ADVERSARIAL OR NON-ADVERSARIAL PROCEDURE: A STUDY OF FAMILY COURTS IN AURANGABAD, MAHARASHTRA

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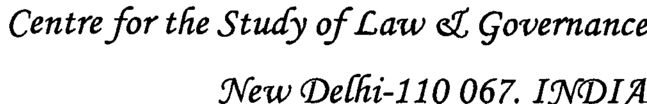

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CERTIFICATE

This is to certify that the dissertation entitled **"Adversarial or Non-Adversarial Procedure: A Study of Family Courts in Aurangabad, Maharashtra"**, submitted by **Ramratan Dhumal** in partial fulfilment of the requirements for the award of the **Degree of Master of Philosophy** of **Jawaharlal Nehru University** has not been previously submitted for the award of any degree of this or any other university and is his original work.

Ramratan Dhumal

We recommend that this dissertation be placed before the examiners for evaluation.

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Dedicated

To

My Mother

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Chapter 1
Introduction

Family is considered universally as one of the basic unit of society. Its stability results into the progress of society. This stability can only be maintained if all its members are living together without any disturbance and having faith in each other. The occurrence of disputes in the family, threatens this stability and thus the law is invoked to determine the issues and render justice. The Family Court Act, 1984 was meant for maintaining the stability of family, wherein it established the family courts in cities having more than one million populations, to try and decide marital and other family issues.

The Family Court Act 1984 was a procedural legislation which explained the proceedings as to the deciding of family matters within the framework State rules. The Act was recommended by 'the Committee on Status of Women' in 1975; Law Commission of India's 59th report, 1974 and feminist movement, with an object to have different treatment towards the marital or family issues as against the civil and criminal cases. The Act came into force on 14th September 1984 and contains twenty-three sections. Since its passing twenty four states have established family courts, where Rajasthan was the first state to establish it and Maharashtra was third state. The family courts are based on the premise that disputes within the family should be solved differently from the generally adopted traditional courts. So, the family court adopts different procedural practice (i.e. non-adversarial/informal procedure) as against the traditional courts. It is specialized court which functions under the administrative control and superintendence of the State Government or Union Territory Administration along with the relevant High Court.

The main object of the Family Court is to promote reconciliation and secure speedy settlements of disputes relating to marriage and family affairs. The underlying idea is to provide an amicable atmosphere for settlement. The same has been explained by the Hon'ble High court in *R. Durga Prasad v. Union of India* AIR Andhra Pradesh 290. as,

> By virtue of Section 9 of Family Courts Act, a duty is cast on the Family Court to make endeavor to assist and persuade the parties in arriving at a settlement in respect of the subject- matter of the suit or proceedings....

Family court exclusively deals with dissolution of marriage; declaration of the matrimonial status of any person; declaration of ownership of properties of the parties concerned; interim order of injunction arising out of marital relationships; declaration of legitimacy of any person, or guardianship of a person, or the custody of or access to any minor; and suits or proceeding for maintenance. It adopts the Code of Civil Procedure, 1908; Code of Criminal Procedure, 1973; Rules laid down by the concerned High Court and may adopt its own procedure in attaining the object laid down in the Act. The Act has initiated the counselling, a non-adversarial justice system in the family court deviating from traditional adversarial justice system which was believed to be cumbersome causing hardship to the spouses and their children with inordinate delay and separation. The paradigm shift in the procedure has been criticized by many jurists including feminists and the Act was even challenged for its Constitutional validity. The fundamental argument in the proposed research has drawn critiques from the functioning of family Courts with the adaptation of formal and informal procedure, which requires thorough examination. Keeping in view all these facts it is proposed to conduct an empirical study on the matter.

Objectives

1. To study the procedural practices carried out by the counsellors and by the court in reaching the outcome.
2. To study the nature of suits filed under the Family Courts and the result from such petitions.
3. To examine the process and outcome of litigation proceedings.
4. To study the role played by judges, counsellors, advocates in conciliation proceedings.
5. To examine the proceedings in comparison with the foreign nation's family courts (namely, United States of America, Australia and United Kingdom).

6. To study the legal procedure in consonance with social aspects and its impact on achieving justice.

Issues of research

1. Whether the establishment of Family Courts achieved the proposed objectives of speedy justice in the light of substantive justice?

2. Whether the adaptation of informal method of conciliation proceeding through counsellors at the outset of the case is sufficient to bring the litigants at justice?

3. Does the presence of informal method, formal method and any other social aspect in the Act impairs the litigant to arrive at justice?

4. Does the Family Court since from its inception brought out its own procedure, which was proposed by the Act at the very beginning?

Hypothesis

The combination of formal and informal procedures of conciliation adopted by Family courts does not serve the interest of substantive justice.

Methodology

(a) The proposed research shall include the Family Court situated at Aurangabad, which forms the universe of the study.

(b) Design/ Framework of the study - Some legal case studies of the procedure as to Family Courts of the foreign nations like U.S.A, Australia and United Kingdom could also be used in enriching the data and conclusions. This will be an exploratory research design, based on qualitative data to be collected from the primary as well as the secondary sources concern with different authorities involved in the matter.

(c) Sources of data - The research shall be carried out through primary and secondary sources with primary and secondary data based on questionnaires and interviews of lawyers practicing in Family Court, Judges of the Family Court, Counsellors,

the litigants and Non-Government Organisations at Aurangabad. The structured interviews shall be asked to lawyers, judges of family court and counsellors. The unstructured interviews shall be placed before litigants and non-government organisations.

(d) The proposed research shall include sample size of fifty to hundred with structured and unstructured questionnaires. Observation of (Law Commission Report) meetings, scanning of official records and secondary source materials both published and unpublished need to be procured. Statistical methods such as average indexing will be used for assessing the impact.

Chapterisation

Chapter I – Introduction

We have introduced the emergence of Family Court Act, 1984, which brought procedural innovation in dealing with the family and marital issues. It further explains the objectives of the study, issue of research, research methodology, and chapter scheme of the study has been discussed at the end of this chapter.

Chapter II - Theoretical Foundation

It traces the emergence of legal system in the light of maintaining egalitarian society and explains the 'meaning of legal system' which is quite a broader concept. Then it explains the present and pre-colonial Indian legal system. From the understanding of the pre-colonial and present legal system it deals with the conceptual framework of 'substantive' and 'procedural law' as both forms the base of legal system. Finally the chapter establishes the link between the 'procedural law' to that of 'adversarial & non-adversarial justice system'. The concern of the chapter is to theoretically explain the inception of non-adversarial procedural framework.

Chapter III - Family Courts in India: Its genesis and mechanism

This chapter addresses the genesis and procedural aspect of family court. Before explaining the genesis it explains the meaning of 'family' through sociological and legal

perspectives. It traces the genesis of family court in India by focusing upon the various reports recommending the establishment of such specialized court and attempts thereon made by feminists. Further, it addresses the scheme of the Act with object, rationale, jurisdiction of the Act. It traces the various procedure practiced in the family court and highlights the reason for the paradigm shift from adversarial to non-adversarial justice system. It explains the proceedings in the family courts tracing various stages and finally it highlights various issues with the family court Act.

Chapter IV - Overview of procedural practices in the Family Courts of Australia, United States of America and Britain.

This chapter addresses the various procedural practices carried out in the family court of Australia, United States and Britain. The concern of the chapter is to understand the family proceedings of these courts that can be analyzed with the family courts in India for making it more efficient.

Chapter V - Working of the Family court at Aurangabad, Maharashtra from 2001 - 2010.

This chapter analyzes the functioning of the family court for the given period. It focuses on the functioning of family court judges (adversarial) and counsellors (non-adversarial) through the available data sought from the 'Family court at Aurangabad with the permission of Bombay High Court. It explains the delay, pendency, disposal of the cases by counsellors and family court judges. It also explain the proportion of the cases decided by counsellor and family court judge. The concern of the chapter is determine the efficiency of the family court judge with adversarial procedure practice with that of counsellors with non-adversarial practice; the attainment of the objective for the which the court was established.

Chapter VI – Conclusion

This concluding part tries to summarize all chapters discussed in the present work and lays down the procedural remedies for the effectiveness functioning of the family courts.

Chapter II

THEORETICAL FOUNDATION

Society is composed of individuals, a complex unit, is in transformation from ages. In the past the society was regulated by the traditions, customs, with natural law principles and later on by the religion and finally by the normative principles with egalitarian values. This transformation took place as a result of 'jurisprudential revolution' brought out by the various schools of law. The 'Positive school' or 'Austanian School' explained the 'sovereign entity', 'subjects' and criticized the natural law school. This school gave the principle of utility and pleaded for the 'codification' of laws denying the authority of 'sacred laws' or 'god-made laws' or 'divine laws'. Further, 'Historical school' stressed to follow laws based on 'customs', as the customs include 'the will of the people' which they termed as the 'principle of volksgeist'. Due to industrialization the role of the state changed from 'laissez-faire' to 'welfare' state. Meanwhile, the 'Sociological school' pointed out that the law should incorporate and satisfy the 'social needs and wants', of the people. At the same time, the 'Realist school' explained the functional aspect of law giving importance to the judges and the role played by them in applying welfare measures. Due to the emergence of this various schools, the modern law incorporated some essential features of every school taking into consideration the reasonability, fairness and justice. This led to the emergence of 'Rule of law[1]'. The rule of law is nothing but the establishment of 'Legal system'.

Meaning of Legal System

It is quite difficult to precisely define 'legal system', as it has been argued by Friedman that-

> The awareness of a legal system as a structure in which the different organs, participants, and substantive prescriptions of the legal order react upon each other, is essentially the corollary to the increasing complexity of modern society, in which millions of individuals depends on the functioning of a complicated

[1] The doctrine of 'rule of law' was propounded by A.V.Dicey, where he expounded it with three principles one Supremacy of law, Second equality before law and equal protection of law and third predominant of legal spirit.

network of legal rules of many different types, and the interplay of public authorities of many different levels (Friedman 2003: 16).

As the legal system has wider scope with varied participants and diverse functions. So, it is quite difficult to precisely delimit it within specific words. However, Friedman quotes the definition of 'legal system' given by Ross as –

> A legal system "constitutes an individual system determined by 'an inner coherence of meaning,' . . . an integrated body of rules . . ." (Freidman 2003: 16).

Another, jurists Howard & Summers cites Julious Stone, where Julious Stone describes 'legal system' as –

> First, a legal order arises in the general range of modern states, unitary or federal and regardless of its particular ideology; second, a legal order must somehow be distinguishable from a moral and social order; third, the concept of law is a class concept, i.e., it must apply to the members of a given class; and fourth, a legal order is an "experienced single entity," something distinct from the "individual norms which are a part of it." (Friedman 2003: 18).

Further, jurist Lawrence B. Solum, lays down the essential elements of legal system, first there should be political entity, 'the State'. Second, all laws should be enacted by legislature. Third, there should be judiciary, to resolve all disputes through legal proceedings and shall direct the parties to perform specific actions (Solum 2004: 27). Thus, he formulates the composition of legal system with the establishment of legislature, executive and judiciary. These three organs form the core of every legal system.

Present Indian Legal System

The present Indian legal system has been established by the 'The Constitution of India'. It declares India to be Sovereign, Socialist, Republic, Democratic and Secular. Its objective is to achieve justice, liberty, equality and fraternity. In order to achieve these objectives it distributes the constitutional functions between the legislature, executive and judiciary and thus partly adopts the doctrine of 'Separation of powers[2]', with checks-n-

[2] The doctrine of 'Seperation of Powers' has been laid down by Montesquieu in his book titled as Esperet Des Lois which means 'Spirit of Laws', where he mentions that for the administration of the state the functions of the state shall be divided into judiciary, executive and legislature. Where the legislature shall legislate the laws, executive shall execute the law and judiciary shall adjudicate upon the laws. Furthermore, he stresses that the functions of these three organs shall be carried out in water tight

balance system. The short description of legislature, executive and judiciary is vital for understanding the Indian Legal System.

The Constitution of India establishes legislature at the centre and state level. They enact laws on entries specified in Schedule VII viz., Union list, State list and Concurrent list. Under the 'Union list' national importance subjects are mentioned on which only the Parliament has authority to make laws; under the 'State list' the local subjects are enumerated. State legislatures have the authority to enact laws with certain exceptions to the centre. Finally, in the 'Concurrent list' both the centre and state legislatures have the authority to legislate on enumerated subjects. Within this legislative framework if there is any question of interpretation then it shall be decided by the Supreme Court taking into consideration the established doctrines[3]. In order to assist the legislature an expertise constitutional body has been established who prepares and recommends the draft on the topics referred by the legislature and such drafts are placed before the respective house for discussion in the form of 'Bill'.

The second organ 'executive' is established at the centre and state. The central government exercises wider functions than the state government. The representatives of the people who establishes majority in the respective houses i.e. Loksabha and Vidhan-sabha forms the government and carries the administration, who shall perform constitutional functions as a cabinet minister or any other ministers. The President of India is the central executive head, assisted by the Prime-minister and his Council of Ministers, whereas the Governor is the state executive head, who shall be assisted by the Chief-minister and his cabinet ministers in the state, all functions are carried out in their

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compartments i.e. each and every organ shall be free to carry its own function and shall not interfere into the work of another, thus there was absolute separation of power without any check and balance, which further attracted lot of criticism.

[3] The doctrine of pith and substance, doctrine of occupied field, doctrine of colourable legislation and doctrine of repugnancy. The first doctrine of pith and substance means the object of statute, where if the legislature enacts any law then the importance should be given to the object of the statute then only its overriding effect should be determined by the court. The second doctrine occupied field relates with the concurrent list which means that once the law has been enacted on any subject by one legislature than the other should not occupy it but it should be reasonable and public interest and should not override the constitutional objectives. The third doctrine colourable legislation is based on the maxim 'what you cannot do directly you cannot do it indirectly', the state legislature cannot override its legislative powers given in the seventh schedule and cannot indirectly encroach into the field of centre. The fourth 'doctrine of repugnancy' concern with the concurrent list where it states that the state legislature should not enact such law which is repugnant to the law of the centre.

name respectively. So, the function of the executive is to execute the laws, which are being enacted by the legislature.

Finally, the third organ 'Judiciary' exercises adjudicatory function by controlling the actions of legislature and executive, which are beyond the scope of Constitution. In India the judicial hierarchy begins with the Supreme Court at the top, followed by High Courts in respective States, then by the Sessions or District courts and finally at the ground level there are Taluka courts. Beside the above mentioned courts, the executive has established 'tribunals' taking into consideration the subject matter[4] and purpose. It has qualified and expertise judges in respective subject and lessen the burden of the mainstream courts. Thus the qualified judges are supplied with the hierarchy of courts. The hierarchy begins with the Supreme Court of India, which is the highest court and its decisions are binding on all lower courts. It acts as an interpreter and guardian of the Constitution and exercises supervisory jurisdiction over all other lower courts. It exercises Writ jurisdiction[5], Original jurisdiction, Appellate jurisdiction[6] and Advisory jurisdiction[7]. Then after, it is followed by 'High court'. It is the highest adjudicatory body in the State and it exercises Writ jurisdiction, Criminal Appellate jurisdiction, Civil Appellate jurisdiction etc. Further, every district has Session courts or District courts to try civil and criminal cases and exercises appellate & supervisory jurisdiction over the

[4] Subject matter tribunal includes, Industrial Tribunal which is concerned with the industrial disputes established as per the Industrial Dispute Act, 1947, Income Tax Tribunal, Central Administrative Tribunal, Railway Tribunal, Debt Recovery Tribunal, University Tribunal and so on.

[5] Writ means order of the court, there are five kinds of writs namely, habeas corpus, mandamus, quo-warranto, certiorari and prohibition. The writ of habeas corpus is exercised whenever there is illegal detention. It means 'produce the body'. The writ of mandamus means 'to command,' it is issued when the public authority is not performing its functions, which has been prescribed by law. The writ of quo-warranto means 'by what authority', it questions the qualification of the occupant of the public office. The writ of certiorari means 'to certify' it is issued when the sub-ordinate court erroneously exercise powers beyond the jurisdiction and gives the decision. The writ of prohibition applies where the public authority or sub-ordinate court erroneously exercised the jurisdiction but have not pronounced the decision. Moreover, the writs are applied only with respect to the state authorities or public authorities. Article 32 of the Constitution of India states the writ jurisdiction of the Supreme Court, whereas Article 226 of the constitution discusses about the High Court's writ jurisdiction.

[6] Under the appellate jurisdiction the Supreme Court exercises both the civil and criminal appeal, where the there should be question of law and question of law of general importance. Moreover, the criminal appeal may lie if there is death sentence awarded by the High Court or reversed by the same. It may exercise appeal in any other cases if the High court certifies that the case deems fit for the appeal or if the high court do not provides certificate then also an aggrieved person can directly approach to the court.

[7] Supreme Court advises the President of India in various legal issues concerning legislation; this is generally carried out when the bill is sent to the assent of the President.

lower courts in the State. Then after in every taluka there is Taluka court[8] which includes Civil Judge Junior Division and Civil Judge Senior Division with respect to civil cases and Judicial Magistrate First Class and Judicial Magistrate Second Class with respect to the criminal cases.

Pre-colonial Indian Legal System

The present Indian Legal System has its roots in the British Common Law model, which began with the advent of Britishers who primarily came for commercial purpose. In order to trade with India the East India Company[9] was established under the seal of Queen Elizabeth, which subsequently got control of the territory and administration. The Company's early administration was only limited to Surat. So to expand their trade they sought certain concession from the Mughal emperor and from other concerned rulers. They sought permission to build factories/trade centres at various places like Madras, Calcutta and Bombay[10]. The factory at Madras was named as Fort St. George, whereas the factory at Calcutta was known as Fort William. These forts were used for residential purposes and for carrying out trade activities. The Company's administrative and judicial powers were regulated through 'Charters' issued by the crown, later on by 'Regulations' and finally by 'Acts' passed by British parliament had drastic changes in the judicial administration of India.

With the establishment of factories at Bombay, Madras and Calcutta the company had limited its administration to these areas only. It was the 'Battle of Plassey 1757' which truly established the British rule in India and regulated the Indians. In Madras the 'Charter of 1661' authorized the Britishers to adjudicate company subjects including the Indians in all cases as per the Law of England (Banerjee 1977: 11). The Charter of 1687 established municipality at Madras presidency, where the municipality consisted of one mayor, twelve aldermen and sixty or more burgasses. The mayor with two aldermen formed the 'justice of peace'. It was also referred as the 'court of record'. It had

[8] The Taluka court is generally established by the government upon the advice of the concerned High Court of that state.
[9] The East India Company was established on 31st December 1600 by the Charter of 1600 for fifteen years license, the trade powers could have withdrawn if the company was not under profit.
[10] Bombay was acquired by Britishers in dowry from Portugese.

jurisdiction to try civil and criminal cases. Further, the municipality was authorized to levy tax. In Bombay the judicial administration during the early British period (1600-1726) was based on Portugese laws as previously it was ruled by Britishers. In Bombay the Britishers could not develop the efficient legal system in the early period as it was under the control of Mughals for some years, so the whole administration was collapsed. The same situation existed in Calcutta. Thus there was no uniformity in the administration of Company's rule. This non-uniformity was removed by the 'Charter of 1726'.

The 'Charter of 1726' established municipalities at Madras, Bombay and Calcutta; and 'Mayor's court'. The Mayor's Court exercised Civil and Testamentary jurisdiction. The appeal from Mayor's court went to the 'Governor or President in Council'. The criminal jurisdiction was vested with religious preachers (Banerjee 1977: 14). The judges in these courts were all merchants and traders who were unskilled and untrained in law. So the need was felt to have skilled and trained judges, this was satisfied by the 'Regulating Act of 1773'.

The 'Regulating Act of 1773' was passed by British Parliament with an object to improve the administration of the Company and to control the affairs of company, as it occupied diwani rights in Bengal through 'Battle of Plassey in 1757'. It established the 'Governor-General and Council' and 'Supreme Court' at Calcutta. This was the first Act which demanded requisite qualification for the appointment of judge. The Supreme Court consisted one chief justice and three other judges with Barristers in England or Ireland and with not less than five years of standing. The Supreme Court was empowered with civil, criminal, admiralty and ecclesiastical jurisdiction. The Supreme Court could try cases only of British subjects or of those who were under the protection of company in Bengal, Bihar and Berar. The judges were directly subjected to King in council. The appeal from Supreme Court went to 'King in Council' or 'Privy Council'. The appeal to Privy Council was also established by the Charter of 1726 and Charter of 1753 (Keith 1990: 154). As per the Act, Warran Hasting was appointed as the first Governor-general. He established two superior courts at Calcutta one is 'Sadar Diwani Adalat' and another 'Sadar Nizamat Adalat'. The Sadar Diwani Adalat functioned as a Civil Court, it tried

civil cases having monetary value above rupees five hundred. It contained one president with two members of the Governor General and Council. It had the appellate jurisdiction and heard appeal from the lower civil courts. The Sadar Nizamat Adalat formed the criminal court or Fauzdari Adalat. 'Daroga-i-Adalat' was the presiding officer of the Sadar Nizamat Adalat who was appointed by Nazim. He was assisted by the Chief Qazi, Chief Mufti and other Maulvies. The sentence of Sadar Nizamat Adalat was confirmed by Nazim. At the same time Warran Hasting prepared 'Code of Gentoo Laws or Ordinations of the Pundits' for the Hindus which were used for resolving the disputes by the hands of pundits. Further, during this period Warran Hasting had established two lower courts one 'Mofussil Diwani Adalat' and another 'Mofussil Fauzdari Adalat' in every district. The civil cases were tried by Diwani Adalat whereas the criminal cases were tried in Fauzdari Adalat. The collector was appointed as the presiding officer of both Adalats. In criminal cases he had the supervisory powers rest left with the Muftis and Maulvies. The appeal from both the lower court went to Sadar Diwani Adalat and Sadar Nizamat Adalat respectively. Thus, the collector became more powerful so, engaged into corrupt practices. After Warran Hasting Lord Cornwallis became the 'Governor-General' and contributed in developing codified laws. In 1793 the 'Cornwallis Code' was adopted, by which the collector's judicial powers were withdrawn and restricted only to the collection and management of revenue. He reconstituted the Mofussil Diwani Adalat into 'Zillah Courts' or 'City Courts'. At the same time, the 'Provincial courts' were established. The appeal from 'Provincial court' went to 'Sadar Diwani Adalat'. At the same time the 'Commissioners' were appointed who were natives and who tried cases up to Rs.50/-. Further, Lord Cornwallis introduced the Court fee system in India, which was later abolished (Banerjee 1977: 365). In determining the family and marital issues of Hindus and Muslims, their respective personal laws were followed with 'expert assistance' from Pundits (Hindu Law Officer) and Muftis/Kazis (Muslim Law Officer) (Banerjee 1977: 369). Meanwhile, during administration of justice, the need was felt to have codified laws to bring uniformity in the pattern of administration of justice as there was extreme inconsistency. During same period the Benthamite philosophy of codification was flourishing so, Indian conditions too

warranted the need to have codified laws so as to counter the extreme diversity. As Banerjee quotes Sir William Jones who explain the prevailing conditions at that time as,

> ...the Hindus and Mahomedan laws are locked up for the most part in two very difficult languages, Sanskrit and Arabic, which few Europeans will ever learn...; and if we give judgment only from the opinions of the native lawyers and scholars, we can never be sure that we have not been deceived by them...a single obscure text, explained by themselves, might be quoted as express authority, though perhaps, the very book from which it was selected it might be differently explained, or introduced only for the purpose of being exploded (Banerjee 1977: 255).

> The application of uncodified Hindu law and Muslim law to matters in which litigants of the two communities had a vital interest was no easy matter. Old Sanskrit and Arabic texts frequently upheld contradictory principles. Obscurity of language was a hindrance to correct interpretation (Banerjee 1977: 263).

So in order to have codified laws the 'Law Commission' was established by the Charter of 1833. The Law Commission was entrusted with the power to draft laws as recommended by the 'Governor-General in Council'. All laws passed by the Governor-General-in-Council were to have the force of Acts of Parliament and hence called Acts instead of Regulations (Sastri 1947: 17). The Law Commission after its establishment enacted some of the important codes which are even part of the existing Indian legal system; they are the Indian Penal Code, 1860; Criminal Procedure Code, 1861; Law of Limitation, 1859 and Code of Civil Procedure, 1859. Before the Law Commission's attempt to codify procedural law Justice Impey had prepared first code through the Regulation of 1781. It contained ninety-five sections. It was the civil procedure of British India. Its preamble stated that, its object was to ensure the ascertainment of the powers, authority and jurisdiction of the courts, to remove ambiguity, obsoleteness and repugnancy of the rules, orders and regulations and to make the people aware about 'the rules, ordinances and regulations to which the judges apply'. Further, it compelled the Diwani Adalats to decide the cases in accordance with the principle of 'justice, equity and good conscience' (Banerjee 1977: 258). Justice Impey's code further incorporated the rule that all 'rules, orders and regulations' should be openly read and published in the courts and translated in local languages (Banerjee 1977: 259). While drafting these various codes, the members of the Law Commission were of the opinion that it should be

suited with the Indian local conditions. As quoted by Banerjee, the Law Commission was of view that,

> ...what India wants is a body of substantive civil law, in preparing which the law of England should be used as a basis but which, once enacted, should itself be the law of India on the subject it embraced.... And such a body of law, prepared as it ought to be with a constant regard to the condition and institutions of India, and the character, religions and usages of the population, would, we are convinced, be of great benefit to that country (Banerjee 1977: 314-315).

Further, with the Mutiny of 1857, the East India Company lost its control over the Indian territory as the charge was directly taken by the British Parliament by passing the 'Government of India Act, 1858'. The Crown was represented by 'Secretary of State' in India and he was assisted by fifteen members. With the parliament influence, the Indian High Court Act, 1861 was passed. The object of this Act was to resolve conflicts between the Crown's court and the company's court with regard to the jurisdictions, as the former appointed more qualified judges whereas the latter had inexperienced judges who were mostly traders. Thus, the Act established High court at Bombay, Calcutta and Madras. The establishment of High Court brought an end to the company's Supreme Court and Sadar Adalats. The High court consisted of one Chief justice and not over fifteen judges of which one-third were to be barristers, including the Chief justice and one-third from the covenanted civil services. The High Court exercised Original jurisdiction, Appellate jurisdiction, Admiralty jurisdiction, Testamentary jurisdiction, Intestate and Matrimonial jurisdiction. Further it was entrusted with the supervisory authority over lower courts like call for returns, direct the transfer of suits, make general rules for proceedings, prescribe forms, and settle fees but only with the approval of Government of India (Keith 1990: 204-205).This peculiar feature today is exercised by the Supreme Court over lower courts. The appeal from High Court went to the Privy Council. The collector was declared as the administrative head. In Bengal the District/Session judges exercised civil and criminal jurisdiction over wider area as compared to the small cause court which was presided by 'Sadar Amins' and 'Munsifs'. In 1898 the jurisdiction of the 'Magistrate First Class' was increased where it could pass sentence of imprisonment up to two years and impose fines up to Rs.1000/-. The 'Magistrate Second Class' could pass sentence up to six months and fine up to Rs.200/-. The 'Magistrate Third Class' empowered to pass

sentence up to one month and fine up to Rs.50/-. In Madras the District/Session Judges exercised unlimited civil jurisdiction and subordinate 'Munsifs court' exercised jurisdiction up to Rs.2500/- (Keith 1990: 208). In Bombay the civil courts were reorganized in four grades namely, District judges, Assistant judges, First and Second class subordinate judges. The Amins and Munsifs were abolished (Keith 1990:208). In 1862 the jury system was introduced in India (Banerjee 1977: 153). The Indian Councils Act, 1861 expanded the members of the council as the non-officials were appointed, who had the authority to legislate laws with certain limitations like for passing the legislation the prior sanction of the Governor-General was mandatory. It further empowered the Madras and Bombay to legislate on various subjects which were assigned to them by the Act. Then after, the Indian councils Act, 1892 was passed, which gave autonomy to the legislative members to discuss the Budget. The Indian Councils Act, 1909 began constitutional government. The elections were introduced by which an Indian was appointed to the Executive council and local bodies elections were also introduced. The elections were carried out through separate electorates on religious basis. Thus, it was an experiment to seek participation of the Indians into the administration, however, there lacked an intention to establish democracy in India (Sastri 1947: 23). With the end of World War I and pressure aroused on to British to give freedom to the India as it promised to do so, but later on deviated and so to relieve the pressure the Britishers passed the Government of India Act, 1919. Through this Act the Central government was made responsible to the home government, where as the provincial government was made partly responsible. It allowed the free and influential discussion over the bills in legislature. It established dyarchy system (Sastri 1947: 26). Finally, the constitutional status was tried to establish by the Government of India Act, 1935. It abolished the Indian council and replaced by the Secretary of State's Advisers. It further established the 'Federal Bicameral legislature', with 'Council of State' and 'Federal Assembly'. Further, it divided the subjects as reserved subjects and transferred subjects. It further established the Federal Court, which resolved the issues of federation as it replaced the High Court of 1861. The Federal court was the highest court, and the appeal from it went to the Privy Council (Sastri 1947: 27). The introduction of English system in India led to the

emergence of new class of Indian Lawyers. Regulation of 1793 stated in its preamble that it was

> Necessary for enabling the courts duly to administer, and the suitors to obtain justice that the pleading of causes should be made a distinct profession; and that no persons should be admitted to plead in the courts but men and education versed in Mahomedan or Hindoo law, and in the Regulations passed by the British government; and that they should be subjected to rules and restrictions calculated to secure to their clients a diligent and faithful discharge of their trusts (Banerjee 1977: 264).

Thus from uncodified regime to Britishers codified regime, the present Indian legal system has adopted the common law model with certain modifications suited to the Indian conditions in establishing 'social order'. Thus, the 'legal system' having rule of law meant for the betterment of the human beings who strive for a peaceful society without any bloodshed and discrimination, which is embedded with justice, ethics and morality, and try to maintain the values of life.

Substantive Law and Procedural Law

In legal system, law is generally divided into two types: "Procedural Law" and "Substantive Law". The 'substantive law' deals with the purposes of law, its subject matter, and concerned with the ends of the administration of justice. On the other hand 'procedural law' governs the process of litigation and it includes civil and criminal legal proceedings (Fitzgerald 2004: 461). The procedural law is also referred as 'adjective law', it governs the machinery of the courts and develops the methods by which individuals enforce their rights in the various courts[11]. Further Salmond defines the 'Substantive law' in terms of determining the conduct of the litigants, whereas the procedural law determines the conduct and relations of courts with the litigants (Fitzgerald 2004: 462). Further, Howard & Summers lays down the distinction between the 'substantive law' and 'procedural law'. 'Substantive law' gives rights and duties to the citizens, and 'procedural law' defines the rights which shall be enforced in a court of law. Substantive law shall define the legal relations between citizens and between state and citizen, whereas procedural law provides the way in which the substantive law shall

[11] The New Encyclopedia Britannica. Vol.I. 15th Edition. University of Chicago: New York. Pg.113.

be made, administered and enforced by legislators, judges, administrators and private citizens. Both, substantive and procedural law governs different kinds of conduct (Howard & Summers 1972: 50). According to the New Encyclopedia Britannica,

> Procedural law is commonly contrasted with substantive law, which constitutes the great body of law and defines and regulates legal rights and duties. Procedural law is a set of established forms for conducting a trial and regulating the events that precede and follow it. Its primary concern is the just and efficient enforcement of the substantive law for instance, where as the substantive law of the criminal code outlines what an offence is and how it will be punished, criminal procedure specifies how the rights of the accused will be protected[12].

The substantive law and procedural both forms the two sides of a coin. In order to seek justice both are the vital. Moreover, the procedural part is crucial as compared to the substantive law, as the procedure need to be reasonably fair, if not properly framed then it may result into injustice and the substantive rights cannot be effectively enforced. For example, the International Humanitarian Rights have been laid down by the United Nation through, Universal Declaration of Human Rights, 1948; but there is no procedure for enforcing these rights. Thus, the substantive rights are mere paper work. So, the determination of a dispute depends upon the fair application and composition of the procedure. A fair procedural system provides a public affirmation in justice (Feinman 2006: 95). The effectiveness of law is generally determined by the application of the procedural law.

> Law, to effective, must go beyond the determination of the rights and obligations of individuals and collective bodies to an indication how these rights and obligation can be enforced. It must do this, moreover, in a systematic and formal way. Otherwise, the numerous disputes that arise in complex society cannot be handled efficiently, fairly, without favoritism, and equally important for the maintenance of social peace, without the appearance of favoritism. This systematic and formal way is procedural law[13].

Moreover, the judge cannot decide the dispute according to his personal views as it tends to be bias, so he has to decide the case in accordance with procedural law. Many of the

[12] The New Encyclopedia Britannica. Vol.I. 15th Edition. University of Chicago: New York. Pg.113.
[13] Ibid.

jurists have termed, the procedural law as the 'heart of law', and justifies it on the ground that, procedure gives the substantive law the authority through bringing it in consonance with the reality of concrete facts, in the absence of which the substantive principle is indeterminate. Secondly, the author argues that, the judicial procedure is more responsible for the efficient legal system, if the trial or pre-trial procedure in the court is unfair then the citizens concludes that the whole system is unfair. Thirdly, the procedural worldwide has uniformity in certain context mainly in its 'absolutes values', which are followed in every legal system, like 'no man should be judge in his own cause', 'issuance of notice', 'audi alteram partem i.e. hearing of both sides' and so on, thus establishing "procedural absoluteness" . Fourthly, the procedure is fundamental as it upholds the basic substantive values such as life and liberty. The author cites Justice Frankfurter of the United States Supreme Court as

> The growth of liberty has been very largely the result of the development of procedural safeguards.

Finally, the author mentions that, law of procedure truly maintains the basic function of law i.e. maintenance of order, through resolving and settling the disputes (Howards & Summers 1972: 82-86).

Adversarial and Non-adversarial Procedure

The effective functioning of law to a large extent depends upon procedural law. The procedural law regulates the conduct of the parties in the court who are represented by lawyers before a neutral judge and by applying the fair principles the justice is delivered. Procedural law is categorized into 'Adversary procedure' and 'Non-adversarial procedure'. From the 'adversarial procedure' 'Adversarial justice system' emanates and from 'non-adversarial procedure' the 'Non-adversarial justice system' derives. According to the New Encyclopedia, 'Adversary procedure' is the method of exposing evidence in court. The two parties examine and cross-examine their witnesses. In case of criminal cases the proceedings are generally carried out by State, whereas in civil cases the litigants have to put forward their claim and denials, where both of them have to engage their own lawyers. There is a pattern of presenting the evidence, the skill of advocate

matters a lot (The New Encyclopedia: 113). According to the 'Black's Law Dictionary', 'adversary system',

> A procedural system, such as the anglo-american legal system, involving active and unhindered parties contesting with each other to put forth a case before an independent decision-maker (Garner 2004: 58).

According to Mirjan Damaska, as quoted in Black's Law Dictionary

> The term 'adversary system' sometimes characterizes an entire legal process, and sometimes it refers only to criminal procedure. In the latter instance, it is often used inter-changeably with an old expression of continental European origin, 'accusatorial procedure', and is juxtaposed to the 'inquisitorial' or 'non-adversary' process. There is no precise understanding, however, of the institutions and arrangements denoted by these expressions (Garner 2004: 58).

Jackson and Doran summarizes certain features of the 'adversary procedure' as,

> So far the only essential characteristic of adversariness as an expression of an ideal conflict-solving procedure is that of a contest presided over by an impartial and independent arbiter. The aim of the procedure is to resolve the conflict in a manner which is accepted by both sides, and it is often assumed that procedures likely to promote acceptance are those which give process control to the parties, in terms of collecting the evidence and presenting it in court (Jackson & Doran 1995: 59-60).

'Adversarial procedure' means when two sides of the case square off to uncover truth and affix responsibility by examining evidence through the questioning of witnesses (Koss 2000: 3). According to Mr. Justice Davies of the Court of Appeal, adversarial system includes key procedural elements viz., orality, a single climatic trial, party control over the dispute resolution process and belief that 'the best and fairest way of resolving a dispute is by contest between competing adversaries'. Further, Louise Greentree quotes G.L. Davies while explaining 'adversarial system' as –

> The adversarial imperative is the compulsion which litigants and especially their lawyers have to see the other side as the enemy who must be defeated; the 'no stone unturned mentality' is the compulsion to take every step which could conceivably advance the prospects of victory to reduce the risk of defeat (Greentree 2009: 3).

She further quotes Christine Parker and Adrian Evans as –

> Although this 'adversarial mindset' has its roots in litigation, it also extends the most areas of practice.... Some lawyers operate on the basis that litigation is the likely outcome of each retainer. This leads to an attitude of precaution and anticipation of litigation directed at covering every circumstance and eventuality which makes legal advice (even outside of litigation) time consuming, complex and costly (Greentree 2009: 3).

According to Upendra Baxi, adversary system manifests a "winner-take-all" attitude (Baxi 1986: 15). In broad terms, an adversarial system refers to the common law system of conduction proceedings in which the parties and not the judge have the primary responsibility for defining the issues in dispute and for investigating and advancing the dispute (ALRC The adversarial and non-adversarial debate). Further, the adversarial is always contrasted with the non-adversarial or inquisitorial procedure. The inquisitorial procedure is generally followed in continental nations and the adjudicatory body has more investigative powers. The common law countries generally follow the adversary procedure.

Non-adversarial approach of justice system in recent years has received importance in United States, Canada, United Kingdom, Australia and elsewhere and it is also practiced in India too to a certain extent. According Buck, as cited by Michael King,

> Non-adversarial justice is an approach to justice, both civil and criminal, that focuses on non-court dispute resolution, including the role of tribunals and public and private ombudsman (King 2009: 5).

According to Michael King, non-adversarial procedure has a wider connotation and includes alternative dispute resolution system, restorative justice, holistic law, therapeutic jurisprudence, problem-solving courts and collaborative law (King 2009: 1). Further Michael King and other explain the object of 'non-adversarial procedure' as –

> Its basic premises are prevention rather than post-conflict solutions, cooperation rather than conflict, and problem solving rather than solely dispute resolution. The truth-finding is the aim, rather than dispute determination, and there is a multidisciplinary rather than legal monopoly approach (King 2009: 5).

The non-adversary system includes multiple disciplines such as Alternate Dispute Resolution (Mediation, Negotiation, Conciliation and Arbitration), Participatory justice, Therapeutic Jurisprudence, Preventive or Proactive Law, Restorative justice, Problem-solving Courts, Managerial justice, etc. Michael King and others specify certain elements of Non-adversarial justice system as the concept is still evolving. The non-adversarial justice system includes the balance of public and private interest, wherein the court sets norms and procedures that regulate the adjudication of disputes giving force to private agreements and publicly exploring and denouncing unacceptable or anti-social conduct. Further it is meant for delivering justice to the community by resolving the disputes thus maintaining safety and good order. Further, it include problem solving approach than the dispute resolution, as the traditional court system to a certain extent has failed to cope with major social problems. It ensures procedural justice to the parties with neutrality, respect, participation and trustworthiness. It further requires the judges to be active and not passive in handling the case. It also includes inter-disciplinary approach in dealing with the issues as importance is also given to the behavioral science. Finally it is based on the idea that avoiding legal disputes is inevitably better for the client than costly, time-consuming and stressful litigation (King 2009: 124). In India the non-adversarial justice has been practiced through Alternate Dispute Resolution mechanism developed by the Industrial Dispute Act, 1947 and then by the Arbitration and Conciliation Act, 1996. The former dealt with labour issues which were settled through conciliation and other adjudicatory bodies and in the latter commercial disputes were solved by the process of arbitration and conciliation, as prolonging of these matters will worsen the conditions of both the parties involved in the dispute and moreover it was concerned with economic aspect. Further, in eighties the need was felt to have non-adversarial approach to the cases involving family issues and the same was also recommended by the Law Commission of India, as the adversary system was seen as destructive to the family relationship because it exacerbates conflict between parties and fosters a win-lose mentality with increased costs and prolonged the matters for years. On the contrary, non-adversarial options such as family counselling are considered as positive alternative to the adversarial system encouraging communication, problem solving and are more likely to provide win-win results. The substantive family law in India during British rule was not codified except

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Christian and Parsi law. Britishers restrained themselves from codifying the Hindu laws but after independence the Hindu Family law was codified, as the codification was necessary because large section of society remained unregulated and there was violation of egalitarian principles. Women were the most vulnerable section who suffered due to non-codification. Thus, the substantive laws were framed in relation to succession, adoption, guardianship etc. These substantive family laws were governed by the adversary procedure laid down in Code of Civil Procedure, 1908; Code of Criminal Procedure, 1973 and Indian Evidence Act, 1872. As stated earlier the adversarial justice system was not suited to the family matters completely as it generated delay, high litigation cost, win-losing mind set, etc. So, the non-adversarial approach was introduced in 1984 by enacting the Family Court Act. The Family Courts are specialized courts with less adversarial procedure, deals the family issues in therapeutic way and differs in practice with the traditional civil & criminal courts. The central philosophy behind the operation of specialist family court is attention to both the psychological and legal aspect of relationship breakdown. Further, 'counselling', a non-adversarial approach has been introduced in the family court which tries to bring settlement within the parties making both of them in better-off position by understanding their real issues. Thus, the Act brought varied procedural changes in order to cope with the family issues. This various procedural innovation, models of the family court, functioning of the family court and other features of the Act have been dealt in the next chapter.

Chapter III

Family Court in India: Its genesis and mechanism

Introduction

India has vast diversity in terms of standard of living, cultures and religious practices. This diversity is a matter of concern and not of pride as, it creates hurdle in the development of society. The society is fragmented into caste and class thus maintaining inequality in the society. Such heterogeneity has been of great concern, attempts have been made to reform it in the past and present. As a part of reform the Constitution of India was adopted to establish egalitarian society by excluding all forms of discrimination, imparting social, economic and political justice. The Constitution further established a legal system to ensure substantive and procedural justice. It guaranteed equality through Article 14, 15 and 16. Article 14 confers equality before and equal protection of law. Further, Article 15 prohibits discrimination against any citizen on the grounds of sex, religion, race, caste etc; and Article 16 provides equal opportunities to all citizens in public appointments. Thus, it makes the 'State' responsible upon violation of these rights and at the same time the 'State' has to protect the interests of all citizens. It broke down the prolonged hegemony of the religious traditions which paved as hurdles in the path of human development. Due to rigid religious traditions the women, children and vulnerable sections of society were denied the equal treatment and the same has been maintained to a certain extent by the personal laws (includes rules with regard to marriage, adoption, guardianship, dissolution of marriage, maintenance, etc.) which bears the influence of religion. Before the Constitution of India came into force the Muslims, Christians and Parsis were regulated by their respective personal laws but the major section of society i.e. Hindus were left unregulated. But as a result of Constitution the Hindu family and matrimonial affairs were codified. Thus, every religion practiced it own personal law in the family matters; this was so to maintain their religious identity and even the State too did not dared to touch their religious faith, showing the 'secularist' approach. Persistently, there is demand from Supreme Court to establish Uniform Civil Code as enshrined under Article 44 of the Constitution to ensure effective justice,

eliminate inequality created by the personal laws and to tackle various other legal issues. The Supreme Court time and again, through Shah Bano case[14], Sarla Mudgal case[15], John Vallmatton case[16], directed the legislature to frame the 'Uniform Civil Code', but nothing has come out of it. Yet the personal laws regulate the family affairs. Thus, the personal laws are merely 'Substantive Laws' explaining the consummation of marriage, its dissolution, maintenance, adoption, etc. These substantive provisions are enforced in the court of law, which determine the substantive rights of the parties upon its breach, so 'family court' is one such court with decides the substantive rights of the parties relating to family matters with different procedural setup. So for effective justice the procedural setup of the court is vital. In order to understand the procedural set up in the 'Family court' beforehand it is important to know the term 'family'. The chapter further explains the genesis, object, rationale, operation, jurisdiction, procedure, proceedings and tension within the Family court.

Meaning of 'Family'

The term 'Family' has no specific definition, as it differs from sociological and legal perspective. From sociological perspective its evolution has been discussed by various theorists like, Engel, Freud and Socio-biologists. All this theories explained 'family' in terms of kinship and marriage. So, marriage is one of the basic elements of the family. Further, there evolution in family as it is not static. Like due to industrialization family has undergone radical change, from joint family to modern nuclear family. Recently, one American anthropologist George Peter Murdock traced the function of the modern nuclear family as, sexual, economic, reproductive and educational (New Encyclopedia Britannica 1993: 67). From legal perspective the term 'family' has been defined by the Civil Procedure Code, 1908, in order XXXII-A6 as follows:

> 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;

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[14] Mohammad Ahmed Khan v. Shah Bano Begum AIR 1985 SC 945
[15] Sarla Mudgal v. Union of India AIR 1995 SC 1531
[16] John Vallamattom v. Union of India AIR 2003 SC 2902

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

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

The above definition considers family in terms of compositions which includes husband, wife, their children, their collaterals, their ascendant and descendants. It considers marriage as a pre-requisite for establishing family. 'Family' is one of the essential units of the society which maintains the social order. Further, the Report of India to the United Nation on Convention on Rights of Child, 2001 stresses the importance of 'family' as,

> The family is perceived as a unit of two or more persons united by the ties of marriage, blood, adoption or consensual unions, generally constituting a single household, and interacting and communicating with each other. It is considered the basic unit of society, to meet the needs of the individuals and those of other societal institutions. It determines the development of individuals, in that it is a major source of nurturance, emotional bonding and socialization. Enriching family life can, therefore, best enhance human development (pg.131).

Further, the Report explains the changing scenario of the 'family' as,

> As a social institution, the family has consisted of more or less formal rules and regulations, organised around the fulfillment of societal needs. It has historically been a part of the ethnic community, which has promoted patriarchy in the family, especially in the upper economic groups where property is the base. In a patriarchal structure, age, gender, and generation strictly determine roles and responsibilities and control and distribution of resources. Control over resources and assumption of superiority gives the man the authority to make decisions about his dependants, which would mainly include women and children. With the advent of industrial civilization and with the advancement of technology, new factors of social transformation have begun to accumulate, which are potent enough to create devastating social changes and shatter many of the old foundations of family life. The old role of the family and the scope of economic security it could provide have been eroded. The family is gradually becoming the smallest unit of human association, which is essential for the prime act of procreation. Similarly, large families have become, in most cases, an economic liability instead of an economic asset. The breaking up of the old family system is brought to notice by an increase in child crimes, in the rate of divorces and in cases of desertions (pg.105).

Thus, marriage is one of the essential aspects of family and it has been regulated by the personal laws setting conditions to its consummation and dissolution. The Muslim personal law regards marriage as a contract. The contract implies that it can be breakdown at any time. The Shariat Act specifies various grounds on which the marriage can be repudiated. Amoung Hindus before the codification of Hindu laws in 1950's, marriage was considered as 'sacrament' so there was no dissolution. Beside Hindus and Muslim personal laws, the Parsis are regulated by the Parsi Marriage and Divorce Act, 1936; Christians by the Indian Christian Marriage Act, 1872 and the Indian Divorce Act, 1869. Irrespective of this, the civil marriage has been recognized by the state, where inter-caste and inter-religious marriages are allowed through Special Marriage Act, 1954. These substantive provisions as to marriage are determined in the court of law. Family court too determines the validity of marriage with other allied subjects with different procedural setup as against the traditional courts.

Family Court: Its genesis

The Family Court Act, 1984 (herein after referred as 'the Act') brought a procedural reform in dealing with the family issues. Its genesis can be traced in the report of 'Committee on the Status of Women', 1975; the report of Law Commission, 1974; the Code of Civil Procedure Amendment, 1976 and persistent efforts of the feminist movement in 1980's. The report prepared by the 'Committee on the Status of Women,' in 1975, which was submitted to United Nations General Assembly on the occasion of International Women Year, stressed for the establishment of specialized family court (Agnes 2011: 270). Further, the demand was intensified by the feminist with creating pressure on the government to establish specialized family court to protect the rights of the women who experienced gender discrimination in the society. Like one Mrs. Kapila Hingorani through her writings in papers, urged an urgent need to establish family courts (Verma 1997: 28). Similarly, Smt. Durgabai Deshmukh also pleaded to establish such specialized courts. Further, Ratna Verma argues that,

> The main impetus to enact the Family Court legislation came from women's movement which brought to the focus anti-women bias within the law and in the courts. The demand was made for reforming laws and procedures which would

> ensure women's economic rights within marriage and make divorce proceedings speedy, less traumatic and just for women (Verma 1997: 15).

At the same time the Law Commission in its 59th report (1974) recommended that in dealing with disputes concerning family, the court ought to adopt humanistic approach radical steps distinguished from the existing radical approach existed in the ordinary civil proceedings; reasonable efforts at settlement before the commencement of the trial; participation of gender-sensitized personnel including judges, social workers and other trained staff. It reiterated that,

> We are clear in our mind that if these measures are adopted, they will go a long way towards the proper resolution of such disputes. We may add that selected judicial officers could be posted in courts empowered under both the Acts, and by dealing with disputes concerning the family, they will be able to acquire experience and knowledge which should not only be value to them but will ultimately benefit the society.

Further, the Civil Procedure Code Amendment, 1976 adopted different procedure in dealing with family matters as Order 32A[17] was inserted. With this all efforts the Family Court Act, 1984 was passed which established the family court.

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[17] Order XXXIIA Ins. by Sec. 80 by Act No. 104 of 1976 (w.e.f. 1-2-1977).

1. Application of the Order
(1) The provision of this Order shall apply to suits or proceedings relating to matters concerning the family.
(2) In particular, and without prejudice to the generality of the provisions of sub-rule (1), the provisions of this Order shall apply to the following suits or proceedings concerning the family, namely:-
(a) a suit or proceeding for matrimonial relief, including a suit or proceeding for declaration as to the validity of a marriage or as to the matrimonial status of any person;
(b) a suit or proceeding for a declaration as to legitimacy of any person;
(c) a suit or proceeding in relation to the guardianship of the person or the custody of any minor or other member of the family, under a disability;
(d) a suit or proceeding for maintenance;
(e) a suit or proceeding as to the validity or effect of an adoption;
(f) a suit or proceeding, instituted by a member of the family relating to wills, intestacy and succession;
(g) a suit or proceeding relating to any other matter concerning the family in respect of which the parties are subject to their personal law.
(3) So much of this Order as relates to a matter provided for by a special law in respect of any suit or proceeding shall not apply to that suit or proceeding.

2. Proceedings to be held in camera
In every suit or proceeding to which this Order applies, the proceeding may be held in camera if the Court so desires and shall be so held if either party so desires.

The philosophy in establishing family court is based upon the principle that the State is under Constitutional obligation to protect its citizen, especially those who are vulnerable in the society, such as women and children, as they are unable to protect themselves and thus to preserve the family life and maintain their welfare (Goldberg & Sheridan 1959: 539). The arguments in establishing specialized family courts are that the family law is concerned with the human relationships so issues arising out of it should be deal separately different from that of traditional civil actions. Secondly, that certain issues especially concerning child left un-contentiously or undefended, so to thoroughly hear and determine the interest of all stakeholders, therefore the family court. Thirdly, the family matters involves deeper social aspect issues, so to bring it to the fore it requires ancillary services from counselors, medical experts, psychiatrics, etc. (The New Encyclopedia 1993: 82).

Definition of Family Court

There is no specific definition of the 'Family court,' even the Family Court Act 1984, does not define it. But some of the jurists have tried to define the term taking into consideration the features attached to it. According to Jane Wade the family court has following features –

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3. Duty of Court to make efforts for settlement
(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.

(3) The power conferred by sub-rule (2) shall be in addition to, and not in derogation of, any other power of the Court to adjourn the proceedings.

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 or this Order.

5. Duty to inquire into facts
In every suit or proceeding to which this Order applies, it shall be the duty of the Court to inquire, so far is reasonably can, into the facts alleged by the plaintiff and into any facts alleged by the defendant.

(1) a single filing system for all of the problem areas of each family so that the family could be viewed as a whole rather than as a series of individual problems;

(2) judges who ideally have some training in both law and the social sciences, such as sociology or psychology, and are capable of co-operation with staff in disciplines other than legal;

(3) counsellors and social workers who would be attached to the court and who would co-operate closely with the judges to provide information and to encourage communication between potential litigants;

(4) a co-ordinating point for those with special skills, psychological, legal or other, in relation to the broken family. Thus the abilities of the "experts" can be utilized with a greater degree of efficiency;

(5) informality, low cost and easy access to the court.

(6) active public relations efforts to promote the image of the family court as an informal, helpful and approachable institution for families in trouble;

(7) jurisdiction over a wide range of "family law" areas so as to avoid the multiple hearings, forum shopping, duplicated evidence, delay and high costs traditionally associated with families in trouble in federations such as the U.S.A., Canada and Australia (Jade 1978: 820-821).

Another author Barbara A. Babb defines 'Family Court' as,

> A unified family court is a single court system with comprehensive jurisdiction over all cases involving children and relating to the family. One specially trained and interested judge addresses the legal and accompanying emotional and social issues challenging each family. Then under the auspices of the family court judicial action, informal court processes and social service agencies and resources are coordinated to produce a comprehensive resolution tailored to the individual family's legal, personal, emotional, and social needs. The result is a one family-one judge system that is more efficient and more compassionate for families in crisis (Babb 1998: 33-33).

According to William 'Family Court' is,

> ...a court which is empowered and staffed to handle all family problems of a justiciable nature. As thus conceived, the family court would handle annulment, divorce, alimony, desertion and non-support, custody, adoption, neglect, bastardy, intra-family conduct problems, juvenile delinquency, etc. ...it operate in a multi-function capacity, family courts employ wider range of personnel than do other courts. These may include probation officers and supervisions, psychiatric social workers, clinical psychologists and psychometrics, nurses, pediatricians, investigators, psychiatrists, administrative officers, referees, and marriage counsellors (Kepharti 1955: 62).

Thus, the Family court has distinct procedural practice, trained judges, staff, participation of other social scientist like psychologist, etc.

Object and Rationale of the Act

The object of the Act as laid down in the preamble is,

> To promote conciliation in, and secure speedy settlement of disputes relating to marriage and family affairs and matters connected there with.

From the preamble it appears that, the Act have two main objects, firstly, to settle the marital disputes including family affairs with non-adversarial approach like conciliation and secondly, it strived to settle such disputes speedily without any undue delay. From the above objects the following assumptions take place –

Firstly, the Act with the establishment of Family court destined to fortify the family ties, amoung the spouses by preserving the marriage as against the breakdown. Secondly, it encourages informal mode of settlement distinct from the traditional pattern practiced in the court, resultantly non-adversarial approach introduced in the marital issues. Thirdly, it initiated multidisciplinary approach to resolve marital discord, as it embedded social issues amoung the stakeholders, so it involved counselors, legal experts, medical experts, psychiatrics etc. Fourthly, it promotes women judge as the presiding officers of this court, keeping in view the object of the court, and obviously their lenient and deep understanding towards the women issues. Finally, settlement process is being considered speedy stringent rules of evidence law are not followed. Thus there is modification in the interest of justice to have expeditious disposal of family disputes.

Beside the above assumptions, the rationale for setting family court were firstly, the adversarial mode of settlement was felt to be cumbersome and inefficient to settle marital disputes, with inordinate delay in settling such issues making the marital ties breakable. So, the need was felt to have procedural innovation with the changes in court's setting and methodology in reaching the judgment. However, the mounting pressure from feminist, to fulfill the constitutional commitments, towards having 'gender justice' was another reason in establishing Family court. Feminist and lawyer, Flavia Agnes specifies that,

> The ideology underlying the enactment was to create women-friendly adjudication spaces, away from the formal structures of civil and criminal courts.

> The task ahead was to ensure that crucial rights of survival of women are not subsumed beneath technicalities and legal jargon. Since adversarial procedures adopted by civil courts are dilatory and confrontational, it was presumed that new litigation for a, less formidable in its appearance, inquisitorial in its approach, and more accessible to women from marginalized sections, would tilt the balance in their favour. (Agnes 2011: 271).

Secondly, as a result, it was pre-conceived and established that the presence of counselors during the settlement process could safeguard the women's right and ensure gender justice in the court of law, which was being demanded by the feminist during the same period. Thirdly, in order to ensure more privacy to the spouses, engaged in marital dissonance over the marital affairs, and issues concerning it, can be withheld before the camera proceedings, shift from the 'open court' to the 'closed court' and an attempt to make the women feel free to discuss her issues and arguments, which are usually constrained by the patriarchal social order within which they are brought up, to maintain the dignity of both the parties. As, the family matters involves obscene allegations and counter allegations about the sexual conduct, which may humiliate women's dignity in the open court (Agnes 2011: 313). Fourthly, an individualistic approach towards the litigants. Finally, such mode of settlement was not introduced in the marital conflicts earlier and thus the importance was given to the Non-adversarial procedure.

Operation/jurisdiction of the Family court: Mechanism

The Family Court Act, 1984 received the President's assent on 14th September 1984, as it was a central statute; the responsibility was shouldered on the state government to establish such court. With the passage of the Act, the first family court was established in Rajasthan in 1987, followed by Karnataka, Maharashtra and so on. Till 2005, ninety one family courts have been established in India so far (Agnes 2011: 273).

The Family Court exercises territorial and subject matter jurisdiction. In territorial jurisdiction the family court entertains family matters within the metropolitan area where the population above one million, as its operation is subjected to that area only. The subject matter jurisdiction includes, suits relating to marriage for a decree of nullity of marriage, restitution of conjugal rights, judicial separation, dissolution of marriage; it entertains the issues relating to the validity of marriage, suits relating to the matrimonial

status of any person, issues relating to matrimonial property of either spouse or both shall be tried before this court, issues relating to the legitimacy of any person, suits relating maintenance, child access custody and guardianship, maintenance cases of criminal nature filed under Section 125 of the Code of Criminal Procedure, 1973. The family court has authority to issue injunction orders over the matters arising out of marital relationship. Thus, in the areas where family courts are established all above mentioned suits are tried by it excluding the civil and criminal courts.

Procedure: Paradigm shift from adversarial to non-adversarial

The Act brings out the procedural innovation, a paradigm shift from 'adversarial to non-adversarial' mode of settlement. The efficient method of settlement has been adopted with regard to marital issues under the Act, in order to prevent the breakdown of marriage. The Act renders obligation upon the family court to prevent the marriage from breakdown by assisting and persuading the contesting parties to reach to a settlement[18]. While bringing such settlement the Family court has to follow the rules which are framed by the concerned High Court of the State[19]. The Act empowers the Family court to adjourn the proceedings for a time being, when it appears that there is 'reasonable possibility of settlement' and attempts should be made towards such settlement[20]. This stage is also the beginning of 'conciliation proceedings/ non-adversarial proceedings'. The procedure is being guided through the rules of the High court but at the same time the Act prescribes the 'general procedure' which is adopted in the general proceedings of the court. The general proceedings includes the application of Criminal Procedure Code, 1973 for the maintenance proceedings[21] under section 125 of the Code of Criminal Procedure, 1973 and the application of Code of Civil Procedure 1908 with respect of the suits of civil nature as given under Section 7(1) of the Family Court Act, 1984[22]. However, the Act authorizes the Family Court to develop and adopt its own procedure relating to the suits or proceedings or truth of facts alleged by one party and denied by the

[18] Section 9 (1)
[19] Section 9 (1)
[20] Section 9 (2)
[21] Section 10 (2)
[22] Section 10 (1)

other in order to arrive at the settlement[23] without giving importance to the above mentioned procedure. In nutshell, the Act specifies three kinds of procedure for the family court, first the rules framed by the concerned High Court within the state. Second, the adaptation of general procedure laid down under Code of Criminal Procedure, 1973 and Code of Civil Procedure, 1908. Finally, the procedure developed by the Family court itself. The Act incorporates the in-camera proceedings[24] on the desire of the either party as deemed reasonable by the court, keeping in view the nature of the case.

For the welfare of the family, the court is entrusted, to seek services of the following persons, in every suit or proceedings pending before the court viz.,

a. Medical experts
b. Such person (especially women) who are associated with the parties or not.
c. Professionals who are engaged in promoting the welfare of the family.

The above services shall be deemed as assistance to the family court and in consonance with the discharging of functions imposed by this Act[25]. Moreover, the availing of services are not binding on the family court it is up to its discretion. The Act further stipulates the legal right of the petition 'to be represented by the counsel'. However, the lawyer can be appointed as 'amicus curie' upon the permission of the court, where such representation deemed reasonably fit by the court and in the interest of justice. This is so to dilute the 'adversary' approach of the court and to make it somewhat 'informal'. The parties are left free to appear before the court and may argue their case by themselves. Moreover, it is believed that the participation of lawyers increases delay due to legal tactics and make the case more like a 'contest', where there exist winning and losing situation than the settlement. With this aspect the court has extra-discretionary powers[26].

The Act authorizes the court to receive as evidence any report, statement, documents, information or matter, which will effectively decide the dispute, in

[23] Section 10 (3)
[24] Section 11
[25] Section 12
[26] Section 13

accordance with the Evidence Act, 1872. In order to seek speedy justice in matrimonial cases, the Act allows the court to record the statements of the witnesses in short and precise, entered into 'memorandum' of substance. The memorandum shall be signed by the judge and witnesses after deposition. This memorandum of substance shall be in writing and shall commence from the examination. This is the record of oral evidence[27]. Further, the court has to receive the formal evidence upon affidavit and this evidence should be read in any suit or proceedings before the family court[28]. During the proceedings the court has the power to summon and examine any person relating to the facts in the affidavit, and that to only upon the application of either party and where the court reasonably thinks fit[29]. This is the evidence of formal character. Finally, the court after examining all witnesses and facts shall pronounce the judgment. The Act states that the judgment shall contain concise statement of the case, points of determination, the decision thereon and finally the reasons for decision[30]. Once the decision is pronounced by the court, it can execute it. The execution takes place in accordance with the Code of Civil Procedure, 1908, for those decree and orders which are of civil nature[31]. In case of order of maintenance under Section 125 of the Code of Criminal Procedure, shall be executed in accordance with the Code of Criminal Procedure, 1973[32]. At the same time the Act states that the orders can be executed by the Family court themselves or it may transfer it to another Family court or any other civil court having local jurisdiction.

The order of the Family court except interlocutory order can be challenged before the High Court on the question of law or question of fact[33]. Further, the Act stipulates the parties from filing an appeal where there is settlement between the parties[34], after consent the decision is binding on both the parties. The appeal shall lie within thirty days from the date of decision, beyond which the matter shall not be entertained[35]. It further expressly precludes any appeal or revision before any other court except High court, from the

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[27] Section 15
[28] Section 16(1)
[29] Section 16(2)
[30] Section 17
[31] Section 18(1)
[32] Section 18(2)
[33] Section 19(1)
[34] Section 19(2)
[35] Section 19(3)

orders, decrees, judgment passed by the Family court[36]. The appeal before the High court shall be heard by two or more judges[37].

The Act authorizes various authorities to frame rules in regulating the functions of the Family court. The Act empowers the High court to make rules concerning the normal and extra working hours of the family court, sittings at various places, and efforts toward procedure followed by family court in persuading the parties to settlement[38]. Further, Central government can frame rules with regard to the appointment of judges of the Family court with the consultation of Chief Justice of India[39]. Finally, the state government can frame rules with the consultation of High court on the salaries and allowances of judges, the terms and conditions of counsellors or other services of the officers appointed under this Act, payment with respect to medical expert, payment & expenses of legal practitioner[40]. Thus it has adopted non-adversarial procedure by appointing counsellors and other social scientists.

Appointment of Judges

The family court judges are assigned with dual function of deciding the marital dispute and to protect the marital discord. The Principal and Additional judges in the family court are appointed by the State government, with the consultation of concerned High Court[41]. The chief judge in the family court is called as 'Principal Judge' and other judges are referred as 'Additional Judges'. The Act prescribes the qualification of family court judge as, the person should have at least seven years experience in judicial office in India or of tribunal or Union or State servant with special knowledge of law; or should possess such qualification as laid down by the Central Government with the consultation of Chief Justice of India[42]. While appointing the judges, the Act dispenses certain primary responsibility upon the selection authority to observe that the desired candidate should have commitment towards the protection and preservation of the institution of

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[36] Section 19(4)
[37] Section 19(5)
[38] Section 21
[39] Section 22
[40] Section 23
[41] Section 4
[42] Section 3 (a) & 3 (b)

marriage, welfare of the children, possess experience & expertise conciliation [43]. Moreover, the Act gives to women as judges of the family court[44]. The family court judge retires at the age of sixty-two years.[45]. Finally, the salary and other perks shall be decided by the State government with the consultation of High court[46].

Appointment of other personnel

The Family court functions with the blend of formal and informal system of adjudication with judges and counsellors. However, the counselor works under the control of the judge to a certain extent. The role of the counsellor is to determine options of settlement and try to convince the parties to reach to a settlement. The cases to the counsellor are referred by the family court judge. The counsellors are appointed by the State government after consulting the High Court; it shall also determine other terms and conditions[47]. At the same time, the Family court may avail services from the social welfare agencies, institutions, professional persons, and persons in social welfare or any other association who are engaged in promoting the welfare of the family thereof[48].

Procedural practice in the Family Court

The family/matrimonial matters are of civil and criminal nature. The matrimonial matters of civil nature include suits relating to adoption, civil maintenance, guardianship, matrimonial property, custody, etc. Whereas, family matters of criminal nature includes maintenance proceedings under Section 125 of the Code of Criminal Procedure, 1973. The civil nature family matters are tried before Civil Judge Senior Division (C.J.S.D.) and criminal nature family matters before Judicial Magistrate First Class (J.M.F.C). This practice is carried out in the every district and taluka place (See Fig.3A and Fig.3B).

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[43] Section 4 (4) (a)
[44] Section 4 (4) (b)
[45] Section 5
[46] Section 4 (6)
[47] Section 6 (1) & (2)
[48] Section 5

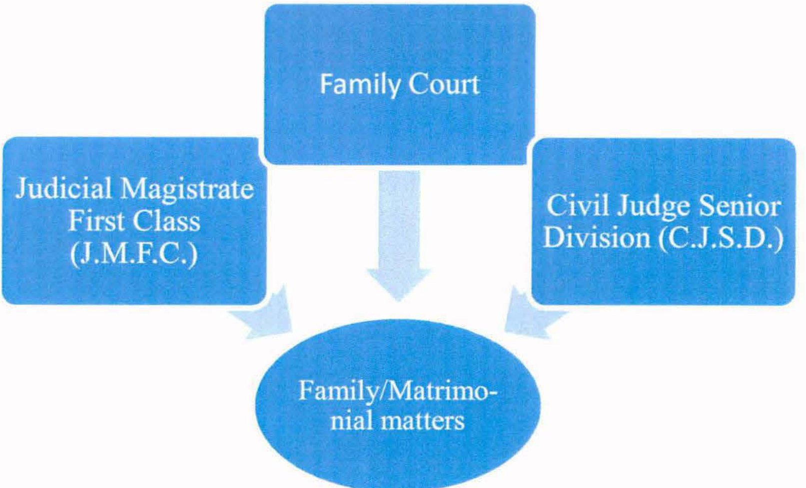


Fig. (3)(A)

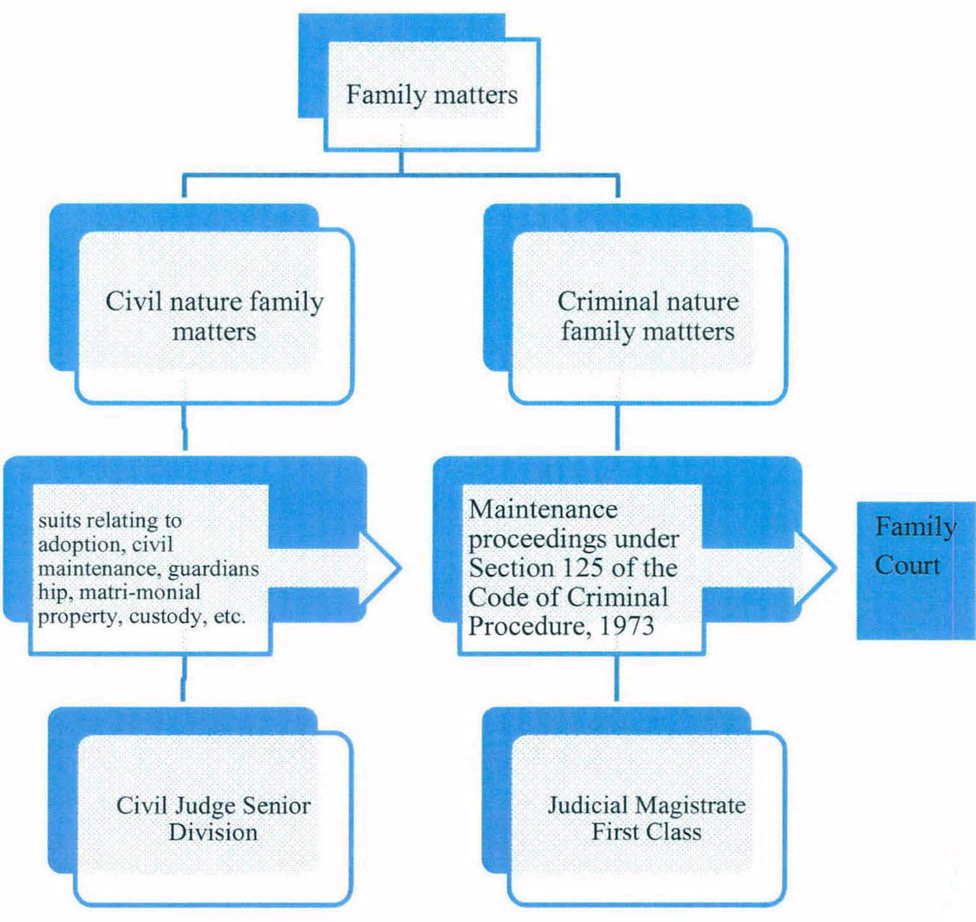
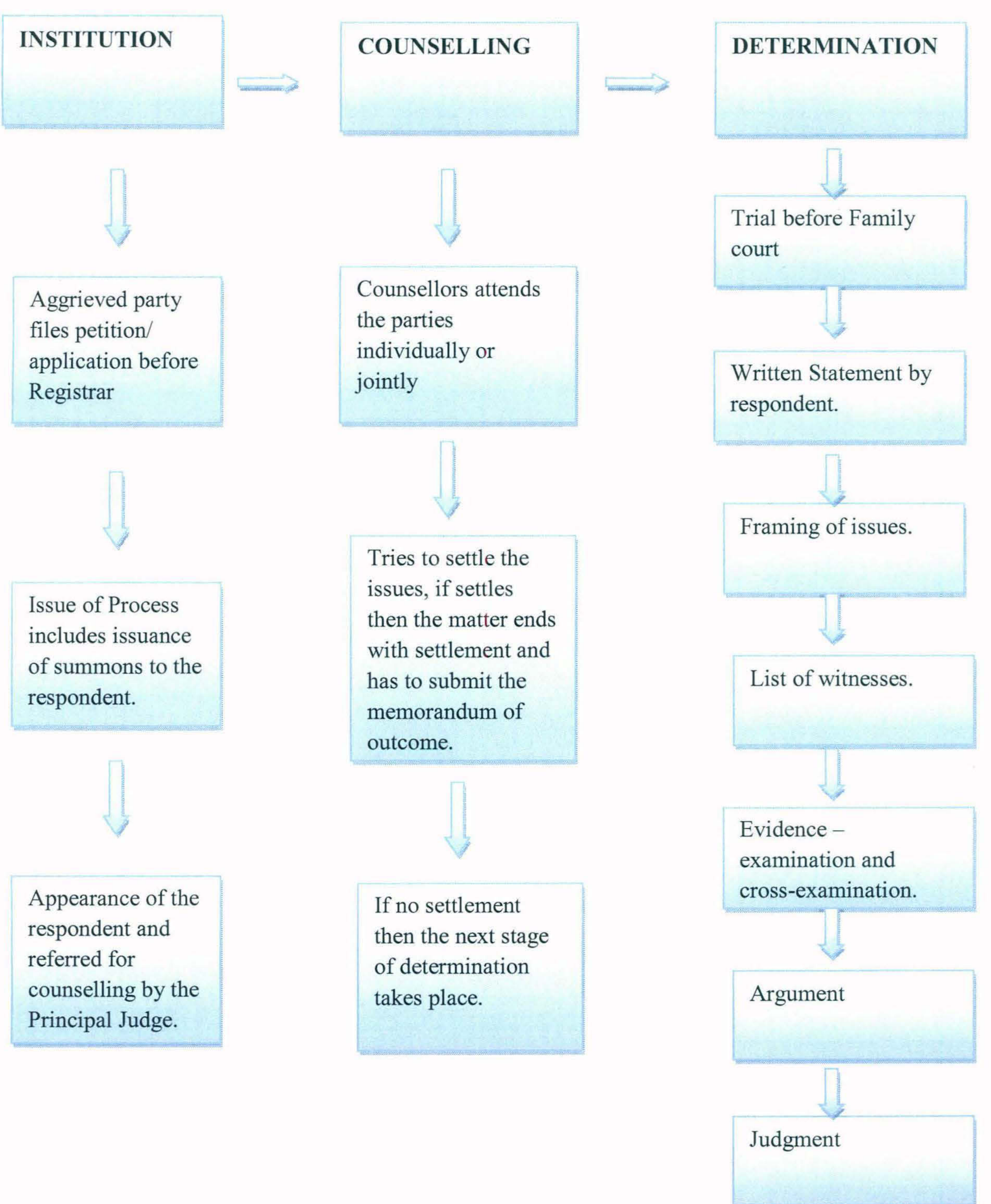


Fig. (3)(B)

Beside the above mentioned courts, the Family Courts established in metropolitan cities with population of and over one million exercises jurisdiction over both civil and criminal nature family matters within the specific territory. If the family matters are outside the metropolitan area then such cases are entertained by Civil Judge Senior Division and Judicial Magistrate First Class respectively. So, within the metropolitan city there are three courts entertaining family matters namely, Family Court, Civil Judge Senior Division and Judicial Magistrate First Class. Beside differentiation in their territorial operation another differentiation lies in their functioning. Further, family court being specialized court has an obligation to deliver speedy justice and to bring settlement within the parties through 'counseling'. In Civil Judge Senior Division and Judicial Magistrate First Class there is absence of 'counselling' though it tries similar family matters as like family court. Finally, family court is not bound to follow the strict rules of procedure. As, it follows Civil Procedure Code, 1908; the Criminal Procedure Code, 1973; the rules framed by the State government in consultation with concerned High Court, but it can derive it own procedure keeping in view its objective. Summarily, the Family Courts differs from the traditional courts in three counts first, territorial application, second counselling, and third procedural practice.

Proceedings in the family court

Fig. (3)(C)



In Maharashtra, the family court procedure is regulated by the 'Family Courts Maharashtra High Court) Rules, 1988 with Code of Civil Procedure, 1908 and Code of Criminal Procedure, 1973. As Rule 45 of the Family Courts (Maharashtra High Court) Rules, 1988 states that,

> Save as aforesaid, the provisions of the Code of Civil Procedure or the Code of Criminal Procedure, as the case may be, shall apply to the proceedings before the Family Court.

The proceedings in the family court can be divided into three stages – first institution stage, second counseling stage and third determination stage. The proceedings commences with the institution of petition/ application[49]. The Registrar shall specify requisite alphabet and number to the petition and forward copy of the petition to the Principal Judge[50]. After filing the petition, 'issue of process' begins with the payment of requisite fees. The respondent is served with summons, setting out charges against him/her by the petitioner. The respondent has to appear in person before the court on the mentioned date and has to file 'Say' within three weeks from the service of summons[51]. If the petitioner fails to issue summons to the respondent within six months from filing of the petition then the said petition shall be dismissed by the Registrar[52]. The respondent's response to the notice is to appear before the court which is termed as 'appearance'. Upon appearance the parties are served with first date by the principal judge and other directions are given to the parties[53] in the presence of counsellors[54]. At the same time the case shall be referred to the counsellor for searching any option of settlement[55]. This is the second stage of 'Counselling', where the counsellor hears the issues between the parties by attending them individually or jointly. Counsellors apply their skills and try to persuade the parties to reach to certain agreement. After counselling the counsellor has to prepare a 'Memorandum' setting out the outcomes of the proceedings[56]. Then after the Registrar shall fix the date of hearing before the judge, if there is any settlement the court

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[4949] Section 5 of The Family Courts (Maharashtra High Court) Rules, 1988.
[50] Section 6 of The Family Courts (Maharashtra High Court) Rules, 1988.
[51] Section 7 of The Family Courts (Maharashtra High Court) Rules, 1988.
[52] Section 22 of The Family Courts (Maharashtra High Court) Rules, 1988.
[53] Section 23 of The Family Courts (Maharashtra High Court) Rules, 1988.
[54] Section 25 of The Family Courts (Maharashtra High Court) Rules, 1988.
[55] Section 26 of The Family Courts (Maharashtra High Court) Rules, 1988.
[56] Section 29 of The Family Courts (Maharashtra High Court) Rules, 1988.

shall pronounce decision in accordance with the settlement, but if there is no settlement then the matter is referred to the trial, this is 'determination stage'. In this stage the parties are bound with the decision of court, however, their exist the option of settlement throughout the proceedings but before the pronouncement of judgment. In the determination stage the respondent files the 'written statement' as against the notice of applicant. After filing the written statement the 'issues' are framed by the court and upon which list of witnesses are prepared. Then after evidence take place, however, the strict rules of evidence are not followed and include examination and cross-examination. After the evidence the argument takes place between the parties and finally there is judgment. The detail chronological order has been explained in Figure (3)(C). Meanwhile the rules empowers the parties to be represented by lawyer at the earliest stage by making a separate application to that effect and the court shall have discretion in granting the permission[57].

The maintenance proceedings before the family court under Section 125 of the Code of Criminal Procedure, 1973 is 'quasi-civil'. After petition for maintenance filed by aggrieved party the summons is issued to the defendant. The defendant has to file the written statement or say. The court has the authority to issue interim maintenance order upon written plea by the petitioner, for this purpose if the defendant remains absent then 'ex-parte order' shall be issued. If there is no interim maintenance plea then the defendant has to file written statement and after which the issues are framed by the court, it is followed by 'evidence', 'argument' and finally judgment.

Tension with the Family Court Act

The Family Court Act, 1984 has attracted much criticism from its passing. The Act was challenged for its constitutional validity. In *Smt. Lata Pimple v. Union of India and others* AIR 1993 Bom. 255, various provision of the Act namely, Section 3, Section 13, Section 10, Section 14, Section 15 and Section 16 were challenged on the ground of being violative Art.14, 19(1)(a) and 21 of the Constitution of India.

[57] Section 37 of The Family Courts (Maharashtra High Court) Rules, 1988.

Section 3 of the Act, was challenged on the ground of being violative of Art.14 of the Constitution, where Section 3 read as under –

> Section 3(1) – For the purpose of exercising the jurisdiction and powers conferred on a Family court by this court, the state government, after consulting the 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 court for such other areas in the state as it may deem necessary and
> c. 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 after such limits.

Section 3 authorizes the State government to establish family court in a city or town whose population exceeds one million. The plain reading of the Section points that the State government has the discretion to establish Family courts in the state, other than falling in sub-clause (a). The petitioner challenged Section 3 as the classification based on population is irrational, unconstitutional and arbitrary, and argued that, " the litigants, who are having common cause in respect of marriage and family affairs are treated unequally on the basis of population and, therefore if offends Art.14 of the Constitution and the classification was not based on intelligible differentia". Finally, the petitioner pleaded that the family court ought to establish in every taluka in order to fulfill the test of Art.14 of the Constitution. But the Hon'ble court rejected the submissions of the petitioner and held that,

> "We are unable to appreciate this contention. In our opinion, section 3 does not create any clarification as such. This provision is consistent with the preamble of the Act. Section 3 of the Act provides separate forum to the family disputes, falling under sub-section (a) but it does not take away the existing forum of civil courts relating to family disputes falling outside the said provisions. It is a phase wise application of the Act depending upon the requirement of establishing Family courts" (para 4).

With respect to the 'intelligible differentia', the court held that, section 3(1)(a) makes it obligatory upon the State government to establish family courts in a city or town whose population exceeds one million. At the same time, the State government under discretion may establish family court though condition laid down in sub-sec (a) is not fulfilled.

Further, urban area with one million population is a viable unit as the pending cases relating to family disputes in various courts situated in such cities or towns is considerably high and that can relieved with the establishment of family court. Finally the Hon'ble court concluded on this point as,

> It must be remembered that the State Government is under an obligation to establish Family Courts in the first instance in the Metropolitan cities having population of 1 Million and above. This is a rational and intelligible differentia made to secure aims and objects of the Act, it is also noticed that metropolitan cites having population of 1 Million and above is place for various matrimonial disputes. It was noticed that the petitions under the Hindu Marriage Act could not be disposed of within a reasonable time and some matters remained pending for years together. It is with this object in mind the Family Courts have been established in the metropolitan cities where population exceeds 1 million. Viewed from this angle, it is clear that what is decipherable and intelligible distinction in each class has been carved out having reasonable nexus with the aims and objects of Act and in order to achieve these aims and object Section 3 has provided in the first instance, establishment of Courts on the basis of population. In our opinion, Section 3 cannot be challenged as being discriminatory and violative of Art.14 of the Constitution.

Further, Section 13 was challenged which read as under,

> "Notwithstanding anything contained in any law no party to a suit or proceeding before family court shall be entitled, as of right, to be represented by a legal practitioner".

The petitioner contended that, it violates Art. 19(1) (a), 21 and 39. The Act has stipulated the parties right to have legal representative. Representation by lawyer is one of the essential features of adversarial system. The petitioner challenged the rule and argued that, "Section 13 creates complete bar and prohibits a party to be represented by a legal practitioner". The court refuted the petitioner's argument and held that, "a fair reading of the section indicates that there is no total prohibition of being represented by a legal practitioner. The proviso clearly provides that if the Family court considers it necessary in the interest of justice, may seek assistance of legal expert as 'amicus curie'. The court further held that, "as regards litigants who desire to be represented by a lawyer in the Family court, they can avail facility as provided by Rule 37. Under this rule, the court may permit the party to be represented by a lawyer in certain circumstances. This rule, in our opinion, sufficiently takes care of the grievance made on behalf of the petitioner."

Further, Section 10 , 14, 15 and 16 were challenged, where section 10 explained the 'general procedure' as,

Section 10 – Procedure Generally-

(1) Subject to the other provisions of this Act and the rules, the provisions of the Code of Civil Procedure, 1908 and of any other to the suites and proceedings (other than the proceedings under Chapter IX of the Code of Criminal Procedure, 1973) before a Family court and for the purposes 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 or the rules made there under, shall apply to the proceedings under Chapter IX of that code before a family court.

(3) Nothing in sub-section (1) or sub-section (2) shall prevent a Family Court 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.

Section 14 – 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 or not, the same would be otherwise relevant or admissible under the Indian Evidence Act.

Section 15 – 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 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.

Section 16 – Evidence of formal character on affidavit –

(1) 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, 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.

The above provisions are procedural in nature, which ought to be observed by the concerned Family Court in dealing the matters. The petitioner's main contention was that, "the procedure prescribed under chapter IV of the Act was discriminatory in nature and therefore violative of Art.14 of the Constitution of India". The petitioner further

contended that, sub-sec (3) of Section 10, empowers the Family court has been given powers to lay down its own procedure with a view to arrive at a settlement in respect of subject matter of the suit or proceedings or at the truth of the facts alleged by one party and denied by other. It was also contended that,

> "Section 14 what is not relevant or admissible under Indian Evidence Act may be admissible under the said provision. As against this, litigation in ordinary civil court relating to marriage and family affairs is governed by Indian Evidence Act. The evidence which is not relevant or admissible under the Evidence Act cannot be laid in proceedings filed and pending before the civil court whereas litigants covered by the said Act are put to a great disadvantage by reason of section 14 of the Act".

Thus, the procedure prescribed under section 10, 14, 15 and 16 of the said Act was alleged to be violative of Art.14. After hearing the contention of the petitioner, the Hon'ble court held that,

> "it is relevant to note that O.32-A has been added on the Civil Procedure Code in the year 1976 with a view to simplify the procedure emphasis on conciliation in the matrimonial matters. A bare perusal and comparison of provisions contained in O.32-A of the Code of Civil Procedure have been incorporated in the procedure prescribed u/s.10 and 14 of the Act and the rules. Some of the provisions are in fact overlapping. It is no more in dispute that provisions of the civil procedure code apply to the proceedings under the Act. The procedure prescribed under the Act, in our opinion, do not suffer from vice of either arbitrariness of being fanciful".

The court further emphasized that,

> "Rule 3 and 4 of Order 32-A of the Code of Civil Procedure also prescribe identical procedure to bring about conciliation between the parties to the matrimonial proceedings. As stated earlier provisions of Code of Civil Procedure apply to the proceedings under the Act, therefore it cannot be said that the procedure prescribed under the Act and rules is discriminatory and therefore violative Art.14 of the Constitution of India. Object of the Act is to approach the problems with conciliation efforts so that relations with the parties be not broken and be patched up".

Beside the challenge for constitutional validity, the Act have been criticized by the feminists. As B. Shivaramayya rightly quotes D. Nagasila who critically examines the settlement approach in Family Court, as,

> But underlying this "conciliatory approach" is the notion or rather the assumption of equality between men and women. It conveniently ignores the fact that women in this country have no equal status vis-à-vis men. In the existing social structure,

> women are vulnerable and totally dependent on men for social and economic security... (Shivaramayya 1997: 34) .

Further, Shivaramayya too criticizes the existing framework of the Family Court, which set aside the real object for which it was suppose to be established. She sets the reason which will persistently influence the settlement in the Family court. The settlement shall always tilt towards women, who are the weaker section of the society being exploited for generation. She mentions the reason as,

> It is two such unequally placed people who are to sit across the bargaining table in Family Courts and arrive at an "amicable" and socially desirable settlement under the supervision of the courts, of course. But as the court themselves have the burden of ensuring that the marriage is preserved, the stronger party. May be able to force a settlement on the weaker (Shivaramayya 1997: 34-35).

Another Jyotsna Chatterjee too shares the same opinion where two unequally placed partners shall share the table to settle their dispute within the existing social structure. As in the marital home the women is dependent on men for social and economic security. Therefore, during settlement their exist strong possibility that the stronger party shall force the weaker (women) towards the settlement and the more destructive part of it is that, this whole process shall take place in front of the conciliator. She points that,

> Besides, the conciliation approach is based on the notion that both parties are equal. It ignores the fact that women have no equal status in the existing social structure – the marital home – and are therefore vulnerable and dependent on men for social and economic security. Two unequal people have to sit across the table in the Family courts to arrive at an amicable and socially desirable settlement under the supervision of the courts. There is always the possibility that the stronger party may be able to force the settlement on the weaker. There is also the risk that conciliatory efforts may be carried too far, thus leading to the destruction of the weaker partner who may succumb to the efforts of zealous counselors believing in the sanctity of marriage, for the Act Stipulates that, "in selecting people for appointment as Judges every endeavor shall be made to ensure that persons committed to the need to protect and preserve the institution of marriage and promote welfare of children are selected". A procedure that marginalizes the needs and interest o spouses as human beings and may silence those needs altogether, specially, the needs of women are bound to be subverted (Chatterjee 1997: 68).

Finally, she points two ways by which women will be suffered in the Family Court. Firstly, women as they are not equally placed with that of their partners socially and sometime economically and secondly, they have to fact the so called neutral person 'counselor' whose job is to bring settlement within the marital discord, the preserver and

protector of the dominant social values/ customs, tyrannical towards women (Chatterjee 1997: 68). Similarly R.R.Singh mentions that the preservation of marriage and conciliation has no substantial meaning as both men and women within the marital sphere are place unequally. On the contrary it also relegates the women from achieving the substantive right provided by the Divorce laws (Singh 1997: 89). Further, Flavia Agnes too critically refutes the basis of Family Court as,

> Ironically, the principle of 'gender justice', which was the primary motivation for the demand for special courts for family matters, was not clearly spelt out in the enactment. Instead, the Act emphasized 'preservation of the family' as its primary aim. The primary concern of the campaigners seems to have been lost in the process of transforming the demand from a campaign into an enactment. The tilt in favour of women which is found in various recent legislations and judicial pronouncements was absent in the Family courts Act (Agnes 2011: 271-272).

Historically, women were denied the right towards property and divorce, but subsequently with the law of the land, this changed a little bit, loosening the sacramental bond (Agnes 2011: 272). Finally she critically concludes the establishment of Family Court as,

> The Family Courts Act was meant to make further progress in this direction by making this right of divorce a practical and feasible reality, rather than a nightmare, by ensuring that matrimonial proceedings were speedy, devoid of anti-women biases, and economically more fair and just to women. So the concern at this stage ought not to have been 'preservation of the family' but protection of rights of women and children'. The aim had to be gender justice the judiciary and court officials had to be carefully selected or, alternatively, oriented towards achieving this end. But unfortunately, the Family Courts Act did not provide for this. Instead, the Preamble laid down that the commitment of the Act is towards preserving the institution of marriage and family (Agnes 2011: 272).

Thus the Act introduced various strategies to promote settlement in marital issues viz., introduction of non-adversarial approach, restricting the lawyers only as amicus curie, in-camera proceedings and relaxing the rules of evidence. The Act was subjected to criticism since its framework but the court successfully withheld its validity. Though, it introduced conciliation but was subjected to criticism from feminists. However, its importance cannot be overlooked as many nations have established these specialized family courts to overcome the traditional adversarial approach and has brought

humanistic approach towards the family issues. The international perspective of family court of limited nation has been dealt in the next chapter.

Chapter IV

Overview of Procedural Practices in the Family Courts of Australia, United States of America and Britain.

This chapter observes the procedural practice in family courts of Australia, Britain, and United States of America. It analyzes and focuses the various procedural features practiced within the court and tried to understand it.

The Family Court in Australia

The family court in Australia was established by the Family Law Act of 1975. The family disputes are generally entertained by the Family Court, Family court of Western Australia, Federal Magistrates Court and the Magistrates' Courts or each State or Territory. The Family Court of Australia and the Federal Magistrates Court are federal courts established by legislation of Australian Federal Government. They exercise their powers as provided by the Family Law Act 1975. The main object of the Family Court is to help families to resolve their disputes without the need of going to a trial before a judge through non-adversarial approach of mediation. The procedure in the Family Court is being regulated by the Family Law Rules, 2004, which is a distinct procedure followed in the court.

The rule makes all attempts towards fair dealing with the parties, and tries to boost their confidence within the court. For this purpose the Family court even entertain complaints of the parties with regard to the judges and other court officials within the court. It assigns rights to the parties as to fair and helpful assistance, guarantees privacy of the parties and confidentiality of shared information, ensures fair and just hearing in safe environment, confirms in time decision and restricted access to information on the file held by the court in relation to the proceedings of the concerned parties. Moreover, the Family court promises for being courteous, helpful and sensitive towards the parties and their needs, deliver prompt and responsive service, providing mediation services appropriate to the needs of the parties or may refer the parties to community agency where appropriate, delivering these services in a safe and secure environment and assures

to provide accurate and up-to-date information that is clear and understandable. As the court officials have to be courteous and helpful towards the parties but the rules restricts the court staff from providing information to the parties with regard to legal advice, interpretation of orders made by a Judicial Officer, tentative speculations about the delivery of decision before proceeding, cannot recommend lawyer, cannot tell words to be used in court papers, cannot help in preparing the argument before the court, cannot be permitted to communicate judge except in trial, etc. Above promises and assurances as to fair dealing in the court can be enforced, by filing complaint before the Administrative judge. But there are certain things which cannot be complained namely, as to judicial decisions, either party may prefer appeal. The Family Court of Australia can determine all matters dealing with family law. This includes:

- nullity or validity of marriage,
- children,
- property,
- maintenance,
- child support, and
- appeal from decisions of the other courts including by a federal magistrate dealing with family matters, and of decisions made in the Family Court itself.

The Family Law Rules 2004, regulate the family court procedure commenced on 29th March 2004. They apply to all matters before the Family Court of Australia. The Rules set out key obligations as to what forms must be used, when they must be filed and any other requirements of the Court. It specifies various services that are being provided in the family court which includes- specific case management services, mediation, children case program, services for culturally and linguistically diverse clients, services for Aboriginal and Torres Strait Islander people. Family court can avail services from the non-government services, services of child support agencies, services of community based services. Further, there are information brochures and kits within the court to educate the parties about the procedure, court services and about their rights. It includes-

BROCHURES

- Appeal Procedures
- Appeals – from decisions of Federal Magistrates
- Before you file – pre-action procedures – financial cases
- Before you file – pre-action procedures – parenting orders
- Case Assessment Conference– the first Court event
- Child Support Application
- Conciliation Conferences
- Conference of Experts
- Costs Notice
- Duty of Disclosure
- Enforcement Hearings
- Maintenance Application
- Marriage, Families and Separation
- Mediation Services – Pathway to Agreement
- My Family is Separating – what now? (Produced in partnership with the Child Support Agency and Centre link)
- Parental responsibility and parenting orders
- Subpoena – information for a person requesting issue of a subpoena
- Subpoena – information for the name person (served with a subpoena)
- The Trial – what happens now that a Trial Notice has been issued?

- Third Party Debt Notices
- Using telephone and video links in the Court

KITS

- Affidavit – kit for applicants
- Affidavit – kit for respondents
- Divorce Kit
- Consent Orders Kit
- Financial Statement Kit
- Service Kit.

It empowers the court to try interim application involving emergency. The interim applications are heard and decided by the Deputy Registrar and Mediator in the court. The financial matters are heard and decided by the Deputy Registrar and child related matters are heard and decided by the Mediator. In family court the clients may represent themselves (without lawyer) at some stage of the court process. In order to help the self-represented clients (without legal representation) the court works with legal aid, community legal centres, Attorney General's Department, Federal Magistrates Court, the Federal Court, and the legal profession and increases the access to justice. With this various assistance the family court works on the following principles -

1. Safety towards all.
2. Reduce family violence.
3. Protect children from family violence.
4. Understand specific needs of the parties.
5. Collaborative functioning with wide range of organisations, agencies and community groups are essential for the success of the Family Violence Strategy.

Considering the above principles the Court encourages separated couples to attend mediation before starting court action, and in Family Court pre-action mediation is a requirement in many situations. The principle behind adopting mediation within the court is to enable the parties to communicate each other over their issues freely and thereby make, arrangements towards children separation and property. Beside mediation the parties have to follow the pre-action procedure.

Moreover, the court mandates both parties to follow pre-action procedure before filing an application in the court. The Family Law Rules 2004 require parties applying to the Family Court to participate in 'Pre-action procedures'. Pre-action procedure includes either parenting orders or financial orders (property settlement or maintenance) and information is provided in brochures. The main object of the pre-action procedures is to reduce the cost of litigation, speedy resolution of disputes without filing an application before the court, encourage the parties to fully disclose their case; it helps in clearly identifying the real issues in dispute. Even if the parties failed to reach to an agreement with the pre-action procedure it becomes easier for the Court to determine the issues and resolve the case quickly and justly.

It applies to anyone who is considering to begin a case, a respondent and even lawyers who are representing the parties. The Family Law Rules 2004 require prospective parties to genuinely attempt resolve their dispute before starting a case with pre-action procedure and should participate in dispute resolution services, such as mediation, counselling, negotiation, conciliation or arbitration. If dispute resolution is unsuccessful, the either party has to set out their claim and explore options for settlement and has to comply with the duty of disclosure of all facts concerning the dispute. If these requirements are not satisfied then the parties shall be penalized. The pre-action procedure is exempted in the cases involving divorce, child support, issues relating to child abuse, family violence, fraud allegations and genuine intractable disputes.

The rules impose certain obligations upon the parties participating in the pre-action procedures. The parties have to protect and safeguard the interests of the child, genuine attempt towards child benefit; should explore settlement options and should avoid inflammatory exchanges which will hamper settlement process, endeavor towards

negotiations, obligation to disclose all material facts, documents and other relevant information to the dispute. The parties should not use the procedure to harass the other party and avoid unnecessary cost or delay and should not raise irrelevant issues; the parties should adopt sensible and reasonable approach.

If there is no agreement between the parties as to their issues in the pre-action procedure then the case is referred to the court. The court at the initial level scrutinizes about the procedural compliance by the parties during the pre-action procedure. The procedural compliance includes - serving of written notice of proposed application to the either party, providing sufficient information or documents to the other party, following a procedure required by the pre-action procedure, respond within the given period. The court may levy costs on the party for the breach of procedure.

The rule further imposes certain obligations upon the lawyers who are representing the parties during the pre-action procedure. The lawyers should advise various ways to their respective clients in resolving their disputes without starting legal action, to advise their clients to disclose all facts during the pre-action procedure and explain the consequences if not followed, notify client about their best interest in compromise and settlement, assist in reducing delay by explaining it to their respective parties, advice clients about the estimated costs of legal action, advise to make an attempt in the best interest of the child, provide clients with respective documents and deliver any other information about the practice in court which will promote settlement.

The family court's 'pre-action procedure' includes the five steps which has been laid down by the rules strictly adhered by the parties. The first step is to invite the other party to participate in the primary dispute resolution; in doing so all relevant documents concerning the pre-action procedure shall be supplied to the respondent and has to ask for the various services available within the court in resolving the dispute. Then after in the second stage the parties should agree on a service provider and attend the service and try genuinely to resolve the dispute by participating in primary dispute resolution. If there is any agreement between the parties as to the dispute then it should be formally applied to the court for 'consent order'. In step third, if the party does not agree on the services or remains absent or fails to participate in the dispute resolution then, the either party

through an application to the Court must give the other person written notice of an intention to start a case in the Court (called a notice of claim), setting out: the issues in dispute, the orders to be sought if a case is started, a genuine offer to resolve the issues, a 'nominated time' (at least 14 days after the date of the letter) within which the other person is required to reply. The pre-action brochure must be attached to the notice of claim. After receiving the 'notice of claim', the respondent has to reply it within nominated time in writing, specifying whether the offer is accepted. If the offer is accepted then there will be formal agreement between the parties, if there is no as such agreement then the person refusing to accept the offer should specify the issues in dispute, the orders which will be sought if a case is started, a genuine counter offer to resolve the issues, a 'nominated time' (at least 14 days after the date of the letter) within which the claimant must reply. Where the other person does not respond, the obligation to follow pre-action procedure ends. Other dispute resolution actions can be taken, including the filing of an application in the Court. Finally, the fifth step states that, where agreement is not reached after reasonable attempts to resolve it by correspondence, other appropriate action may be taken to resolve the dispute, including by filing an application in a court.

After all unsuccessful attempt to resolve the dispute, the parties can make an application before the court to decide their issues; finally the family court in deciding the matters adopts 'case management system'. The case management system has been laid down in Fig. A.

The Family Court's case management system		
Before filing an application	After an application has been filed.	
PREVENTION ⇨	RESOLUTION ⇨	DETERMINATION
BEFORE LITIGATION ■ Community education ■ Relationship/separation counselling and mediation including by community organisations ■ In some Court registries, pre-filing mediation ■ The Family Court's pre-action procedure	**STAGE 1: ASSESS** ■ Information session ■ Case Assessment Conference ■ Procedural Hearing **STAGE 2: RESOLVE** ■ Case management/ dispute resolution options tailored to each case	**MAIN STAGES** ■ Preparing for trial ■ Pre-Trial Conference ■ The Trial

Figure A

The legal action begins with the filing of an application and after consulting a lawyer. The applicant has to file requisite form as to the concerned issue that need to be resolved. The legal help as to filing is provided through registry office. After filing an application the information session begins in which general introduction to family court. It covers separation and common emotional experiences when relationships break down, the need of children and the responsibilities of parents after separation, how family mediation services may help to resolve disputes and build parenting skills, information about operation of family court, what happens on the first day of court, the role of lawyers and how best to use their services. Then the date is issued for 'Case Assessment Conference'. It follows a group Information Session and concludes with a 'Procedural Hearing'. It may

be conducted jointly and separately. Its main purpose is that the court will assess the main issues of the case, target future services of the court to meet the needs of the case and provide an early opportunity to reach agreement with the aid of an officer of the court. Confidential and personal issues are heard by Deputy Registrar or Court Mediator. Further, the applicant has to serve notice to the respondent with the documents filed before the court. The documents are listed in the Act with affidavit and other brouchers which are provided in the court. Upon received the respondent must prepare a written response to the documents served. The documents must then be filed with the family court and 'served' upon the applicant or their lawyer at least seven days before the Case Assessment Conference, Procedural Hearing or hearing to which to the response relates. In this the parties may reach to an agreement, court shall assess the main issues and facts of the case and where appropriate may recommend other services targeted to each case such mediation or progression to a hearing. The court will explain what will happen next and how the court process works. The Case Assessment Conference is privileged. If an agreement is reached at the Case Assessment Conference (most likely in the form of consent orders approved by a deputy registrar) then neither person has to attend any future court events. Where there is no agreement between the parties then two options are left before the parties either to adopt more dispute resolution session or appear before the judge for trial. After Case Assessment Conference, procedural hearing takes place. In which the agreement entered in Case Assessment Conference will be made legally binding orders of the court or orders if no agreement towards the next step. This hearing can be attended by the party with lawyer and encourage to settle and look after all options, most cases settled at this stage. The Deputy Registrar explores all options. For further options the deputy registrar may refer to mediation if child related issues are there and if property then refers to conciliation conference. If there is no consensus among the parties the 'trial' begins. Before trial the 'trial notice' will issued. The trial notice is an order which makes the parties obliged. There will be Pre-Trial Conference. It requires certain documents should be filed within specified dates. The order will set a date by which the parties have to obey the order and lodge a compliance certificate. After the compliance certificate the trial begins, if proper directions are not fulfilled then it will be placed in defaulters list. The Pre-trial Conference decides whether the matter is ready for

trial, after pre-trial conference a date for the trial usually about four to eight weeks later. Deputy registrar conveys the Pre-trial conference in presence of both parties with lawyer. After pre-trial conference the case begins with trial. During trial the affidavits shall be used to decide the case which shall have the witnesses. The affidavit shall been the other attachments which shall form the evidence. The witnesses are produced before the court shall be cross-examined by the either party. The rule of evidence in family court is governed through Family Law Rules and the Commonwealth Evidence Act, 1995. After hearing the decision is delivered with reasons. After the decision appeal is provided.

Family court in United Kingdom

In United Kingdom there are no specialized family courts. There are different set of courts which exercise concurrent jurisdiction over a number of family matters. The family cases are tried and decided by the Family division of the High court, County courts and Magistrate courts. The Family division of High Court exercises jurisdiction over judicial divorce and other wide range of family matters and shares some of the jurisdiction with the County courts. The county courts carry the major family work, whereas the high court exercises the complex and important disputes. The Magistrate court exercises family jurisdiction of granting divorce to wives on conviction of their husbands in criminal proceedings for aggravated assault. These three courts are termed as 'Family Proceedings Courts' and are the essence of modern family court system in England. Recently, simplified and unified family procedural rules have been introduced in these courts as against the traditional procedure (Civil Procedure Code). The 'Family Procedure Rules 2010' has been framed with an objective of rendering the courts to determine the case justly and in the welfare of the parties. Case justly includes [58]–

- Determination of the case expeditiously and fairly.
- Dealing with the case in proportionate to the nature, importance and complexity of the issues.
- Ensure that the parties are on equal footing.
- To reduce the litigation cost.

[58] Rule 1.1.

It further lays down the duty upon the parties to assist court towards its objective[59]. The rules specify duty upon the court to carry 'active case management' inconsonance with the given objectives. The active case management includes –

- To encourage parties for co-operation in the conduct of proceedings.
- To decide promptly which issues require more attention and which issues are to be resolved and procedure there to.
- Encourage parties to use 'alternative dispute resolution' procedure if it deems fit and facilitate such procedure.
- To help the parties to settle whole are part of the issues.
- To fix timetable and see the progress of the case.
- To consider whether particular step justify the cost.
- To deal with different aspect of the case in same occasion.
- To make use of technology.
- To give directions to ensure that the case proceeds quickly and in the efficient disposal of the case.

In Part 3 of the Family Procedure Rules 2010 explains the court's power to 'alternative dispute resolution'. Rule 3.2 states that the court must consider at every stage in proceedings, whether 'alternate dispute resolution' is appropriate. If it appears to the court that 'ADR' is appropriate it shall adjourn the proceedings for specific period as it deems fit. It enables the parties to obtain information and advice about ADR and if parties agrees then to enable ADR to take place. In initiating ADR the court gives directions about the time and methods of ADR which the parties must tell the court if any of the issues in the proceedings have been resolved. If the parties fail to do so then the court shall give direction as to the management of the case. Before an applicant makes an application to the court for an order in relevant family proceedings, the applicant (or the applicant's legal representative) should contact a family mediator to arrange for the applicant to attend an information meeting about family mediation and other forms of alternative dispute resolution. If the problem is resolved by the parties then has to enter an agreement and apply for the 'consent order' before the concerned court. In order to

[59] Rule 1.3.

protect the rights of children and represent them in family proceedings there is an organization named 'the Children and Family Court Advisory and Support Service (CAFCASS).

More emphasis has been laid down on the parties to resolve their problems outside the formal court system termed as 'private ordering'. However, financial and property matters are considered hard to resolve, which require the interference of the court. In England various researches have supported the use of mediation in family matters and clubbed together some of the benefits which it assigns as –

- It encourages couples themselves to resolve disputed issues and helps them develop their skills in negotiating their conflicts;
- It can involve other interested parties (children, parents, etc)
- It focuses on the future not the past,
- It avoids the polarization of the adversarial process, which can freeze parties into opposing solutions to problems,
- It tends t o reduce emotional suffering for the parties and their families.
- It tends to result in longer-lasting arrangements for the parties and their children, with better prospects of renegotiating such arrangements when circumstances change.
- It tends to reduce the costs to the parties (and, where they are legally aided, to the Legal Aid Fund) because of reduced involvement of lawyers and the courts, and
- It is often more cost effective as a result of enabling the parties to reach their own agreement rather than negotiating at arm's length through lawyers. It is cheaper than litigating.

Family courts in United States of America

In U.S.A the state has authority to establish family courts within its respective region through appropriate legislation. In 1914 the first family court was established at Cincinnati, Ohio.(Kepharti 1955: 61). There is no uniformity in the establishment of family courts in U.S.A., and even the family jurisdiction has been scattered in different courts in different states. So, it is quite difficult to precisely explain the procedural practice. In order to assist the states in establishing the family court in 1959, 'the Standard Family Court Act' was passed. The aim of the Act is,

> "...to protect and safeguard family life in general, and family units in particular, by affording to family members all possible help in resolving their justiciable problems and conflicts arising from their inter-personal relationships, in single court with a common philosophy and purpose, working as a unit, with one set of family records all in one place, under the direction of one or more specially qualified judges" (Babb 1998: 36).

Further, the Act describes family court as tribunal, and it deviates the procedural practice from adversarial to non-adversarial in the court i.e. the mediation has been introduced in deciding the family cases. It tried to bring together all the family issues within one roof of the family court with trained judges in child and family issues. It tries to develop efficient 'case management system' within the family court (Babb 1998: 36-37). Until, 1998 fourteen states namely Alabama, Colorado, Kansas, Louisiana, Mississippi, Missouri, Nevada, New Mexico, Ohio, Oklahoma, Oregon, Pennsylvania, Texas and Wisconsin (Babb 1998: 39). Beside this in other states the pilot family projects have been introduced. Recently, an attempt has been made to bring all scattered family proceeding within the Family court and which has been termed as 'Unified Family Court', where the same had been reiterated by Roscoe Pound as,

> It has been pointed out more than once of late that a juvenile court... a court of divorce jurisdiction... a court of common law jurisdiction might be dealing piecemeal at the same time with the difficulties of the same family. It is time to put an end to the waste of time, energy, money and the interests of the litigants in a system, or rather lack of system, in which as many as eight separate and unrelated proceedings may be trying unsystematically and frequent at cross-purposes to adjust the relations and order the conduct of a family which has ceased to function" (The Place of Family court in the Judicial System. 5 Crime & Delinquency 161, 164. 1959).

The 'Unified Family Court' includes – a single court for family matters, a single judge for single case, a single social service, centralized physical facilities, intake services, comprehensive support services for children, time standards relating to child custody, an integrated information system, adequate training and an advisory council. Very few states have established it till now. As stated there is no unified procedural practice in family court in U.S.A. so it's difficult to lay down. However, there is practice of mediation method within the family issues and quick disposal is carried out. Every court has Family

Information Centre, which imparts beforehand educate the couples about their rights and procedural practice.

Thus, the overall study of procedural practice in family courts in Australia, United States of America (except Britain where there is no specialized family court but there is unified procedure in relation to family proceedings) has common feature of mediation (non-adversarial approach). There exists procedural change towards the family matters, deviating from adversarial to non-adversarial. The Australian and Britain family justice system has precise and efficient 'case management system'. Whereas in United States there is no uniformity in the procedure as different states have different rules, however, an attempt is being made to establish 'Unified Family Court' and succeeded to a certain extent. Everyone has given more importance to the protection of children and distribution of property and conducts mediation only when the parties are at equal footing.

Chapter V

Working of the Family Court at Aurangabad, Maharashtra from 2001 – 2010.

Introduction

Aurangabad is one of the fastest developing cities with vast industrial area and internationally renowned tourist place. It is the divisional head of Marathwada region with Municipal Corporation. As discussed in the previous chapter that the family court was established by the Family court Act, 1984 and it brought certain procedural reforms in dealing with the family and marital issues. As a result of this Act, the Family court was established at Aurangabad, Maharashtra on February 20th, 1993. It was inaugurated by Chief Justice Manoj Kumar Mukherjee of Bombay High Court. The family court is situated in the Session Court building. There are two judges in the family court 'Principal Judge' and 'Additional Judge' representing 'Principal Family Court' and 'Additional Family Court' respectively. Since 1993, there was only one women judge appointed in the family court and at present there is no women judge in the family court. Further, there are four counsellors in the family court with other staff. In the light of the procedural innovation (practice of non-adversarial approach of counselling) and criticism from jurists of the establishment and functioning of family court, warrants the study of the family court. The study has been limited to the family court at Aurangabad as it is viable and moreover there was absence of such procedural study of the Aurangabad family court in the past. The study of the working of the family court, Aurangabad from 2001 to 2010 is to understand the procedural functioning of the court and to analyze the objects for which it was established. The period of ten years generates sufficient data for analyzing the outcomes with regard to delay, filing of the case, pendency, disposal of the cases etc. by the Family court and by the counselors.

Limitation

The quantitative data was sought with the permission of the High Court at Bombay. Beside figures the Family court refused to give any other information, which could have been proved to be vital in furtherance of research. Moreover, the family court

authorities refused to provide any qualitative information from that of Counsellors and even the counsellors themselves, as a result the in depth information of the procedural practice as to counsellors could not be gathered. The defence as to the refusal was to maintain the privacy of the parties. However, informal information was gathered from the lawyers randomly.

Data description

The working of the family court has been studied under two heads –family court and counselling. As family court is the amalgamation of adversarial system (judges deciding the case) and non-adversarial (counselling). This is to determine the efficiency of both the system in dealing with family matters and thereby suggest procedural measures to strengthen the system.

The data of the working of family court from 2001 to 2010 is divided in two heads:

1. Cases tried and decided by the family court judges. It covers civil and criminal cases. The figures of civil cases are given in table 1 and criminal cases in table 2.

2. Cases tried and decided by the counsellors. Table 3 explains the figures of counsellors.

These tables shows the number of cases filed per year, the caseload, the number of cases disposed per year and the number of cases pending at the year end. With these the trend of instituted cases, caseload, pendency and disposal for civil cases, criminal cases and counselling has been drawn. Further, the pendency rate and disposal rate has been calculated respectively. Here filing implies filing of fresh petitions, usually defined as 'newly instituted petitions'. Caseload is the sum of cases filed in the current year and pending cases from the previous years. Cases 'disposed' include cases on which verdicts are declared. 'Pendency' means the cases which remain undecided or pending at the end of the year. Thus, the intention is to determine the procedural impact in seeking speedy justice and to compare the efficiency of the family court to that of counselling with available data.

Table (5.1)

Civil cases decided by the Family Court at Aurangabad.

Year	Cases pending in the previous year	Institution of the cases	Total Nos. of cases	Disposal	Balance
2001	514	845	1359	862	497
2002	497	839	1336	880	456
2003	456	867	1323	872	451
2004	451	648	1099	853	246
2005	246	642	888	557	331
2006	331	742	1073	642	431
2007	431	737	1168	567	601
2008	601	735	1336	721	615
2009	615	758	1373	790	583
2010	583	691	1274	613	661

Source: Family Court at Aurangabad, Maharashtra.

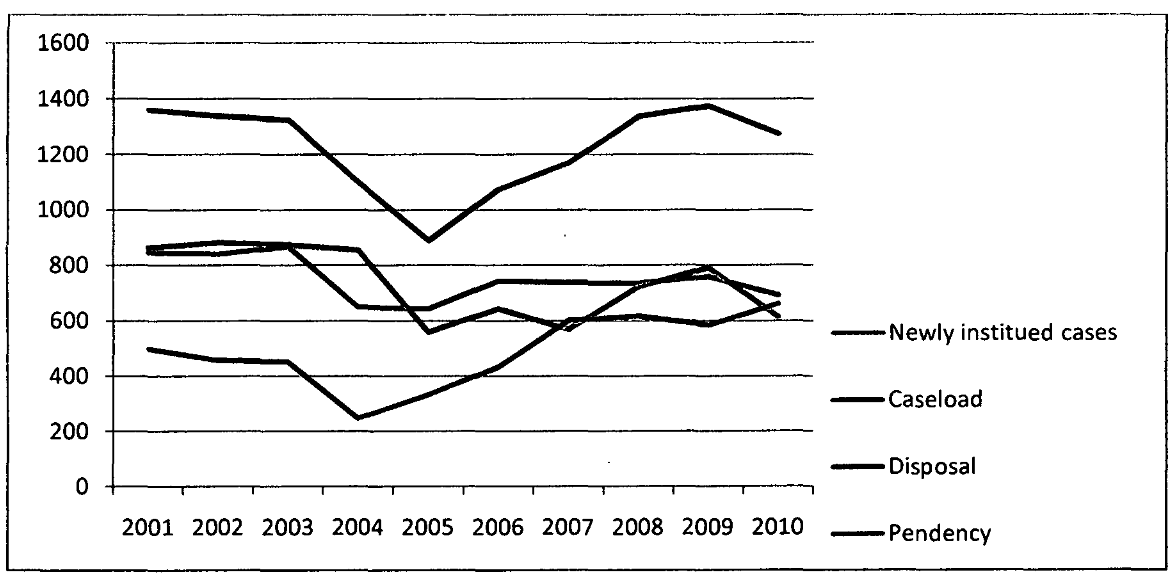

Fig. (5.1.1)

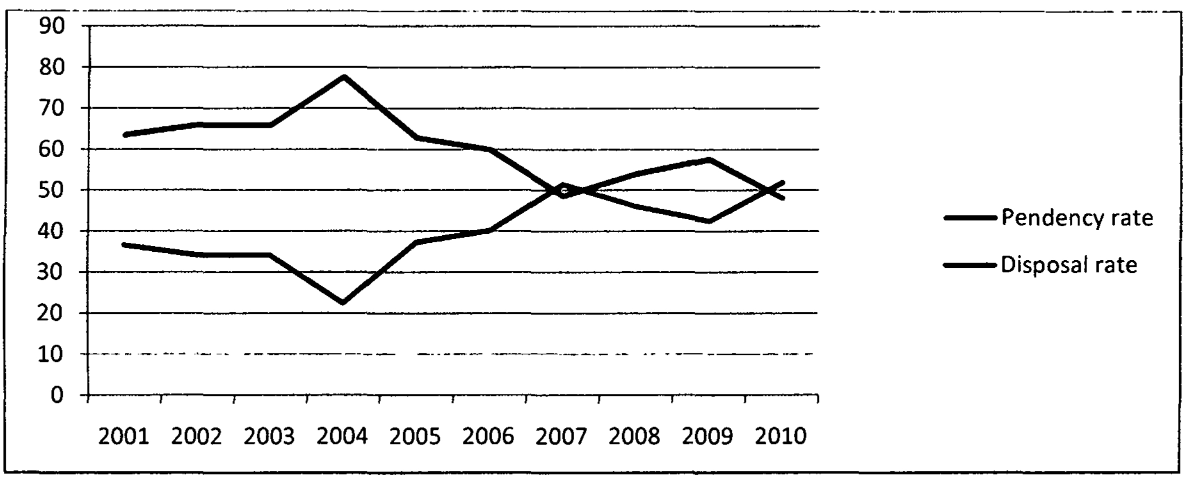

Figure (5.1.2)

Table 5.1 shows the number of civil cases that were instituted in the respective year, pendency of cases, cases decided and the balance. The trends from table 5.1 is given fig.5.1.1 and 5.1.2. Figure 5.1.1 explains the trends of filing cases (newly instituted cases), caseload, disposal and pendency during the year 2001 to 2010. The trend of filing civil cases remains constant in between 750 to 850 throughout the period with an average of 750 cases. But the trend as to caseload is quite high, as it is the sum of newly instituted cases and pending cases during the beginning of the year. Till 2005 it gradually increased but then it slightly decreased in 2009 and 2010. The caseload increases with the increase in pendency and increase in caseload creates additional delays in the case processing system. Further, the trend as to pendency increased from 2004 and quite high in 2010 and slightly low than the disposal. Figure 5.1.2 explains the growth rate trends in pendency and disposal of civil cases. As one of the object of the family court is to deliver speedy justice, so in the light of this object the disposal and pendency trend proves to be vital, as was one of the reason for establishing these specialized court. Fig.5.1.2 describes the disposal rate (the percent of disposed cases to that of caseload) and pendency rate. The disposal rate throughout the year was above fifty percent except in 2007 and 2010, with forty-eight percent. The average/mean disposal rate for the whole period was sixty percent. From 2001 to 2005 it was above sixty percent. The high disposal rate implies low pendency rate and has maximum efficiency. Further, Fig.5.1.2 reveals the pendency rate of the civil cases, where the pendency during year 2001 to 2003 remained between 35% to 40% and decreased in the year 2004 to 20%, but then it was doubled in the year

2005 to 40% and then after it increased from 2005 to 2007, where in 2007 it was above 50%. In 2008 and 2009 it was slightly below 50% but increased in the year 2010, where it was above 55%. The average pendency rate throughout the period was approximately forty percent.

Table (2)

Criminal cases decided by, the Family court at Aurangabad.

Year	Cases pending in the previous year	Institution of the cases	Total Nos. of cases	Disposal	Balance
2001	1873	2681	4554	2998	1556
2002	1556	2614	4170	2725	1445
2003	1445	2642	4087	2618	1469
2004	1469	1642	3111	2461	650
2005	650	1470	2120	1246	874
2006	874	1396	2270	1242	1028
2007	1028	1213	2241	1035	1206
2008	1206	1209	2415	1236	1179
2009	1179	1166	2345	1223	1122
2010	1122	994	2116	920	1196

Source: Family Court at Aurangabad, Maharashtra.

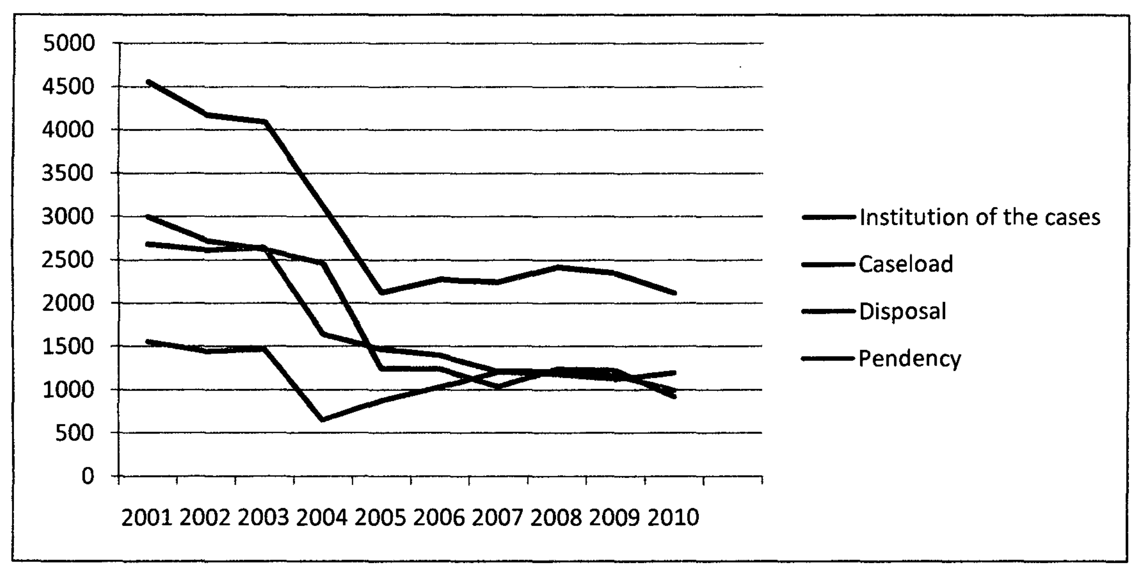

Figure 5.2.1

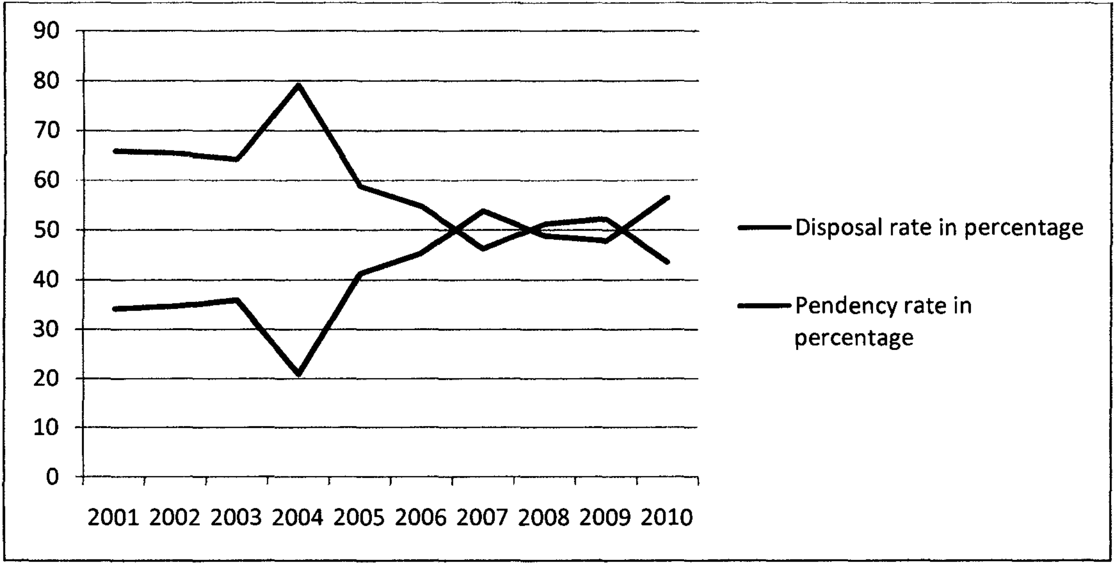

Figure 5.2.2

Table 2 relates with the criminal cases tried and decided by the family court judge during the year 2001 to 2010. As mentioned earlier the criminal case includes maintenance proceedings u/s. 125 of the Code of Criminal Procedure, 1973. The criminal jurisdiction is not extensive as compared to the civil jurisdiction; nevertheless, the number of

maintenance cases tried by the family court judge is too high as compared to the civil cases. From Fig.5.2.1 explains the trends in criminal cases with respect to institution of cases, caseload, disposal and pendency. The trends in filing of the criminal petitions are constant from 2005 to 2010 but prior to 2005 it was quite high. The caseload trend appeared to be low from 2001 to 2005 but then onwards it remained constant.

Fig.5.2.2 describes the disposal rate (the percent of disposed cases to that of caseload) and pendency rate. The disposal rate throughout the year was above fifty percent except in 2007 and 2010, where it was forty-six percent and forty-three percent respectively. The average/mean disposal rate for the whole period was fifty-eight percent. From 2001 to 2004 it was above sixty percent. The high disposal rate implies low pendency rate and has maximum efficiency. Further, Fig.5.2.1 reveals the pendency rate of the criminal cases, where the pendency during year 2001 to 2003 was around thirty-five percent and the lowest in 2004 with twenty percent. But then it was doubled in the year 2005 to forty-two percent and then after it increased in 2005 and 2006. In 2007 it was fifty-three percent. In 2008 and 2009 it was slightly below fifty percent but increased in the year 2010, where it was fifty-six percent and was the highest throughout the period. The average pendency rate throughout the period was approximately forty-two percent. Upon comparing pendency rate of civil cases and criminal cases (Fig.5.1.2 and 5.2.2), it appears that there is no much difference in pendency rate, in civil cases the pendency was forty percent and the criminal cases it was forty-two percent slightly high. It suggests that the time is more consumed by civil cases than the criminal cases as it is obvious that the filing of criminal cases is more than the civil i.e. from 2001 to 2010 family court judge tried 7504 civil cases forming 30.58% of the total cases, whereas 17027 criminal cases were tried forming 69.41% of the total cases. Thus, there is need to have proper case management for civil cases.

Table 3 - Cases decided by Counsellors.

Year	Cases Referred	Dispose	Balance
2001	2488	1295	1193
2002	2088	789	1299
2003	2340	943	1397
2004	1607	772	835
2005	1366	614	752
2006	1475	694	781
2007	1486	688	798
2008	1587	783	804
2009	1542	727	815
2010	1281	564	717

Source: Family Court at Aurangabad, Maharashtra.

Figure 5.3.1

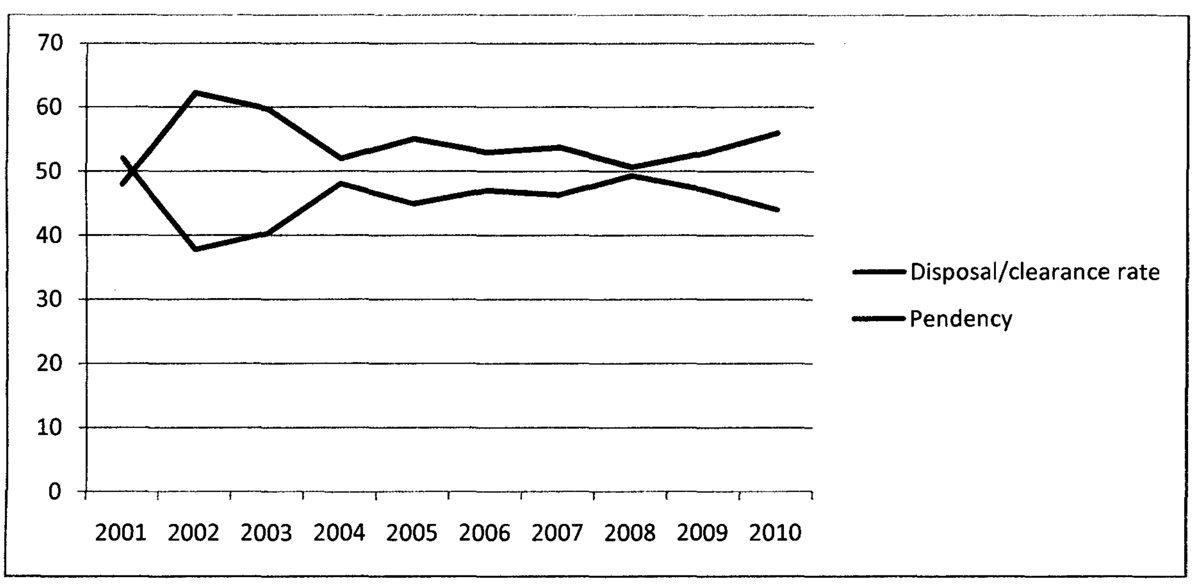

Figure 5.3.2

Table 3 describes the figures before the counsellor with respect to the cases referred, pendency and disposal during the year 2001 to 2010. The counsellors have been assigned with an obligation to bring settlement amoung the spouses over the marital issues. His role is considered as vital in the light of the humane procedural approach adopted by the Act in dealing with the family matters. Of the various procedural innovations in the family court, the counselling forms the core part. Counsellor brings reconciliation, divorce by settlement, maintenance by settlement, custody & access of the child. The efficiency of family court shall remain incomplete without the assessment of the counseling process. Figure 5.3.1 reveals the trends relating to referred cases, disposal and pendency. The trend as to referred cases remained constant from 2004 to 2010. Similarly, the trend as to disposal too was static from 2004 to 2010 earlier it was slightly high. The average/mean for the whole period was 1726.

The second fig.5.3.2 explains the disposal rate and pendency rate. The disposal rate of the counseling is quite disturbing. Throughout the years, the disposal rate was below fifty percent except in 2001, where it was fifty-two percent. The average/mean disposal rate was 45.4 percent. As the disposal rate was below fifty percent, it has

increased the backlog and thus the caseload too. The procedural innovation need to be assessed in this regard as it affects the speedy justice delivery system. The growth rate in pendency can be observed in fig.5.3.2. It is clear that consistently the pendency rate was between 50 to 60 percent of the total cases referred and tried during the respective years. The average pendency for the period was 54 percent.

Comparing the Adversarial with non-adversarial

The family court is the blend of adversarial and non-adversarial procedural practice. In adversarial the judge has the least role to play, beside applying the law towards the facts the judge delivers justice upon the facts presented by the lawyers who represent the parties in the strict rules of evidence. The common law generally adopts this pattern. Non-adversarial meant settlement by the parties themselves in the presence of neutral person and in the absence of lawyers. In family court the procedural reform has introduced the non-adversarial approach with certain features of adversarial justice systems.

Table 4

Sum of civil cases and criminal cases tried and decided by the family court during the year 2001 to 2010.

Year	Newly instituted cases both civil and criminal	Caseload	Disposal	Pendency	Pendency Rate	Clearance rate
2001	3526	5913	3860	2053	34.72	91.34
2002	3453	5506	3605	1901	34.52	95.78
2003	3509	5410	3490	1920	35.48	100.54
2004	2290	4210	3314	896	21.28	69.10
2005	2112	3008	1803	1205	40.05	117.13
2006	2138	3343	1884	1459	43.64	113.48
2007	1950	3409	1602	1807	53.00	121.72
2008	1944	3751	1957	1794	47.82	99.33
2009	1924	3718	2013	1705	45.85	95.57
2010	1685	3390	1533	1857	54.77	109.91

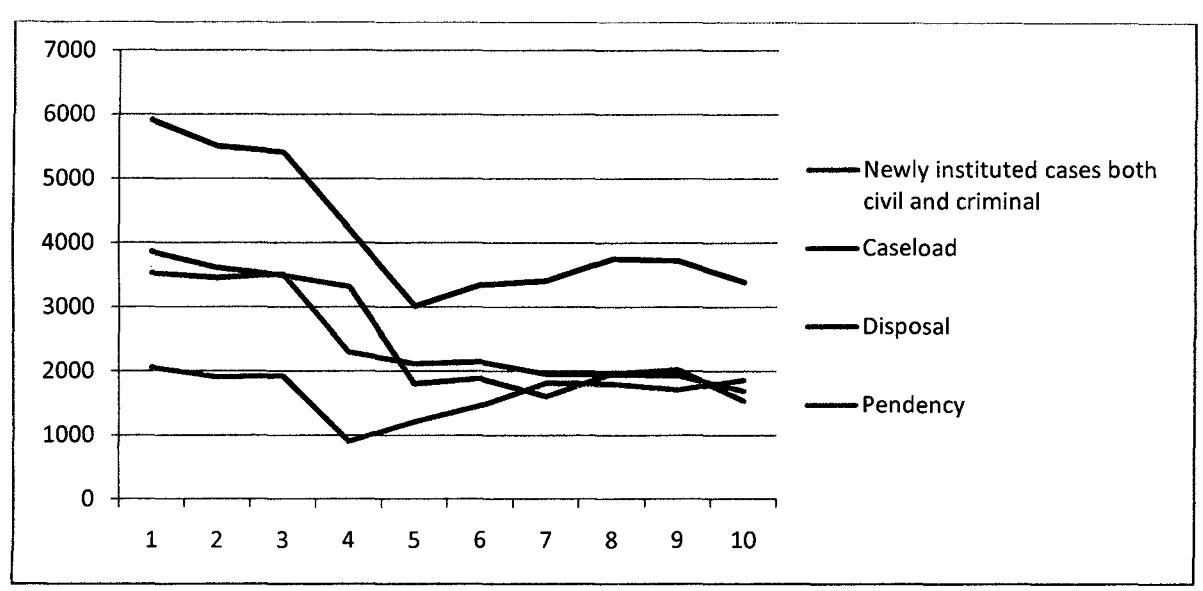

Figure 5.4.1

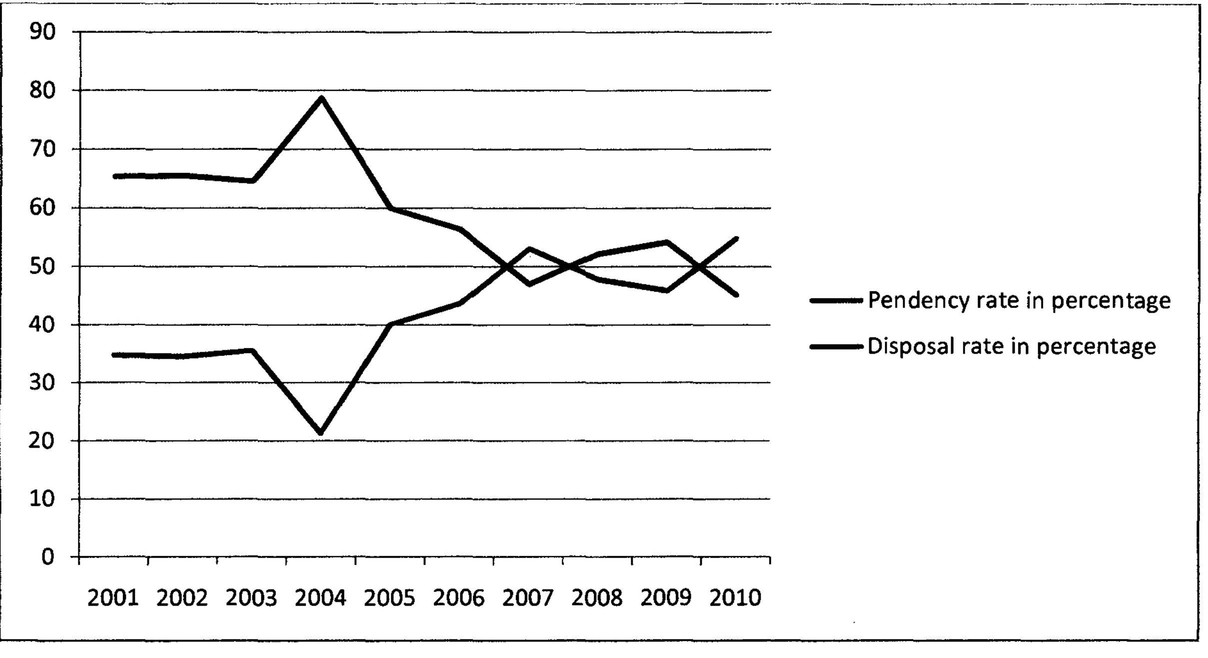

Figure 5.4.2

Table 4 displays the total number of cases (sum of civil and criminal cases) that were tried and decided by the family court during the year 2001 to 2010. It reveals the trends of the newly instituted cases, disposal, pendency and caseload of overall cases of the

family court as given in Fig. 5.4.1 and pendency rate and disposal rate given in Fig. 5.4.2, further which can be compared with that of Fig. 5.3.1 and Fig 5.3.2 respectively. After comparing the trends of family court and counsellor, it is evident that the pendency is considerably high in the latter as compared to the former. The average pendency of the family court (sum of civil cases and criminal cases) is forty percent, on the contrary the pendency before the counsellor is fifty-four percent. The efficiency of the court can be judged through the procedural practice as it also depends upon the availability of judges in the court and also upon the awareness of the parties about their rights. There are two judges and four counsellors in the Family court at Aurangabad, despite the good number there is high pendency, the reason behind it is the lack of procedural framework in terms of time period taken in settlement.

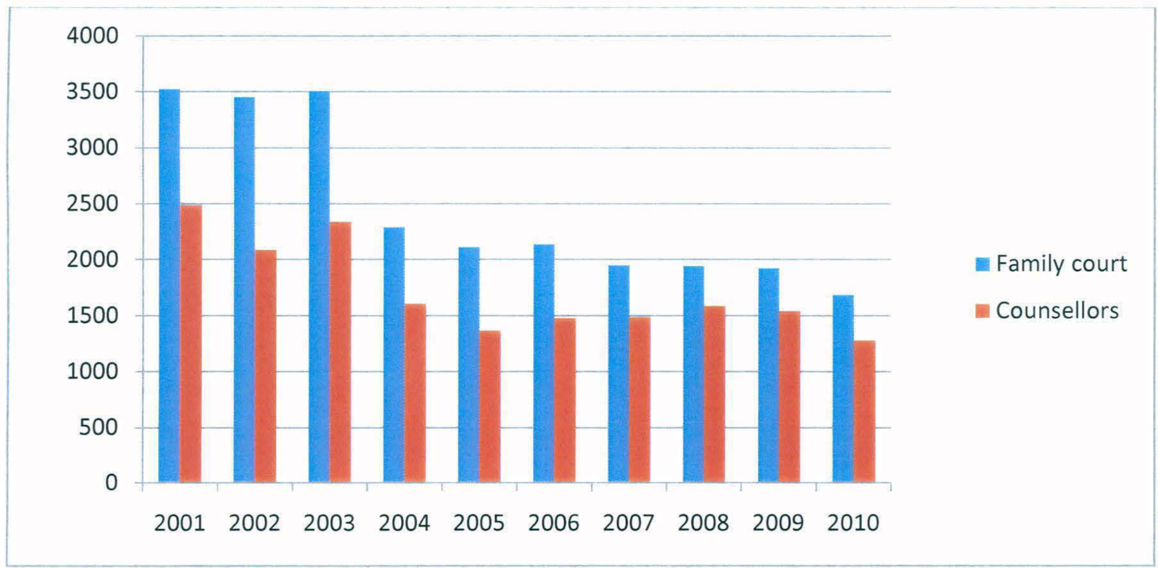

Fig.5.4.3 – Proportion of cases tried by family court judge vis-à-vis counsellors

Further, during the year 2001 to 2010 the total of number of cases tried by the family court were 24,531 and those by the counsellors were 17,260 forming 58.69 percentage by the family court and 41.30% by counselling. The difference is 17.39%. This shows that the family court tries more dispute than the counsellors. From the fig.4.3 it also appears that there is decrease in the number of cases tried by the family court judges and counsellors. There may be many reasons for the decrease like people are not aware about their rights, or most of the family disputes might get settled by community members

without approaching the court or there might be decrease in the marital disputes and so on. There is need to find out the correct reasons through proper evaluation. However there is need to bring some more procedural innovative measures in the family court.

Chapter VI

CONCLUSION

The legal system tries to maintain egalitarian society by protecting the rights of individuals especially those of vulnerable. So the operation of 'substantive' and 'procedural law' is vital to this effect as they are part of legal system. As, a part of procedural reform the Family court Act, 1984 was enacted by the Parliament, with an object to promote conciliation and deliver speedy justice in marital/family issues. It introduced the 'non-adversarial procedure' i.e. counselling in resolving the issues. The family court is the blend of adversarial and non-adversarial procedural practice. In adversarial the judge has the least role to play, beside applying the law towards the facts the judge delivers justice upon the facts presented by the lawyers who represent the parties applying the strict rules of evidence. The common law generally adopts this pattern. Non-adversarial meant settlement by the parties themselves in the presence of neutral person and in the absence of lawyers. The Act has introduced non-adversarial procedure in the family court with some features of adversarial system. The counsellors are appointed by the Act, who tries to settle the issues with the consent of the parties in the absence of lawyer. The Act imposes duty upon the family court to bring settlement between the parties by taking into consideration the nature and circumstances of the case. As the Act adapted non-adversarial procedure, with restricting the lawyers from practicing in the family court, this approach was challenged for its Constitutional validity, however, the Act was declared constitutionally valid. Thus, the establishment of family court is need of an hour and cannot be diluted and have to be accepted. Similarly, at the international level, many nations have established family courts with non-adversarial approach with an understanding that family issues require different treatment than the civil and criminal cases.

With the increasing trend of establishing family courts with non-adversarial approach our study has dealt with family court generally through literature and specifically with the data collection of the cases tried and decided by the family court

judges and counsellors at Aurangabad, Maharashtra from 2001 to 2010. Thus, so to assess the efficiency of family court and assess the procedural approach suggest that,

The Speedy justice is one of the objects of the family court; in the light of this object the data reveals that, the performance of counsellors (non-adversarial) is quite slow as compared to the family court judges (adversarial). In analyzing the speedy justice of Aurangabad family court from 2001 to 2010 it reveals that the disposal rate of the family court judges is 60 percent and that of counselling is 45.4 percent. Further, the pendency of the cases before counsellor was quite high as compared to the family court judge. The non-adherence to time schedule in counselling is the main reason of pendency, as the parties are left free (without time limit) in finding the option of settlement. So, there should be a rule incorporating strict adherence to the time limit and the court should assess its implementation. Further, during the year 2001 to 2010, 58.69% cases were tried by the family court judge and 41.30% by the counsellors. The difference is 17.39%. This shows that the family court tries more dispute than the counsellors. To a certain extent family court is performing well but there is requirement of more efforts in attaining the speedy justice. In order to increase the accessibility of the counsellors there is need create awareness amoung the people.

Another main object of family court is to bring settlement between the parties. This settlement process has been criticized for being anti-women as both men and women are not equally placed. Generally settlement takes place amoung the equals but women forms vulnerable group in the Indian patriarchal society. The argument expressed by the feminists is legitimate, but at the same time counselling is also important. So there is need to have certain procedural and structural changes in dealing with the counselling method. Like before referring the matter for the counselling the judge should substantially confirm that the parties are equally placed this can be determined through various factors like qualification of the spouses, source of income, job profile, dependency, etc. With regard to this there no provision either in the Act or in the Maharashtra Rule, 1988. Whereas in England, Rule 1.1 of the Family Procedure Rules 2010 lays down responsibility upon the judge to see whether the parties are at equal footing, if it appears that they are equally placed then only the matter is referred to the

counsellors, if the parties are not at equal footing then the matter is decided by judge through adversarial method. Further, in Australia, Britain and United States there is pre-counselling before initiating the proceedings of the family court, this helps in getting quick remedy as the differences are checked at the initial stage and there is more probability of seeking settlement. In Australia 94% of the cases are settled through pre-counselling. So the procedure should incorporate effective pre-counselling to tackle the problem at early stage.

In adversarial method the presence of lawyer makes the parties equally competent, but in case of counselling the parties have to represent themselves so if the parties are not at equal footing then there are chances of tilting the decision in favor of the dominating, and which is the sheer violation of fair and just procedure. So, that effect there should be an express provision within the Rules that the judge should see the parties be at the equal footing. As lawyers are not permitted to practice before the court as of right, but can assist the court as an 'amicus curie'. Similarly the Maharashtra Rules, 1988 permits lawyer to represent the party only upon an application before the court and decision of the court thereon. Here the judge exercises the discretionary power in permitting; this setup shows that the family court is more controlled by the judge having inquisitorial proceedings. The rule should permit the lawyer to practice in the family court with an obligation to guide the parties towards the settlement. Similarly, the Australian family court permit lawyers to practice in the family court and they are involved in the settlement process where they advice their respective client about settlement. Further, while engaging the lawyer in settlement process, there should be precise rules assigning the duties of lawyers as a result this will increase the efficiency of family court. At the same time the lawyers should be trained about the family court proceedings and the skills of settlement need to be developed, so the reform in the legal education at the very elementary level can be the true reform.

Another important lacuna within the rules and the Family court Act is that both are silent on educating the parties about the court proceedings. As the Family Court Act, 1984; restrict lawyers from practicing in family court as of right except as amicus curie; it has impact upon the parties as they found it quite difficult to cope with the court practices

as the alternative is absent. In Australian Family court the staff assists the parties in understanding the court proceedings and this has been laid down in Australian family Rules, 2004 specifically. At the same time family court uses extensive internet portals disseminating information about the proceedings via internet with various brouchers and providing online applications, this relieves burden of the court to a large context and as the parties get acquainted with the proceedings they take necessary steps with least hardship and at certain level they can appoint lawyer too if there exist complex question of law, it results into speedy justice. In Indian context the rules are silent about the dissemination of information and educating the parties, even in court premises there are no hoarding about the procedural information. The use of local language to this effect can be more useful and the parties can take confident move.

Further, the Family Court Act, 1984 and the Maharashtra Rules 1988 are silent on the obligations of staff towards the parties. As the Act precludes the parties as of right to have lawyer and has failed to create any alternative in helping the parties to cope up with legal formalities. So, the incorporation of express provision in the Act or Rule demanding staff's responsibility towards the parties in providing information about the court's formalities could serve the better purpose. Further, prospective rules should incorporate rules assigning duties of the staff members and courteous towards the parties, this will boost confidence of the litigants in family court. In Australia the Family Rules, 2004 lays down duties of the staff towards the parties, this helps the spouses instantly to complete legal formalities instantly. Moreover, the counsellors should be competent to bring settlement between the parties and even protect the rights of children. Further, there should be regular assessment of the court's performance and it should be made available for the researchers.

Finally the family court with non-adversarial procedure is essential in dealing the family matters to a certain extent, with major role of protecting the interests of both the parties especially that of children and to avoid the hardships of broken family. A happy family leads to the progress of the society and society to that of nation.

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