Family Courts

MEENAKSHI APTE

For very long time women's organisations in India were demanding the changes in Family law. These changes took place in 1955-56 when Hindu Marriage Act, Special Marriage Act and Hindu Succession Act gave several rights to women. These rights were in the area of marriage, divorce, maintenance, guardianship of children and right to hold and dispose property with the International Decade of women. There is more awareness among women and demand for Family Courts indicates this awareness.

The reasons for demanding Family Courts are (i) Speedy Justice, (ii) Reduction of costs in getting justice, (iii) Effort to avoid the painful process to prove the wrongs done in open public places. It is expected that family courts are likely to give more humane considerations to women who are the victim of age old customs. Now that Family Courts Act of 1984 is passed, we have achieved one of our demands. The implementation of the Act is left to the State governments.

Prior to going to the Act proper, I would like to narrate an experiment which we undertook in the City Civil Court, Bombay. Sub-Section (2) of Section 23 of the Hindu Marriage Act enjoins the court to make every endeavour to bring about reconciliation between the parties before proceeding to grant any relief under the Act. Sub-Section (2) of the same section enables the court, to adjourn the proceedings for a reasonable period and refer the matter to “Any person named by the parties in this behalf on to any person nominated by the court. While the section leaves it open to the parties themselves to refer the matter to any person of their choice, it leaves the court free to nominate any person if the parties fail to name such person. The person so nominated may be directed to report to the court as to whether reconciliation is possible. Then the court is required to have regard to the report of the person so nominated. It is to be noticed that reconciliation in matrimonial cases is an accepted principle. It has acquired statutory recognition in Section 23 of the Hindu Marriage Act and a duty is cast on the court to attempt reconciliation. With the approval of the Bombay High Court an experiment Project on Marriage Counselling was started in the City Civil Court Bombay in April 1980. This project was initiated by the Department of Family and Child Welfare of the Tata Institute of Social Sciences. Two full time qualified and experienced social workers were appointed as counsellors. They were directly appointed in the court as right from the beginning, it was felt that counselling
process should be an integral part of the judicial machinery and should not be left to the outside agencies. Factors like diverse cultural attitudes between spouses and their families, division of labour between men and women, urbanisation, the graduate break down of joint family system, increase in life expecting, the emergence of women economically and socially as a distinct class of persons, problems connected with sexual behaviour, influence the result of marriage counselling. The marriage counsellors apart from interviewing the parties involved, also paid home visits, tried to contact inlaws, employers, to find out more about the persons involved in the process. The children were visited, contacts were made to the schools and efforts were made to find out if the marital discord of parents affected the child's school performance and All possible help was made available to tackle the behaviour problems of children if any.

Reference Procedure was basically initiated by the Judges presiding over matrimonial courts. Consent was obtained from both the parties for this procedure. The marriage counsellor was given time for about four to five weeks. If more time was required, the counsellors ask for the extension of time limit. Confidentiality is the Supreme principle observed in social work. Everything the parties have revealed in confidence is not reported to the court. However the counsellors assessment of the problem is reported to the judges. Counsellor may even the issues involved and come to a solution regarding maintainance, child custody, residence or even divorce. The counsellor does not make any decisions for the clients but helps them to arrive at a proper solution if they have a desire to arrive at a solution. Happiness or unhappiness in a marriage depends on both the persons involved in the concerned marriage. People Panting to be happy make all efforts to be happy and people wanting to make life difficult for themselves and for others are not easy to counsel. They are hard and tough cases. Some times help of other experts on sexual matters, psychiatrist is taken if felt necessary.

Some factual information

In all 337 cases were referred to the counsellors from June 1980 to September 1984

<table>
<thead>
<tr>
<th>Years in which cases are filed</th>
<th>1976</th>
<th>77</th>
<th>78</th>
<th>79</th>
<th>80</th>
<th>81</th>
<th>82</th>
<th>83</th>
<th>84</th>
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<td>13</td>
<td>33</td>
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<td>51</td>
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<td>19</td>
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<td>2. Petitioners</td>
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<td>W</td>
<td>Joint</td>
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<td></td>
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<td></td>
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<td>92</td>
<td>238</td>
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</tr>
<tr>
<td>&amp; custody</td>
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<td></td>
<td></td>
<td></td>
<td></td>
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3. **Years of Marriage**

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<th>51–60</th>
<th>61–70</th>
<th>71–75</th>
<th>76–80</th>
<th>81–84</th>
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<td></td>
<td>5</td>
<td>4</td>
<td>44</td>
<td>75</td>
<td>183</td>
<td>33</td>
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</table>

4. **Case filed within years of marriage**

<table>
<thead>
<tr>
<th>Years</th>
<th>Yrs.</th>
<th>Yrs.</th>
<th>Yrs.</th>
<th>Years</th>
<th>Years</th>
</tr>
</thead>
<tbody>
<tr>
<td>First 5 yrs.</td>
<td>6–10</td>
<td>11–15</td>
<td>16–20</td>
<td>21–25</td>
<td>25+</td>
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<tr>
<td></td>
<td>218</td>
<td>68</td>
<td>34</td>
<td>12</td>
<td>8</td>
</tr>
</tbody>
</table>

6. **Type of Marriage**

| Arranged | Marriage by choice | 316 | 43 |

7. **Marriage by choice**

| Within community | 27 |
| Inter community  | 11 |
| Inter religious  | 9  |

7. **Reasons as found out by the councillors.**

| Temperamental incompatibility | 143 |
| Desertion and cruelty        | 134 |
| Mental illness/retardation   | 34  |
| Sexual incompatibility       | 13  |
| Suffering from venereal disease | 2  |
| Adultery                     | 56  |
| Marriage by fraud            | 6   |
| Suffering from leprosy       | 2   |
| Interference from in-laws    | 128 |
| Alcoholism                   | 19  |
| Sterility                    | 6   |
| Irresponsible                | 72  |
| Immature personality         | 74  |

8. **Number of children**

| No child | 129 |
| One child | 142 |
| Two children | 54  |
| Three children | 18  |
| Four or more children | 13  |
9. Children at present staying with

Mother — 160
Father — 41
Siblings separated — 21
Hostel — 2
Cases reconciled are — 67

The Project has proved the utility of counselling process in Matrimonial Courts. Which is going to be very useful for the implementation of Family Court Act.

Important objectives of the marriage counselling project were to (i) To offer counselling services to the couple. Get first hand experience in handling Matrimonial cases. (ii) To evolve a course in marriage counselling and to prepare personnel for matrimonial counselling. Most of these objectives are fulfilled by the pilot project which is likely to help the working of Family Courts in Bombay. The need for counselling services is well established and the Govt. of Maharashtra has made the permanent appointments of marriage counsellors and they are now governed by the rules and regulations of the City Civil Court.

Implementation of the Family Court Act—The need for marriage counselling work has been fully recognised by the act. The act is to be implemented in those city where the Population exceeds 1 million. Maharashtra thus has 3 cities Poona, Bombay and Nagpur.

The cases which will get reported to the Family Court are—Matrimonial cases for divorce, maintenance child custody, restitution of conjugal rights, nullity of marriage, etc. Civil and criminal cases will be covered. It is estimated that about 4000 cases will get reported in Bombay, 1500 in Poona and 700 to 800 in Nagpur. (These estimates are based on the existing case load). If we estimates that are social worker can carry 250 case load per year, large number of workers will have to be recruited and trained. Implementation of act should be done consciously.

Personality of marriage counsellor plays important role. Properly trained person having skills in counselling, adequate knowledge in psychology, sociology and cultural anthropology is necessary. Their exposure to the knowledge available in psychiatry, sexology and law also is very necessary. Persons having masters degree in social work/counselling with adequate experience and skills in handling interpersonal behaviour is essential. Degree in either social work or counselling is likely to be misleading because just a social work degree may not have any content in marriage counselling or counselling degree may concentrate on vocational counselling. If necessary new courses will have to be visualised. A good counsellor should take into account the interest of both the parties involved in marriage, should be impartial, objective should be able to handle psychological tensions and emotional problems of the parties. Should have a belief that people have a capacity to change and can change. They should have diagnostic skills in understanding human behaviour. They must have capacity so that both the parties can have confidence in them. Above all they should not be corrupt.
Family Courts can avoid procedural delays. The existing law does not provide for approaching the counsellor even before filing the suit. Since there is no provision in the law, the voluntary agencies can start such centres particularly to help women to sort out the issues involved in their Matrimonial matter.

There are several issues in the child custody matter. Whenever parties separate in the process of martial discord children stay with either the mother or the father. One must accept the right of their partner on the child. The counselling process will facilitate the child to communicate with the parent with whom they do not stay particularly when they are young. Agrieved parents do not facilitate this process easily. On the other hand they create difficulties in the process. Children suffer most in such circumstances which at times gets resulted in the child developing behaviour problems, scholastic backwardness and even personality disorders when they are adults. Children need to be preserved in actual live situation while deciding about the custody.

One of the common complaints is that husbands do not pay maintenance charges regularly. This creates several difficulties of women. Family Courts should have powers to implement their decisions and need to be supported with the vigilance machinery.

Usha Mehra  
Registrar  
Delhi High Court  
Sher Shah Marg,  
New Delhi.
Discriminatory Provisions in Maintenance Laws

KUSUM

Matrimony entails a number of rights and obligations on the part of the spouses qua each other and maintenance is one of them. A husband is under an obligation to maintain his wife during coverture and even upon separation and divorce. This is so under all personal laws in India governing people belonging to different religious groups, e.g. the Hindus are governed by the Hindu Marriage Act, 1955 (HMA), the Parsis by the Parsi Marriage and Divorce Act, 1936, and the Christians by the Indian Divorce Act, 1869. There is still another statute, the Special Marriage Act, 1954, which is applicable to those who marry under this Act irrespective of their caste, community or religion. So far as the Muslims are concerned, the only statute which mentions maintenance for the wife is the Dissolution of Muslim Marriages Act, 1939 but it simply gives to a Muslim wife a ground for dissolution for the marriage if the husband has neglected or failed to provide for her maintenance for a period of two years. There is no mention of divorce for a separated or divorced wife in the Act. Nonetheless, Islamic scriptures and religion texts do concede this right to divorced Muslim wives, though in a limited way. It is heartening to note that very recently the Supreme Court in Mohammed Ahmed Khan v. Shah Bano Begum has brought divorced Muslim wives at par with other wives in this regard. It may be pointed out here that there is another statute also under which Hindu wives can claim maintenance from their husbands viz. the Hindu Adoptions and Maintenance Act, 1956 (HAMA).

Apart from these personal laws, there is still another law which is a secular piece of legislation and is uniformly applicable to all religious communities. This is the Code of Criminal Procedure, 1973 which, under section 125 provides for maintenance of wives. Under this Act, there is no discrimination of any kind and a wife, whether she is a Hindu or a Parsi or a Christian or even a Muslim, is entitled to claim maintenance from her husband. In Shah Bano Begum it was contended that under the Muslim law the husband’s liability ceases beyond iddat and after payment of dower but, the court overruled this argument and held that “The liability imposed by section 125 to maintain close relations who are indigent is founded upon the individual’s obligation to society to prevent vagrancy and destitution. That is the moral edict of the law, and morality cannot be dubbed with religion.”
However provisions of the Code of Criminal Procedure apart, we find that under the personal laws, wives of one community are discriminated against wives belonging to another community in various ways.

As observed above, a Hindu wife can resort to two statutes for seeking maintenance against her husband—the HMA and the HAMA. Under the HMA, as also under the Parsi and the Christian Acts mentioned above, a wife can claim maintenance from her husband only in case there is or has been a matrimonial case under the Act like case of judicial separation or divorce. If there is no such litigation, then she has no right to maintenance under the provisions of that Act. However, the HAMA comes to the rescue of a Hindu wife who is staying away from her husband but without her or her husband filing any matrimonial case. Of course, she has to establish that she is living away from her husband on justifiable grounds. The Act gives a number of them like desertion, cruelty, disease, etc. Thus whereas a Hindu wife can get maintenance even without going to a matrimonial court, a Parsi, Muslim or Christian wife has no corresponding right. Quite often a wife may be living away from her husband under very legitimate and compelling circumstances and yet may not choose to go to court for divorce or separation. She may abstain from matrimonial litigation hoping that things might settle down or in the interest of children or for fear of social stigma. In this situation, how is she to sustain herself? Agreed, she can go to a criminal court under the provisions of Cr. P.C. but these provisions have their limitation e.g. a maximum ceiling of Rs. 500. It is unreasonable that such discrimination should exist whereby a wife belonging to a particular group is entitled to maintenance whereas a wife similarly placed but belonging to another religious group is denied the same. It is therefore suggested that so long as the Uniform Civil Code does not come through, there should be provisions in the matrimonial laws of the Parsis, Christians and Muslims enabling and entitling wives living away from husbands on reasonable grounds, to seek maintenance from their husbands even without a decree of separation or divorce or annulment.

Then there is the question of maintenance of wives of avoid marriage. Under the Hindu and the Parsi law even a wife whose marriage is annulled or declared void is entitled to maintenance. There have been many court rulings on this point under the Hindu law, and maintenance has been granted to ‘wives’ whose marriage was void ab initio. In one case a wife was made to go through a mock marriage and there was no legal marriage at all and yet she was treated as a wife for purposes of grant of maintenance. However, under the Christian law, there is no such provision. Though there is a provision under the Indian Divorce Act whereby a marriage may be declared void on certain grounds, yet no relief by way of maintenance exists for wives where marriage has been so declared. Only those wives who have obtained a judicial separation or divorce are entitled to permanent alimony. Here again the question is, what is the way out for the ‘wife’? And to make matters worse, in such cases, she has no relief even under the provisions of the Cr. P.C. for maintenance under section 125 of the Cr. P.C. can be claimed only by a lawfully wedded wife. The wife is utterly helpless and often it may be for no fault of hers. Take an instance where a man
already married, marries again and the second wife has no knowledge of his first marriage. Later the marriage is got annulled. Where does the wife stand? She is utterly ruined in every respect.

It is submitted that this discrimination should go and suitable amendments be made in the Indian Divorce Act. In every respect this Act now deserves a place in a museum of antiquities and a new law is called for.

Another point is in regard to a ceiling in the grant of interim maintenance i.e. maintenance pending litigation which is granted with the object of providing the wife to meet her litigation expenses and her personal expenses during litigation. Under the Christian and the Parsi law, there is a provision that the amount of alimony pendente lite shall not exceed one-fifth of the husband’s net income. One wonders why this limit should be there. The matter should best be left to the discretion of the court which will fix the quantum having regard to the circumstances of the parties—including their income and needs. Recently there have been some judicial pronouncements where courts have disapproved “quantification based mechanically on a fractional share of the income of the husband” and fixed the amount keeping in view the totality of the circumstances. There is no such restriction under the Hindu law. It is therefore suggested that this limitation should be removed from the Parsi and Christian laws as well. We raise slogans against gender discrimination—discrimination between men and women—oblivious of the fact that there is discrimination between women inter se and the law is the perpetrator of the same. In provisions which have a social purpose to serve, like maintenance which is provided to prevent vagrancy and destitution, women of all religious creeds should be equally treated lest the less privileged are driven to “seek sanctu- ary in the streets”.

—Kusum
Indian Law Institute
The Family Courts Act—An Appraisal

JAYA SAGADE*

The Family Courts Act has received the assent of the President on the 14th September 1982. However, the Act will come into force when the Central Government issues a notification to that effect in the official gazette.¹

For more than last 15 years there was a constant demand for establishment of a family court. Laws dealing with matrimonial matters did neither emphasise family welfare nor laid down guiding principles for conciliation. During the matrimonial proceedings emphasis was on strong advocacy and observation of technical and rigid rules of procedure and evidence, caused inordinate delay. Adversary principle which is the basis of civil litigation was followed in matrimonial matters also, that further embittered relations between the parties.

Keeping all these fallacies in the mind, the present Act is enacted. The object of the Act is to promote conciliation and secure speedy settlement of dispute relating to marriage and family affairs.

An attempt is made here to analyse the provisions of the Act in the light of the above mentioned objects. Suggestions are also made to improve loopholes left in the act.

II

The Act consists of in all 23 sections which are further classified in 6 chapters. Chapter I gives the preliminary information about the Act. Chapter II deals with establishment and the constitutions of family courts and jurisdiction is covered under Chapter III. Procedural aspect is dealt in Chapter IV. Provision of appeals is in Chapter V and miscellaneous is covered in the last chapter.

III

The Act provides for establishment of a family court in a city or town with population exceeding one million². However, the discretion is with the State Government to establish a family court, if necessary, in areas where the population is below one million.³

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* Lecturer, ILS Law College, Pune 411004.
¹ Though the Act is of much importance, no efforts are made by the Central Government till today since it passing as to its implementation.
² See 3 (a) of the Act.
³ See 3 (b).
There is neither an explanation provided nor guidelines are given for using such discretion, by the State Government. More than 80% of the Indian population resides in villages. It becomes difficult for rural poor to travel a long distance for seeking help from the Courts. They have to suffer a two-way loss. On the one hand, they are required to spend on bus fare, on the other hand they lose their daily wages. Hence, establishment of a family court in rural and interior areas is absolutely necessary. Merely, a discretionary provision for its establishment given to the State Government, probably, would not solve the problem. It is submitted that the State Government should consider establishment of ‘Circuit Court’ for conducting matrimonial proceedings in various areas. Such court may have a sitting once or twice in a week in the specified area depending upon the population and the load of work.

The Act further provides for selection and appointment of judges. The preference is to be given to women. It is submitted that it would amount to a discrimination against men. There is no logical or scientific reasoning to believe that because of their sex females would be able to do a balanced justice or would have a better understanding of family problems. Another qualification required for becoming a judge of a family court is seven years’ practising experience. A lawyer who could survive in the profession, for seven years, would hardly prefer to become a judge. The service conditions, emoluments, paid, are not so lucrative as to attract a good lawyer to the Bench.

A family court will have a jurisdiction to try all matrimonial matters viz. Restitution of conjugal rights, judicial separation, dissolution of marriage, legitimacy of children, guardianship custody of a child and providing maintenance. Sec. 125 of Cr.P.C. would also be under the purview of a family court. This court would also be entitled to issue an injunction order in circumstances arising out of a marital relationship.

In spite of this long list of the subjects, certain important matters are left out. Adoption is not within the jurisdiction of a family court. The provision as to Guardianship is vague. Is this court entitled to try the matters under the Guardians and Wards Act? Jurisdiction regarding the property suits between the parties to the marriage is not self-explanatory. Does it cover only matrimonial property? The power is not given to attach the salary at source in case of maintenance orders.

For achieving the object of conciliation in disputes relating to marriage and family affairs, a provision is made as the association of social welfare organisations with the family

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4. Sec. 4 (4) (b).  
5. Particularly, when the newspaper reports highlight on the atrocities committed on women by other women. It will not be too bold statement that females are less sympathetic towards the problems of other females. Traditional role of mother-in-law or sister-in-law continues even today.  
6. Sec. 7.  
7. Sec. 7 Expln (g)  
8. Ibid (c).  
court. Rules are to be framed for this purpose by the State Government in consultation with the High Court. If this provision is properly and promptly implemented it would be of great help to courts. Social workers would be able to do home visits. Such visits would result in fruitful discussion which in turn would help the conciliation. A Family Court would also be entitled to secure services of a professional family welfare expert or a medical expert. This is an innovative provision. But again its success depends upon the nature and quality of Ruries and its implementation in practice.

With a view to secure speedy settlement of family disputes and to carry on the proceedings on informal basis, a party to a proceedings before a family court would no more be entitled as of right to be represented by a lawyer.

Formalities of recording the evidence of witness at length and the technical rules of evidence are also relaxed. However, discretion in given to the court to seek assistance of a legal expert as a amicus curiae if necessary. The provisions will certainly achieve a better result but depending upon who the judge is and how is he going to handle the matter.

Further if either party desires that the proceedings under the Act should be held in camera then the court will have to do so. Even where on such desire is expressed the court in its own discretion may direct that proceedings shall not be held in open court. Thus the choice is left to the parties and to the Court. The purpose behind such rule is the administration of justice would be rendered impracticable by the presence of the public. Parties may not feel confident and secured and hence be deterred from seeking relief at the hands of the Court. Considering these objectives, it is submitted that the proceedings under the Act should be held in camera and no choice should be left. It would further support to achieve the objects of the Act as conciliation is going to be the basis of the proceedings.

One appeal is allowed under the Act to the High Court on questions of facts and law within 30 days from the date of the judgement of a family court. To bring the finality to the proceedings at the earliest, the provision is adopted. As the whole objective of the Act is to solve the disputes by conciliation and as in formality is brought in the procedure, the provision to appeal to the Supreme Court is being taken away. However, anomalies

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10. Sec. 6.
11. Sec. 12.
12. Sec. 13. See Lingapper P Appelwar V Statir-Moh. (1984) SCC 479. The Supreme level has held that under Art. 22 (1) the constitution, there is so fundamental right being represented by an
14. Sec. 11. This sec is in contravention of sec. 22 of the HMA, 1955. Sec. 20 of the present Act gives overriding effect to all other laws. However, the HMA, 1955 had the same provision before its amendment in 1976. Since 1976 all the proceedings under the HMA are required to be held in camera, with the special objects in mind the amendment was brought in the year 1976. What is the propriety in going back for the old provision?
15. Sec. 19.
created due to interpretation of the legal provision of the personal law by the different state High Courts could be removed through a writ jurisdiction.

IV

Such are the important provisions of the Family Court Act. After long discussions and constant demands for last ten years it has appeared in the statute book. The Act is not wholly a progressive but certainly is a significant step towards settlement of matrimonial disputes. The object is good but let us hope it will not defeat its purpose by sticking to rigid technical rules of procedure, evidence. Probably, the whole success of the Act would depend upon the judicial personnel constituting a family court. Let us hope, that judicial activism would contribute to a greater extent in achieving the objectives of the Act.
Observations on the Muslim Women (Protectional Rights on Divorce) BILL 1986

Prof. UPENDRA BAXI

I. The proposed Bill is a fraud on the Indian Constitution. In legal parlance, this expression describes that behaviour of a legislature which knowing fully well that it has no power to legislate on a subject matter yet proceeds to make a law in such a way that the transgression appears to be within its power.

My reasons for saying this are based upon the analysis of the Constitution and its interpretation.

II. First, the Constitution does nowhere speak of something called the 'personal Law'. Article 372 simply says that laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force unless repealed or amended by the legislature. But that Article makes it crystal-clear that such laws continue in force subject to other provisions of the Constitution. Article 13 is one such provision in part III which enshrines fundamental rights. This Article says that all laws in force in the territory of India immediately before the commencement of this Constitution shall be void to the extent they are inconsistent with the fundamental rights. What is more, the State shall not make any law which takes away or abridges this right; if it does they will be void to that extent. Nowhere does the Constitution refer to 'personal laws'. Either such bodies of law are laws in force at the time of the commencement of the Constitution or they are not. If they are, they have to comply with fundamental rights, failing which they are void.

The term “personal law” is not a term of art; at best it refers to bodies of law which are in force by virtue of Article 372. They may only continue to be in force if and only if they do not take away or abridge any fundamental right.

The expression ‘personal law’ is calculated to deceive and defraud people, no matter who uses this expression. This expression is an enemy of any clear thinking on the subject, and an aid to lawlessness of the State.
IV. The Bill cannot be said to reaffirm or continue anything called “personal law.” It may and does seek to change some laws in force. Parliament is at least supposed to know the law and the Constitution; so are Ministers who take an oath of allegiance to the Constitution.

V. Since the Bill seeks to make a law, it must not be violative of fundamental rights as interpreted by the Constitution. The Bill, as it stands, openly violates Article 14 in that all other divorced wives can obtain maintenance by court orders under Section 125 of the Cr.P.C., whereas Muslim women will be unable to do so if it is passed. The Bill does confer power upon the Magistrate to direct the husband to pay maintenance during the period of iddat. But Section 4 prescribes that notwithstanding this, he may order relatives or in absence of relatives direct the Wakf Board to pay maintenance. In so providing, the Bill treats Muslim women as a separate and distinct class. The Bill violates the older doctrine of reasonable classification; it is also patently violative of the requirement of reasonableness and non-arbitrariness incorporated in Article 14 by the Supreme Court in Maneka Gandhi’s case. It violates the command of Article 15 (1) that the State shall not discriminate against any citizen on the ground of religion. The Bill also violates the fundamental right to livelihood declared to be a part of right to life and liberty under Article 21 in the Bombay Pavement Dwellers Case (Olga Tellis v. Bombay Municipal Corporation), in so far as the Magistrate has to decide whether to ask the relatives or the Wakf Board to pay maintenance—a complex and time consuming process during which even interim maintenance order may not be validly made.

VI. The Union Law Minister and the Minister of State for Law are Senior Counsels at the Supreme Court who at least must be presumed to know the law of the land; so must the Cabinet consisting of Ministers all of whom have taken an oath of allegiance to the Constitution.

VII. The Bill cannot, by any stretch of imagination, be considered to be a fulfilment of Article 25 which enshrines the right to freedom of conscience and religion. This right is subject to restrictions on the ground of public health, public order and morality. At first sight, the last restriction is puzzling; how can religion be subject to morality? Whose morality, that of any other religion? The answer is clearly in the negative. The expression ‘morality’ must inescapably refer to constitutional morality. That morality is at least embodied in Articles 14, 15 and 21 as interpreted by the Supreme Court and by fundamental duties of citizens and the Directive Principles of State Policy. Parliament is prohibited to make laws which are violative of these provisions and the freedom of conscience and religion is made expressly subject to these norms.

VIII. The unconstitutionality is thus hideously writ large on the Bill. What is more, Members of Parliament, being citizens, are bound to observe in the making of laws their duties under Part IV-A of the Constitution. Every citizen of India is bound by
these fundamental duties. Under clause (g) of Article 51-A all citizens are under a constitutional duty to "renounce practices derogatory of women"; the Bill seeks to institutionalize such a practice. Clause (h) obligates all citizens to develop scientific temper; this duty is violated by statements which signify that there is something called the personal law. Scientific temper requires us at least to understand that all laws, existing and proposed, must conform to the Constitution. The same clause further obligates the fundamental duty to develop "humanism" and the "spirit of... reform." The Bill violates these duties massively. Clause (e) requires all citizens to "promote spirit of harmony and the spirit of common brotherhood amongst all people of India transcending religious, linguistic and regional or sectional diversities"; the plea proposed Bill grossly violates this fundamental duty.

IX. The proposed Bill also manifestly violates the constitutional duty of the State under a large number of Directive Principles. Article 37 mandates that the Directive Principles shall be fundamental in the governance of the country and that it shall be the duty of the State to apply these principles in making laws. What are the relevant principles thus paramount on the State in making of laws? These are as follows insofar as it concerns the proposed Bill.

(a) Article 38(1) directs the state to strive for the welfare of the people and promote, as effectively as it can, a social order in which justice, social, economic and political shall inform all the institutions of national life. Can anyone honestly say that the proposed Bill is a fulfillment of this Directive?

(b) Article 38(2) directs the state to eliminate "inequalities in status, facilities and opportunities...amongst individuals." Can anyone honestly say that the proposed Bill is a step in this direction?

(c) Article 39 (1) directs the State to develop policies which will tend to secure that all citizens, men and women equally, have the right to an adequate livelihood. Can anyone say honestly that the proposed Bill is designed to fulfill this Article?

(d) Article 41 directs the state among other things, to cater to the needs of people in "undeserved want." Can anyone honestly say that the proposed Bill, let alone catering to the situation of "undeserved want" among Muslim women, is not creating such want?

(e) Article 44 is the directive obligating the state to secure for all citizens a uniform civil code throughout the territory of India. Can anyone honestly believe that the proposed Bill is a step towards that direction?

(f) Article 46 requires of the state a special solicitude for "weaker sections of society"; divorced Muslim women, and indeed, all women suffering from traditional religiously ascribed inferiority are encompassed in this notion. Can anyone honestly say that the proposed Bill tends in this direction?
(g) Article 51 requires the state to foster respect for international law. Many United Nations Resolutions and Declarations, to which the Indian state is a party, prohibit discrimination against women. Can anyone say honestly that this Bill fulfills the Directive?

X. The proposed Bill not merely repudiates fundamental rights which limit, with crystal clarity, the power of Parliament but also repudiates each and every relevant Directive Principle fundamental to the governance of the country and the making of the law. It also violates major Fundamental Duties. Such a Bill can only be described as a calculated affront to the Constitution by those who have sworn an oath of allegiance to the Constitution.

XI. Even if passed, the President of India is not obliged to give his assent to it. Under Article III of the Constitution the President has the power to withhold the assent and return the Bill to Parliament with a message urging reconsideration of such a Bill. Only if the President's suggestions are disregarded and the Bill is passed in original form unamended as per the message that the President is disabled to withhold his assent therefrom. When a Bill is tinged with unconstitutionality in all its aspects, the President is obliged under his oath of office to return the Bill. Obviously, in so doing he is clearly not bound by the aid and advice of the Council of Ministers.

XII. The President is also empowered under Article 143 to consult the Supreme Court if it appears to him at any time that a question of law or fact has arisen, or is likely to arise, which is of such a nature and of such public importance that he may refer the question to the Supreme Court for consideration and advice. The phrase 'at any time' leaves open the possibility of referring a Bill passed by Parliament, like the proposed one, which exudes unconstitutionality in its every pore (as it were) to the Court and the possibility that he may append the opinion of the Supreme Court to his message to Parliament under Article III of the Constitution. The President has the inherent power and duty in certain situations, like the proposed Bill, to return it to Parliament for reconsideration; he has also the ancillary power to consult the Supreme Court at this stage unbound by any advice of the Council of Ministers, more so in view of recent disclosures by Arun Shourie in The Times of India suggesting rejection of mature legal advice against this kind of legislation by the Union Home and Law Ministries.

XIII The present Bill is a coup against the Constitution. It violates every single major provision of the Constitution. The Constitution exists, like all law, to discipline power. The desire to overcome these limits of the discipline of the law is a human failing. The Supreme Court exists, indeed it is its sole raison de etre, to rectify excesses of power. If Parliament and the President behave as if the Constitution does not exist, it is the duty of the Court to remind them that it does. One can only hope that if the current effort to oust the Constitution from public life crystallizes, the Supreme Court of India foils this repudiation of the Constitution.
XIV. Jawaharlal Nehru's dilemma of how to build a just state with just means is clearly not inherited by his successors in power. But the Court cannot afford to disinherit the Constitution. Parliament by passing this lawless law will be merely testifying to the arrogance of power. If the Supreme Court acquiesces with this gesture of extraordinary defiance of the Constitution, it will cease to be both Supreme and a Court.

XV. Indeed, this is one case reeking with anti-constitutionalising where the court, within its fundamental rights jurisdiction, can direct Parliament to desist from passing the Bill or the President to withhold the assent. This is the acid test of the senior members of the Bar and Justices of the Supreme Court.
Family Courts

PARAS DIWAN

Parliament has passed the Family Courts Act 1984, but it will be brought into force only when the Central Govt. issues a notification in the official Gazette, and different dates may be appointed for bringing it into force in different States. Before the Family Courts start functioning, the Central Government, the State Governments and the State High Courts will have to frame rules on several matters connected with the family courts.

Concept of Family Court

It is now socially accepted that adjudication in regard to any matter pertaining to family, whether divorce, maintenance, custody and guardianship of children or trial of juvenile offenders should not be viewed in terms of failure or success of a legal action, but as a social therapeutic problem needing solution. No court which is engaged in finding out what is for the welfare of the family, viz, whether a marriage has broken down or not, which spouse needs financial support or which parent should have custody of children, should rest content with the assertions and contentions of the parties and evidence led by them to prove or disprove the same. The court engaged in finding solutions to familial problems requires a less formal and more active investigational and inquisitional procedure. In short, adjudication relating to family matters should not be viewed as a litigation in which parties and their counsel are engaged in winning or defeating a legal action. It is rather an adjudication in which parties, lawyers, psychiatrists, welfare officers and social workers, all are engaged in finding out a solution to the problem before the court. Thus, the concept of family court implies an integrated broad-based service to families in trouble. It stipulates that the family court structure should be such which is meant to preserve and stabilise the marriage, and when it has broken down irretrievably to dissolve it with maximum fairness and minimum bitterness, distress or humiliation, and provide solutions to divorce aftermath—problems.

Status of Family Court

Under the Family Court Act, to begin with, family courts are to be set up for a town or city whose population exceeds one million, though later on State Governments may set up family courts for other areas.

The Family Court may consist of one or more judges, and where there are more than one judge, each judge is entitled to exercise all or any of the powers conferred on the family
court. In the case of plurality of judges, the senior most will be designated as Principal Judge. The age of retirement of judges of Family Court is 62 and their emoluments, terms and conditions of service are to be determined by the State Governments in consultation with their High Courts. It appears that the status of the Family court will be higher to the District Court but lower to the High Court.

Only those persons who have at least seven years’ experience as judicial officers or as members of a tribunal or those who have held a post under the Government of India or State Government for that duration requiring special knowledge of law or who have been advocates of High Court for that duration are eligible to be appointed as judges of the family court. Other qualifications may also be laid down by the Government of India in consultation with the Chief Justice of the Supreme Court. Women will be preferred for the judgeship of the family court. In appointing Judges, the Act lays down, “every endeavour shall be made to ensure that persons committed to the need to protect and preserve the institution of marriage and to promote the welfare of children and qualified by reason of their experience and expertise to promote the settlement of disputes by conciliation and conselling are selected”. It is a laudable, pious wish, but how will such persons be found out? In our submission for the judges of the family court, apart from the knowledge of family law, knowledge of psychology, sociology and social work should be necessary. Such persons have to be trained. Under the Act those persons who are engaged in the research or teaching of family law are not eligible to be appointed as Judges of the family court. In our submission, since the family court system visualises a less formal procedure, where legal technicalities and technical procedure is dispensed with, such persons, being experts in family law, are eminently suitable to man the family court.

Jurisdiction of Family Court

The countries having the family court system are still engaged in a controversy as to what matters should come within the jurisdiction of the court. There is an agreement that all family law matters, such as marriage, matrimonial causes, maintenance and alimony, guardianship, custody, education and support of children, settlement of spousal property and like should come within the jurisdiction of the court. Disagreement exists as to para-familial matters, such as inter spousal assaults, familial assaults and other offences or criminal nature between the spouses and their children, interspousal and inter-familial torts and contract, and dowry or dower. Our Parliament has favoured the former view. Explanation to section 7(a) of the Family Courts Act lists the following matters: (i) matrimonial causes, (ii) suits for declaration of validity of marriage or spousal status, (iii) suits regarding spousal property, joint or separate (iv) suits for injunction arising out of marital relationship, such as a suit for injunction to restrain a spouse from taking a second spouse or a suit for injunction for preventing any other wrong (for instance, sale of joint property or spouse’s property), (v) suits for maintenance, (vi) suits relating to guardianship and custody of minor children, and (vii) suits relating to maintenance of wife, children and parent under the summary procedure under s. 125, Criminal Procedure Code. If any other statute confers
jurisdiction on any matter on the family court, then obviously the family court will have jurisdiction over such a matter. In our submission, it would have been better if the parafamilial matters were also brought under the jurisdiction of the court. Thus, no matter under the Dowry Prohibition Act falls under the jurisdiction of the family court.

Procedure

The concept of family court essentially implies dispensation of the traditional adversarial procedure. This implies that simple rules of procedure should be devised. The rules of procedure should not merely be simply worded covering the whole range of procedure from the commencement of an action to its conclusion, including means to enforce judgements and orders, but should also be flexible reflecting the diverse problems involved in family adjudication, standard forms to meet all situations should be drafted, pleadings should stay away from the traditional adversary or fault oriented approach, pre-trial process should be laid down designed to provide dignified means for parties to reconcile their differences and to reach amicable settlements without the need of trial wherever feasible. Further, free legal advice should be available to the parties as to their rights, obligations and responsibilities. Where children are involved, steps for immediate protection of their interests and rights should be taken. The rules should be such that all issues between the parties should be determined without any prejudicial delay. The language, conduct, documents and legal representation should be simple shorn of technicalities. The-trial documentation of the pleadings should be such that issues between the parties are clearly defined; this will help in avoiding frivolous litigation, encourage pre-trial debate and settlement. It is submitted that since the main objective of the family court system is to encourage and enable parties to go into a process of reconciliation, failing which of conciliation. If the parties have been able to come to some settlement the family court/judge should be able to pass consent orders without any formality of formal trial and hearing.

It is evident that the Family Court Act has opted for a less formal procedure. Although s. 10 of the Act generally makes the procedure laid down under the Civil Procedure Act applicable to the family court proceedings, it has been further laid down that the family court has power to evolve its own rules of procedure which will over-ride the rules laid down in the civil Procedure Code or any other law. Sections 14, 15 and 16 of the Act provide for the informality of procedure. It is laid down that any document, report, statement or information relevant for the trial will be admissible in the family court even though under the Indian Evidence Act such documents etc. may not be admissible. The family court judge need not record the full evidence (as is imperative in the adversarial procedure system); he may just prepare a memorandum of substance of evidence. Where the evidence of a person is of formal character, it may be tendered by affidavit. Further, the judge need not deliver a detailed judgement, though the judgement should contain a concise statement of the case, the points arising for determination, and the reasons for the decision.