

Family Courts — Anti-Women?

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'Operation Family Courts' has been successfully launched — but has the purpose been achieved? This is the predominant question plaguing the minds of all the women's organisations in the country today. The establishment of Family Courts (F.C.) had been demanded, pursued, and pushed by women's organisations for over a decade before they were established in 1984. However the Family Courts Act and the actual functioning of the F.C.'s has proved to be the anti-thesis of what women's groups demanded.

Family or matrimonial issues were considered too sensitive an area to be left to the mercy of adversarial jurisprudence of the present legal system, which by its very nature involves a lot of mud slinging on either side. To get relief one had to have a legally sound case, and this meant facts had to be exaggerated, issues distorted and grounds added. Affected parties and their sensibilities had to give way to legal expediency. In this sequence of events women inevitably came out as the worst sufferers and faced the greatest humiliation. Personal laws relating to marriage, divorce, property rights etc., as such weigh heavily against women. In addition the court procedures added insult to injury. The role of the much maligned legal profession was another factor to be considered. The delays, fleecing of clients, and capitalizing on the client's ignorance and gullibility also made matters worse.

It was in fact, demanded by all the women's organisations that resolution of disputes within a family should be free from all this. Disputes should be resolved through amicable conciliation and agreement rather than litigation. The unequal power equation in society between the man and the woman made the adversarial approach anti-women. Hence the women's movement raised the demand for laws and procedures which would ensure that issues like maintenance, divorce etc., were speedy, less expensive, less traumatic and fairer to women. The demand for a more humane, sensitive and gender-fair approach to the issues of family disputes culminated in the introduction of the Family Courts.

However the culmination seems to defy the very beginning and the very process which led to it. A preliminary reading of the Family Courts Act does paint a very appealing image. The Statement of Objects of the Act reads, "*that Family Courts to be set up for the settlement of family disputes; where emphasis should be laid on conciliation and achieving socially desirable results*". Lawyers, though not fully eliminated from the scene, have a reduced role. Lawyers are to appear only

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with the permission of the court and that too not as contending adversaries but as 'amicus curiae' or friends of the court, to assist the court. So, seemingly, individuals have more control over their lives and are not mortgaged to some professional lawyer for whom a client would be nothing more than a source of income. With professional social workers, medical persons etc., the rosy picture of the family courts is complete.

But the truth is otherwise. The basic premise underlying the Family Courts Act is itself questionable and loaded against women. The entire scheme of the Act focusses on 'protection and preservation of the institution of marriage' and 'welfare of the children'. Per se there is nothing one could take exception to, but place it in the context of a social structure where women are in a disadvantaged position *vis-a-vis* men, the whole colour changes. The underlying principle of this legislation seemed to be the notion or rather the assumption of equality between men and women. It did nothing to challenge, correct or even acknowledge the existing imbalance between both sexes and hence the need to introduce correctives. Family and marriage are precisely the area where women are most powerless and deprived of the very basic rights of self protection. "The modern nuclear family is not a 'heaven in a heartless world', but the site of egocentric, strategic and instrumental calculation as well as sites of usually exploitative exchanges of service, labour, cash and sex, not to mention sites frequently of coercion and violence." Dowry demands, wife — burning, wife battering, rape of the wife, and the unrecognised and undervalued domestic chores of the wife are but some of the cruder manifestations of the existing unequal family structure. Whilst statutes might not differentiate or discriminate between women and men, social reality and legal practice situated in the social reality, certainly do. Any legislation, which does not take into account this reality and treats unequals equally is unjust. Thus the Family Courts Act advocates not only 'preservation of the institution of marriage' but also prioritises achieving 'socially, desirable results' without stating what these socially desirable results' are. Whether 'socially desirable results' are a goal wherein the present gender bias is corrected, and real social equality is achieved, or is a blatant male chauvinistic statement wherein the desire is to achieve what the society, as it exists, demands, is an unanswered crucial question, which could tilt the scales as far as the Family Courts Act is concerned.

Another underlying premise which needs to be questioned is the presumption that 'welfare of the children' is necessarily taken care of within the institution of marriage and in no other way. This presumption is not only baseless but contrary to reality. When a marriage is broken, it is far better for a child to be brought up by a single parent, than for it be exposed to the constant verbal and physical abuse, and humiliation of his/her mother.

The Act identifies individuals solely in terms of 'marriage' and 'children'. The main actors in the marriage — the woman and the man are ignored. Instead of admitting that break-down of marriages is a growing reality and that such break-ups should be made less traumatic, that moral courage and confidence should be given to the woman that her destiny is not irrevocably tied to the man who does

not even respect her, let alone care for her, the Act simply ignores it. Conciliation and settlement in this atmosphere most often lead to compromises by the women. To rub salt into the wound, the Act provides that only people who are committed to preserving the institution of marriage be selected as Judges of the Family Courts. Thus any person championing the rights of women can easily be labelled 'feminist' and 'anti-family' and easily be disqualified.

Another cause for concern in the Family Courts Act, is the 'in-camera' proceedings. While 'in-camera' proceedings can be favoured as providing privacy, a need felt more by women than men, in the long run, it would work against women's interests. So far, since proceedings were in the open court, public and popular opinion could act as a constant deterrent in preventing or atleast monitoring the courts from taking a totally anti-women conservative stand, and making value judgements. There was scope for some kind of informal control exercised by the public and to give them their due, by the legal fraternity. Now, even this marginal control and vigilance is made impossible by proceedings taking place within closed chambers.

Finally, the position of women as a social group is controlled largely through the family. With this 'informal' approach to family matters, fundamental problems faced by them become hidden and are muted in the name of 'conciliation'. Women are blocked from bringing their problems and needs to the public sphere of formal justice, where every issue can be weighed against substantive and concrete rights conferred on parties. Women's issues, whether dowry, wife-beating, rape or other acts of violence perpetrated by members of the family on women, have always been treated as 'private' or 'personal' issues. Whether the neighbourhood or the police, it is with great reluctance that intervention is even made on behalf of women. Women's organisations have been crying hoarse that it is time that problems and issues affecting women are not labelled 'private' affairs and the social and State machinery step in, as in all other matters. Thus far, the legal institution was relatively neutral, and free of this biased treatment. This is not to negate laws, judicial attitudes and prejudices which are loaded heavily against the woman. But atleast women's issues were notionally and technically treated as any other matter. The introduction of informal justice in dealing with the family has the effect of invidiously relegating women to the 'private' sphere even in the legal system.

While the formal legal system may not exactly be the panacea for all evils, it at least offers three crucial things. It gives substantive procedural rights, and safe-guards which do go some way towards providing a notional equality in presenting cases before the law. It involves lawyers who can again mitigate the power-imbalance between the parties, whether in bargaining or presentation of cases in courts, particularly in an adversarial system. Informality, conciliation and an inquisitorial mode of justice, offer less protection for weaker or more vulnerable parties. Finally, by arguing for the right to formal justice in family law, we keep the family clearly in the public domain.

In view of all this, one cannot help wondering if the demand for a separate family court was a 'faux-pas' on the part of the women's organisations. Have we jumped from the frying pan into the fire?