
ANALYSIS OF THE FAMILY COURTS IN PROTECTING THE RIGHTS OF CHILDREN

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ABSTRACT

This paper is based on the theme child rights and role of judiciary. However here role of family court is mainly focused. Title of this paper is 'Analysis of the Family Courts in protecting the rights of children'. Based on marriage relationships are formed and it is through relationship family is formed. Concept of family had undergone a radical change from its traditional point of view. Now the concept of nuclear family is emerged. With these change and also due to some other factors problem in family also increased. Today filing of family related cases are on a rise. Disharmony in the family life may upset the development of children. In fact they are worsely affected by this conflict. Here an attempt had been made to analyse the family court its establishment, jurisdiction, procedure etc and the challenges faced by it in protecting the rights of children and some suggestions are also put forwarded for rectifying those challenges. Methodology adopted here is doctrinal.

Introduction

Children are the most precious gift of the god. They are the promise of the future. When they are keenly and carefully developed –mentally, physically and educationally they became the valuable asset of the nation. This section of population need to be moulded, motivated, skilled and trained properly to bring rapid progress for a country. Generally person under the age of 18 is considered as child. However in our country this may change from legislation to legislation depending upon the conditions.

Though India ranks second most populous country in the world, it occupies first position in terms of population of the youngsters. As per estimates, the current population of India is 1,372,269,634. Among them 29.7% of population are under age 15, 64.9% of population are of the age group between 15 and 64 and 5.5% of population are of the age 65 and above¹. There are different institutions² and mechanisms for protecting the rights of the children in India. Among them the Family Courts established under the Family Courts Act, 1984 plays a crucial role. The number of functional family courts in India was 439 as of May 2016. The top 10 states in terms of the number of functional family courts were: Uttar Pradesh, Madhya Pradesh, Bihar, Kerala, Rajasthan, Karnataka, Maharashtra, Jharkhand, Chhattisgarh and Tamil Nadu as of May 2016. The number of functional family courts in Kerala was 28 as of May 2016. It accounted for 6.38% of the number of functional family courts in India as of May 2016. The above mentioned top 10 states accounted for 76.08% of the total number of functional family courts in India as a whole as of May 2016³.

“The family is a group defined by a sex relationship sufficiently precise and enduring to provide for the procreation and upbringing of children”⁴. It is the most fundamental and universal of all institutions which provides the basis for the socialization of children. Through the mingling of parents, siblings, uncle, niece and other relatives it provides a platform for the children to socialize and thereby build up their culture, behaviour etc. Family also provides social identity and recognition to the child. It is through the family that sexual impulse are controlled and regulated. It is the only unit which provides support to its member through love, affection,

¹ available at: <https://countrymeters.info/en/India> (visited on 14 february 2019).

² National Commissions for the Protection of Child Rights(NCPCR), Juvenile Justice Boards, Child Welfare Committees, Child Protection Units etc.

³available at: <https://community.data.gov.in/functional-family-courts-as-of-may-2016> and <https://data.gov.in/catalog/answers-data-rajya-sabha-questions-session-239> (Visited on 14 february 2019).

⁴ Kingsley Davis, Human Society (Surjeet Publications, 8thedn., 2007).

comfort, help etc. Nuclear family, joint family/extended family, matrilocal family, patrilocal family etc are some of the popular forms of family.

The disharmony in relation between the spouses even if of minor amplitude, affects the mental strength and confidence of the child. It develops a sense of insecurity in them which seriously affects their educational prospects also. Break down of the joint family system results into the emergence of the nuclear family which definitely developed a sense of insecurity among the members. There is no one to guide/mediate the spouses which in effect results in disparity in their family life. The end of these disparities and disharmony among the members is the filing of litigations in family courts. It may be pertaining to divorce, custody, maintenance and guardianship of children, adoption etc. Children are most affected by these litigations, their mental and moral development, tender age and childhood are worsely affected by these litigations.

The movement to establish a family court in India was initiated by the late Durgabhai Deshmukh, the noted social worker from Maharashtra. After a tour of China in 1953, where she had occasion to study the working of family courts, Deshmukh discussed the subject with certain judges⁵ and legal experts and then made a proposal to set up family courts in India to Prime Minister Jawaharlal Nehru⁶. At the beginning the main reason for establishing family courts was to provide speedy disposal of cases relating to women. The immediate reason for setting up of family women organisations, welfare organisations and individuals for the establishment of special courts was for producing a forum for speedy settlement of family disputes⁷. Government of India altogether took 10 years to pass the necessary legislation and finally the Family Courts Act was passed in 1984 and was widely accepted. However in Kerala family court was established only on 6th June 2002

Establishment of Family Courts

The State Government, after consultation with the High Courts, and by notification establish in any area in the state comprising city or town where the population exceeds one million, a

⁵ National Commission for Women, Family Court Report on Working of Family Courts and Model Family Courts (2002).

⁶ Family Courts in India: an Overview, available at: <http://www.legalserviceindia.com/article/I356-Family-Courts-in-India.html> (Visited on 26 December 2018).

⁷ Supra note5

family court. State Government may also establish family courts for such other areas in the state as it may deem necessary⁸.

JURISDICTION OF FAMILY COURTS

Family courts shall exercise the jurisdiction exercisable by any District Court or any Subordinate Civil Court under any law for the time being in force and can deal exclusively with the 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 the legitimacy of any person, or guardianship of a person, or the custody or access of any minor and suits for maintenance⁹.

Any dispute that arises in a marriage between the parties irrespective of their caste or creed and validity of marriage, falls under the jurisdiction of the family courts. Family courts shall also have jurisdiction exercisable by a Magistrate of the First class under Chapter IX relating to maintenance of wife, children and parents of the Code of Criminal Procedure, 1973 and such other jurisdiction as may be conferred on it by any other enactment¹⁰.

PROCEDURE TO BE FOLLOWED IN FAMILY COURTS

Once we try to contemplate the provisions of the Family Courts Act, 1984 particularly section 9 to 18 which exclusively deals with the procedure to be followed in family court what we can positively affirm is that here the framers of this Act had made every endeavour to protect the rights of the children. The Act provided that family court shall make every effort for a settlement in respect to the subject matter of the suit or proceeding and it should be in accordance with the nature and circumstance of each case¹¹.

Another peculiarity regarding family court is that it can exercise the powers of the civil court and the provisions of the Civil Procedure Code is applicable to its suits and proceedings also. The provisions of the Criminal Procedure Code shall apply to the proceedings under Chapter IX of that code before a family court¹².

⁸ The Family Courts Act 1984, s. 3 (Act 66 of 1984)

⁹ The Family Courts Act 1984, s. 7 (Act 66 of 1984)

¹⁰ The Family Courts Act 1984, s. 7(2) (Act 66 of 1984)

¹¹ The Family Courts Act 1984, s. 9(1) (Act 66 of 1984)

¹² The Family Courts Act 1984, s. 10 (Act 66 of 1984)

If either the family court or the party so desires even its proceedings may be held in camera which in one way or the other beneficial for the wellbeing of the child¹³. For promoting the welfare of the family and also in executing the functions imposed by this Act family court can receive the assistance of medical and welfare experts¹⁴. Experts who tender such report can be examined and evidence so adduced can be relied upon¹⁵.

By virtue of Section 17 of the Act, Judgement of a family court shall contain statement of the case, the point for determination, the decision thereon and the reasons for such decision.

From the family court an appeal shall lie before the High Court on fact and law within a period of 30 days from the date of the judgement or order of a family court. However no appeal shall lie from a decree or order passed by family court with the consent of the parties or from an order passed under Chapter IX of the Code of Criminal Procedure, 1973. Such appeal shall be heard by a bench consisting of two or more judges¹⁶.

Concept of Child Friendly Justice

Children are one of the most vulnerable section of our society. They need special care and protection and this is also not different in the case of our justice system. Building on international children's rights obligations, child-friendly justice introduces principles that empower children to enforce their rights and encourages government, court, and law enforcement officials to develop policies that address children's precarious situation in the justice system¹⁷.

Child-friendly justice asks us to appreciate and minimise the challenges that children face at each step in each aspect of a legal proceeding, building confidence in the view of the justice system as a solution to children's legal issues rather than another of an already long list of problems. Respecting child friendly justice principles will not only eliminate many of the traumatic experiences children face in the legal system, it will foster greater respect for their

¹³ The Family Courts Act 1984, s. 11 (Act 66 of 1984)

¹⁴ The Family Courts Act 1984, s. 12 (Act 66 of 1984)

¹⁵ Pradeep Kumar A.V v. Sindhu C.K [2009] KLT 501 (HC).

¹⁶ The Family Courts Act 1984, s. 19 (Act 66 of 1984)

¹⁷ available at: <http://gruppocrc.net/up-content/uploads/2011/05/child-friendly-Justice-and-children-s-Rights.pdf> (visited on 14 January 2019).

rights by providing children the full access to justice they need to bring violations of these rights forward¹⁸.

United Nations Convention on the Rights of the Child, 1989 and Child-friendly justice Member states of Convention on the Rights of the Child are obliged to follow the obligations of child friendly justice and some these obligations are incorporated in their very provisions and they are discussed below,

Best interests

1. “In all actions concerning children...the best interests of the child shall be a primary consideration.”
2. “States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being...and, to this end, shall take all appropriate legislative and administrative measures.”
3. “States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities....¹⁹”

Separation from parents

1. “States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine...that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.”
2. “In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known²⁰.”

The child's opinion

¹⁸ Ibid

¹⁹ Convention on the Rights of the Child, 1989, art 3

²⁰ Convention on the Rights of the Child, 1989, art 9

1. “States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child....”
2. “For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body....²¹”

Protection from abuse and neglect

1. “States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation....”
2. “Protective measures should...include effective procedures for the establishment of social programmes to provide necessary support for the child...and, as appropriate, for judicial involvement.²²”

Refugee children

1. “States Parties shall take appropriate measures to ensure that a child who is seeking refugee status shall...receive appropriate protection and humanitarian assistance....”
2. “For this purpose, States Parties shall...assist such a child...to trace the parents or other members of the family.... In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment....²³”

Torture and deprivation of liberty

“States Parties shall ensure that:

- (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment...

²¹ Convention on the Rights of the Child, 1989, art 12

²² Convention on the Rights of the Child, 1989, art 19

²³ Convention on the Rights of the Child, 1989, art 22

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect...and in a manner which takes into account the needs of persons of his or her age. In particular every child deprived of liberty shall be separated from adults...and shall have the right to maintain contact with his or her family...;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of...liberty before a court or other...authority, and to a prompt decision on any such action.²⁴”

Rehabilitative care

“States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.²⁵”

Administration of juvenile justice

1. “States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.”

2. “To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that...

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees...

²⁴ Convention on the Rights of the Child, 1989, art 37

²⁵ Convention on the Rights of the Child, 1989, art 39

(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance...;

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and...in particular, taking into account his or her age or situation, his or her parents or legal guardians;

(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality...

(v) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

(vi) To have his or her privacy fully respected at all stages of the proceedings.”

3. “States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular...

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.”

4.“A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.²⁶”

Role of Counsellors

Role of the counsellors in the family courts is very important. In family courts every endeavour shall be made first to solve the disputes through counselling. The process of selection of the counsellors is significant for delivery of justice. So far as the judges are concerned, they can also participate in counselling at the second stage. At the first stage the cases are sent to the

²⁶Convention on the Rights of the Child,1989 art 40

counsellors for counselling. In many cases where at the initial stage the counselling has failed, proactive role of the judge has helped in resolving the dispute²⁷.

Counselling and conciliation are the two pillars on which the whole structure of family courts is built. Counselling, in fact, is the foundation on which the philosophy of conciliated settlement rests. The role of the counsellors is not limited to counselling but extends to reconciliation and mutual settlement wherever deemed feasible. Most of the cases filed before the family courts can be resolved by way of proper counselling²⁸.

The Counsellor shall fix time and date of appointment and inform the same to the parties for their appearance. If either of the parties fails to attend on that date the counsellor may fix another date and communicate the same to the concerned by registered post. In case of default by either of the parties on the adjourned date, the counsellor shall submit a report to the court and then the court will take action against the defaulting parties. On appearance of parties the counsellor made efforts to settle the dispute by way of conciliation. The counsellor may in discharge of his duties visit the home of either of the parties and interview the relatives, friends and acquaintances of either of the parties⁵³.

The counsellor may take the assistance of any organization, institution or agency in discharge of his duties. The counsellor shall submit his report to the Court as and when called for to assist the court in deciding the case on hand. The report of the counsellor all points about living environment of the parties concerned, personalities, relationship, income and standard of living, educational status of the parties, status in society and counsellor's finding²⁹.

The marriage counsellor shall be used the powers against the women in the interest of the family since it is imbibed into the minds of such counsellors and their primary commitment is to preserve the institution of marriage. The report of the marriage counsellor is kept confidential, and not made a subject of cross-examination³⁰.

Custody and Guardianship

²⁷ available at: <https://www.ncw.nic.in> (Visited on November 15,2018)

²⁸ Family Dispute Conciliation, available at: <https://www.mainstreamweekly.net/article1205.html> (Visited on 16 October 2018).

²⁹ Ibid

³⁰ Flavia Agnus, *Family Law: Marriage, Divorce and Matrimonial Litigation* (Oxford University Press, New Delhi, 2011).

The term ‘custody’ is not defined in any Indian family law, whether secular or religious. The term ‘guardian’ is defined by the Guardians and Wards Act, 1890 as a “person having the care of the person of a minor or of his property or of both his person and property³¹.”

The Guardians and Wards Act, 1890 is applicable in determining the matters relating to custody and guardianship of every person irrespective of their religion. It authorizes the District Courts to appoint guardians of the person or property of a minor, when the natural guardian as per the minor’s personal law or the testamentary guardian appointed under a Will fails to discharge his/her duties towards the minor. The Act is a complete code laying down the rights and obligations of the guardians, procedure for their removal and replacement, and remedies for misconduct by them. It is an umbrella legislation that supplements the personal laws governing guardianship issues under every religion.²⁰ Even if the substantive law applied to a certain case is the personal law of the parties, the procedural law applicable is what is laid down in the Guardians and Wards Act, 1890³².

Section 7 of the Act authorizes the court to appoint a guardian for the person or property or both of a minor, if it is satisfied that it is necessary for the ‘welfare of the minor.’³³Section 17 lays down factors to be considered by the court when appointing guardians³⁴. Section 17(1) states that courts shall be guided by what the personal law of the minor provides and what, in the circumstances of the case, appears to be for the ‘welfare of the minor’³⁵.Section 17(2) clarifies that in determining what is for the welfare of the minor, courts shall consider the age, sex and religion of the minor; the character and capacity of the proposed guardian and how closely related the proposed guardian is to the minor; the wishes, if any, of the deceased parents; and any existing or previous relation of the proposed guardian with the person or property of the minor³⁶. Section 17(3) states that if the minor is old enough to form an intelligent opinion, the court ‘may’ consider his/her preference³⁷.

³¹ Guardians and Wards Act, 1890, s. 4(2) (Act 8 of 1890)

³² Guardians and Wards Act, 1890, s. 6 (Act 8 of 1890)

³³ Guardians and Wards Act, 1890, s. 7 (Act 8 of 1890)

³⁴ Guardians and Wards Act, 1890, s. 17 (Act 8 of 1890)

³⁵ Guardians and Wards Act, 1890, s.17(1) (Act 8 of 1890)

³⁶ Guardians and Wards Act, 1890, s.17(2) (Act 8 of 1890)

³⁷ Guardians and Wards Act, 1890, s.17(3) (Act 8 of 1890)

By studying the above provision we can conclude that in appointing a guardian to the person or property of a minor under the Guardians and Wards Act, 1890, courts are to be guided by concern for the welfare of the minor/ward.

However, in modern statutory Hindu law, the Hindu Minority and Guardianship Act, 1956 provides that the father is the natural guardian of a minor, and after him, it is the mother³⁸. In deciding the guardianship of a Hindu minor, the welfare of the minor shall be the 'paramount consideration'³⁹. Section 26 of the Hindu Marriage Act authorizes courts to pass interim orders in any proceeding under the Act, with respect to custody, maintenance and education of minor children, in consonance with their wishes. The Section also authorizes courts to revoke, suspend or vary such interim orders passed previously.

Challenges faced by the Family Court in protecting the rights of the children

The main objective of the establishment of family court is for the speedy disposal of family cases but unfortunately this very objective is defeated since it is burdened with lot of pending cases. This is one of the important challenges faced by the family courts.

Mental health and confidence level of the children are badly affected by the overcrowded court atmosphere. Family Court judges should not be impatient. They should behave with love and affection towards children and should not do anything which may upset the children. They should value humanitarian considerations. While deciding the cases judges should ensure that their discretionary power is exercised in a manner which ensures best interest and welfare of the child.

Alternate dispute resolution techniques like conciliation and mediation applied in court is not satisfactory and not upto the mark as expected. Counselling need to be completed within a stipulated time period and there is lacuna in the legislation regarding it and hence it need to be rectified for speedy disposal of cases.

Judges who are having the aptitude and attitude to deal children and family matters need to be appointed. Honourable High Court while appointing family court judges need to seriously consider this fact. Absence of such judges is another challenge faced by the family court.

³⁸ Hindu Minority and Guardianship Act, 1956, s. 6(a) (Act 32 of 1956)

³⁹ Hindu Minority and Guardianship Act, 1956, s. 13 (Act 32 of 1956)

There is a lack of arrangements in family court for the child to sit and wait and to meet their separated parents. Family courts failed to arrange necessary facilities for refreshment, medical care etc to the children.

Conclusion

From the above discussions we can conclude that family court is having a tremendous role in protecting the rights of children. Yet there are certain matters which need to be improved and rectified. For tackling the problem of delay counselling should be made as expeditiously as possible and amendment to this effect need to be made in the concerned statute. For rendering speedy justice to children family court shall prioritise the cases of children. Long wait of children in open court need to be avoided or atleast minimised. If possible separate time frame and day should be fixed exclusively for dealing matters relating to children so that court can reduce the chance of these children to be exposed before the crowded litigants, advocates, witnesses etc. Appearance of children in family court during school time should be avoided. Refreshment and leisure facilities need to be provided to the children and a feeling of easeness or a tension free child friendly environment should maintained both in chamber and also in open court. Questions which may upset and thereby causing mental stress to the children need to be avoided and judges and advocate should be vigilant about it. Privacy of the children need to be respected. Unnecessary adjournment of the cases need to be avoided. Confidence of the public in the family court system will last forever if it could overcome these difficulties by making proper modification in its system.