from the date of filing.

(6) For every petition filed for maintenance, an interim maintenance shall be fixed within a period of fifteen days from the date of filing".

7. Assistance of Medical and Welfare Experts

The words used in Section 12 of the Family Court are vague and uncertain. Family court can secure the services of medical experts or such person related to parties or not, including a person professionally engaged in promoting family welfare is not clear. The experts as well as their involvement is to be made clear instead of a general statement that for the purpose of assisting the Family Court in discharging the functions imposed on the Act.

Section 12 should be revised as *"12. Assistance of medical and welfare experts.-In every suit or proceedings, it shall be open to a Family Court to secure the services of a medical expert or other experts such as psychologists, psychiatrists and sexologists (preferably a woman where available), who are*

not related to the parties for the purposes of assisting the Family Court for the purpose of settlement or counseling."

8. Right to legal Representation

Section 13 of the Family Courts Act adopts a negative stance, by providing that no party shall entitle to be represented by a legal practitioner in Family Court. The lawyer's service cannot and should not be dispensed with the complicated family cases unless and until the procedure followed are Code of Criminal Procedure and Code of Civil Procedure, 1908. It is also complicated to a layman to understand the substantive rights and liabilities under the different and complicated personal laws followed in matrimonial issues.

Appearance of advocates cannot be completely barred. One of the reasons is that a judge or a counselor 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. In order to address this crucial problem it can be suggested an amendment could be proposed to allow participation of lawyers

subject to a proviso giving power to the court to terminate his vakalathnama if he uses delaying tactics by unnecessary adjournments.

Section 13 should be revised as "*13.Legal Representation: (1) A party to a suit or proceedings before a Family Court shall be entitled as of right to be represented by a legal practitioner of his/her choice.*

(2) Family Court may permit a person other than a legal practitioner to represent a party in the interest of justice.

(3)If the family Courts considers it necessary in the interest of justice, it may seek the assistance of a legal expert as 'Amicus curiae' or an advocate of a child whose interest may be affected."

9. Applicability of Indian Evidence Act, 1872

Sec.14 carries a marginal note on the 'Applicability of Indian Evidence Act, 1872'. But there is no direct provision in the section to the effect that either it is applicable or not applicable to the Family Courts. But the section assumes that the Evidence Act will apply , but at the same time , gives an overriding power to the judge to receive irrelevant and inadmissible report etc, if he is of the opinion that such a course will be effective disposing the dispute. If one takes the view that Evidence Act would not apply, then some curious results follow. Several provisions of the Indian Evidence Act such as, 1) Competence of the witness, 2) the privilege in the law of evidence, 3) order of

examination of witnesses, 4) the questions that can and cannot be asked in chief and cross examination, 5) procedure for contradicting a witness, 6) procedure for refreshing the memory of a witness, 7) judges' power to put questions to a witness, competency of child witness etc., would become inapplicable. Hence section 14 is to be deleted and it has to be made clear that the provisions of Indian Evidence Act, 1872 will be applicable to Family Court and will be deemed to be a civil court for that purpose. The section 14 is to be amended as

"*14.Applicationof Indian Evidence Act, 1872- A family Court may receive evidence according to the provisions of Indian Evidence Act, 1872 only for trial and the Family Court shall be deemed to be a civil Court having all powers of a civil court."*

10. Time- Bound Execution

To ensure speedy execution of decrees or orders passed by the Family Courts, the local Civil and Criminal Courts situated in the respective localities be conferred with jurisdiction to execute the orders and decrees of the Family Courts. Hence Section 18(3) of Family Courts Act, 1984 may be amended as

"A *decree or order may be executed either by the Family Court which passed it or by the other Family Court or ordinary civil or criminal courts, as the case may be having jurisdiction within a period of six months from the date of decree or order."*

Part-B: Administrative actions

In order to fulfill the objectives and for effective functioning of Family Courts certain administrative reforms could be taken as the starting point, which are important for the just disposal of family disputes and are outside the frame work of personal Law.

1. Establish more family courts

The people, who are parties before the Family Courts, are almost the unfortunate lot in the society who are at the brink of the collapse of their marital lives. Unless, the stake holders in this system show more concern, going by the huge pendency of the cases in the Family Courts, the speedy settlement of family disputes, as aimed at by the Act, will only be a mirage. It is high time for the Government to establish more number of Family Courts as early as possible so as to instill a ray of hope in the minds of the litigant public that speedy settlement of Family Disputes by the Family Courts is a reality[38].

The family disputes and violence against women are increasing everywhere more particularly in Kerala. Considering the population and the statutory prescription, the State is still shortage of seven Family Courts[39]. The Family Courts Act permits the State governments to establish courts for such

[38] *S.Sumathi vs R.Sharavanakumar* 2013 (2) TLNJ 622
[39] Table -1, Supra p 7

other areas in the State as it may deem necessary[40]. Hence it is highly necessary to establish at least one Family Court in every Taluk and more at the rate of population

2. Investigative powers.

The family court should have some investigative powers so that they can compel disclosures of income and assets to pass orders of maintenance. In order to assess the income or assets of the husband for ascertaining the maintenance amount, the judges must take assistance from village officers, probation officers and other officers who could, inter alia, draw inference from standard of living of the family. The maintenance must be deducted from the salary or income of the Respondents and deposited in the court in the beginning of every month without waiting for execution petition and further court orders.

3. Improve Conciliation and Mediation mechanism

The very aim of settlement of family disputes through conciliation is materialized only by creating an atmosphere conducive for it. At present in adalat and mediation the counsels are appearing with parties and which results the silence of parties and heated bargaining of counsels. First of all provide privacy to parties to discuss their problems to arrive at a conclusion as the family matters include serious, complicated strictly personal matters including

[40] Sub section (b) of Section 3 of the Family Courts Act, 1984.

their bed room secrets. A homely and friendly atmosphere is inevitable for effective conciliation.

Conciliation and mediation shall be strictly between parties and Advocates may be strictly prohibited from sitting along with parties at the time of conciliation, counseling and mediation of family court cases.

A problem during mediation is that personal issues get intertwined with societal problems and the younger generation, being made a scapegoat in the changing times due to the ensuing cultural war between conservatives and liberals. Appropriate training in a direction to ensure violence free life than that of preserving the institution of marriage and family is to be ensured.

Considering the possibility of allegations and counter allegations vitiating the atmosphere and causing further strain on the relationship of the parties, in family disputes and matrimonial cases the ideal stage for mediation is immediately after service of notice on the respondent and before the filing of objections/written statements by the respondent.

4. Special training to Family Court Judges.

The newly recruited Family Court Judges should undergo a gender and equity sensitization course, and training on conciliation before being

appointed[41]. Judges should make an effort for settlement by inviting both the parties, before initiating trial proceedings. Periodical training to deal with family disputes should be provided to the Judges, Counselors, Advocates and Support persons. Separate Training Module is being prepared for each of the groups in consultation with the Judicial Academy

Gender sensitive judges can take a more proactive role in the proceedings rather than simply responding to the material presented by the lawyers. Deciding a case in the courtroom involves settlement of the disputes between the parties and a decision about the application of law. Judges have the ultimate control over this process. They determine what evidence can be given under the rules of evidence. An important factor in this behalf is change in the outlook and perception of the Judge and such training is inevitable for judicial officers.

The Family Courts Act expressly provided that the commitment of the statute is towards the settlement of family dispute[42]. This has been often misinterpreted by a section of judges and counsellors as the primary objective of the law and at times, forces the women for reconciliation with their husbands even at the risk of violation of their human rights. This reveals the absence of orientation training to the judicial officers. As the implementation of the provisions of the Family Courts Act demands alternative orientation for the Bar

[41] 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.

[42] Chapter 4 of the Family Courts Act.

and Bench the persons working in both these areas should be specifically selected and trained. The object of judicial education is to change ones awareness, knowledge, skills and behaviour in relation to gender issues and to provide an opportunity to evaluate and discuss the issues against existing understanding and social context

Only trained mediators, advocates, activists possessing special knowledge in family law and expertise in dealing with the welfare of women and children are to be appointed for mediation and adalth.

5. Standardized forms and procedure:

The procedure followed in all courts should be made uniform. The appearance of parties, trial, and evidence should be in a uniform manner. There should be a consistent system for counseling, mediation and adalat. The producing and handing over the children in custody matters should in standardized manner. To ensure the litigant-friendly approach, petitions / applications / suits for seeking different relief and affidavit format should be standardized and printed in English and vernacular languages and be made available to the litigants. These forms should be in simple terms and easy to use.

6. Help Desk /Redress cell

Every Family Court should have a Help-Desk to assist the litigants to get information regarding cases to be filed, pending and disposed. Through this

help desk the litigants can get information regarding their rights, duties, documents, procedure to be followed and the method to acquire documents. Every Family Court should have a Redressal Cell within its premises. The general public must have easy access to those cells where they can give vent to their grievances, obtain information about the status of their cases, clarifications regarding the judgments passed, etc

7. Active role of Support mechanisms:

The role of institutional support mechanisms should be strengthened with a view to providing information, legal assistance, and emotional support during the period of crisis. The district level activities should percolate to the village and community so that large number of women litigants from socio-economic backward class would get the benefit.

The state government shall in consultation with the High Court provide by Rules as prescribed by section 5 of the Family Courts Act for the association of the institution, organizations and persons engaged in promoting the welfare of women and children and should accordingly involve such institutions, organization and persons in the working of the Family Court

8. Legal Assistance

The women victim is to be provided with a counsel.[43] The right to maintenance includes right to life. It provides a decent way of life by getting adequate maintenance from the husband, father or from the children, as the case may be, it is to be protected by the State. The State is duty bound to provide the service of Public Prosecutor / Assistant Public Prosecutor to protect the rights of the destitute. Hence such a provision is to be incorporated to extent the service of government pleaders or public prosecutors to the victim in maintenance cases. The legal aid clinics should be work in hand with family courts.

9. Execution mechanism

Execution of maintenance orders is currently entrusted with the local police who have the responsibility of law order also. Due to the overburdening of the police personnel, the execution of warrant in maintenance cases gets the least priority. On the other hand, the Women's cell is the wing of police dealing with issues related to women and children and they have no authority to register crimes. For execution of summons or warrant in maintenance cases there is no necessity to register crime or detailed investigation or other procedural formalities but only to intimate or catch the offender. It would be

[43] *The Delhi Domestic Working Women Forum Vs Union of India*, 1995 (1) SCC 14 reiterated in *Khem Chand Vs State of Delhi* 2008 (4) JCC 2 497.

advisable if the responsibility of execution of maintenance orders is entrusted to the women's cell so that unwanted delay is avoided.

It is also advisable that the constitution of an outpost police station in the premises of the family courts. This would benefit the destitute and poor women to execute the maintenance orders passed by the family court. These outpost police stations would be vested with powers to execute warrant in maintenance orders and to investigate the income and assets of the respondents throughout the state with the help of the local police people, which would help these women to obtain maintenance for themselves.

10. Provide Infrastructure*:*

Duty is cast on the state to provide on affable and congenial atmosphere to those approaching the courts for justice. Though the Kerala family court rules and procedure elaborates the role of counselors and access to justice for women, In reality, the infrastructure, location, attitude and culture dominating in the procedure are far from gender friendly. When it comes to the infrastructural facilities, the family courts generally suffer from unsatisfactory conditions. There is no proper space allotted for the children to meet their separated parents. None of the courts have proper toilet, rest room, canteen facilities which make them least women friendly irrespective of the vision and mission enshrined in the Act. Due to lack of canteens, drinking water and

proper sitting arrangements the litigating parties are subject to endless hardship. Most of the Family Courts are under-staffed too. At some places there is lack of separate room for counseling and reconciliation. There is no convenient room for feeding the children who accompany their parents to the Family Courts.

Family Courts should be provided with all the facilities and basic amenities to ensure a litigant friendly congenial atmosphere for resolving matrimonial disputes. They should have sufficient space to accommodate the Counseling Centre for Family Court counselors (separate room for each counselor), child centre cum crèche, meeting room for couple to talk freely with each other, waiting room for litigants, pre-litigation counseling centre, canteens, toilets, drinking water etc.

Many cases are filed on similar points and such cases should be clubbed with the help of technology and used to dispose other such cases on a priority basis; this will substantially reduce the arrears. Similarly, old cases, many of which have become in fructuous, can be separated and listed for hearing and their disposal normally will not take much time. Same is true for many interlocutory applications filed even after the main cases are disposed of. Such cases can be traced with the help of technology and disposed of very quickly.

11. Counseling facility.

The recruitment of the present counseling team should be restructured. The qualifications for the Family Court Counselors should be prescribed as post-graduation in social work / psychology / family therapy and diploma / degree in counseling. They should have a minimum of five years experience in family counseling. In addition to the academic qualification and experience, their personal traits, attitude, ethical values should be assessed. They should be middle aged people. After selection, they should be capacitated in the area of gender, legal, medical and conciliation skills.

The performance of the counselors should be reviewed periodically, to extend their tenure and legal awareness programs and conciliation skills training should be organized for them on a regular basis. The counselors should be empowered to seek the services of experts, not only for their opinion but mainly for their therapeutic services.

Permanent Principal Counselors are not available in all the courts. It has been observed that some of the Family Courts do not even have any counselors for months, and in good number of Courts the counselors keep changing frequently[44]. The entire litigants approaching before the Court are not attending

[44] Report of National Workshop on Family Court, supra p 80

counseling[45]. During the conciliation proceedings, each case should be attended to by only one counselor. If a case is counseled by more than one person, it is a violation of professional ethics and the principles of counseling. Maximum efforts should be taken to ensure that each case is posted to the same counselor, to reduce the burden of the parties to repeatedly narrate their problems to different persons.

The Way Forward

Presently, the formal legal system is adapted to accommodate a set of laws and procedures to protect women from various forms of injustice and discrimination. Yet several pitfalls, systemic constraints and restraints within the legal system operate against women and their legitimate rights. These lacunae exist in spite of the process of law reform that has been initiated by several stakeholders in the justice delivery system as well as the civil society. In other words it may be said that the ad hoc and sporadic attempts of legal reforms have resulted in formulation of a system which provides for inadequate redress to the women. For instance, lacunae in both content and procedural aspects of law dealing with domestic violence have been pointed out through several studies.

The present work focused on similar contradictions existing in the justice delivery mechanisms specifically in the context of family courts in

[45] Figure XXII, Supra p 133

Kerala. It examined the lacunae that exist within the law as well as the impediments that continue to act as hurdles in the pathway to justice for women. The study revealed that high level of education and human development indicators may not necessarily lead to legal justice and effective delivery mechanisms in the realm of law. Viewed from a broader perspective, the Kerala state apparently has helped to empower women through its policies and laws, yet, at the same time, its actions have also tended to institutionalize and reinforce patriarchal norms and values. It has been said that the patriarchal attitudes and values held by the three organs of the Indian State – namely, judiciary, executive and the legislature, prevented them from implementing the constitutional mandate of equality in its true spirit. These view women not as citizens entitled to rights, rather they perceive them within the confining web of their social relations.

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APPENDIX

Annexure-I

As on 31/10/2014

NUMBER OF FAMILY COURTS FUNCTIONAL

S.No.	Name of the State	Number of Family Courts functional in the State
1	Andhra Pradesh + Telangana	27
2	Arunachal Pradesh	-
3	Assam	03
4	Bihar	33
5	Chhattisgarh	20
6	Delhi	15
7	Goa	-
8	Gujarat	17
9	Haryana	06
10	Himachal Pradesh	-
11	Jammu & Kashmir	-
12	Jharkhand	21
13	Karnataka	24
14	Kerala	28
15	Madhya Pradesh	31
16	Maharashtra	25
17	Manipur	04
18	Meghalaya	-
19	Mizoram	04
20	Nagaland	02
21	Odisha	17
22	Punjab	-
23	Puducherry	01
24	Rajasthan	28
25	Sikkim	02
26	Tamil Nadu	14
27	Tripura	03
28	Uttar Pradesh	75
29	Uttarakhand	08
30	West Bengal	02
	Total	410

Gender Justice through Alternate and Distinct Legal Framework: An Empirical and Critical Study of the Family Courts in Kerala

INTERVIEW SCHEDULE

BLOCK I
General Information

No	Question	Answer
1	Name	
2	Religion: 1. Hindu 2. Muslim 3. Christian 4. Non - religious 5. Others (specify)	
3	Age (Completed years as on 31/12/2013)	
4	Educational qualification: 1. Illiterate 2. Below S.S.L.C 3. Pre Degree/+2 4. Graduate 5. Post Graduate 6. Professional 7. Others (specify)	
5	Employment: 1. Home Maker 2. Self - Employed 3. Government/Public Sector 4. Private sector 5. Others (specify)	
6	Monthly Income (in Rs)	
7	Assets including movable and immovable properties (value in Rs)	
8	Date of Marriage/ Living together	
9	Are you legally separated (1. Yes 2. No)	
10	If 'No' to Q. 9, are you staying separately? (1. Yes 2. No)	
11	If 'Yes' to Q.10, date of started staying separately	
12	No. of children	
13	If legally separated/staying separately, custody of children Please √ (M - Mother, F - Father, O - Others)	M: F: O:
14	Are you economically dependent? 1. Yes 2. No	
15	If 'Yes' to Q.15, dependant of whom: 1. Parents 2. Sibling 3. Relative 4. Other (Specify)	
16	Whether you have any dependants 1.Yes 2.No	
17	If 'Yes' to Q.17 , specify 1. Parents 2. Children 3 . Siblings 4 . Others (specify)	
18	Have you acquired any property after marriage 1. Yes 2. No	
19	If 'Yes' to Q. 19 , specify the source 1. Parents 2. Own 3. Spouse 4. Others (specify)	
20	Have you lost any property after marriage 1. Yes 2. No	
21	If 'Yes' to Q. 21, specify the current value of lost property (in Rs)	
22	If 'Yes' to Q. 21 , specify the breakup of loss in % 1. Medical Expense 2. Domestic Expense 3. Misuse by husband / husband's family 4. Misuse by children 5. Debt repayment 6. Others	1: 2: 3: 4: 5: 6:
23	Who filed the petition 1. Self 2. Spouse 3. Parents 4. Other (Specify)	
24	What is the relief sought for 1. Maintenance u/s 125 Cr.PC 2. Maintenance under personal law 3. Divorce 4. Restitution of conjugal rights 5. Judicial separation 6. Guardian and ward 7. Recovery of money/property 8. Declaration of status 9. Others (Specify)	

BLOCK-II
Speedy Disposal

No	Question	Answer	
1	Date of filing of the case		
2	Present status of the case 1. Case filed 2. Notice Served 3. Counter filed 4. Trial started 5 . Evidence completed		
3	If Answer to Q 2 is '5 ', give the date of completion of evidence		
4	No. of court visits in relation to the case		
5	Did you get any interim relief 1.Yes 2. No		
6	If 'Yes' to Q 5, time taken for disposing interim application	Months	Days
7	Has the interim order been executed 1.Yes 2. No. 3.Partially executed		
8	If 'Yes' to Q 7, time taken to execute the order	Months	Days
9	Time taken to receive the order on the interim/urgent petition after its disposal?	Months	Days

BLOCK-III
Conciliation

No	Question	Answer
1	Have you attended counseling 1.Yes 2. No	
2	If 'Yes' to Q 1, Who did the Counseling? 1. Principal Counselor 2. Other Counselors from Court 3.Counselors from outside the court	
3	If 'Yes' to Q.1, specify the number of sessions	
4	Whether the counseling was useful 1. Yes 2. No	
5	Have you met any expert other than the counselor 1. Yes 2. No	
6	If 'Yes' to Q.5 specify the expert 1.Psychologist 2.Pschyiatrist 3.Sexologist 4. Others	
7	Was the meeting with the expert beneficial to you? 1. Yes 2. No	
8	Did you attend any *Adalat* of the Family Court 1.Yes 2. No	
9	If 'Yes' to Q. 8, do you feel the *Adalat* as an effective forum for dispute settlement 1. Yes 2. No	
10	Have you undergone mediation 1.Yes 2.No	
11	If 'Yes 'to Q 10, in whose presence the mediation was held? 1.Advocate of Mediation Cell 2.Judge	
12	Whether the mediation was useful 1. Yes 2. No 3. Partly useful	
13	Have you been compelled to compromise on domestic violence for the sake of securing family/marriage life 1. Yes 2. No	

Place :

Date of Interview :

NAME OF FAMILY COURTS IN KERALA & NAME OF PRESIDING OFFICERS
(as on 31.1.2014)

Sl. No:	*Name of the District*	*Name of the Family Courts*	*Name of Presiding Officers*	*Date of taking charge*
1	Thiruvananthapuram	Thiruvananthapuram	Sri. G. Radhakrishnan (Rtd.DJ)	21.6.'13
		Nedumangad	(vacant)	-
		Attingal	Sri. T.K. Madhu (Rtd. DJ)	18.1.'13
2	Kollam	Kollam	Smt. Thulasi Bai (Rtd. DJ)	5.11.'12
		Kottarakkara	(vacant)	-
		Chavara	Smt. S. Santhakumari	30.3.'13
3	Pathanamthitta	Thiruvalla	Sri. K. Dharmajan	25.5.'12
		Pathanamthitta	Sri. T.U. Mathukutty (Rtd. DJ)	3.8.'13
4	Kottayam	Ettumanoor	Smt. Sophy Thomas	23.5.'11
		Pala	Sri. B. Devbal (Rtd. DJ)	22.8.'13
5	Alappuzha	Alappuzha	Sri.V.N.Sathyananthan(Rtd.DJ)	5.11.'12
		Mavelikara	Sri. R. Sudhakaran	3.8.'13
6	Idukki	Thodupuzha	Sri. Emmanuel P.Kolady(Rtd. DJ)	5.11.'12
		Kattappana	Sri. Emmanuel P.Kolady(Rtd. DJ)	26.10.'13
7	Ernakulam	Ernakulam	Smt. N. Leelamani (Rtd. DJ)	26.11.'11
		Muvattupuzha	Sri. M.P. Bhadran (Rtd. DJ)	5.11.'12
8	Thrissur	Thrissur	Sri. K.P.Bhagaval Singh(Rtd. DJ)	5.11.'12
		Irinjalakuda	Sri. T.K.Ramesh Kumar	1.8.'13
9	Palakkad	Palakkad	Sri. T.B. Sivaprasad (Rtd. DJ)	5.11.'12
		Ottappalam	Sri. M.K. Kuttikrishnan	31.8.'13
10	Kozhikode	Kozhikode	Sri. P.D. Soman (Rtd. DJ)	29.10.'12
		Vatakara	Sri. T.V. Mammootty (Rtd. DJ)	6.10.'12
11	Malappuram	Malappuram	Smt. V. Shiny	28.5.'11
		Tirur	Sri. V.P. Jayanandan	19.10.'13
12	Wayanad	Kalpetta	(vacant)	-
13	Kannur	Kannur	Sri. D. Ajithkumar	28.3.'13
		Thalassery	Sri. P.M.Abdul Sathar (Rtd. DJ)	8.7.'13
14	Kasaragod	Kasaragod	Sri. P.D. Dharmaraj (Rtd. DJ)	6.10'13

STATEMENT NO . VII(A)

STATEMENT SHOWING THE FILING,DISPOSAL AND PENDENCY OF CASES IN THE VARIOUS FAMILY COURTS IN THE STATE OF KERALA FOR THE FINANCIAL YEAR 2008-2009

Family Courts at:	Number of cases before the Family Court				Number of cases disposed of									Pendency at the end of the year(as on 31-3-2009)	Year wise breakup					
	Pendency at the beginning of the year(as on 1-4-2008)	Institu-ted	Recei-ved by transfer/r estored	Total	Trana-sferred	Without Total	Expartee	No. of cases in which parties who have decided to live together after filing Divorce case	Compro-mised	After full reference judgment for		Total excluding transfer	Aggre-gate duration for disposal(in days)		Below 1 year	Between 1-2 years	2-3 years	3-4 years	4-5 year	Above 5 years
										Petitioner	Counter petitione r									
Thiruvananthapuram	5002	4634	59	9695	17	1113	680	420	2291	353	66	4923	9935	4755	2341	1029	645	488	211	41
Kollam	4541	3941	24	8506	9	870	624	135	810	1238	177	3854	3915	4643	3159	649	366	263	57	149
Pathanamthitta	1376	1882	55	3313	44	916	397	91	433	152	42	2031	3940	1238	1027	162	42	6	0	1
Alappuzha	2131	1870	0	4001	0	113	150	163	74	1488	163	2151	4270	1850	747	411	375	317	0	0
Kottayam	1203	2227	39	3469	28	331	435	494	199	665	191	2315	474657	1126	1072	52	2	0	0	0
Thodupuzha	466	611	16	1093	1	136	46	18	150	14	0	364	2008	728	473	171	64	20	0	0
Ernakulam	3206	2638	23	5867	16	697	793	24	522	633	182	2851	1413606	3000	1805	619	293	172	88	23
Thrissur	3685	2837	58	6580	18	1513	343	155	711	80	33	2835	0	3727	2267	623	471	155	80	131
Palakkad	2110	2257	5	4372	0	0	136	20	68	1498	650	2372	2800	2000	1896	90	14	0	0	0
Kozhikode	1821	2360	478	4659	24	653	935	59	493	808	220	3168	3070	1467	938	472	27	18	6	6
Thalassery	1964	2327	9	4330	6	951	861	27	208	359	33	2439	796364	1885	1211	427	145	54	19	29
Manjeri	1471	3575	168	5214	0	1947	502	0	725	460	91	3725	2650	1489	1357	132	0	0	0	0
Wayanad	178	312	126	616	3	111	6	0	10	139	14	280	27494	333	223	105	5	0	0	0
Kasaragod	833	1005	42	1880	4	659	227	34	57	185	55	1217	637000	659	491	97	45	26	0	0
TOTAL	30017	32476	1102	63595	170	10010	6135	1640	6751	8072	1917	34525	3381709	28900	19007	5039	2494	1519	461	380

STATEMENT NO . VII(A)

STATEMENT SHOWING THE FILING,DISPOSAL AND PENDENCY OF CASES IN THE VARIOUS FAMILY COURTS IN THE STATE OF KERALA FOR THE FINANCIAL YEAR 2009-2010

Family Courts at:	Number of cases before the Family Court				Number of cases disposed of									Pendency at the end of the year(as on 31-3-2010)	Year wise breakup					
	Pendency at the beginning of the year(as on 1-4-2009)	Institu-ted	Recei-ved by transfer/restored	Total	Trana-sferred	Without Trial	Expartee	No. of cases in which parties who have decided to live together after filing Divorce case	Compro-mised	After full reference judgment for		Total excluding transfer	Aggre-gate duration for disposal(in days)		Below 1 year	Between 1-2 years	2-3 years	3-4 years	4-5 year	Above 5 years
										Petitioner	Counter petitioner									
Thiruvananthapuram	4755	4659	16	9430	16	1166	900	449	1532	463	63	4573	9462	4841	991	3067	929	639	312	176
Kollam	4643	4212	39	8894	3	900	598	307	936	1058	142	3941	3721	4950	1719	1488	802	305	238	398
Pathanamthitta	1238	1766	25	3029	7	688	403	57	416	221	34	1819	3768	1203	1124	50	9	17	2	1
Alappuzha	1850	2725	0	4575	0	381	175	107	143	1661	100	2567	2014	2008	18	57	169	445	921	398
Kottayam	1126	2440	32	3598	43	315	407	554	187	608	269	2340	1648	1215	839	71	5	3	0	0
Thodupuzha	728	758	5	1491	3	187	88	39	380	23	0	717	2072	771	534	183	39	14	0	0
Ernakulam	3000	3150	20	6170	28	706	680	31	503	403	161	2484	1568883	3658	6	18	78	395	2419	738
Thrissur	3727	3603	73	7403	23	606	463	235	700	1183	46	3233	40265	4147	1494	1174	652	325	502	0
Palakkad	2000	2379	0	4379	9	336	24	11	168	1609	88	2236	2650	2134	1927	191	11	5	0	0
Kozhikode	1467	2721	268	4456	17	486	687	71	331	1171	236	2982	3313	1457	662	688	60	14	11	22
Thalassery	1885	2349	89	4323	5	776	825	45	141	363	58	2208	443965	2110	1198	590	219	66	21	16
Manjeri	1489	4233	27	5749	0	2227	457	0	732	462	63	3941	2105	1808	1731	77	0	0	0	0
Wayanad	333	398	55	786	3	356	48	6	17	49	17	493	137874	290	227	47	11	4	1	0
Kasaragod	659	984	36	1679	4	548	201	74	71	131	39	1064	97183	611	408	65	32	25	0	0
TOTAL	28900	36377	685	65962	161	9678	5956	1986	6257	9405	1316	34598	2318923	31203	12878	7766	3016	2257	4427	1749

STATEMENT NO . VII(A)

STATEMENT SHOWING THE FILING,DISPOSAL AND PENDENCY OF CASES IN THE VARIOUS FAMILY COURTS IN THE STATE OF KERALA FOR THE FINANCIAL YEAR 2010-2011

Family Courts at:	Number of cases before the Family Court				Number of cases disposed of									Pendency at the end of the year(as on 31-3-2011)	Year wise breakup					
	Pendency at the beginning of the year(as on 1-4-2010)	Institu-ted	Recei-ved by transferr estored	Total	Trana-sferred	Without Trial	Exparte	No. of cases in which parties who have decided to live together after filing Divorce case	Compro-mised	After full reference judgment for		Total excluding transfer	Aggre-gate duration for disposal(in days)		Below 1 year	Between 1-2 years	2-3 years	3-4 years	4-5 year	Above 5 years
										Petitioner	Counter petitione r									
Thiruvananthapuram	4841	5121	118	10080	24	1122	754	169	778	658	162	3643	11080	6413	2495	2250	805	484	232	147
Kollam	4950	4325	7	9282	12	628	463	320	550	535	138	2634	488	6636	1483	2897	1148	513	210	385
Pathanamthitta	1203	1871	55	3129	10	547	256	49	277	150	26	1305	3845	1814	1590	180	25	8	9	2
Alappuzha	2008	2000	0	4008	28	897	149	208	272	168	22	1716	2014	2264	12	19	42	276	1337	578
Kottayam	1215	2675	46	3936	51	785	407	129	197	581	263	2362	1715	1523	1431	83	4	5	0	0
Thodupuzha	771	1027	30	1828	19	333	162	24	213	222	31	985	2441	824	284	432	70	27	8	3
Ernakulam	3658	3304	49	7011	45	678	746	41	598	378	129	2570	1570952	4396	3	7	28	165	363	3830
Thrissur	4147	3564	72	7783	26	866	420	92	552	1344	5	3279	865742	4478	3324	654	302	182	16	0
Palakkad	2134	1916	12	4062	2	100	101	2	12	726	134	1075	2900	2985	2312	651	19	3	0	0
Kozhikode	1457	2976	749	5182	541	428	638	244	375	1102	182	2969	5307	1672	1082	532	36	13	5	4
Thalassery	2110	2403	834	5347	601	1143	534	46	201	386	83	2393	293	2353	1745	434	136	24	9	5
Manjeri	1808	4198	8	6014	0	1831	447	0	711	399	55	3443	2560	2571	1789	782	0	0	0	0
Wayanad	290	400	29	719	3	196	39	12	11	134	14	406	156118	310	263	34	5	4	4	0
Kasaragod	611	1048	33	1692	3	776	168	30	79	71	26	1150	90260	539	483	30	11	9	3	3
TOTAL	31203	36828	2042	70073	1365	10330	5284	1366	4826	6854	1270	29930	2715715	38778	18296	8985	2631	1713	2196	4957

STATEMENT NO . VII(A)

STATEMENT SHOWING THE FILING,DISPOSAL AND PENDENCY OF CASES IN THE VARIOUS FAMILY COURTS IN THE STATE OF KERALA FOR THE FINANCIAL YEAR 2011-2012

Family Courts at:	Number of cases before the Family Court				Number of cases disposed of									Pendency at the end of the year(as on 31-3-2012)	Year wise breakup					
	Pendency at the beginning of the year(as on 1-4-2011)	Institu-ted	Recei-ved by transfer/r estored	Total	Trana-sferred	Without Trial	Exparte	No. of cases in which parties who have decided to live together after filing Divorce case	Compro-mised	After full reference judgment for		Total excluding transfer	Aggre-gate duration for disposal(in days)		Below 1 year	Between 1-2 years	2-3 years	3-4 years	4-5 year	Above 5 years
										Petitioner	Counter petitione r									
Thiruvananthapuram	6413	5785	338	12536	224	425	851	342	984	1433	275	4310	13504	8002	3315	2934	916	439	220	178
Kollam	6636	4308	26	10970	27	998	576	354	746	616	101	3391	0	7552	2630	2082	1570	630	371	269
Pathanamthitta	1814	1952	20	3786	5	426	251	128	235	212	21	1273	3326	2508	1460	798	217	31	2	0
Alappuzha	2264	2359	0	4623	35	1085	212	196	276	241	31	2041	1990	2547	516	1406	481	95	31	18
Kottayam	1523	2584	53	4160	23	613	221	30	285	1001	62	2212	1959	1925	1563	280	35	47	0	0
Thodupuzha	824	1063	61	1948	6	298	156	0	252	352	66	1124	2510	818	620	143	45	10	0	0
Ernakulam	4396	3530	190	8116	391	501	971	47	1102	478	87	3186	1603870	4539	801	3039	618	54	17	10
Thrissur	4478	4136	14	8628	14	743	827	280	698	772	38	3358	768081	5256	4038	719	290	148	61	0
Palakkad	2985	2593	2	5580	6	774	569	4	139	1100	44	2630	2900	2944	2304	539	92	3	2	4
Kozhikode	1672	3316	261	5249	50	667	878	102	286	1309	149	3391	4145	1808	1556	216	18	7	5	6
Thalassery	2353	3263	335	5951	52	1246	710	99	460	506	350	3371	2307	2528	1887	499	135	3	1	3
Manjeri	2571	3732	9	6312	0	1523	474	0	471	48	0	2516	3120	3796	1319	2149	325	1	2	0
Wayanad	310	260	169	739	1	124	30	6	19	138	10	327	106508	411	358	45	2	2	2	2
Kasaragod	539	971	15	1525	1	705	155	28	95	81	38	1102	0	422	406	9	2	5	0	0
TOTAL	38778	39852	1493	80123	835	10128	6881	1616	6048	8287	1272	34232	2514220	45056	22773	14858	4746	1475	714	490

STATEMENT NO . VII(A)

STATEMENT SHOWING THE FILING,DISPOSAL AND PENDENCY OF CASES IN THE VARIOUS FAMILY COURTS IN THE STATE OF KERALA FOR THE FINANCIAL YEAR 2012-2013

Family Courts at:	Number of cases before the Family Court				Number of cases disposed of									Pendency at the end of the year(as on 31-3-2013)	Year wise breakup					
	Pendency at the beginning of the year(as on 1-4-2012)	Institu-ted	Recei-ved by transfer/restored	Total	Trana-sferred	Without Trial	Expartee	No. of cases in which parties who have decided to live together after filing Divorce case	Compro-mised	After full reference judgment for		Total excluding transfer	Aggre-gate duration for disposal(in days)		Below 1 year	Between 1-2 years	2-3 years	3-4 years	4-5 years	Above 5 years
										Petitioner	Counter petitioner									
Thiruvananthapuram	8002	7563	102	15667	1597	745	1151	140	602	2005	490	5133	15975	8937	4576	3167	693	287	144	70
Kollam	7552	4803	14	12369	1165	1588	638	478	443	739	150	4036	0	7168	2147	2279	1409	687	331	315
Pathanamthitta	2508	2424	25	4957	0	764	492	152	430	375	31	2244	3401	2713	1964	458	244	32	4	11
Alappuzha	2547	2274	0	4821	37	1177	204	179	210	133	38	1941	3025	2843	1117	498	682	314	166	66
Kottayam	1925	2520	75	4520	39	694	316	80	334	919	55	2398	2543	2083	1533	393	89	68	0	0
Thodupuzha	818	1005	43	1866	8	348	133	0	238	377	71	1167	3325	691	533	143	14	0	0	1
Ernakulam	4539	4636	535	9710	984	997	960	89	743	558	106	3453	1533058	5273	3044	938	625	263	267	136
Thrissur	5256	5640	307	11203	1549	1217	962	187	827	1317	168	4678	891250	4976	3249	1387	184	156	0	0
Palakkad	2944	2678	9	5631	9	565	557	8	178	1054	64	2426	2900	3196	2718	368	95	11	2	2
Kozhikode	1808	3524	194	5526	14	991	352	47	371	1384	111	3256	4558	2256	1259	907	41	21	13	15
Thalassery	2528	3394	123	6045	13	1622	660	58	398	769	167	3674	7758	2358	1981	312	51	8	3	3
Manjeri	3796	3219	0	7015	0	1720	551	0	212	93	30	2606	2980	4409	2633	1459	269	47	1	0
Wayanad	411	436	14	861	8	392	48	8	20	50	12	530	12101	323	232	70	16	5	0	0
Kasaragod	422	1003	13	1438	5	572	219	10	47	66	28	942	150810	491	241	225	12	6	0	7
TOTAL	45056	45119	1454	91629	5428	13392	7243	1436	5053	9839	1521	38484	2633684	47717	27227	12604	4424	1905	931	626

List of Publications

1. Legislative framework of Family Court-An Assessment published in *ADVALOREM*-Volume-II,Issue 1,January-March 2015,ISSN:2348-5485 pages 98-106 (Law Jouranl of Banarus Hindu University)
2. Law of Maintenance under the Criminal Jurisprudnence in India; Diminishing role and a case for restructuring, UPES Law Review (Journal - University of Petroleum Energy Studies)

Legislative Framework of Family Court: An Assessment

Adv. T. Geena Kumari.[*]

Abstract

Conventional adversary legal systems have been deplored as unsuited for matrimonial disputes primarily due to time consuming procedural intricacies, structural animosity and lack of privileged treatments to women and children involved in the altercations[1].

In the matrimonial cases, an alternative legal system that is capable to address these issues was demanded by the activists as well as the policy formulators.

There was a great demand for a judicial system in the familial domain that would pursue conciliatory practices and disposes the disputes expeditiously[2]. Such a distinctive and innovative judicial system was also presumed to be proactive in delivering gender justice effectively.

Ordinary legal system was grossly inadequate to handle the fragile issues of conjugal jurisprudence. The proceedings of ordinary civil courts, rigid rules of procedures and evidence were not apt to deal family issues.

Hence the Code of Civil Procedure 1908 was amended in 1976 to provide for a special procedure in suits or proceedings related to matters concerning the family.

Not much use has been made. Again the 59th law commission had stressed that in dealing with disputes concerning women the court must adopt an approach radically different from that adopted in ordinary civil proceedings[3].

Due to the mounting pressure from women organizations the Parliament has enacted the Family Courts Act, 1984 to promote conciliation in, and secure speedy settlement of, disputes relating to marriage and family affairs and for matters connected therewith[4].

Keywords: Family Courts, Marriage, Matrimonial disputes, Divorce

Introduction

The family Courts Act, 1984 is an alternative and distinct legal frame work that it gives more importance to conciliation, less technical and informal. It gives Special powers for settlement and shows flexibility in evidence as compared to ordinary civil courts[5].

The absence of court fees and association social welfare agencies[6] make it more accessible to common people. The family Courts are dealing with disputes arising out of marital relationships and mainly between men and women.

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[1] 59th Law Commission of India Report, Amendment to Marriage Laws,1974.

[2] Statement of Objects and Reasons of the Family Court Bill, 1984.

[3] *Anil Bahal v Manju*,AIR,1989 All 9

[4] Preamble of Family Courts Act,1984.

[5] Subsection 3 of Section 10 of the Family Courts Act.

[6] Section 12 of the Family Courts Act.

Women in our society are not possessing equal status within the institution of marriage and family.

The family court act as a beacon light

The family court was established to resolve family disputes, mainly among married couple and the structure put in place was without frills and without excessive legalese. The system allowed both parties to pursue their case without the presence of lawyers[7] with judges playing the role of benign arbitrator.

The Family Courts are free to evolve their own rules of procedure, and once a Family Court does so, the rules so framed over ride the rules of procedure contemplated under the Code of Civil Procedure.[8] Special emphasis is put on settling the disputes by mediation and conciliation and it reduces the chances of any further conflict. The aim is to give priority to mutual agreement over the usual process of adjudication and to form a congenial atmosphere where family disputes are resolved amicably.

The shackles of a formal legal system and the regular process of adjudication causes unnecessary prolonging of the matter and the dispute can worsen over time. This can be a very traumatic experience for the families and lead to personal and financial losses that can have a devastating effect on human relations as well. This again points to the importance of having guidance counselors and psychological experts to deal with such matters.

The Act stipulates that a party is not entitled to be represented by a lawyer without the express permission of the Court.[9] However, invariably the court grants this permission and usually it is a lawyer which represents the parties[10]. The most unique aspect regarding the proceedings before the Family Court are that they are first referred to conciliation and only when the conciliation proceedings fail to resolve the issue successfully, the matter taken up for trial by the Court[11].

The Conciliators are professionals who are appointed by the Court. Once a final order is passed, the aggrieved party has an option of filing an appeal before the High Court. Such appeal is to be heard by a bench consisting of two judges.

The act also brought civil and criminal jurisdiction under one roof. This was seen as a positive measure to centralize all litigations concerning women. Secondly the very nature of criminal courts facilitate 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 women's favor. While the act laid down the broad guidelines it was left to the state government to frame the rules of procedure.

The legal framework: a critical analysis

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[7] Section 13 of Family Courts Act,1984.
[8] Sec 9 of the Family Courts Act,1984.
[9] Sec 13 of Family Courts Act,1984.
[10] *Lata Pimlpe v Union of India*,AIR 1993 Bomb 255.
[11] *Bini v Sundaran*, AIR 2008 Ker 84

Even after three decades, the Family Courts have not impacted the legal system the way it was expected. Reasons are multifarious. Present day disputants have little patience to go through the painful process of reconciliation and instead opt to approach divorce courts. Heavy backlog of cases in regular courts meant low priority being accorded to posting of judges to Family Courts. There can be no doubt that in some states, Family Courts have offered affordable and accessible legal service to poor and indigent litigants and has worked reasonably well with support services well knit into the system.

But general perception has been one of disappointment. The reasons attributed to the unsatisfactory functioning of Family Courts include over-expectations of the people in general, inadequate training to the personnel of support services, insufficient manpower and lack of coordination between courts and support services[12].

Even 30 years after the Family Court Act having come into operation, women and children of the rural areas are deprived of its benefits because of financial constraints and their inability to reach the courts, which are situated at the district level.

Also, practically speaking, the Act is of no help to the majority of suffering women inhabiting the rural areas, who by virtue of their ignorance and illiteracy, do not have adequate means to ascertain their husbands' incomes or investments, which can be of great help to the judge in deciding the case. Some of the bottlenecks which make the act less effective are the following:

Lack of Clarity: The act does not define 'Family'. Matters of serious economic consequences, which affect the family, including testamentary matters, are not within the purview of family courts. Only matters concerning women and children, divorce, maintenance, restitution of conjugal rights, nullity of marriage, declaration of marital status and custody of children, are within the purview of family courts[13].

Absence of lawyers: The act and rules exclude representation by lawyers, without creating any alternative and simplified rules. The rhetoric about the proceedings as conciliatory and non- adversarial is far from truth. 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 consequences of the suggestions made by court officials. For example when a woman files for divorce and maintenance, the husband turns around and pressurizes for reconciliation only to avoid paying maintenance. It is crucial to the woman that people who are mediating are aware of these strategies.

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[12] Namita Singh Jamwal, Have Family Courts lived up to expectations? Mainstream, Vol XLVII No 12, March 7, 2009

[13] Section 7 of Family Courts Act.

If a judge or a counselor feels that woman should go back to the husband simply because he is making offer and as a wife it is her duty to obey him, it will be detrimental to the women's interest. The gender aspect of the Act becomes meaningless in this situation[14].

Lack of rights: In addition to procedural lacunae, other problems connected with substantive law also persist. Family courts have been set up to deal with problems that arise on 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 woman are often unaware of their husband's business dealing and sources of income, it is difficult, if not impossible, to prove his income.

To make matters worse, the existence of 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 of woman and creating new rights in their favor 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 security for women[15]. 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. Such a law will allow transfer of 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[16].

Indifferent Counseling: Counseling and conciliation are the two pillars on which the whole structure of FCs is built. Counseling, in fact, is the foundation on which the philosophy of conciliated settlement rests. The counselors, their skill and competence have a tremendously important role to play in the whole process.

The role of the counselors is not limited to counseling but extends to reconciliation and mutual settlement wherever deemed feasible. A good number of cases (by one estimate up to 50 per cent) can be resolved by way of proper counseling. It has been observed that some of the FCs do not even have any counselors, and in good number of courts the counselors keep on changing

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[14] A. Flavia *Family Courts Act:Pro-family and anti-woman.* in *Women Studies in India-A reader* edited by Mary E John, Penguine Books India,2008 p 273

[15] Kirti Singh, *Economic Rights of Deserted Women*, Report of Seminar conducted by Economic Research Foundation, Delhi, 87 (2007)

[16] Vina mazumdar, kumud Sharma, *Persistent inequalities: Women and world development*, New York, Oxford university press, pp

frequently. For example, in the family courts at Tamil Nadu, the counselors are changed every three months[17].

Thus, when cases stretch for a period of time which is longer than this, the woman or the aggrieved person has to adjust with new counselors and their story has to be retold several times.

Many of the counselors are just part-time and are not properly trained. Proper selection and training of the counselors is of crucial importance for efficient and competent delivery of justice. As is expected, it is the counselors who take up the cases at the first stage. It has been seen that in many cases where counseling has failed at the initial stage, proactive role of the judge has helped in resolving the dispute.

The present rules or practices, however, do not permit the judge to personally counsel the parties when the case has come up for trial[18].

While a rare and sensitive counselor makes use of this power in the interest of women, more often those powers are used against the women in the interest of the family since it is imbibed into minds of such counselors that their primary commitment is to preserve the institution of marriage.

Further, the reports prepared by marriage counselors based on their investigation, are not binding on the judges. It has no evidentiary value. The report of the marriage counselor is kept confidential and not made a subject of cross-examination.

No Protection from domestic violence: A major drawback of the Family Courts is that it doesn't explicitly empower Courts to grant injunctions to prevent domestic violence. While there has been progress, viz the enactment of the Protection of Women from Domestic Violence Act, 2005 which now extends to punishing women for acts of violence as well; there are still issues of jurisdiction to be tackled[19].

It must be understood that the Family Courts Act has to be read in totality i.e. in accordance with the provisions in other laws, for example, the Civil Procedure Code on matters of jurisdiction.

Restrictive Jurisdiction: Since the Family Court has restrictive jurisdiction to deal with the suit or proceedings between the parties to a marriage. The apex court clarified the term' Parties to Marriage' in various decisions. The essential ingredient should be a dispute between the husband and wife and the said dispute can be with regard to their marital status, divorce, restitution of conjugal rights, judicial separation, child custody, maintenance as also property sharing[20].

In disputes within family between brothers, sisters, father, mother and other family members, the family court has no jurisdiction to entertain the same. The parties to the marriage

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[17] Geetha Ramaseshan, *Workshop on Women and Law*, organized by NUALS,Kerala State Planning and Indian law Institute ,Kerala Branch on 4-9 July 2009

[18] Namita Singh Jamwal, Supra 9.

[19] Now the Judicial First Class Magistrate Courts are dealing with the petitions under the provisions of Protection of Women from Domestic Violence Act,2005.

[20] Section 7(1) of the Family Courts Act,1984

referred to cannot be confined to the parties to the subsisting marriage.[21] The disputes relating to the family may be there even after the dissolution of marriage. If the disputes relate to husband and wife and such disputes arose between the parties consequent on the dissolution of the marriage, it could be decided only by a forum like family court.

This dispute between them is closely connected with family disputes[22]. It is clear that a suit or proceedings between the parties to marriage with respect to the property of the parties or either of them comes within the purview of the Family Court[23]. On the allegation that if one of the parties to the marriage had made over the property to a stranger or relative, that stranger can be included in the party array and it will not oust the jurisdiction of the family court[24].

A Hindu is under obligation to maintain an unmarried daughter in so far as such unmarried daughter is unable to maintain herself from her own source of income

This obligation is personal and legal in character and arises from the existence of the relationship between the parties[25]. A destitute widowed daughter has a right to maintenance against her brothers after the death of her father if she didn't get sufficient provision from her deceased husband's family for her maintenance and this will also come within the purview of the Family Court.[26]

A family court has jurisdiction over the suit or proceedings between the parties to marriage with respect to the property of the parties of either of them. The apex court held that the wordings 'disputes relating to marriage and family affairs and for matters connected therewith' in the preamble, must be liberally construed.

The Family court thus was held to have jurisdiction to decide dispute relating to properties claimed by the parties irrespective of whether the marriage is subsisting or not. The divorced Muslim wife, who had already filed petition under sec.3 of the Muslim Women's (protection of rights on divorce) act, has no bar for the family court to decide the matter[27].

The Family Court has no power to deal with the prayer relating to the issuance of a succession certificate or to grant relief thereof[28] but if they want a declaration with respect to the marital status or legitimacy, the family court has jurisdiction.

Appointment of Judges: It is common knowledge that in establishing the FCs, the same judiciary has been incorporated, as it existed in the civil/criminal courts. A change of cadre is yet to be adopted. The judges appointed to the family court do not have any special experience/expertise in dealing with family matters, nor have they any special expertise in settling disputes through conciliation, a requirement prescribed in the Act.

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[21] *Abhraham Thomson v.Kunjamma Jeevamony* , 2001(1) KLT SN 99

[22] *K.A.Abdul Jaleel v T.A. Shahida*.AIR 1997 Ker.269.

[23] *Shyni v. George and Ors.* 1997(1)KLJ573

[24] AIR 1997 Ker.23,

[25] 1998(2)KLT 501

[26] Kota *Varaprasada Rao And Another vs Kota China Venkaiah And others*.AIR 1992 AP1

[27] *K.A Abdul Jaleel Vs T.A Shahida*. AIR2003 SC 2525

[28] *Vasumathi v Chandriyani*,AIR,1991,Karn.201.

Further, it was laid down in the Family Courts Act that the majority of judges should be women. However, this provision has not been complied with. In the course of the workshop organized in March 2002 by the National Commission for Women, it was noted that there were only 18 women judges till then in the Family Courts in India out of 84 judges in all the 84 courts that existed at that time[29].

Lack of Uniformity: Furthermore, the lack of uniformity regarding the rules laid down by different states also leads to confusion in its application. Merely passing a central legislation is not in itself a complete step; for implementation in its spirit, it is to be ensured that some level of uniformity is maintained, at least in the initial stages of its coming into effect.

Further, the need to amend certain laws is also to be examined and implemented effectively in order to ensure that these courts do not face any hindrance in their working. The different courts follow different procedures with some of the courts such as the Uttar Pradesh state government not having made the rules till recently, the Rajasthan state government also being guilty of the same attitude of not appointing counselors although the rules may have been framed. The same rules are silent on the qualifications and method of appointment of these counselors.

In Tamil Nadu and Karnataka too the rules have been framed shoddily with there being no emphasis being given to the proper criteria of selection with people being selected from a list of ten people engaged in the field of social welfare being given to the High Court for approval.

It is only in Maharashtra that there has been some improvement in the manner in which the way the counselors are appointed and the qualifications for the same. Being made equal to the permanent employees and on the recommendation of the Bombay High Court undergoing special training at the Tata Institute of Social Sciences, these counselors are a lot more competent at least in terms of their qualifications to handle the different disputes that may arise in front of them.

Actual functioning: The setting up of family courts reflects the attitude of the state towards women's issues. It reconfirms the fact that justice most legal reforms have been carried out only as a token measure to appease women's groups without any real concern for women. The total number of family courts was few and which was not all sufficient to satisfy the emerging needs.

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 woman who do not have any exposure to and experience in dealing with public institutions are the worst suffers.

The woman are also victims of general anti-woman bias in society which is reflected in the attitude of judges, court clerks, or other person to treat the women litigants with contempt while the men experiences a certain privileges from those person depending upon the social strata they belong to.

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[29] Family Courts, Report of Workshop held on 20th March 2002, conducted by National Commission for Women, New Delhi

In the absence of basic infrastructure like a stamp office, typist, stationeries, adequate sitting arrangements, canteen, latrine, drinking water, the litigants are subjected to endless hardships. The court is seen more doling out maintenance orders, rather than a court deciding crucial legal and economic issues.

The Way Ahead

There is an urgent need to rejuvenate the system with a view to make it more gender centric and accountable. 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 organization for guidance in matters related to gender issues.

In the context of family courts, action forums should be initiated and strengthened by incorporating NGO, 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.

To avoid gender bias it is suggested that all the Family Courts must appoint at least one woman judge along with the male judges. It would not only help in speedy disposal of cases but also have a humane approach in deciding them. Every Family Court should have a Redress Cell within its premises.

The general public must have easy access to those cells where they can express their grievances, obtain information about the status of their cases, clarifications regarding the judgments passed, etc.

The marriage counselors should not be frequently changed as it causes hardships to a woman who has explained all her problems afresh to a new counselor each time. The family courts committed to simplification of procedure must omit the provisions relating to the court fee act. The existing infrastructure of the Court is not well planned. The working environment for the Court staff must be improved.

A greater number of rooms must be provided for the office staff to work in a congenial atmosphere. Good drinking water facilities clean and hygienic toilets, both for men and women, must be provided. To avoid over-congestion in the Court, proper arrangements must be made for visitors and clients to be able to sit.

Conclusion

Law can be used as an instrument of social change. Hence, the Family Courts Act. 1984 came into force when India is passing through a rapid social and economic transition and it is a piece of social legislation.

To judge the success or failure of social legislation and gauge its impact on social institution is not an easy task. Like other social legislations, the Family Courts Act alone cannot bring about the desired social change or reform. The legislators, law enforcing agencies social

workers in governmental, voluntary organizations and researchers all must pool their efforts together.

The passing of Family Courts Act is the beginning of the Family Court Movement. Social legislation is one of the instruments of Change and is not an end in itself. It is neither infallible nor omnipotent. To achieve the objectives of the Family Court Act 1984, much supportive action is needed. Viewing as a whole, each Family Court is playing its social role well. It is still in its infancy.

To make it more effective the necessary legislative administrative change as mentioned above have to be considered. Although it is essentially a Civil Court the powers of Criminal Courts should be vested in it especially against defaulting husbands who neglect their wives to maintain. Then it can achieve its social mission and we can call the Family Courts to be the arms of social revolution.

Law of Maintenance under the Criminal Jurisprudence in India

Diminishing Role and a Case for Restructuring

T. Geenakumari*

The Background

Law of Maintenance in India, since the end of nineteenth century, at least in the territories under the administration of British Crown, has not been left to the juggleries of religious personal laws alone but has been made as part of secular criminal jurisprudence. The British Indian Parliament enacted Section 488 of the Criminal Procedure Code ('Cr.PC' for short) in 1898 for preventing vagrancy by making the male members of the family liable to take care of the weak and destitute wife, parents and children.[1] While reenacting the Cr.PC in 1973 after repealing the Code of 1898 the Parliament of Indian Republic followed the suit by inserting Sections 125 to 128 in Chapter IX with wider jurisdiction and compassion for ensuring maintenance of impoverished dependents. The democratic Constitution of India not only mandated protective discrimination under Art. 15 (3) in favour of women and children but also through the noble declarations in Articles 39 and 44 has accorded sanctions to such anti-insolvency welfare legislations. The judiciary, applying the 'mischief rule of interpretation', also played a very decisive role and through progressive activism enlarged the scope and extent of such legislations.[2] Right to maintenance under the criminal law has in no

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[1] Chapter XXXVI of the Code of Criminal Procedure providing for maintenance of wives and children intends to serve a social purpose. As per Sec. 488(1), *"If any person having sufficient means neglects or refuses to maintain his wife or his legitimate or illegitimate child unable to maintain itself, the District Magistrate, a Presidency Magistrate, a Sub-divisional Magistrate or a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, at such monthly rate, not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate from time to time directs."*

[2] Earlier the issues of sexuality, morality and polygamy, whichever the way they emerge, could always be turned against the women's claims of maintenance. Gradually there is a change in judicial interpretations of sexuality, morality and adultery when it is used to contest women's claims of maintenance. Flavia Agnes, *Women and Law in India* (2004) Oxford University Press, New Delhi, pp 33 – 41. Also see, *Syed Mohd Ghouse v Noorunniza Beegum*, 2001 Cr LJ 2028, *Sunita @ Kavitha Vivekanand More v Vivekananand More*, 2001(II) DMC 693 (Bomb), *Nishi Kant Halder v State*, 2001 (I) DMC 119 (Cal), *Mahesh Chandra v Additional Civil Judge*, (I) 2001DMC 220

way taken away the rights of the parties to avail the benefits of alimony under the personal laws. The law of maintenance has thus operated in dual spheres except in the case of divorced Muslim women who have been deprived of the protection of Section 125 Cr.PC, 1973 (hereafter 'S.125' for short) by the adversary legislative intervention in 1986 [3] for nullifying the effect of *Shah Bano* [4] dictum of the apex court. With the enactment of the Family Courts Act, 1984, the operation of S. 125 have been brought under the exclusive jurisdiction of the Family Courts.[5]

The scope of Sections 125 to 127 has been enunciated by the Supreme Court in Bai Tahira[6] which was reiterated in Fazlunbi [7] in unequivocal terms:

> *"Whatever the facts of a particular case, the Code, by enacting Sections 125 to 127, charges the court with the humane obligation of enforcing maintenance or its just equivalent to ill-used wives and castaway ex-wives, only if the woman has received voluntarily a sum, at the time of divorce, sufficient to keep her going according to the circumstances of the parties. Neither personal law nor other salvationary plea will hold against the policy of public law pervading Section 127(3) (b) as much as it does Section 125."*[8]

Although the operational configuration of S. 125 has been held to be effective and pragmatic,[9] figures from the Family Courts of Kerala shows that the number of people seeking shelter under this provision, of late, has been reduced considerably. The rate of growth of the number of proceedings under S. 125 in 2009-10 over the previous year was 5.6% whereas it has come down to (-) 11.75% in 2012-13. It is inexplicable that the reduction

[3] Muslim Women (Protection of Rights on Divorce) Act, 1986 (Act No. 25 of 1986)
[4] *Mohammad Ahamad Khan v Sha Bano and Others*, AIR 1985 SC 945
[5] As per sub-sections (b) and (c) of Section 8 of the Family Courts Act, 1984, the Magistrate of First Class has no jurisdiction or power under chapter IX of the Code of Criminal Procedure 1973.
[6] *Bai Tahira v Ali Hussain Fidalli Chothia,* AIR 1979 SC 362
[7] *Fazlunbi v K. Khader Vali and Anr,* AIR 1980 SC 1730
[8] The position was also upheld in *Mohammad Ahammad Khan v Sha Bano and Others*, supra 4
[9] *Chaturbhuj v Sitabai*, AIR 1989 SC 236,*Captain Ramesh Chander Kaushal v Mrs. Veena Kaushal and Ors*, AIR 1978 SC 1807

has happened when all cases taken together in the Family Courts of Kerala has registered the rate of growth of 5.91 percent in 2012-13 over the previous year. Similarly, it has been noticed that the share of cases under S. 125 in the total cases under the Family Courts also has come down sharply. An enquiry was conducted to ascertain this phenomenon in the Family Courts of Thiruvananthapuram, Ernakulum and Kozhikode districts.[10] It has been observed that during the period of 2008-09 the number of cases under S. 125 in these districts was 1142 and the total number of cases in the Family Courts in these districts was 7152. In 2012-13, these numbers have come to 1194 and 9357 respectively. It shows that while the share of cases under S. 125 in all the cases in the Family Courts in these districts has come down from 15.97 percent in 2008-09 to 12.76 percent in 2012-13. (See Table below) This is a precarious situation that demands detailed scrutiny of the law and the sophistication involved in the implementation of it.

Districts	**2008-09**			**2012-13**		
	No. of Cases under S. 125 Cr.PC	**No. of total cases in Family Courts**	**No. of cases under S. 125 Cr.PC as % of total cases**	**No. of Cases under S. 125 Cr.PC**	**No. of total cases in Family Courts**	**No. of cases under S. 125 Cr.PC as % of total cases**
Thiruvananthapuram	406	2154	18.85	537	2716	19.77
Ernakulum	371	2638	14.06	356	3117	11.42
Kozhikode	365	2360	15.47	301	3524	8.54
Total	1142	7152	15.97	1194	9357	12.76

[10] They represent the southern, central and northern parts of the State and belong to the erstwhile Travancore, Cochin and Malabar regions respectively.

From the above figures, it appears that the confidence of the familial victims in the functional efficiency of S. 125 has been reduced considerably. This situation apparently points towards certain inherent problems in the law that has not been appropriately addressed through legislative interventions. S. 125 is a secular code, uniformly applicable to the weaker sections of domestic outfits[11] and that needs to be updated and protected. In the absence of an effective secular law of maintenance like S. 125, the poor, weak and destitute in the familial edifice will be thrown out to the mercy of patriarchal and complex personal laws. Such a situation will be disgraceful to the secular fabric of the country and surely in contradiction to the welfare ideals of the Constitution. This paper attempts to discuss the law of maintenance under the criminal justice and highlight the major issues confronting the operational efficacy. It is also endeavored to submit certain suggestions to overcome the deficiencies in the law.

Law of Maintenance under Personal Laws – A Brief Outline

Every personal law in India has insistently recognized the responsibility of an adult male member of a family to maintain his close relatives like parents, wife and children[12] when they are unable to take care of themselves. A transient observation of the provisions of various personal laws is enough to show the importance attached to the maintenance of destitute dependants in a family under such laws. Under the *Sastric* Hindu Law the head of the family is bound to maintain its members and one of the necessary incidents of joint Hindu Family is the right of maintenance.[13] When the Hindu law was codified, appropriate provisions have been incorporated in the enactments for ensuring maintenance of the wife, children and parents.[14] The Muslim Law of maintenance is a law of imperfect obligation

[11] Except divorced Muslim wives who will be ruled by the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986

[12] Although under the Hindu Marriage Act, 1955 a destitute husband is eligible for maintenance from his affluent wife, similar provision is absent in other personal laws.

[13] Mulla, Principles of Hindu Law, (16th Edn), 1990, N.M. Tripathi Pvt. Ltd. Bombay, pp.451-464

[14] Two statutes which provide for maintenance for the Hindus are the Hindu Marriage Act, 1955 (Sections 24 and 25) and the Hindu Adoption and Maintenance Act, 1956 (Sections 18 and 21)

imposing a moral and not a legal obligation.[15] It suffers from indefiniteness and this was remedied by giving extended powers to the Qazis. However, in the absence of such discretionary powers with the present day courts, there is a lack of certainty in the law of maintenance. Right to maintenance of a divorced Muslim woman is provided in the Muslim Women (Protection of Rights on Divorce) Act, 1986[16] and also under the prevailing customs. The provisions for maintenance for the Christians are contained in the Divorce Act, 1869.[17] The Parsi Marriage and Divorce Act, 1936 also provides for maintenance.[18] Although the principle is to do away with familial vagrancy and destituteness, wide variations can be observed at the operational level of the laws in fixing the eligibility of the parties to claim maintenance. The legal diversity is more palpable in the case of eligibility of maintenance of parents.[19] In addition to the personal laws the secular laws like the Special Marriage Act, 1954 also contain provisions for the maintenance of wife.[20]

Intervention of the State and Making Law of Maintenance as Part of Criminal Justice

Notwithstanding great ideals of protection of weaker sex and feeble physique under the customary laws, often the treatment meted out to such categories of people was not truly admirable. Moreover, the supports received by the weaker sections have not been considered as their right but deemed as charity. Hence there was no guarantee for the alimony or any compulsion, except the moral principles, to maintain one's dependents. This situation demanded the state to intervene and make the right to maintenance a legally enforceable claim.

[15] Sir Abdu Rahim, *Principles of Mohammaden Jurisprudence* (3rd Edn) (2001), Universal Law Publishing Co. Pvt. Ltd. Delhi, p 62
[16] Sec.3(a) of Muslim Women (Protection of Rights on Divorce) Act, 1986
[17] Sec.36 to 38 of the Divorce Act,1869
[18] Sec 39 to 41 of the Parsi Marriage and Divorce Act,1936
[19] Though the Hindu parents had a statutory right under the provisions of the Hindu Adoption and Maintenance Act,1956 and the Muslim parents too had some rights in this regards, there was no provision for maintenance of parents belonging to other religions
[20] Section 36 and 37 of the Special Marriage Act, 1954

In spite of clear and explicit anti-vagrancy stipulations in the personal laws, the British Indian Parliament exercised legislative wisdom to incorporate specific legal provisions in the criminal law of the country for granting right to maintenance to wife, children and parents from husband, father and son respectively. In Cr.PC, 1898, Section 488 provided for subsistence maintenance, inter alia, of ill used wives, parents and children who are unable to maintain themselves. The principal purpose of Section 488 was to prevent vagrancy by providing a summary magisterial remedy. In *Bhagwan Dutt V. Kanta Devi*[21] the court remarked that

> *"Sections, 488, 489 and 490 constitute one family. They have been grouped together in Ch. XXXVI of the Code of 1898 under the caption, "of the maintenance of wives and children". This Chapter, in the words of Sir James Fitzstephen, provides "a mode of preventing vagrancy or at least of preventing its consequences". These provisions are intended to fulfill a social purpose. Their object is to compel a man to perform the moral obligation which he owes to society in respect of his wife and children. By providing a simple, speedy but limited relief, they seek to ensure that the neglected wife and children are not left beggared and destitute on the scrap-heap of society and thereby driven to a life of vagrancy, immorality and crime for their subsistence."*

When the Code of 1898 was substituted by Cr.PC in 1973, section 488 was reincarnated as S. 125 with broader compassion and wider jurisdiction.[22] The very purpose of

[21] AIR 1975 SC 83

[22] "125. (1) If any person having sufficient means neglects or refuses to maintain
(a) his wife, unable to maintain herself, or
(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or
(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or
(d) his father or mother, unable to maintain himself or herself, a Magistrate of the First Class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:
Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means.

making anti-vagrancy maintenance provisions as part of the criminal code was to ensure uniform applicability of the provision irrespective of the personal laws of the parties to the suits. Law under S. 125 is a comprehensive scheme for the maintenance of wife, children and aged parents. A suit for maintenance under personal law can be properly instituted (other than the provisions of Hindu Adoption and Maintenance Act, 1956) only when there are proceedings pending or decided under that law, whereas for filing a petition under S. 125, matrimonial litigation is not a condition precedent. Also, the proceedings under S. 125 are swift and summary. The Code of Criminal Procedure (Amendment) Act, 2001 [23] has also done away with the ceiling which, prior to the amendment, was Rs.500/-. The Family Courts are now bestowed with the responsibility of exercising the powers under S. 125.[24] Section 126 (1) of Cr.PC, 1973 permits the applicants in maintenance claims to file petition in any Family Court wherever they resides, or the spouse resides or where they last resided.[25] In some cases the filing of petition can be anywhere at the option of the applicant.[26]

Scope, Extent and Applicability

Explanation.-For the purposes of this Chapter
(a) 'minor' means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875), is deemed not to have attained his majority;
(b) 'wife' includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.
(2) Any such allowance for the maintenance or interim maintenance and expenses of proceeding shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance or interim maintenance and expenses of proceeding, as the case may be;
(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole, or any port of each month's allowance [allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be] remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made:
Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due:
Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

[23] Act 50 of 2001

[24] By virtue of Sec.8 of the Family Courts Act 1984,the magistrate shall have no jurisdiction or power under Chapter IX of Code of Criminal Procedure, 1973

[25] Sec 126(1) Cr.PC 1973

[26] *Vijay Kumar Prasad v State of Bihar & Another*, AIR 2004 SC 2123

The proceedings under S. 125 are not punitive but of civil nature and the remedies provided under this section are in the nature of civil rights.[27] *"This provision is a measure of social justice and specially enacted to protect women and children and falls within the constitutional sweep of Article 15(3) reinforced by Article 39."*[28]

S. 125 enables a wife, who is unable to maintain herself upon proof of negligence or refusal by the husband who is having sufficient means, to claim monthly allowance for maintenance. The expression 'means' occurring in this section does not signify only the visible means such as real property of definite employment.[29] If a man is healthy and able bodied, he must be held to possess the means to support his wife, children and parents and he cannot be relieved of his obligations on the ground that he is unemployed.[30] The words 'sufficient means' should not be confined to the actual pecuniary sources, but should have reference to the earning capacity.[31] Neglect or refusal to maintain may be express or implied, may be by word or conduct. It means something more than mere failure.[32] Applicability of S. 125 in cases where the wife is affluent has been raised before the court time and again and the High Court of Kerala in *P.T. Ramankutty v Kalyanikutty*[33] took the view that

> *"there is nothing in the section to show that in fixing the monthly allowance the Magistrate should consider the means of the husband alone and shut his eyes to the means of the wife….. The power to grant maintenance allowance is purely discretionary and the object of the section and its social purpose are to prevent vagrancy and destitution and not to punish a husband for having neglected or refused to maintain the wife or to enrich a wife who has already sufficient income for her maintenance."*

[27] *Bhupinder Singh v Daljit Kaur*, 1979 AIR SC 442, *Zahid Ali v Fahmida Beegum,*1983 (3) Crimes 373 (Bomb)
[28] *Captain Ramesh Chander Koushal v Veena Koushal* Supra 9
[29] *Maganbhai Chotubai Patel v Maniben,* AIR 1985 Guj 187
[30] *Sucheta Dilip Ghate v Dilip Santharam Ghate,* AIR 2003 Bom 390
[31] *Nagendrappa Natkar v Neelamma,* (II) 2013 DMC 68 (SC)
[32] *Begum Subanu Alias Saira Banu & Anr vs A.M. Abdul Gafoor,* AIR 1987 SC 1103
[33] AIR 1971 Ker.22.

Although the above ruling was under Section 488 of Cr. PC of 1898, the court took similar stand in cases under S. 125 as well. 'Unable to maintain herself' is the precondition for getting maintenance.[34] It was clarified that

> *"There can be no doubt that when the Code was amended in 1973, it was at least further clarified unambiguously that a wife claiming maintenance under Section 125 must be a person "unable to maintain herself'. If she has a settled employment or properties which fetch her an income sufficient to maintain herself, certainly she cannot be said to be a person unable to maintain herself. "*[35]

The object of S. 125 is to prevent vagrancy by compelling a person to support his wife or child or parents unable to live themselves. Even if the wife is employed, that would not disentitle her from initiating action under this section, if she can convince the court that even after employment she is unable to maintain herself.[36] To come within the ambit of the phrase 'unable to maintain herself', the wife need not be an absolute destitute.[37]

Sub-section (4) of S. 125 mandates that no wife shall be entitled to receive an allowance for maintenance from her husband, if she is living in adultery or if without any sufficient reason she refuses to live with her husband or if they are living separately by mutual consent. Sub-section (5) enables the husband to get the order of maintenance passed in favour of the wife cancelled on any of the grounds above.[38] The term 'wife' includes divorced wife also and she is entitled to get maintenance till her remarriage if she is unable to maintain herself.[39] Explaining the foundation of S. 125 the Court held that

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[34] *Rajathi v Ganesan*, AIR 1999 SC 2374
[35] *Muraleedharan vs Vijayalakshmi* **,** AIR 2007 (NOC) 61(Ker)
[36] *Minakshy Gaur v Chitranjan Gaur*, AIR 2009 SC 1377
[37] *Chaturbhuj v Sitabai*, AIR 2008 SC 530. It is also clarified in various decisions that wife possessing MBA Degree (*Tejaswani v Aravind Tejas Chandra*, AIR 2010 228 (Karn) or Law degree(*Muraleedharan v Vijayalakshmy*, AIR 2007 (NOC)61 (Ker)) or sufficiently educated for getting a job *(Shiv Kumar v State of UP*, AIR 2007 (NOC) 1274 (All)) cannot be said to be capable of maintaining herself unless her income is proved.
[38] *Puliyulla Chalil Narayana Kurup v. Thayyulla Parambath Valsala* , II (2005) DMC 266
[39] *Rohtash Singh v Ramendri*, (2000) 3 SCC 180; *D. Velusamy v D. Patchiammal*,(2010)10 SCC 469

"Under section 488 of the Code of 1898, the wife's right to maintenance depended upon the continuance of her married status. Therefore, that right could be defeated by the husband by divorcing her unilaterally as under the Muslim Personal Law, or by obtaining a decree of divorce against her under the other systems of law. It was in order to remove this hardship that the Joint Committee recommended that the benefit of the provisions regarding maintenance should be, extended to a divorced woman, so long as she has not remarried after the divorce. That is the genesis of clause (b) of the Explanation to section 125(1), which provides that 'wife' includes a woman who has been divorced by, or has obtained a divorce from her husband and has not remarried."[40]

However, consequent to the enactment of Muslim Women (Protection of Rights on Divorce) Act, 1986 the law relating to Muslim divorced women is different. A Muslim husband is liable to make reasonable and fair provisions for the period of *iddat*.[41] A divorced Muslim woman who has not remarried and who is not able to maintain herself after *iddat* period can proceed against her relatives who are liable to maintain her in proportion to the properties which they inherit on her death, according to Muslim law. In the event of the relatives being unable to pay maintenance, the Magistrate may direct the State Wakf Board to pay such maintenance.

A wife may seek maintenance even without any matrimonial litigation. She may stay separate if there are sufficient grounds justifying that and yet she will be eligible for maintenance. [42] The fact that divorce has been obtained by mutual consent would not

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[40] *Mohammad Ahamad Khan v Sha Bano and Others* Supra 4

[41] Period of *Iddat* means, in the case of a divorced woman, three menstrual courses after the date of divorce, if she is subject to menstruation, three lunar months after her divorce, if she is not subject to menstruation and if she is enceinte at the time of her divorce, the period between the divorce and the delivery of her child or the termination of her pregnancy, whichever is earlier.

[42] A husband beating his wife (*Govindachari v Shantakumari*, 1977 Crl. LJ 215), false accusation of un-chastity (*Chander Prakash v Shila Rani*, AIR 19668 Del176), husband's bigamous marriage (*Saira Banu v Abdul Gafoor*, AIR 1987 SC 1103; *Rajathi v C. Ganeshan*, AIR 1999 SC 2374), husband's impotency (*Sirajmohammad Khan v Hafizunniza*, AIR 1981 SC 1972) and ill treatment for dowry **(***Ammini V Kuttappan*, 1988(1) KLT 532**)** are instances of reasonable grounds for wife's separate living.

preclude a wife from claiming maintenance under S. 125.[43] The settled position of law is that even if the wife had agreed not to claim compensation, it would be immaterial since any such agreement would be against public policy and hence not enforceable.[44] The court has jurisdiction under S. 125 only to direct payment of future maintenance from the date of petition.[45] A woman cannot stake the claim of past maintenance but entitled to get the same from the date of petition.[46]

While maintenance provisions are welfare measures aimed at preventing destitution of wives, under S. 125, only a legally wedded wife can claim maintenance. Where a marriage suffers from legal flaw, which goes to the roots of validity of the relationship, the wife is not entitled to maintenance.[47] There have been unfortunate situations where even a woman who has been defrauded by the man to enter into a bigamous relationship has had to suffer. In view of the Supreme Court rulings in *Yamuna Bai v Ananta Rao*[48] and *Bakulbai v Gangaram* [49] the settled position is that such a woman is not entitled to get maintenance. In Savitaben *Samabhai Bhatiya v State of Gujarat* [50] the Court reiterated the stance and held that

> "*The law operates harshly against the woman who unwittingly gets into relationship with a married man and S.125 of the Code does not give protection to such woman. This may be an inadequacy in law, which only the legislature can undo. But as the position in law stands presently, there is no escape from the conclusions that the expression 'wife' refers to only legally married wife"*

[43] *Rajesh R Nair v Meera Babu*, (III) 2013 DMC 67 (DB) Ker.
[44] *Anand Tukaram Nalwade v Latika Anand Nalwade*, AIR 2009 Noc 210, Bomb; *Suresh v Vidya*, AIR 2009 (NOC) 213 (HP).
[45] *Thoombath Haris v Khadeeja Sherbi*, AIR 2010 (NOC) 230 (Ker)
[46] *Dileep Kumar v State of UP*, AIR 2010 (NOC) 897 All ,see also *Pradip Kr. Saini v Seema*, 2010 (II) DMC 49 (Raj)
[47] A man took a second wife during the subsistence of the first marriage, the second marriage being void, she is not entitled to get maintenance, *Naurang Singh v Sapla*, AIR 1968 All 412
[48] AIR 1988 SC 644
[49] (1988)1 SCC 537
[50] AIR 2005 SC 1809

Compliance of strict proof of marriage is not necessary in maintenance proceedings under S. 125 and some form of marriage is enough to uphold a wife's right to maintenance. In *Dwarika Prasad Satpathy v Bidyud Prava Dixit*[51] the Supreme Court explained that

> *"Validity of the marriage for the purpose of summary proceeding under Section 125 Cr. PC is to be determined on the basis of the evidence brought on record by the parties. The standard of proof of marriage in such proceeding is not as strict as is required in a trial of offence under section 494 of the I.P.C. If the claimant in proceedings under Section 125 of the Code succeeds in showing that she and the respondent have lived together as husband and wife, the Court can presume that they are legally wedded spouses….. "*

The responsibility to maintain children is a moral obligation as well as a legal duty. The legitimate or illegitimate child is entitled to get maintenance till he/she attains majority and if the child is, by any reason of physical or mental abnormality or injury, unable to maintain himself or herself is entitled to get maintenance from the father even after attaining majority.[52] A child is entitled get claim maintenance under S. 125 independently of any matrimonial litigation between the parents. In *Noor Saba Khatoon v. Mohd Quasim*[53] it was held that

> *"the children of Muslim parents are entitled to claim maintenance under Section 125 Cr. P.C. for the period till they attain majority or are able to maintain themselves, whichever is earlier and in case of females, till they get married, and this right is not restricted, affected or controlled by the divorcee wife's right to claim maintenance……"*

[51] *Dwarika Prasad Satpathy v Bidyud Prava Dixit*, 2000 Crl.LJ (1) SC; Also see *Santosh (Smt) v Naresh Pal* (1998) 8 SCC 447
[52] Section 125 (1) (c) of Cr. PC,1973
[53] AIR 1997 SC 3280

It was further held that the provisions of Muslim Women (Protection of Rights on Divorce) Act, 1986 does not in any way affect the rights of the minor children of divorced Muslim parents to claim maintenance from their father under S. 125 till they attain majority or are able to maintain themselves, or in the case of females, till they are married. This was reiterated in *Mst. Bilkis Begum @ Jahanara v Majid Ali Gazi and Anr*.[54]

Sub section (1) (d) of S. 125 deals with the right of the parents to get maintenance from the children.[55] Neglect or Refusal by children and inability to maintain oneself is necessary to prove in such cases.[56] A child against whom a parent stakes a claim cannot take a plea that the parent must reside with him or her to justify claim for maintenance under S.125.[57] A parent's right to be maintained is not depending on his duties and obligations.[58] S. 125 (1) (d) imposes a liability on both sons and daughters to maintain their father and mother who are unable to maintain themselves and there is no exception to a married daughter.[59] Regarding the obligation of the daughter to maintain the parents it was held that

> *"The parents will be entitled to claim maintenance against their daughter, provided, however, the other conditions as mentioned in the section are fulfilled. Before ordering maintenance in favour of a father or a mother against their married daughter, the court must be satisfied that the daughter has sufficient means of her own independently of the means or income of her husband, and that the father or the mother, as the case may be, is unable to maintain himself or herself."* [60]

Traditional norms and values of Indian society laid stress on providing care for the elderly and children. However, appreciating the fact that the Indian personal laws have not been adequate in this area the State has intervened and made the law of maintenance as part

[54] JT 2002 Suppl 1 SC 115
[55] In Cr.PC, 1898 there was no provision for maintenance for the parents.
[56] *Attar Singh Jain v Amit Singh Jain*, 1982 Cr.LJ 211(Del)
[57] *Balan v Devi*, (1) 2009 DMC 701 (Ker)
[58] *Narayana Kurup v Valsala* supra 38
[59] *V.M. Arbat v K.R.Sawai*, AIR 1987 SC 1100
[60] Ibid

of the criminal jurisprudence. Since the enactment is secular and uniformly applicable to all, irrespective of religions, it is desirable to enhance the scope and applicability of S.125 for it being simple, less expensive and capable for speedy execution.

Challenges to the Efficacy

Compared to the provisions for maintenance under various personal laws, operation of S. 125 is supposed to be faster, more effective, less expensive and least complicated. As said earlier, the object of Chapter IX Cr. PC, 1973 is to provide a speedy remedy by a summary procedure to enforce liability in order to avoid vagrancy. Explaining the purpose of S. 125, the Madras High Court in *Mani v Jayakumari* [61] held that *"these provisions provide a speedy remedy to those who are in distress. They are intended to achieve this special purpose."*

Whatever be the legislative intent, providing remedies at a faster pace in the given administrative set up is nothing but an illusion. An applicant may have to wait for years to get the relief which is traumatic in the case of people who depend on a paltry sum of maintenance allowance to meet both the ends. In order to avoid such an awful situation the Criminal Procedure Code (Amendment) Act, 2001 was passed which inserted provisions for interim maintenance allowance.[62] This has, to a limited extent, helped the parties to save themselves from abject poverty and vagrancy.

An order under this section can be passed if it is proved that a person with sufficient means has neglected or refused to maintain his wife, children and parents who are not able to maintain themselves. The procedure is comparatively very simple and easier to comprehend. But, the major difficulties in establishing rights of maintenance under S. 125 are delay in execution, absence of public prosecutor, lack of investigative powers and other procedural delays due to counseling, mediation, *adalat* etc.

[61] 1998 Crl.LJ 3708 (Mad)

[62] As per the amendment, during the pendency of the proceedings, the Magistrate may order payment of interim maintenance allowance and such expenses of the proceedings as the magistrate considers reasonable and to pay the same to such persons as the Magistrate may from time to time direct.

Execution of the order is one of the most difficult parts in ensuring justice in the proceedings under S. 125. If the respondents have avoided the payment of the amount awarded under this section, the only available option is to issue summons or warrant to execute the order. These warrants are to be executed by the local police and in most of the cases it has been observed that there is laxity on the part of the police personnel in executing the warrant of maintenance. Lack of time and facilities are also major constraints in executing the maintenance orders. Since the imprisonment does not and cannot absolve the respondent's liability to pay maintenance [63] proper execution of the warrant of maintenance is an effective method to ensure prompt payment of maintenance. But this is not effectively implemented and the unscrupulous defaulters often circumvent the court directions.

Unlike in other criminal proceedings, the complainant under S. 125 is denied the services of a public prosecutor to submit their grievance. Since maintaining close relatives is declared as the obligation of an individual towards the society to prevent vagrancy and destitution,[64] it should have been taken as the duty of the State to make it more effective for which the service of the public prosecutor is indispensable. But, unfortunately, such a system has not been thought of by the legislature or judiciary.

The computation of assets and liability of the respondent, including his monthly income for fixing the amount of maintenance is now based only on the documents produced by the applicant. In the absence of such documentary evidence, the only option before the court is to believe the words of the respondent. The victims, being women, children and aged parents, may not be able to collect and produce the records and evidence. They may not have access to such documents and records. It often results in awarding inadequate allowances not commensurate to the capability of the defaulter. In such situations, for ensuring justice to the

[63] *Ajith Kumar v Shaima*, 2010 AIR (NOC) 229 (Ker)
[64] Y.V. Chandrachud C.J. in *Shabano* case, Supra 4

hapless victims the Court should investigate to determine the assets and liabilities of the respondent. But such steps are not initiated by the Family Courts.

When a case for maintenance under S. 125 comes up for consideration the duty of the court is only to allow maintenance to the eligible applicants or deny it to ineligible claimants. There is no responsibility cast on the court to decide either on the status of the parties or on uniting or separating them. But even for the proceedings under S. 125 many practices like counseling which are essential only for divorce or similar cases are being followed. Without considering the relevance of such practices, the courts are making them mandatory. In every proceeding by the Family Courts, counseling is done at the first instance itself. Such meaningless practices are contributing substantially for the delay in disposing the cases. In *adalat* and conciliations, many number of sessions are conducted which are, from the point of view of granting maintenance, futile and unwarranted. But by taking recourse from the statutory provisions the courts are continuing with these practices which in fact reduce the efficacy of the law of maintenance under S. 125.

Conclusion and Suggestions

The provisions under S. 125 are intended to fulfill a social purpose, which compel a man to perform the moral obligation which he owes to society in respect of his wife, children and parents. By providing a simple, speedy but limited relief, they seek to ensure that the neglected wife, children and parents are not left beggared and destitute on the scrap-heap of society and thereby driven to a life of vagrancy, immorality and crime for their subsistence. The jurisdiction conferred by the section on the Magistrate is more in the nature of a preventive rather than a remedial jurisdiction; it is certainly not punitive. It is the duty of the court to interpret the provisions in Chapter IX of the Cr.PC in such a way that the construction placed on them would not defeat the very object of the legislation. In the absence of any express prohibition, it is appropriate to construe the provisions in Chapter IX

as conferring an implied power on the Magistrate to direct the person against whom an application is made under S. 125 to pay some reasonable sum by way of maintenance to the applicant, pending final disposal of the application. It is quite common that applications made under S. 125 also take several months for being disposed of finally. There is an inversely proportional growth is seen in the number family court cases and S. 125 proceedings. In order to enjoy the fruits of the proceedings under S. 125, some initiatives from the part of the judiciary and legislature are necessary.

For making the operation of S. 125 more effective, following suggestions are put forward:

1. Execution of maintenance orders is currently entrusted with the local police who have the responsibility of the law order also. Due to the overburden of the police personals, the execution of warrant in maintenance cases gets least priority. On the other hand, the women cell is the wing of police dealing with issues related to women and children and they have no authority to register crimes. For execution of summons or warrant in maintenance cases there is no necessity to register crime or detailed investigation or other procedural formalities but only to intimate or catch the offender. It would be advisable if the responsibility of execution of maintenance orders is entrusted to the women's cell so that unwarranted delay is avoided.

2. Make appropriate amendments in the Family Courts Act, 1984 for making counseling an unwanted procedure for the cases under S. 125

3. At present there is no enforcement machinery under S. 125 to investigate about the assets and income of the respondents. Had such a system operative, the maintenance orders would have been more righteous and reasonable. It is imperative that appropriate provisions are incorporated in the Cr.PC to make investigations about the assets and income of the respondent's mandatory before passing the order of maintenance.

4. Unlike other cases coming under the purview of Cr.PC, the help of Public Prosecutor / Assistant Public Prosecutor is not available in disputes under S. 125. State is duty bound to protect the life and personal liberty of the persons and to achieve the same. Since the right to life includes a decent way of life by getting adequate maintenance from the husband, father or from the children, as the case may be, it is to be protected by the State. Hence the State is duty bound to provide the service of Public Prosecutor / Assistant Public Prosecutor to protect the rights of the destitute.State is duty bound to protect the life and personal liberty of the persons. Since the right to life includes a decent way of life by getting adequate maintenance from the husband, father or from the children, as the case may be, it is to be protected by the State. Hence the State is duty bound to provide the service of Public Prosecutor / Assistant Public Prosecutor to protect the rights of the destitute.

5. Even though S. 125 proceedings are treated as summary proceedings, it has not been enlisted along with other summary proceedings in Section 260 of Cr. P C.[65] In order to ensure speedy disposal of cases under the proceedings of S. 125 it is indispensable that necessary provisions for the time bound disposal of cases are incorporated in the Code.

In short S. 125 is a piece of social legislation which provides for summary trial and speedy relief by way of maintenance to wife, children and parents. The social security concept envisaged by the legislature through S.125 is to provide sustenance to a victim spouse, deserted parents and children so as to prevent vagrancy and destitution. This is in conformity with the great ideals enshrined in the Constitution of India. Hence it is imperative to secure and protect such a social legislation which can be achieved only through proper stock taking and remedial measures.

[65] There are clear provisions in the Protection of Women from Domestic Violence Act, 2005 and the sexual Harassment of Women at Workplace (Protection, Prohibition and Redressal) Act 2013 for time bound disposal of cases.