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## **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<sup>1</sup>. 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

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<sup>1</sup> 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<sup>2</sup>. The Family Courts Act 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.<sup>3</sup> Correction of the societal mindset of its gender bias depends more on social norms, and not merely on legal sanction.<sup>4</sup> The deficiency in this regard has to be overcome by leaders in the society aided by the necessary systemic

<sup>2</sup> N.S.Jamwal, *supra* p 17

<sup>3</sup> 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),

<sup>4</sup> 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 innovative 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<sup>5</sup>. 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.<sup>6</sup> 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

<sup>5</sup> Statement of objects and reasons, supra p 68

<sup>6</sup> 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.<sup>7</sup> One to three years are taken to file counter.<sup>8</sup> 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<sup>9</sup>. As majority of them are young women<sup>10</sup> 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

<sup>7</sup> Table -10 ,supra p 125

<sup>8</sup> Ibid

<sup>9</sup> Table VII and Figure XVI. Supra. p 120

<sup>10</sup> 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<sup>11</sup> 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.<sup>12</sup>

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.<sup>13</sup> 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

<sup>11</sup> *The Mediation Training Manual of India*, Mediation and Conciliation Project Committee Supreme Court of India, Supra p183

<sup>12</sup> Marylyn M Mays, ‘Responsibility of the Law in relation to the Family Stability,’ International and Comparative Law Quarterly, Vol.25, 1976 pp 409,421

<sup>13</sup> 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<sup>14</sup>.

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

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<sup>14</sup>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*’,<sup>15</sup> 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<sup>16</sup> 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.<sup>17</sup> 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

<sup>15</sup> Supra p 70

<sup>16</sup> The Jurisdiction lies with the Dowry Prohibition Officer and the Magistrate of First Class under section 8B of The Dowry Prohibition Act 1961

<sup>17</sup> 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.<sup>18</sup> 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<sup>19</sup>. 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<sup>20</sup>. Only 1 percentage got it from their spouse<sup>21</sup>. But 87 percent of the women litigants lost their assets after marriage<sup>22</sup> and 76.6 percentages lost their property due to misuse by their spouses<sup>23</sup>. In short majority of women are returning to their parental home after losing their assets along with mental and physical health.

<sup>18</sup> 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.

<sup>19</sup> Figure No.VII, Supra p 112

<sup>20</sup> Figure VIII , Supra p 113

<sup>21</sup> ibid

<sup>22</sup> Figure IX Supra p 114

<sup>23</sup> 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<sup>24</sup>. Only when based on such modified 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.<sup>25</sup> 72 percentage of women litigants revealed that they suffered domestic violence for

<sup>24</sup> B.Sivarmayya, *Matrimonial Property law in India*, Oxford University Press, 1999 p 32

<sup>25</sup> 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.<sup>26</sup> There are increasing reports of dowry related violence, rape and other atrocities against women in Kerala.<sup>27</sup> 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

<sup>26</sup> Table VII and Figure XVI. Supra p 120

<sup>27</sup> 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 crowded. 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<sup>28</sup>. 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<sup>29</sup> 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

<sup>28</sup> Subsection 4 of Section 4 of the Family Courts Act.

<sup>29</sup> Ibid

Judges and an asylum for the underperforming judicial officers<sup>30</sup>. A majority of Family Court judges felt that appointment to family courts was a “punishment posting” for them<sup>31</sup>.

### **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<sup>32</sup>. 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 used 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

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<sup>30</sup> Supra p 174

<sup>31</sup> Report of Meeting of Family Court Judges Supra p 183

<sup>32</sup> 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<sup>33</sup> 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

<sup>33</sup> Supra p 190

to secure gender justice and equality. There should be protective discriminatory provisions on the basis of constitutional mandate.<sup>34</sup> 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<sup>35</sup>. It is common knowledge that in establishing the Family Courts, the same judiciary has been incorporated, as it

<sup>34</sup> 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.

<sup>35</sup> 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.<sup>36</sup> 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*

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<sup>36</sup> 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 of 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 institutions 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.<sup>37</sup> 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.*

<sup>37</sup> 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 notwithstanding 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. Application of 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<sup>38</sup>.

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<sup>39</sup>. The Family Courts Act permits the State governments to establish courts for such

<sup>38</sup> *S.Sumathi vs R.Sharavanakumar* 2013 (2) TLNJ 622

<sup>39</sup> Table -1, Supra p 7

other areas in the State as it may deem necessary<sup>40</sup>. 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

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<sup>40</sup> 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<sup>41</sup>. 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<sup>42</sup>. 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

<sup>41</sup> 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.

<sup>42</sup> 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 adalath.

#### **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.<sup>43</sup> 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

<sup>43</sup> *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 an 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<sup>44</sup>. The entire litigants approaching before the Court are not attending

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<sup>44</sup> Report of National Workshop on Family Court, supra p 80

counseling<sup>45</sup>. 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

<sup>45</sup> 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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