Chapter - IV

The Institution of Family, Marriage and Provisions for Divorce
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Part I : Dimension of the Family

Introduction:

"Edmund Burke said that society was a partnership between those who were living, those who were dead and those yet to be born. The interests of each generation cannot unexceptionally coincide so that adopted patterns must always be a compromise of self-interest, duty, instinctive desire and the taboos and conventions of civilization".

As a reproductive and biological unit, a family is composed of a man and a woman having a socially approved sexual relationship and whatever offspring they might have. "As a social unit a family is defined as a group of both sexes related by marriage, blood or adoption, performing roles based on age, sex and relationship, and socially distinguished as making up a single household or a sub-household."

Murdock defines the family as "a social group characterized by common residence, economic co-operation, and reproduction."

Aileen Ross studied the Hindu family in urban areas and according to her, "the family is group of people usually related as some particular figure of kindred, who may live in one household, and whose unity resides in a patterning of rights and duties, sentiments and authority." Her study focuses on the interaction between members of both genders, occupying specific statuses and roles, defined by tradition and emerging norms and directives for behavior. She makes a distinction between four sub-structures of the family:-

1. **Ecological sub-structure** i.e. spatial arrangement of the family members and their householder.

2. **Sub-structure of rights and duties** i.e. division of labor within the household.

3. **Sub-structure of powers and authority** control over persons and resources.

4. **Sub-structure of sentiments** i.e. the effective relationship between the members.
The present research has focused on the sub-structural aspects of the family which play an important role in determining the processes of conflict various disputes and their settlement within the family or the larger kin-group.

There have been major interventions in the form of social reforms and laws for prohibition of oppressive or in human practices within the private sphere of family in India. However different religions communities continue to be regulated by their own personal laws, which makes a uniform civil code impossible to implement. Laws that apply to men and women tend to be recast in the mould of familial ideology as prescribed by tradition and religion. Thus it is not merely creation or passing of laws for reform and homogenizing human rights, that can explain the different areas of dispute and oppression that arise through application of the legal strictures themselves.

All personal laws are definitely and openly based on the fundamental values and norms shaping the statuses and roles of men and women in the Indian family. The ideology of familism, naturalizes and universalizes the picture of men and women's roles, so that they are treated as a homogeneous mass.

Actually in the application of these laws and the procedures adopted for setting disputes, law of this nature, tends to obscure the multiplicity of differences between different petitioners and respondents, their background and specific problems which are socio-culturally conditioned. It is this very area of contradiction and confusion that is addressed as the crucial area for study in the present research.

Moreover, the divorce law in India is different in each community. Hindus including Buddhists, Sikhs and Jains are governed by the Hindu marriage Act, 1955, Christians by the Indian divorce Act 1869, Muslims by the Dissolution of Muslim marriages Act 1939. These provides the grounds on which a persons can obtain divorce and other types of relief. Civil marriages, inter-community marriages and divorces are governed by the Special Marriage Act, 1956. What is relevant at this point of the discussion is that in cases of divorces taken on grounds of cruelty, bigamy or adultery, the legal provisions have been interpreted and applied by courts. These judicial approaches are heavily informed by familial ideology. (In the chapter on analysis of court data and in chapter I these laws have been discussed in detail).

The ground for cruelty for example is not equally available to women and men in all personal laws. In Muslim law, a man can divorce his wife without stipulating any ground through practice of traditional divorce customs of 'talaq'. Since the 19th century, social reformers and women's rights activists have sought to extend legal intervention of the law, particularly criminal law, into the realm of the family. But
the distinction between public and private (family life) continues to shape the way in which the Indian Penal Code intervenes in cases of domestic violence, dowry harassment and rape within the domestic sphere.

In India, the problem is that the state and society at large both patriarchal and refuse to consider women as individuals but see them as wives and mothers, as 'natural' inferiors and dependents. The 'invisibilisation' of woman's role and work in the household, the double burden that all working women bear, the sexual double standards, the lack of control over her own income, are all direct corollaries of the patriarchal premise of locating of the woman primarily within the family.

Kinship norms mainly stress asymmetrical and discriminatory rules of patrilineal kinship. This is not to underrate the important supportive and care-taker role of kinship network. In India, the bulk of care taking is within the family. But care-arrangements need to be 'de-gendered' so that women do not have to subjugate themselves in their families in return for the initial and socio-economic support received from the husband and his family. The impact of education, social reform, employment opportunities and social morality is bound to change the balance of familial relations. This will naturally reduce the 'embededness' of the woman in her kinship and family alone. 4

In the following chapters the above position will become clearer through the analysis of the court cases and the working of Family Court law in practice.

The Institution of marriage and the provisions for Divorce

The study of the Family Court must take into account the provisions for divorce, from traditional society until the present day. Moreover, the definitions and conditions allowing (or disallowing) divorce in various religious communities needs to be understood in the Indian society. Another additional point of view is the Western idea of marital dissolution and the legal provisions in Western society. The advent of colonialism, the advent of Islam and Christianity and the vast range of customary norms applicable to different regions, castes and ethnic communities, must also be taken into account. This overview will be able of place the modern law of divorce, the multiple aspects of marital disputes and the role of the Family Court intervention, in a historical as well as sociological perspective. 5

Divorce in historical perspective

The institution of marriage is a socially constructed and arranged dyadic relationship. Some stresses and failures are bound to occur and marriage in any society is not infallible. One method to deal with unsuccessful marriage is divorce. It is relevant here to examine whether divorce enjoys normal and social sanction of society and whether it was present in some form in the past.
The Dharmashastras and Smriti Period

As mentioned often, the Hindu society regarded marriage as a religious sacrament, and was indissoluble by human action.

In the Vishnu Purana when the marriage ceremony commenced, the groom held the hand of the bride and led her round the fire with the words “I take thy hand for good fortune, that they mayest attain old age with me as thy husband,” The permanency and indissoluble nature of a sacred union is endorsed in the above. However in vedic period, the position of woman was a respected one and adult marriage was common.  

Narada and Parasara, in the Smritis have laid down that marriage could be dissolved if the husband was impotent (‘Kliba’). Narada considered women to be the field (Kshetra) and man to be the seed – giver (Bijn). Hence the field must be given to one who has the seed (‘Bijavati’). But she who finds her husband to be devoid of virility may, after a period of six months, choose another man as her husband. Narada and Parashara have cited five grounds on which, a wife could remarry. A woman could take a second husband it the first was missing (‘Nashta’) or dead (Mrita) or had become an ascetic (‘Pravrajita’) was impotent (Kliba) or was degraded from caste (Patita). One significant category is when the husband was dead (Mrita), which meant that she could marry after widowhood. This concession has not generally been given to Hindu women until the 19th century of reform. After 200 A.D. gradually the status of women began to deteriorate and though the husband had the freedom to marry again or engage in adultery, the wife had to be faith full to his, all through her life. Manu even advocated that a woman should be a dutious wife to a husband who abandoned her. Manu allowed a wife to marry a second time only if her husband was insane or diseased and the marriage was not consummated. The injustice a woman is actually still rampant in this case, as Manu seems to advocate that a wife must always be a virgin at the time of marriage. The Code of Manu gave the husband exclusive right of repudiation while the wife could not reject the husband for any cause whatever.

The writers of the Dharmashastras (400 B.C to 100 A.D.) laid down that a Brahmin wife should wait for an absent husband for life years. Kautilya reduced this period to ten months. He also asked the woman to take judicial permission before remarrying in these Circumstances. He has also given detailed rules of divorce for couples who were incompatible. In such a case the aggrieved spouse had the right to demand a return of personal property or jewelry. However Kautilya normally allowed for divorce in some forms of Hindu marriage (Asura, Gandharia and Rakshay marriages) which were not common among upper castes. Lower castes, tribes and ethnic groups in India have always been more tolerant towards
Divorce than upper castes and aristocratic communities. Among upper castes, if a wife was childless or if she committed adultery, divorce was available to her husband.

**Divorce in Buddhist period :-**

Buddhist literature indicates that divorce was rather unusual in the society in the ‘Kanhadi Payana’ (Jataka, No.444). A Woman points out to her husband that though she did not love him, she refrained from marrying again because it was not custom in the family for a wedded wife to take a new husband. Women in higher castes were not willing to take divorce, though lower caste persons did resort to it.

Around 500 B.C. Buddhism had spread widely in India. The ethic of puritanism and asceticism became strongly entrenched. Divorce was considered gross and unethical. Also, unmarried girls could become nuns according to Buddhist Canon.

**Medieval Period :-**

After 900 A.D. there were great changes in the religious, social and political life. The Buddhist influence was waning and the new influence of Islam was also being felt in society. Rajput clans decried adultery and also followed clan exogamy. Caste and ethnicity became major forces for enforcing endogamy and barriers to divorce.

Monogamy had also become prevalent among certain upper castes, but among the wealthy, polygamy denoted a status symbol. Widow remarriage was banned and due to threat of Muslim invasion, child-marriages of girls were a common custom for protection. The Devadasi system of offering girls to temples as gifts to God (girl - brides) spread in Karnataka, Maharashtra and Andhra Pradesh.

In most cases, among lower castes and marginal groups, divorce was allowed and decided through Panchayats and caste assemblies. The intervention of the state and court of law in the customs of family and court of law came much later, in the 19th century; Marriage has always been regarded, even today, as more than a civil contract or sexual union, for it creates complex social status-sets and involves a series of social relations between the involved parties. In this process, the State as well as custom play a vital and influential role. Marriage has more to with morals and civilization of people than most other institutions.

Marriage in the modern state is formally segregated from its sanctimonious character, and is brought under the rule of the law. But even so, the ceremonial aspect and moral base remains unavoidable and powerful.
In India too, the provisions of the Hindu marriage Act 1955, have abolished the sacramental and eternal character of Hindu marriage. Changes made therein, like the Marriage Laws (Amendment) Act 1976 and the Child Marriage Restraint (Amendment) Act 1978, have attempted to reduce the emphasis on religious norms and transformed the character of the relationship. The legislators thus incorporated certain western concepts of marriage, also inserting the provision for its dissolution and judicial separation in specified circumstances.

The concern of social reformers for relieving the miseries of women who are subject to the trauma of a bad marriage, led to the need of a law allowing divorce in the Indian society. But divorce per se is not a solution to marital problems, in totality. There are a number of other issues like the woman’s lack of occupation and dependency on the husband or parents, which create subsequent difficulties. The custody and care of children of divorces is again a very sensitive realm of interpersonal conflict and misery. The divorced male too faces many problems in the family as well as psychologically. Marital dissolution is still not as common here as it is in western societies.

Western Perspective on marital dissolution

William Goode, an authority on the sociology of the family, has expressed a view that, ever in the west, divorce is looked at as evidence that the family system is not working well, and is treated as an unfortunate situation. The church had always denounced divorce as unethical and not permissible by the Catholic religion. Protestant reformation asserted the right to divorce as early as the 16th century. The western bias in favor of romantic love views marriage as based on love, so that divorce means failure of the relationship.

All marriage systems require at least two people, with their individual expectations and desires. When they live together some tensions are bound to arise. Though a social institution must be able to resolve internal conflicts and survive, this is a difficult and delicate process. If members remain unsatisfied and become estranged, there must be some mechanisms for keeping interpersonal hostilities within certain limits.

Three main patterns of prevention of strain are discernable. One, is to lower the expectations about what the individual may expect from marriage e.g. the Chinese praised family life as the most important institution, but also socialized their young, that they were doing a bounden duty and were not to expect romance or happiness from it. Some adjustment and acceptance of the reality could create strong family bonds. In the Indian situation, lowering of expectations of conjugal or romantic fulfillment, was checked though the practice of child marriage and strong indoctrination of girls and boys regarding the marriage as a ‘Dharma’ i.e. duty to the community, society and the family’s ancestors.
A second pattern wide spread in pre – industrial societies and also found among the Chinese, is to value the kinship network more than conjugal happiness. The success of the marriage is rated not so much by the intimate emotional harmony of husband and wife, as by contribution of the couple to strengthen the lineage or extended kin. Thus tensions are not allowed to build up and ruin the relationship.16

Societies vary in their definitions of what is a bearable level of dissension between husband and wife as well as in their solutions for a difficult marriage. Obviously, the tolerance level of women in the older generation in Indian families was exceedingly high as compared to those of a modern young wife. The difference lies in the level of indoctrination about the ideal of being a ‘good faithful and submissive’ wife, which also existed all over the world. In older times couples lived together (even in western societies) for the sake of social status and the welfare of children. Today a couple who cannot adjust to each other, will definitely seek some way to resolve the problem, if not to dissolve the marriage. It is observed in the data collected from court records for this research, that younger couples with or without children, have very low levels of tolerance and cannot adjust to any kind of discrepancy in role expectations or demands made on them as a married couple within a kinship network.

As to what should be done about an unsatisfying marriage, even western countries vary considerably. In Spain Ireland, Italy and Brazil, where Roman Catholics are the majority, only legal separations are allowed. In the Indian Christian community, personal law does not permit dissolution except on basis of proven adultery. In Muslim societies where polygyny is practiced, a husband may just stop spending any time with an estranged wife. Under the traditional family systems of Manchu China and ToKagawa Japan, a man would take an additional wife or bring a concubine into his home. In China a dissatisfied husband stayed away from home for long periods or went on journeys – a form of separation or desertion. In Indian society, desertion by husband who did not return from a journey, is cited as a ground for divorce by Kautilya and Narada. In many social strata today his problem remains a common cause for dispute. These devices to avoid trouble, to seek alternative relationships to ease the burden of a faulty marriage, show that societies do not easily condone divorce. Divorce has never been treated as an ideal behavior or a solution to marital problems or intra-familial disputes. Divorce grows out of dissension but creates additional conflict between both sides of the family line. (See Chapter-VI on Analysis). Prior marriage agreements are broken, there are problems among in-laws and disruption of inter-relationships and mutuality. Problems of custody, maintenance and remarriage also arise as an aftermath, or as seen in the present study, before and during the court – case itself.
But however difficult divorce may be, it cannot be completely avoided or be banned. As Goode puts it – “Divorce is, then, one of the safety valves for the inevitable tensions of married life”. There are many variations on the basic idea of divorce in different societies, and different alternative styles of living. But divorce has become a major and widespread solution to problems of marital living. There are of course various methods, procedures, accepted causes and legal remedies which offer only a variation on the pattern of divorce.

Divorce differs from these variations principally in that it permits remarriage of both partners. In societies like India where a man can enter another union without divorce, the situation is different. A woman of course does not have many options, even if she is unhappy in the marriage, she accepts the husband’s second wife and does not usually go to a court of law.

Of course it is not correct to speak of divorce as a more extreme solution than other patterns of dealing with unhappy relationships (like bigamy, desertion or concubinage). On the whole, in India divorce does create a great deal of disturbance in existing value systems and patterns of authority, affecting both spouses in many ways, positive and negative. Divorce rates do however provide an index of change within the family system and an index of change in the larger social structure. The older system may be breaking down even in India, but the fundamental functions of the family – reproduction, social placement, maintenance socialization of children, and social control, may be as well served as they once were. Goode however goes on the observe that the western conjugal family has less supportive kin network and is focused on conjugality. This definitely leads to an unstable marital and family situation.

Perhaps the most striking changes have occurred in the general values and norms relating to divorce. Divorce is no larger a stigma or shameful episode one must hide from other, and is not a sufficient reason to cast a person out of ‘respectable’ social circles. It is an experience to be regretted, but the divorce receives sympathy, and is not viewed as a violation of public decency. The Indian situation also is slowly assuming similar reactions to this once ostracized event. Divorce is assumed to be and also accepted as one type of solution to family disputes and maladjustment.

It is one facet of a broader set of changes in western society, which is increasingly becoming secular instead of moral judgement, today a person evaluates an action by instrumental norms ( “Is this more useful or a better procedure to fulfil my needs and solve my problems?” ).
There is also a strong influence of ‘individualism’ and the concept of the personal right to decide one’s own life becomes the prime objective. However, a change in values alone does not necessarily lead to a great change in action patterns as other elements are always involved. Economic dependence of the wife, lack of housing, children and non-supportive family members may force a couple to keep up a stable but unhappy marriage going.

Another important change is that the divorce has more alternatives in terms of the services and roles he or she needed to be performed by the spouse. In the western world, division of labor in terms of a woman keeping house and the husband working outside, is no longer the norm. In India too the urban couple can make use of many supplementary services like catering facilities, ready made foods, mechanical gadgets used in house work etc. Of course this applies more to the financially better off sections of the society. Among the lower economic strata, women have always worked out of the home for supplementing the husband’s income. In many countries of the world, single parent and female headed families are also becoming common.

There is a general altitude in India (and also in the west) that divorce rates have gone up because certain deeper factors, like the ‘egalitarian ethos’ has spread due to the women’s movement and constitutional guarantees given to all citizens by the state. But it may be observed that equal rights to women are still not a reality in most cases. Actually what is sociologically relevant is that women demand a greater range of rights than men are willing to concede, just as men are willing to impose a few more obligations than women are willing to accept. Thus in a period of tremendous changes in sex – role definitions, there is bound to be stress and confusion as regards gender roles, and more conflicts, as mutual expectations are changing too and frustration leads to divorce in many such families. This is true of the west as well as the developing world also.

Relationship between socio – economic rank and divorce rates are discussed by many sociologists. Socio – economic factors have strong influence on family life style and directly or indirectly affect many decisions within the family. The modern world encourages materialism and higher consumption rates per family. The needs are created by media and there are no normative limits posed on members about the range of economic demands placed on earning members. Hence families feel that they must compete for more income and more spending for social prestige. The responsibility of satisfying these demands rests primarily with the husband and also with the wife. And any failure to satisfy these needs is considered a his/her own failure. This is an important thought process in modern life which places creates great stress and unhappiness. Economic strains can be displaced into non- economic factors within a marriage, even in playing parental roles and sexual adjustment.
Changing concept of divorce in India -:

Whatever may be the reason for increasing number of divorces in India, there are today sufficient legislative sanctions against almost all major reasons for failure of marriage. Law of course can be of limited use, and is not a deterrent or a solution of marital breakdown.

It is possible that arranged marriages may be at the root of all above problems as such marriages are arranged by family elders on the basis of caste, religion and economic criteria. The choice of the young couple is not taken sufficiently into consideration. It is also alleged by some scholars that arranged marriage supports the society's ability to sustain traditional images and role of women, while the urban environment and education have changed the mind – set of young women today. In China for example the marriage law of 1950, abolished arranged marriages and legalized divorce and widow remarriage. This was done to also ban polygamy, infanticide and child marriages, which are connected to the practice of arranged marriage.

In India the Child Marriage Restraint (Amendment) Act 1978 has tried to minimize it not to eliminate Social injustice, by increasing the marriageable age of the boy and girl. The results of this legislation are still not clearly available for reference.

The Hindu law of divorce is definitely reformist in its objectives and nature, but the problem lies in its implementation in a highly complex, plural and predominately rural society. Among Indians, especially Hindus, the principle of divorce is still an alien social pattern and resorted to as a last resort. Divorce taken by one spouse for reasons of re-marriage are still rare, though there are a few such cases found in the present study of family Court petitions. Actually, the Divorce Act of 1955 was introduced mainly to provide succor to parties in a broken marriage to enable spouses to separate, setting aside the strong sacramental nature of marriage. The law also sought to provide protection to woman, dependents and measures for child custody and adoption. However, divorce as such has little legal meaning in many backward rural and tribal areas, even today. Failure of marriages and separation in lower economic and social strata are very common, but no legal aid is available to a woman burdened with full care of her children, after a husband deserts or leaves her. One important problem which results in divorce or informal desertion is the pathological craving for a son in Indian families in all stratas of society. As divorce is not legally granted on such a ground, illicit bigamous marriages are enacted even among educated people. The National Family Health Survey of India conducted in 25 states of India in 1992-93 shows a strong preference for sons due to various. This results in lower status to women leading to neglect and desertion by husband, if she does produce a male child. Illicit second
marriages also are not objected to by a dependent and unemployed wife who cannot dare to voice her misery and demand divorce change in social values, education and more employment for women can be of some help in preventing this problem.

**Breakdown of Marriage and Divorce Structure**

When an unhappy marriage causes misery and becomes an 'empty shell' relationship, there has to be some provision for separation. Actually divorce merely gives a legal status to a marriage which is already disrupted. Sometimes resort to legal divorce is preceded by the stages of desertion by one spouse and separate residence for a long duration of time.

**The fault theory of divorce**

The fault theory of divorce was based on similar grounds for divorce (cited above) in many countries like Japan, Poland, Austria and Rumania. However gradually there is increasing tendency in England and most developed western countries to seek divorce on ground of breakdown theory of marriage. In India, the Hindu law code of 1955 (section 13) does give weightage to the fault theory which still prevails in Indian divorce cases even today. Divorce decrees based on 'faults' as grounds for divorce are found in majority cases studied for the present research.

The matrimonial offense theory or fault theory implies that parties are to enter a marriage but not free to get out of it. The guilty party and innocent one are the two essentials of this theory. Adultery, cruelty and desertion are the principal matrimonial offences. They may be treated as matrimonial faults of one spouse, in addition to faults like religious conversion, insanity, leprosy, H.I.V. infection etc. If one of the matrimonial bars in proved against the petitioners, he or she is unable to obtain divorce. Under sec. 13(1) of the Act, nine grounds of divorce based on guilt or offense theory are recognized for seeking relief by both husband and wife. (With some variations this fault theory of divorce is applied by Muslims and Christians too).

Marriage is meant to put a stop to sexual promiscuity. Extra-marital relation of either spouse has been found to be a serious threat to marital stability. Hindu marriage being a sacrament places strong emphasis on marital fidelity. But it cannot be disputed that from the beginning, these values are left to be cherished and preserved at the hands of the woman. Prior to the Hindu Act of 1955, the Hindu man was allowed to marry a second wife without the first wife's consent or without any justification. Therefore, it did not amount to adultery but could easily be construed as moral infidelity and irresponsibility of the husband. The law and dependent status of women made this possible.
But today adultery has been made a ground of divorce as well as judicial separation after the passing of the Marriage Law (Amendment) Act, 1976. Prior to this act, adultery of the spouse had to be proved by the wronged party, and this was near impossible for the wife and a social stigma too. With the passing of the amendment this qualification has been removed and it is not necessary to show or prove that the opposite party is living in adultery. The charge of adultery is a serious defamation of character and the Family Court as well as the Civil Courts take care to weigh the evidence carefully and require reliable documentary evidence. Cases of this type have been proved in this study on the basis of marriage certificates, new postal address, rationcards and even birth certificates of illegitimate children from such liaisons.

The courts today accept the reality that direct evidence for adultery is not easily available. But circumstantial evidence must be sufficiently strong and inclusive. It is also to be noted that an accusation of adultery itself is a symptom of a breakdown of mutual love and trust between the couple. Taking this affair to court is actually on grounds of incompatibility and inability to live in harmony together. Section 23 of the Act of 1976 requires, that before granting relief, the court must be satisfied that the ground of relief is established. (This study has made careful analysis of cases of divorce petitions made on grounds of adultery in case of Hindu, Muslim and Christian couples, for whom different personal laws are applicable).

Under the fault theory, the ground of cruelty is a very common and important one. Under various personal laws (section 10 of Indian divorce act, 1869, sec. 27 of special marriage act 1954, section 2 of Dissolution of Muslim marriage act 1939 and sec. 13 of the Hindu marriage act. 1955.) cruelty is a strong cause for petitions by both men and women. The Hindu Marriage Act of 1955 had allowed judicial separation for the ground of cruelty. In 1976, cruelty has been made a cause for divorce as well. The concept of cruelty is again a difficult one to define prearily and also difficult to prove in some cases. The Muslim marriage Act 1939 has given some definitions of cruelty, but not sufficiently to enact an exact legal definition. Some acts of cruelty in this Act include the husband beating his wife, living with prostitutes and leading an immoral life or if compelling his wife, to lead an immoral life. Another type of cruelty is to obstruct religious observance of a faithful Muslim wife or impotence and refusal to enact marital obligation.

The Supreme Court in India has considered in certain important decisions, that one spouse has treated the other with cruelty, so as to create apprehension in his or her mind that it will be harmful or injurious for him or her to live with the spouse. "Cruelty is not necessarily physical violence only but may extend to behavior which may cause mental pain or agony or injury to the mind as well. Cruelty also is judged according to other factors like family environment, local customs, social conditions, physical and mental conditions of the parties. (There are
a large number of Court cases studied in this dissertation where the cause of mental and physical cruelty has been a major reason. It has been seen that the definition of cruelty by the man and his wife may be quite different, and the woman of today has a growing awareness of her right to happiness and security.

Moreover the history of matrimonial cruelty in the English law shows that in the beginning, the intention to commit cruelty, was considered an essential element. But today, regardless of any discussion of intentions, cruelty as a ground can be accepted, based on actual evidence. The sociological imbalances of power and authority patterns within the family, especially through strong patriarchal norms is one major area for exploration. The changing needs and demands of women from the marital relationship also create a new area for interpretation of marital conflict. Women have also been responsible for inflicting mental and physical cruelty on their spouse. Other aspects of cruelty are, false charges of adultery against each other and mental harassment, through verbal abuse. Sexual perversions is also considered a ground to prove cruelty, as also are dowry demands on the wife.

Desertion is another significant cause for separation under most of the Indian personal laws. Both the Hindu Act of 1955 and special marriage Act of 1954, consider desertion as a ground for divorce. The act of desertion is a manifestation of breakdown of marital relationship, mutual trust or is due to fear and incompatibility. The relationship being strongly sacramental and favorable to men more than women, escaping a bad marriage can happen only by willful desertion of the spouse. Today young women who enter their new home are adults and attached to their parental family and native home. This makes a strong ground for the woman to go back to her family of orientation when she finds her needs or demands not met in her marital home. Physical violence and alcoholism are also reasons why the woman leaves her home, taking her children with her. As seen in the research data from Family Court cases. Desertion is a bold and definite denial of willingness to keep the marriage going, and results in petitions for restitution of marital rights to assert conjugal rights and expectations. Desertion is based on lack of consent of the other party and thus is not informal divorce at all though it is the beginning of most divorce petitions. The Supreme Court has defined desertion as "the intentional permanent forsaking and abandonment of one spouse by the other without other's consent and without reasonable cause, and to total repudiation of the obligations of marriage".

Desertion as a ground for divorce under the Hindu marriage Act was added by the Amendment Act, 1976. Before the amendment it was only a ground for judicial separation. Desertion can be actual or constructive desertion. a spouse may leave the other permanently and this becomes actual desertion as a case for divorce. When one spouse forces the other to leave due to misconduct or violence, it is called constructive desertion, and the party who causes desertion is guilty. The legal
aspects are discussed to denote the use of different kinds of force, power, violence or pressure by one member of the marital dyad, who wishes to be free of the marriage tie, either by leaving physically or forcing the other to do so. Desertion due to domestic violence and dowry harassment can be analyzed in this way.

Other causes for divorce are:

1. Insanity
2. Leprosy
3. Venereal disease and H.I.V. Aids
4. Conversion to another religion.

All these areas will be explored in the chapter where analysis of actual case studies of divorce cases filed on above grounds are made. Each case presents different socio-cultural, economic and psychological considerations requiring in-depth analysis.

Protection for the wife:

There are certain special protective legal provisions favoring women in the Hindu marriage Act 1955 section 13. (1) and (11). In the above sections polygamy is and bigamy is a penal offence after 1955. Introduction of monogamy is mandatory in the Act. A woman can obtain divorce if husband marries without her consent.

Another important area dealt with is sexual perversion and rape within marriage. This is a step towards a more humane approach to a woman's sexuality and right over her own body. A girl can also file for divorce if she has been married before the age of 18 years and has been forced to consummate marriage.

'Protection of the woman in her marital home' is a favorable aim or ideal, of the above - but implementation and awareness is not yet adequate. The main aim of the Fault Theory is to find a cause for conflict and protect one spouse or give relief of separation.

Consent Theory:

Marriage need not always fail due to the fault of a particular party to meet out the difficulties of fault theory. This theory is based on the view that parties to the marriage are free to dissolve the marriage as they are to enter it. When a marriage fails owing to problems of adjustment, even though, both sides have made an effort to go on, continuance of such a marriage is neither in the individual's interest, nor in the interest of the society. The guarantee for individual freedom and choice as in the west became known with colonialism, industrialization and modernization. The idea of human rights came into focus and marital consent is also an individual's right
today. The basis of marriage being mutual fidelity, if for any reason, the parties feel that mutual fidelity cannot continue, they should have freedom to dissolve the marriage, as this is the only way to preserve fidelity.

By the Act of 1976, divorce by mutual consent is recognized under section 13 B of the Act. In doing so, the legislature has brought the Hindu Marriage Act in line with matrimonial statutes in other parts of the world, where temperamental incompatibility is regarded as a valid ground for dissolution of marriage. The requirement here is that there is a consent and equal right given to both parties. Such a democratic procedure is reformist in intention and reduces the rancour and long drawn litigation in traditional divorce. An idea of contractual consensual decision is involved and it is important that the women has equal right while the man is liberal and agreeable to take a joint decision without ego hassles. The overall structure of our society remains patriarchal, so such divorces are still fewer than divorces which are decided by petition of one spouse versus the other. The Family Court law of 1984 has accepted and encouraged this type of settlement, once it is established the marriage has broken down. The objective is to preserve and stabilize marriage and family life but not to stagnate the spouses existence and create stability at the cost of happiness.

Another important sociological feature is that the conjugal dyad is given a central position regarding decision to keep up the marriage or to dissolve it. Though the family members are involved and give testimony it required, a natural consent divorce is a step towards encouraging stronger conjugal decisions rather than consanguine and affinal considerations. The time required to settle such a case is also only one year, or sometimes even as little as six months.

The strong value of familism implicitly endorses continuity of the lineage of the family through patriliny or matriliny. When marriage can itself be temporary, the value of maintaining the 'name' and 'honor' of the family, as well as laws of inheritance and custody of children, all must adjust accordingly. The Family Court Act must therefore deal with problems of maintenance, child custody as well as inheritance of ‘stridhana’ (for Hindu women) and return of ‘meher’ (for Muslim women). In an intricately woven family network, a change in one set of relationships, also influence, alter or negate, certain affiliated relationships. But certain relations like the bond between a grandchild and grandparent which are based on biological ties do continue. All these issues and altered relations come into play when a separation takes place, even by mutual consent. The state must interfere to ensure welfare and justice to both parties, children and dependent parents. Therefore petitions by mutual concept are less in number and more amongst couples who are independent earners and supported by their families. However the Hindu marriage law does not grant divorce immediately after a petition is made, and gives some period between this and the actual passing of the
final decree of divorce, which finally severs the marital tie. The waiting period is to
give both parties time for rethinking, discussion and access to counseling by family
or professional, social workers and mediators.

The court has no power to declare a divorce on the basis of a petition for
mutual consent divorce. Mutual consent should continue till the divorce decree is
passed, after proper legal procedure.

**Break Down theory of Divorce :-**

The law based solely on the 'fault' ground was not found to be satisfactory in
many cases of divorce. The reasons for marital discord could be total breakdown on
psychological and emotional grounds too. Though traditional marriage custom
could not grant the spouses freedom on such intangible grounds, western thinking
and adult marriage by consent, contributed to this area of thought. The need for
emotional satisfaction is today accepted as an integral function of marriage or any
other close personal relationship. In a primary group, the basis of stability lies in the
intimacy and informality warmth and expressiveness - but this kind of bonding can
also breakdown and create great mental and social distancing. A dyad like that of a
couple, who are unhappy with each other on the above level, must find it an
intolerable burden to carry out the duties and obligation towards each other.

Daniet Goleman in his perceptive analysis of emotional intelligence status
that love can be a dangerous emotion and can turn a married couple into "intimate
enemies".\(^{25}\) He puts forth his idea that "our deepest feelings, our passions and
longings are essential guides, and that our species owes much of its existence to
their power in human affairs".\(^{26}\)

Due to extensive and refined socio-biological and psychological
experimentation, the modern society recognizes the power and reality of the
existence of emotions and psychological needs in our lives. As a result marriage is
also an area wherein these needs and stresses are becoming significant factors for
stability or for instability and breakdown. Goleman gives startling data indicating
that in America, out of all marriages that began in 1890, about ten percent ended in
divorce. By 1920, the rate was 18 also. For people married in 1970 it was a 'fifty-
fifty' chance, but for a married couple starting in 1990, the increase was up to 67%
also ending in divorce.\(^{27}\)

The important point is that couples are more at risk of divorce because social
pressures and stigma is eroded and there is a heightened expectation of
psychological satisfaction and 'happiness' in marriage. Media images of romance,
increased education and element of independence is making the problem of
'breakdown' a social one too.
Prior to 1964 in India, only the spouse who had obtained a decree for judicial separation or restitution could get divorce. This was possible after a waiting period of two years. To remove these lacunae, an amendment was made in 1964, and these grounds were converted into the breakdown of marriage. Now, either party, could sue for divorce and avoid a state, wherein the relationship was legally there but emotionally void. The period of waiting for the decree was reduced to one year in 1976. Though there are legal and other procedural lacunae in this law, the basic intention was to free the couple from a broken marriage and establish a new life again individually. The law here takes a humanitarian rather than reformist view of the situation and has provided relief to couples and their families, without much legal procedure and delay.

In 1981, another significant action was that a Bill was introduced in the LokSabha (Bill no. 23 of 1981). Proposing certain amendments to the Hindu Marriage Act, 1985 about the prevision of irretrievable breakdown as a ground for divorce. The parliament referred the Bill to the joint select committee, which undertook an extensive national review of the matter. Various surveys and studies were made from all strata of people regarding the above issue and it submitted Report to Parliament recommending that the amendments should be introduced only after a system of Family Courts was introduced in the country. The Family Courts Act 1984 has been since enacted and Family Courts have been set up in many states. In view of this development, the amendment was proposed again by the Law Commission. The Law Commission circulated a letter to women's organizations, asking whether 'in view of undue hardship suffered by victims of marital discord', it was desirable to introduce 'irretrievable breakdown of marriage' as a ground for divorce in the HMA 1955. There was keen debate on this issue, as it has far-reaching implications for women and society at large. Will it be in the larger interest of women, it divorce is made easy, simply and quick? The question is debated and certain conclusions are drawn by study of court cases in the present research.

The classical statement, supporting this ground in made by the law commission of England. The aims of good divorce law are:-

1. to buttress rather than to undermine, the stability of marriage
2. When, regrettably marriage has irretrievably broken down, to enable the empty shell to be destroyed with the maximum fairness, and the minimum bitterness, distress and humiliation.

The purpose of establishment of the Family Court was to make an endeavor by the presiding officer for reconciliation and restoration of marital relations. The intricacies and delays of litigation should be avoided or reduced, by not appointing an advocate.
Interaction of Legal and Social Institutions.

The following section discusses the inter-relationship and interdependence between family and other subsystems of society. This may be called the ecological approach wherein the institution of marriage, family, polity, economy and law are understood in a state of mutual adjustment and adjustment. It is a dynamic equilibrium within the geographic environment as well.

Methodological issues and Conceptual frameworks for understanding family in India :-

Family can be studied from an ecological perspective. This view considers the family to be a functional unit that is composed of interrelated and interdependent subsystems. Adaptation and adjustment are the two main processes that are required for the adequacy of family functions.

In the structure functional approach three major functions are cited –

(1) Family and society
(2) Functions of subsystems within for members
(3) Functions of the family for individual members

The functional analysis of the family emphasizes the relationship between the family and the larger society. The interactions, role performance and mutual obligations are based on the values and norms of the broader society. There are various dyadic relations which are at the core of family life. The filial or parent-child dyads, fraternal or sibling dyads; the conjugal or husband-wife dyads and grandparent-grandchild dyads.

The environment in which the family exists consists of various arrangements. The geographic ecology, the urban environment, political and economic activity as well as the legal and religious institutions. The effect of mass media and housing, welfare and educational institutions also has powerful impact.
In the present research the major variables mentioned above are used as independent variables to assess their correlation with the dynamics and dysfunction in the family. As the research topic is the role of law and the Family Court, the variable of law is given more emphasis. The impact of various factors like ethnicity, education economic factors and housing or family disputes, leads to legal recourse by members.

Family receives inputs of conformation from the environment. It processes transforms and controls these inputs and directs them towards certain goals which feed back into the environment. Thus the elements to the family and Its environment constantly aim at adopting to each other and go toward a state of equilibrium.  

The family has to meet the demands of the larger society,(the norms, customs, law and traditions) and also it must tend to the needs, performance and morale of Its members. The requirements from above and below may not be congruent.

When the family and/or its environment cannot adopt to each other there exists a state of disequilibrium between he two. Family is vulnerable to dis-equilibrium, not only because of internal changes, but also because of inputs from the external environment. The interests of family members have to be protected, while the obligations to each other must also be enforced by custom and law. The goal of any intervention, whether by welfare services or by law, must be to protect the rights of family members, as also to promote family responsibilities and stability. These exchanges need not always be directed towards bringing in a state of homeostasis.
In figure No. 3 the family is treated as a configuration of statuses-roles and practices. The ethnic background i.e. religion, caste and language influence the internal and external connections of the family.

The disputes and stress within the family are affected by the environment, the composition and the structure. It is the variable of family structure which holds key to the various problems faced by the members, structure is conceptualized as the complex inter-play of role, power and status on one hand, and their manifestation in the relationships within the family. Family roles, and power are defined by age, sex and other variables like income and education too; while, there are dyadic and kinship relations that are deeply influenced by the traditional norms and the socio-economic and political forces, which excel a strong influence.

Family structure is a configuration of role, power and status as well as relationships. Roles are formulated to assign functions to various members and grant positional authority too. According to role differentiation is the distribution of persons among the various positions and activities distinguished in the structure and hence the differential arrangement of the members in the structure.

Norms of family relationships may comprise norms of dyadic relationships familism and kinship orientation. According to Rogers and Sebald familism is the subordination of individual interest to those of the family group. Kinship orientation is the degree to which an individual fulfils the role expectations of the kinship reference group.30 [The cases taken for study in the Family Court, voice these different conceptual categories that is dyadic relations, familism and kinship orientation - as reflected is the types and causes of petitions, the evidences presented and the process of court settlement. The judge also takes close cognizance of these factors when granting a decree of divorce or passing another kind of judgement after studying and hearing the case.]

In summary family structure consists of roles, power and status which are determined by age, gender, education, income culture etc. and also family relations which are dyadic and kinship oriented relations of all types. When the above substructures give rise to adherence and commitment to the norms of loyalty to family name and existence, the individual faces problems of adjustment in asserting any independent opinion or need. When analyzing the petition for divorce, these structural facets have taken into account. In the case of women, the advent of urban life, education and awareness of human rights, makes dents into oppressive pressures of patriarchal familism. Men on the other hand are placed in an ambiguous or in an aggressive stance, in responding to these fundamental changes within the status role relationships and new dimensions of the conjugal relationship. The unity and stability of the family may be at risk in some cases, while at the other
side of the spectrum, individual rights to freedom, equality and humane treatment are also legitimate. This contradiction is the cause of disputes and demands for court settlement of these conflicts.

**Figure 3: Family and Law-Ecological Framework**

To assess the impact of gender, petitions have been analyzed with gendered roles being an independent variable and correlated with the variables of socio-economic background, family composition and ethnicity (religion, caste, culture).
The research also tries to correlate the family composition (Joint, nuclear and alternate types) and the impact of urbanization on the type of dispute, type of petition, causes for disputes and the court judgement passed.

Socio-economic background, ethnic factors, religion and family type all have been studied. They are assumed to contribute to the causes of disputes, the petition made, the involvement of family on both sides and the eventual court order.

**Family practices :-**

Family practices depend upon the family's religion, caste, cultural values and customs. They are also greatly influenced by urbanization and the new behavior patterns it exposes to the family members. The structure of the family endorses and strengthens these family practices like marriage pattern, selection of marital partners, rituals, financial exchanges like dowry, 'mehr' and attitudes and methods of seeking divorce. Practices which are of importance are also in other areas like the lineage pattern, residential arrangements, child bearing and son preferences. The important rules regarding adoption and guardianship and custody of children is also important when studying the cases of divorce and its various implications on the family. Similarly adoption of a child is also directed through the 'petition D' of the Family Court. The major area of dispute is that of customs and laws regarding maintenance to a wife and child in case of marital separation and desertion by one spouse. The Hindu, Muslim and Christian personal law has specific previsions and procedures which have to take into account the customary forms of the above range of family practices. As a natural corollary, personal laws incorporate many traditional norms and customs, which make the case for a uniform law code weak in the Indian situation.

To sum up-

1. Family laws are dependent on the primary level on religion ethnicity and family practices of all types.
2. On the macro-level, the influence of the urban style of living and thinking also has a symbiotic relationship with law well as family attitudes towards the personal law code itself.

The Figure No. 3 illustrates that: (i) Family Practices influence law and Application, (ii) Law and its provisions - also shape and change practices

The family group and network, as well as the law of the Family Court are actually two different institutions based on certain ideology and directed by wide range of traditions, customs and norms. The aim of this research is to understand how legal interventions based on the values of the welfare state and social justice,
interact and influence or are, in turn influenced by the human inter-relationships, exchanges conflicts and adjustments, engendered by the marital bond as it is ‘lived’ in a complex family system, governed by a complicated system of norms, mores, customs and sanctions.

Though major socio-cultural values do shape our world-view and aspirations, values and norms cannot be treated as causal agents in research. This would lead to a fallacy of utopian or normative determinism. This methodological stance has been employed while studying the cases of familial disputes within the Family Court. The effects of the legal and socio-political as will as cultural environment within which the law is applied, shapes its efficacy and style of dealing with disputes in the familial sphere, and also affects the granting of social justice to all parties involved. To understand a society one must understand its culture, its institutions and its channels of mobility and processes of change. Acculturation globalization and policies of liberalization further weaken the concept of cultural and normative determinism.

Parsons had stressed the importance of value-consensus through the processes of socialization and institutionalization. In the present society, socialization has become a complex and multi-faceted process. There are new ways, to define means and goals, and needs and demands are in a state of flux oriented to market forces. Changing production and consumption patterns, exposure to mass media, tend to make traditional norms and existing laws, partially redundant or even ineffective. Socialization is a ‘constant’ in an individuals life as he lives in a dynamic world. Socialization may become inadequate or even inappropriate, at certain times, making the guidelines of custom and tradition unacceptable or difficult to follow. The existing social control mechanism, including the legal norms and codes have to face these changes and even be amended or reformulated. Internalization of moral, social and legal norms, is influenced today by factors like gender, age, education, religion and occupation. Marc Galanter observes that law is often portrayed as giving expression to the aspirations and values of a society. But law cannot cover the entire gamut of social life. The duality of law underlies both the need and the possibility of an inquiry that looks at the complex interplay between ‘Law as culture’ and ‘Law as social change’. Galanter looks at law as a cultural phenomenon and a process of change. Political theorists like John Austin considered law as a command or order and violation of it was met by threat of physical coercion. E. A. Hoebel remarks that a social norm is legal if its neglect is met by the application of physical force by an individual or group possessing the socially recognized privilege of so acting. However Hoebel does not agree with the culturological approach to study of law. He feels that all system of law, whatever their content and unique dynamics, must have some essential elements in common. A juristic act is never an individual and an isolated thing, it is part of the prevailing social order.
Malcolm Feely observes two main features of current social science research on law and society.

a) The investigation of the 'gap' between the legal idea and actual practices and,

b) Law is understood as a command supported by sanctions.
Feely claims that these two features must be also supported by the problems of goal identification as basic to the concept of law. Another characteristic, is that the language of law is generally complicated and technical, hence this can lead to serious distortion in analysis by focusing on a single goal or a set of goals.\textsuperscript{33}

In the present study, when court records were studied in detail, the above type of distortions in language and interpretations of law could be located and analyzed.

In many socio-legal studies, social scientists have failed to see the function of law in structuring inequalities, as they have not gone deeper to examine the structure of the legal system, court procedure and the impact it has on the litigants. According to the same sociologists, all laws are by definition political, laws are authoritative and all law making is political policy making.

Donald Black suggests that a major focus should be on the process of legal mobilization. "Mobilization is the link between law and the people served or controlled by the law". This can also mean that "law is used as a 'last resort' by people and that too without benefit of explicit mobilization of legal institutions".\textsuperscript{34} The concept of legal mobilization is significant, as it views that changes and reforms need a legal basis and sanction of the state. Women's organizations and activists give importance to the need to question laws which are ineffective or gender biased. The Family Court Act of 1984, is itself a part of the judiciary and state machinery, meant to impart justice in the area of family disputes which come within the jurisdiction of personal laws.

The philosophy of law, views laws in their actual working in the court as well as understanding and awareness of law in society. It is necessary to access the suitability of legal instruments, negative consequence of the law and the myths about the function of law as well as the truth about its role. The philosophical view of legal norms, rejects the positivist legal philosophy, which states a positive relationship between states and law, but which does not concern and itself with law as dealing with social reality, at a particular time and place. Rosco Pound's view is that law should be studied in its actual working and not as it stand in the book. Law is an instrument of social engineering, documented and put into action by the policy maker and the executing authorities.

The present inquiry into the working of the Family Court in Pune has taken the above perspective as focus. The Family Court Act 1984, is a new legal statute, enacted to improve upon the existing law codes and procedures, regarding family matters and the application of personal laws in Indian society. The law of the Family Court has been studied in its actual working from actual court cases registered in the official court records.
Micro-level Study of Law:

Micro comparisons of legal systems are concerned with the defaults of specific legal rules and institutions rather than entire legal systems. The functional approach is pronounced at this level. Scholars often begin with a specific social problem and seek to discover the various ways in which legal systems solve it, or they begin with a specific legal institutions and examine how it operates in various social systems. (e.g. comparison of Family Court working in India as compared to that in Australia, UK and U.S.A). Legal anthropologists have done valuable work in this area.

Many anthropologists also point out that African and Asian legal Systems are an outgrowth of colonial experience and also of the distribution of power in the society. The Indian legal system and procedures are modeled on British law to a great extent. There is in India therefore what is called a dual legal system where borrowed elements from British law are remodeled and re-constructed to include certain core values and norms which define customary religious and caste-based law. Weber has attributed certain innovative roles to 'legal notables' as he calls them. He states that legal notables-lawyers, judges and high-level civil servants, introduce new rules and new interpretations of existing legal norms in the course of administrations of justice. The development of the Hindu Law Code and the movement for reform through legal measures through the 19th and 20th century, illustrates this above process of legal notables undertaking 'social engineering' through law.

Talcott Parsons theory of social systems treats law as promoting social integration and stability. He treats law as a rational legal system, consisting of a set of prescriptions, proscriptions and permission. The legal system specially in highly differentiated modern societies, performs the functions of a 'Generalized mechanism of social control'. Talcott Parsons, Max Weber and other macrosociologists raise two common themes :-

1. Each of the theorists endeavored to comprehend the macro-structural relationships between law and other institutional systems of a society.
2. If the hypotheses implicit in these theories are to be empirically tested certain legal indicators will have to be developed. The sociology of law has this task to perform.
3. The sociology of law also treats law as having (a) Legal autonomy, i.e. processes of change are immanent or endogenous, not externally induced. (b) The concept of 'legal transplant' has a naturalistic ring to it as though it occurs independent of any human agency. In many instances a legal borrowing involve the "imposition" of a foreign body of law by a colonial power.
The classical and contemporary theories of law and society, reviewed above, all fall short of providing precise guidelines for uncovering the linkages over time, between legal and non-legal institutions in different societies. Of fundamental importance to the field of the sociology of law is the question of how the legal institutions is related to each of the non legal institutions. The above question is set forth in a model diagramming eight types of interactions or linkages between legal and non-legal institutions. (See Figure No. 5).

**Figure 5: A social structural model of interactions of legal and non-legal institutions**

![Diagram of interactions between legal and non-legal institutions](image)

On the left side of the diagram are a set of six non-legal institutions, each of which is composed of values norms, roles and organizations. If the norms comprising the non-legal institutions are sufficiently by institutionalized, they can have direct regulatory impact on legal personnel as well as citizenry, (Interaction-4-Single Institutionalized). On the other hand, if the norms of the non-legal institutions are not sufficiently strong to regulate the behavior of the citizens, a process of ‘Double Institutionalization’ (Interaction 1) occurs, whereby the legal system convert non legal Institutional norms into legal norms. (Codification of Hindu personal law, Muslim Sharia law and Christian personal law in India). In addition, the legal system can introduce a norm that is not a component of any non-legal institutions. This means that the legal system can introduce an innovative norm (interaction 2) that does not have a counterpart in any of the legal institutions. (An example of this is the innovation of ‘no-fault’ divorce clause in Family Court law). The legal system’s regulatory impact (interaction 3) may succeed or fail with both. Depending on whether legal personnel implement the law and citizens comply with the law, the effect of the legal system can be reinforcing (interaction 7) or subversive (interaction 5) and the effect on non-legal institutions can be stabilizing (interaction 9) or destabilizing (interaction 6).

The implementations of the social structural model of law are :-

1. The legal system is not seen as creating rules and regulations, insulated from other subsystems of society.
2. The personnel of the legal system, whether judges, lawyers, administrators, activate legal rules and doctrines in the course of performing their role in the legal system.
3. Formally organized collectivities viz. courts legislature or law-enforcement organizations, perform the various functions of a legal system.
4. While performing functions, as above, these interact with individuals and organizations representing interests embedded in the non-legal sub-systems of the society.

To sum up, each of the society’s sub-systems (legal and non-legal) has the same structural element: values, norms, roles and organizations. The challenge faced by the sociology of law is to discover the linkages-cultural and social-structural-between the legal system and the non-legal systems in terms of the four constituent structural elements. These linkages affect both the legal personnel as well as the citizens of a state. The present study attempts to interpret and analyze some of the eight linkages discussed in the social structural model of law and society.
Sociology of Law:

Sociological problems regarding law are attracting the attention of theorists and policy makers, as well as practitioners of law. It is important to see law of the state and its institutions in a close relation with the life of society and the process of social development.

It is possible to say that the empirical sociology of law was born in 1962 in Washington D.C, when a research committee on sociology of law was established by the international sociological association. The work of Max Weber, Nicholas Timasheff, Enrlich and Lion Petrazynkim, written mainly in German and Polish language can be treated as starting points to this approach. All these theorists try to assess the influence of social processes upon law and the influence of law on social life. They emphasize social development through the growth of universalism and relationalism. Sociology of law is the theoretical and general discipline studying regularities in the function of law. It formulates hypotheses on how law influences and is influenced by the wider reality. Legal norms should be viewed as by products of the functioning of the social system in which their origin and their effects should be looked for.

Definition(s) of Sociology of law:-

1. “The sociology of law aims at grasping law in Its working, to determine the range of efficiency of short or long range impacts of law; it seeks to find out what kind of legal instruments are most suited for remolding political attitudes, economic relationships or human interaction, it seeks to discover negative by products that ensure from law”. 42

2. Donald Black remarks that “a purely sociological approach to law should involve, not an assessment of the legal policy, but rather, a scientific analyses of legal life as a system of behavior”. 43 He also feels that normative ‘legal sociology’ has become identified with “the debunking and unmasking of law”.

3. George Gurvitch has propounded another perspective about the sociology of law. “Sociology of law is that part of human spirit which studies the full social reality of law, beginning with its tangible and externally observable expression, in effective collective behavior, crystallized innovations and in the material basis of jural institutions”. 44

Sociology of law therefore interprets the behavior and material manifestations of law according to the internal meanings, which, while inspiring and penetrating them, are at the same time in part transformed by them. Sociology of law also must be able to guide the process of social engineering by offering
rational and effective means for remolding of human conditions. The practical application of sociology of law lies in shaping social policy, to make it useful for practical application. Judicial symbolic patterns of writing and speech, procedures along with their expression through lawyers judges and also court personnel, have to be taken into account. Sociology of law should note how law influences and is influenced by the wider reality.

Jonathan Caplan remarks that the language of law is extremely complicated and not understood by a layman. This results in a monopoly of jurists, lawyers, judges and academics in interpreting the law for the common man. Legal assistance has became a part of human life, like hospital assistance. Lawyers therefore may act as a powerful force against social change and reform in legal system itself. This reiterates the Marxian interpretation of law and society, as being instruments of domination of a market oriented system. Marxian and Weberian analysts stress the significance of the eco-material factors, in modeling a legal system in a given society at a given time. But there are various other factors also which affect the law like geographical, demographic, ethnic, religious and political ones, though they cannot all be placed on the same level for analysis. The sociology of law assumes that a social group is a sort of ‘laboratory of judgements’, and the ultimate evaluation, resulting from various clashes within a group, that emerge as a net product or synthesis of the interest of that group-in the form of codified legal system. (e.g. The Hindu law code enacted in 1955 in Indian society). However, it is also true that, within every social group, there are functions, coteries and pressure groups which also shape the legal system (e.g. the Taliban in Afghanistan, the Christian church and dominant caste groups of India). Such groups can shape and foster interests, which may be incompatible with the welfare of the larger social whole and even the state-backed legal statutes and laws.

Another significant fact is that, most matters of dispute in small and large communities are settled without resort to institutions or percepts of official law. Members may confirm because of the dominance of the public opinion, multilateral expectations and feelings of reciprocity; also out of fear, and moral pressure. So the formal means of law are summoned only when other means of social control fail to perform their role, the integrity of the group is weakened or group pressure is inadequate. (The pressure of a sacramental definition of Hindu marriage is now challenged by public opinion as well as legal provisions themselves).

Approaches to the study of the relationships between the Law and Society:

1. **Legal Positivism**: Advocates that pure sociological concepts should be applied to the study of law, regardless of the variations in the patterns of law in different cultural environments. Some theorists regard law as an instrument of social change, as all laws are politically and culturally oriented.
2. **The Functional Approach**: to the study of the sociology of law, advocated by Malinowski, says that all custom is law to primitive people. Laws are sanctioned by society and the direct interdependence and reciprocity that law brings about, pressure and stabilize the social system. Anthropological studies show that informal ('living') law functions even where so-called legitimized authorities do not exist. Law should be understood not only as an official (formal) format but in its entire scope of actual functioning.

3. **The Process Approach of law**: proposes that law has certain elements in common, yet it is historically specific. The main function of law is seen to be one of selecting norms for legal support in a particular culture. The process perspective proposed, that law should be used to ensure a better understanding between 'the law' and the people. Law does not merely maintain order. It is both, an independent and dependent variable. It should be used as a policy instrument to ensure social engineering and welfare.

4. **The Marxian Approach**: proposes that even if law is developed to ensure social stability and control, it does not ensure just distribution of reward and punishment. The orthodox Marxian approach tends to profess the view that, sociology of law refers to the class-origin of law and its manipulative character used by the class in power.

Litigation and formalism of law along with its reutilization, are not conducive to ensuring the welfarist and protectionist objectives of law. (The present research tries to go beyond the formal and tap other hidden latent features of legal cases and procedures). Socio-legal research must be concerned with 'study of law in action' i.e. reform of law and official amendments as a response to the social situations at a point of time. This research in to the working of the Family Court, focuses on the interface between legal process, formation of new laws to deal with changing socio-cultural need and dynamics of familial and conjugal ties.

Investigations on law can be of two types-speculative and empirical in approach:

1. **The Speculative Approach**: involves pondering over the essence of law itself and its functioning.

2. **The Empirical Approach**: investigates the place of law among other social norms. It also focuses on selected problems concerning the social functions of law as a means of social control. One of the prominent exponents of sociological jurisprudence, Roscoe Pound, suggest that law ought to be studied in its actual working and not as it is handled as an instrument of social control. Even the negative effect of legislation and actual human behavior shaped by these changes must be carefully analyzed.
Ideas on the borderline of law and political science are another source of inspiration for empirical investigations in the field of law. The traditional approach treated law as a monistic and unique field. But the truth is that multiple relations and various types of motives, fashion and control social behaviour, and of these, only a part are legal in nature. But in the more impersonal, industrialized social organizations, law becomes an efficient instrument supposed to resolve social conflicts efficiently. Law also helps to promote formalism and to smooth over complicated relationships. Here, the limited detached, rational and impersonal model of a law abiding citizens emerges.

There are three tendencies in the historical processes of legal change:-

a. The tendency towards increasing demands. As time passes law and the legal constitutions require increasingly more from individuals, quantitatively as well as qualitatively. The number of obligations and quality of what is required of citizens, both increase. Some kinds of illegal behavior ceases to be defined as illegal, because of changes in law for example, inter-religious marriage and rights to property for women in India are now accepted by law in present times.

b. Secondly, there is change in the motivational stimuli. As society become more technologically developed, more urbanized and more westernized, law tends to offer a different set of motives to warrant the same kind of behavior. For example in the past, people had to be forced to 'work', by coercion or by instilling fear. But eventually the same effect (i.e. work) can be extracted by creating favorable conditions and making 'work' a social and moral value itself. Similarly, the motivation to take divorce from an abusive husband in the past would be due to helplessness and fear. Today a woman would look at domestic violence as a violation of her right to security and freedom. Changing underlying motivation, alters the basic designs and norms of interpersonal behavioral adjustment and indicates lower rates of tolerance of damaging relationships.

c. There is a tendency to diminish motivational 'blockages' towards legal behavior. Resorting to a court of law for redressal of wrong or assertion of personal rights, is no longer a tabooed subject. This is because there is relatively less social condemnation if one decides to take the legal path to solving disputes, which may can even be of personal and private nature.

These above tendencies tend to overlap in the process of functioning of the law. The law performs an organizational and also an educational function according to Nicholas Timasheff. The organizational functioning of law molds motives conducive to human actions by coordinating social action and creating social order.
The educational function modifies the behavioral tendencies, eradicating the anti-social and fostering socially acceptable modes of behavior. In modern society, most social interaction and transactions are legally bound and follow legal tenets. (for example, contracts, loan agreements, commercial transactions). It is only in cases where clashes, conflicts and competitive violations of norms occur, that there is need to resort to a specialized agency like courts and tribunals, for solutions.

**Three levels of Functioning of the law**

"Does a legal enactment, legitimately issued and marked by valid authority, function automatically?" This question needs to be answered, to understand how a law actually has impact on society.

The science of law is interested mainly in the origin of the law, Its sources and Its interpretations—but not in actual functions performed by it. Lawyers construct their case with the reference to the legal enactment, and often fail to see the real world behind it. Actually, an abstract legal precept enacted by the legislature, influences social behavior through a three-fold connection:

1. The first independent variable in the process is the content or meaning of the law in the given social and economic system, where it is an element of the valid legal pattern. (for example, The Family Court law of 1984, as an intrinsic part of the Indian Personal Law Codes and the Constitutional guarantees, which form the broader frame of reference).

2. The second independent variable is the type of sub-cultural functioning within the larger social, political and economic system, as a link between the directives of the law markers and the actual behavior of people to whom the law is addressed. (For example, the sub-culture of family traditions and customs, caste and religious factors, which lie at the base of different personal law codes in India).

3. The third variable is, the actual function of an abstract legal percept within a given socio-economic system and given legal sub-culture. This represents the personality types and attitudes of those who are the ultimate agents, carrying out legal directives. (For Example, the lawyers, counselors, judges in the court of law).

The first prism through which the legal percept is refracted on Its way from law makers to those whom it concerns, is the set of social, economic and cultural conditions in a given society. Every society has different types of values, ideas and institutions. There are also various narrower social environments and circles within a society, which cherish different specific sub-cultures within different castes tribes, ethnic and religious communities. But in every society there is always some degree
of obedience to law and the morals and attitudes that support or impede the functioning of the legal system. Deviation from the larger legal culture does occur and may lead to the administration of law in different ways.

The **second prism** through which a legal message is refracted on its way from the law makers to the ‘user’ of law is the specific content of the legal subculture, influencing the attitudes of those who create the law. The attitudes, knowledge and perspectives of jurists, politician, academician and judicial activities, are all of important in this respect. Various social movements and interest group pressure, can also have impact in this process.

On the **third level**, law reaches the common man through a certain channel, headed by the state and the judiciary. The degree of acceptance of the law itself, depends on the degree of acceptance of the authorities giving information about the law and practicing it. Law must be supported by a pro-legal sub culture and realized by individuals who also value it as one of the means of social engineering and reformist interventions.

Thus, the **ecological framework in which the law is practiced, the impact of sub cultures on the makers of law and the concept of using law as an accepted mode of social engineering, are the three levels on which the functioning of a law can be analyzed.**

In this research, the above issue is addressed by making a detailed analysis of cases in the Family Court, through study of petitions, court procedure records and the final judgements pronounced by the judges. The application of the concept of manifest and latent functions to legal acts and procedures in sampled cases yields conclusions regarding the original petitions and what the end result of the whole case turns out to be. It is impossible to assess the effectiveness of the normative act as a whole without investigating the distribution of its indirect results.

**Effectiveness of law can be influenced by :**

1. Conditions of unrest which cancel the influence of the law- for example social and political unrest and emphasis on alternatives codes, like religious fanaticism.

2. And those factors that modify the degree of effectiveness of legal regulations- i.e. custom, family bonds, patriarchy, economic dependence, lock of education to lack of legal awareness.
3. A normative Act is also brought to actual functioning by the administrative apparatus which also controls its effectiveness. The apparatus as such is not socially productive. Its existence is justified by its bringing about the effective functioning of an act and controlling the administration of the legal procedure. Hence the administrative machinery also has to be evaluated by its productivity and efficiency.

4. Certain formal limitations can also create ineffectiveness of law, and one such case is the defective transmission of information about law. Legal provisions, amendments in the law and changes in regulations must be made known to the public. If this is not done, legislators and lawyers can use this ignorance and ‘distancing from formal law’, to bend the law to their advantages. This may result in unintended negative results for the parties contenting a legal case. (The Family Court law of 1984 has recommended the setting up of legal Aid centers in the civil court, and has actually barred professional lawyers from handling cases in the Family Court, unless unavoidable).

To sum up, the factors which influence the effectiveness of the law are

1. Scope and knowledge of the law
2. Multiple possibilities of interpretation with respect to earlier laws, as in case of amendments
3. Lack of stability of law as well as the enforcing official agency
4. Existence of multiple legal authorities, as in case of personal law codes in India
5. Effectiveness of law can also be limited or impaired by legitimization of illegal behavior
6. Respect for the law-maker as the authority also influences effectiveness of law. Religious respect for law or rational respect for law are both relevant here

The person who resorts to a legal provision in order to solve a dispute or a problem, makes cognitive and affectional calculations. He must decide whether the means used to achieve certain goals will serve his interests to the maximum, and not adversely affect his “significant others” group. If he finds that his own interests and the demands of legal systems are compatible with his own demands, he takes a conformist stand. If there is a gap his behavior will depend on the outcome of
factors, like probable persecution and social condemnation. Efficiency of a law must therefore take into account the welfare of the community and wider society, along with the fulfillment of desired goals of those who make the law, put it into practice and the person who puts the formal law to his personal use.

The function and effectiveness of legal provisions is analyzed with reference to certain important theoretical concepts and paradigms, which are discussed in the next section.

Application of concepts from general sociology to the area of sociological study of law:

1. The Reference group
2. The concept of cognitive dissonance
3. Status inconsistency

1. The Reference group

The different concepts used to apply and understand the general theory of reference groups, are applicable to the sociology of law. Three types of reference groups influence the working of law and the perception of the law, by members of a particular group. These are (a) Positive reference groups, (b) Negative reference groups, (c) Comparative reference groups.

Different types of reference group behavior can be useful in the field of sociology of law. There can be a number of negative reference group like anti-social groups which can be located in a society even though they transgress particular laws. Similarly, in case of marriage, a woman who cannot adapt to her marital family due to cultural differences, can treat her parents family as a ‘positive reference group’ and this leads to conflict and stress in the marital relationship and family, which becomes a ‘negative reference group’. Many cases of desertion by woman who return to their parental home after a few years or even few months of marriage, can be examples of such negative reference-group related behavior.

Often legal officials, lawyers or judges represent the legal subculture and a positive reference group for a certain community. But for some societies where there is a gap between legal systems and its social, cultural and political acceptance, the legal profession and the court itself, or the whole legal apparatus may be regarded by an average citizen as a major negative reference group. (In marathi, there is a popular adage warning that “Never climb up the steps of a law court”.) Also, support for the legal system but lack of support for the political establishment is also a possible arena of conflicting commitments. These two types of legitimacy are not necessarily the same, as the law may advocate a set of regulations, which
may be contrary to customary beliefs and traditional norm of behavior in a religious, caste or ethnic community. The famous Shah Banu case is a striking example of this anomaly in a Indian legal case history.

A particular caste or religious group may regard the Hindu law code in India as a part mouth piece of communal political forces, and may therefore oppose formation of a uniform civil code.

The dynamic interplay between reference groups resulting in various types of reference group motivated behavior, can be used as an explanatory factor in processes which generate deviant behavior in the primary as well as secondary groups in a society. Comparative reference group as a concept, can also be put to use in analysis of marital adjustment and causes of conflicts and disruptive actions of family members.

2. Cognitive Dissonance

The concept of cognitive dissonance can be useful to study socio-legal thoughts and ideas. Divorce as an idea or norm, may be accepted as a new socio-legal institution today. But if a general opinion survey is taken about the merits and demerits of 'quick' divorce or 'no-fault' divorce, many persons will react with a negative attitude an opinion. Thus, if there is a discrepancy between a social need and the relevant legal institutions there can be increase in range and intensity of views and behavior opposing or breaking the norms and customs in force, in favor of a more functional solution. The sharp contradictions in beliefs and opinions, create an area of conflicting acceptance of legal and rational provisions. There can thus be three levels of acceptance of the law as a basis of moral regulation.

a) As mere lip-service and purely external manifestation of values to accommodate perceived social expectations.

b) Internal acceptance and commitment to internalized values which are not externally expressed.

c) Acceptance that is consistent with behavior guided by accepted values.

To illustrate no. (a), we can see gender equality is professed by most educated people, but they do indulge in discriminatory behavior like accepting dowry or forcing amniocentesis and female foeticide. In case of category (b), a person may not openly express preference for a son as propagated by Indian tradition. But as seen in the analysis of data, husbands have deserted the wife and not welcomed her to her marital home after her confinement. Referring to category (c), we may give the example of a mutual-consent divorce based on
acceptance of equal right to freedom and agreement about mutual incompatibility, which leads to divorce without legal conflict and litigation. Here the legal provision of 'no-fault' divorce introduced in Family Court divorce petition law, is accepted and practiced.

3. Status Inconsistency

Status Inconsistency is another sociological concept useful in the sociology of law. Modern society, accepts notions of equality of all citizens in the eyes of the law. All persons are treated as equal, when they approach the legal system for solution of disputes. There is also, in theory, equal access to the legal system and equal protection under Its provisions. This is a significant pre-conception in exercising the law. But is it really the case in actual social, economic and political interactions and interpersonal dealings?

Justice at law is a luxury beyond the reach of the common man today, even though all are entitled to employ it for defending their rights. This explains why many members of a community consider the prevalence of social injustice to be related to the way in which the legal apparatus actually functions. Activists, human rights advocates and feminist critics look at law as suppressive and unhealthy as it fosters gender injustice.

In modern society from the point of view of a citizens status, a normative provision is designated, which attributes to everybody the same rights to legal protection. But from another point of view (due to influence of socio-cultural norms religious and political pressure). This ideal status is systematically undermined by bias and the promised status ranking and rights are denied. This inconsistency of status (which is socially induced) might create many reactions and patterns of behavior as a response. The groups which are affected by this problem, for example women, may unite to rectify the injustice and confusion. But status-inconsistency may also lead to and encourage types of illegal solutions which arise out-side the legal order and lead to anti-legal behavior. It could also create mistrust towards the legal system and simulate political beliefs which reject the existing type of legal and social establishments. Status inconsistency thus leads to ‘radicalization’ of beliefs. However we must point out, at this juncture that inspite of the lack of adjustment so created, legal systems can not really adjust to individual wishes and can not bring about sudden changes in these norms and laws.

There is, a strong mutual interdependence between concepts employed in general sociological framework and those generated from studies of socio-legal problems. Law does not function through static or normative analysis. It is a dynamic element of social life which is constantly generated by the interplay of different social factors.
Behind the formal law are hidden moral sentiments which are crystallized in principle attitudes and interests. The theories which try to explain the functioning of law using the concept created by jurists and lawyers, are not adequate. They are too narrow and too limited. They do not consider the impact exercised by the ‘living law’ which is based, not on corrective apparatus but is consensus-rooted and locally applied.

Dean Roscoe Pound, the most important American legal sociologist expressed the view that “Perhaps the most significant advance in the modern science of law, is the change from the analytical to the functional standpoint”. The functional attitudes require that judges, jurists and lawyers keep perceptually in mind the relations between the law and living social reality, “a consideration of law in action”.

Continued on next page
Part - II: Family Court

Introduction

The concept of Family Court has made headway in countries like, Australia, U.S.A., Japan and England. Family Laws aim at conserving family life and are supposed to work constructively to provide relief to families facing stress and conflicts. Since the object of the family law in most countries, especially in India, is to protect the family and prevent any breakdown, what can be done if indeed the matrimonial relationship is dysfunctional to the couple and unhappy for all? It is in the interest of all members of the family to provide relief by easier and faster legal methods of divorce and resolving related matters such as custody of children.

Eminent jurists and legal activists have advocated the setting up of Family Courts since 1960 in India. Dr. Paras Diwan, noted jurist, points out that in India, family matters are treated on par with other civil as well as criminal matters and the delays are phenomenal. It takes three years or more, to dispose a divorce petition as the adjourning is done in the same manner as in other civil matters. This causes hardship to family members, children and the couple themselves. The Law Commission in its 54th report on the code of civil procedure has recommended the establishment of Family Courts.

To give justice to family problems and divorce proceedings. In October 1981, the Indian Council of Family and Social Welfare, held a seminar on ‘women and law’ where the President, Justice Y.V. Chandrachud, emphasized that unless we have Family Courts, no generic justice can be meted out in family matters, since witnesses like relatives, doctors etc. are not prepared to give testimony in ordinary civil courts.

The movement to establish Family Courts started in 1970. Before 1857 dissolution of marriage was not available to a vast majority of people in England. Only proof of adultery and cruelty by wife, could enable a man to get a divorce by the Divorce and Matrimonial Causes Act. In Australia similar divorce laws existed until 1959. The passing of the Matrimonial Causes Act consolidated the various grounds for divorce under 14 causes. Restrictions on divorce were designed to uphold the importance of marriage as an institution. In practice these laws forced couples to remain married when they did not wish to and made many marriages a charade. Increasingly it came to be recognized that marriages failed for many complex reasons and it was too simplistic to assign blame between the parties in a black and white way. Thus it was better if the reality of marital breakdown was recognized and provide facilities to deal with in a supportive and human
way. These ideas are embodied in the Family Law Act 1975, which transformed divorce law in Australia. It abolished all the existing grounds for divorce and replaced them with a single ground, ‘irretrievable breakdown of marriage’. In Australia the Family Law Act, 1974 covers family law. The family law Act 1975, was a further step that covers divorce, property, children’s maintenance, custody and access, as well as guardianship. This Act set up Family Courts to deal with above issues and also has powers to deal with issues regarding harassment and violence. The Family Court also has counselors for couples wishing to separate and a program of mediation. There is also another provision for couples who live together but are not legally married. Their relationships are called De Facto relations and are common and socially accepted. The de facto relationships Act, 1984, Which has similar provisions for divorce maintenance and custody of children. Australia is the first country to have instituted the system of Family Courts. Every modern state is taking an active and often a commanding part in regulation of family life. Many of these functions are of judicial or quasi-judicial nature, and go back to the traditional role of the courts as guardians of the weak and exploited. Today these functions are practiced by many types of courts, like Tribunals, Juvenile courts, Magistrates courts and Family Courts. The extent and power exercised by these judicial and quasi-judicial courts, is an indication of the social importance of the and of the responsibility which the state has traditionally felt for its maintenance. There is also today a view that there is need of procedure, which should be less formal and inquisitorial and less modeled upon adversary litigation, as the present divorce procedures are. A Family Court with a more therapeutic approach to family conflict and thrust towards conciliatory procedures is the need of the time.

Need for Family Court

The need for a Family Court is obvious, as any matter pertaining to the family, whether divorce of custody of children leads to serious breakdown of the protective umbrella of the household. The Family Court case should not be viewed in terms of success or failure of a legal action. It should be treated as a social pathology, needing a therapeutic approach and human methods of settlement. The court engaged in the solution of such a problem requires a less formal and more active investigational procedure. Such a procedure implies that the legal action is not a litigation in which parties and their counsel are engaged in winning or defeating the legal action, but an action in which all are engaged in finding a suitable solution to a human problem. The principle of an integrated Family Court which would deal with the complex and multi-dimensional aspects of family disruption by non-adversary procedures has been subject of study and research in the United States.
It must be realized that family and related disputes are as important as those related to labour, income tax, revenue and Criminal matters. When the cases regarding divorce or maintenance are dealt under civil or criminal jurisdiction, there are delays, only adversarial litigation and distress for all involved in the dispute. In order to avoid these negative consequences, Family Courts with a special legal and social approach are very necessary. The welfare of children who suffer the most due to marital breakdown makes a strong case for institution of Family Courts in India. An integrated family Courts needs to be a separate institution with specially trained staff and experienced judges at the head of the organization. Marriage Counseling, legal aid and a cheaper and faster method to register the case is essential. To provide this and avoid adversary litigation, the Marriage Laws Amendment Act 1976 provides certain reforms. These reforms relate to procedures in divorce proceedings which otherwise drag on in court for years. As the jurisdiction in matrimonial proceedings is exercised by the district Judge or sub-judge, they proceed in a slow manner as other civil matters. To prevent such long delays the Act now lays down that, “the trial of a petition under Hindu marriage Act, 1955 and Special Marriage Act 1954”, “shall so far as is practicable consistently with interest of justice in respect of the trial, be continued from day to day until its conclusion, unless the court finds the adjournment of the trial beyond the following day to be necessary”.

Today state and law, both are much more active in social engineering than in former times, but law without justice is blind and justice without law is lame. Thus law geared to justice is the basic foundation of the personal law code and administration of this law through the special courts, like a Family Court.

Recommendation of the 54th report of the Law Commission of India and the 59th report on the Hindu marriage Act and Special Marriage Act :-

Propositions made as regards Family Courts:

1. A Family Court should be constituted for each state, designating it as the ‘State Family Court, containing three or more judges to be appointed by the President of India’.
2. Within the state there are many districts, and each district there must be a ‘divisional district Family Court, presided over by one judge’.
3. Right to appeal against decision of Family Court lies with the High Court.
4. Each divisional Family Court should have to be equipped with a welfare officer, marriage counselor, and psychiatrist.
5. Two research bodies need to be put into action to access the function and workability of the Family Court, namely, (i) The Indian Family Law Council (ii) The Indian institute of Family Studies.
Along with the above proposals certain other services are considered essential for the Family Court. Auxiliary services and supports services have the objective to help parties at reconciliation, conciliation and to lessen the adversarial atmosphere.

The Family Court must be supported by :-
1. Family counseling and conciliation services
2. Investigative services
3. Legal aid services
4. Enforcement services

Counseling and Consolation:
Family counseling should be three tiered service: (i) Premarital Counseling, (ii) Consolation Counseling, (iii) Post-adjudicatory Counseling

The reconciliation and Counseling role is to promote reconciliation. Whenever possible, Where it is not possible or is undesirable efforts must be made to secure amicable settlement of all disputed issues. Post-adjudicatory counseling is to help the parties to face the aftermath of divorce.

The Family Court will also need investigative service once we accept that an adversarial system will not be accepted. This service helps judges to arrive at a balanced decision. It will also help in functional settlements and reasonable property division, entailed in divorce.

The Legal Aid service should also be a part of the Family Court system. Legal aid schemes are available for the weaker sections and illiterates persons. By section 39A of the Indian constitution free legal aid is to be provided. The Legal Services Authority Act 1987, as amended by the Act of 1994, came into force in November, 1995, it aims at establishing, a nationwide network for providing free and complete legal services to weaker sections. The National Legal Services Authority (NALSA), has also been set up for implementing and monitoring legal aid.

For the legal aid service, proper guidance and provision of socially committed lawyers is necessary. Where the custody of children is concerned, children should be represented by independent lawyers. However as per the Family Court Act 1984, lawyers are discouraged from taking up litigation in the Family Court.

The Family Court: Structure and Process

The ideal of welfarism and the socialist ethic have been underlying principles of the Indian State and the judiciary. State intervention through the medium of legal
reform has been undertaken since the 19th century and through the 20th century too. Since independence in 1947, the framers of the Indian Constitutions as well as jurists and legal scholars have taken a deep interest in promoting the ideals of the equality freedom and social justice for every strata in the Indian society. The enactment of the Hindu law code in 1955, after much debate discussion and criticism from different social groups scholars and jurists, was a step towards creating a civil rule of law, especially in the private field of personal law. Most of the private issues and disputes regarding caste, family and inheritance had been decided by caste panchayats and religious priesthood or counsils. The Hindu Law Code, 1955, was a significant break through in the development of civil and secular law in the Hindu community. The Hindu Law Code consisted of the number of laws and enactments dealing with marriage, divorce, adoption, widow remarriage and inheritance of property. Legal scholar Rama Mehta (1987) points out that there was a significance campaign for reform in Hindu law between 1934 and 1951 in Indian society. The three phases in this process are – issue formation, committee formation and legislative deliberation. After much discussion and wrangling between political leaders and various functions, the Hindu Code Bill was passed. Jawaharlal Nehru was the main force and he treated the Congress victory as a popular mandate in support of the Code, which would help to fulfil his commitment to social welfare and reform. The Hindu code bill was divided into five separate Acts:-

1. Special marriage Act (1954)
2. Hindu marriage Act (1955)
3. Hindu Succession Act (1956)
4. Hindu Minority and Guardianship Act (1956)
5. Hindu Adoption and maintenance Act (1956)

These and other personal laws made a great deal of change in the status of women within the family and her rights to property. However many problems like political participation of women, the evil of dowry and problems of the backward sections, remained unresolved. Taking an overview of the policies, administrative laurel and procedures of the civil court, the law commission took cognizance and began to suggest the initiation of a Family Court as a separate legal body to settle marital disputes. The Family Court Law was passed in 1984, and courts were established in Pune, Nagpur, Bombay and Aurangabad. The Pune court was the first and started functioning in 1989.

The Indian society is a complex and plural society composed of castes, sub castes different religious communities. Some religious communities like the Muslims and Christians are still ruled by their own religious laws. As the 1970’s approached, the women’s movement in India had become strong and vocal. In 1975, the committee on the status of women recommended many legal reforms in the legal system for the benefit of women especially as regards their position in their marital family. The problems of domestic violence and dowry harassment
were being reported in the mass media and public opinion demanded change in existent legal provisions. Many women’s organizations recommended that all matters concerning the family should be dealt with separately. Accordingly, provisions for special proceedings in family matters was included in the Code of Civil Procedure by an amendment in 1976. But nothing further was done until the 1980’s when the women’s movement started raising demands for reforms in laws concerning women. In response to this, the rape law was amended in 1984 and again in 1986; cruelty and harassment to wives was made a cognizable offence under section 498(A), Indian Penal Code(IPC) in 1983. A special section to deal with dowry deaths was included in 1986. Thus focus on disputes and problems in family became the primary thrust of legal reforms. The family in India is a pivotal unit and the state and the law wished to preserve its structure and protect its functional efficiency. Welfare for children, women and security became important. protection of Constitutional rights of the weaker sections, i.e. women, children and disabled persons in the family, was necessary.

The woman’s movement also focused attention on the unequal power relationship between men and women at every level, and the anti-women bias against women, within the law and court. A demand was made for laws and procedures which would ensure women’s economic rights within marriage, make divorce proceedings speedy, less expensive, less traumatic and more just.

What was required was matrimonial laws and courts somewhere along the lines of labor laws and labor courts. The latter recognize the unequal power balance between labor and management. Special statutes and procedures are needed to tilt the balance in favor of labor, because of inequalities of bargaining power. Similarly laws and procedures were needed in matrimonial matters which would apply the same principles in order to reduce disequilibrium in gender relations. The concept of setting up of separate courts for family matters was therefore was ripe. In the 54th Law Commission’s report the following observation is significant :-

Disputes concerning the family sect 1.2.1 - “In our report on the Code if Civil Procedure, we have had occasion to emphasize that in dealing with disputes concerning the family, the court ought to adopt a human approach – an approach radically different from that adopted in ordinary civil proceedings, and that the court should make reasonable efforts at settlement before commencement of the trial. In our view, it is essential that such an approach should be adopted in dealing with matrimonial disputes. We would suggest that in due course, states should think of establishing Family Courts, with presiding officers who will be well qualified in law, no doubt, but who will be trained to deal with such dispute in a human way, and to such courts all disputes concerning the family should be referred.------- 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------ Acts, and by dealing with disputes concerning the family, they will be able to acquire experience and knowledge which should not only be of value to them but will ultimately benefit the society.”

This means that the legal pundits and the law makers were becoming aware that laws and procedures were needed in matrimonial matters which would try to reduce the disequilibrium inherent in marriage relationships by creating new procedures for dealing with disputes.

Since the demand for a uniform secular and non-sexist code was not conceded, the state recommended the passing of the Family Court Act as a positive step towards better legal procedure in these matters. In Indian society, the institutions of marriage and family have been considered the cornerstone of the social structure. There has also been a deep-seated belief that the sacrosanct nature of Hindu marriage and the tradition bound family structure are intrinsic in maintaining personal and social stability. The vast changes in the social life of Indian cities due to industrialization, westernization and civil society and law, naturally affected the norms governing marriage and the structural controls governing family members. The various provisions in the Hindu Law Code of 1955 had already affected many aspects of family life. But in many court cases, the procedures were too formal, there were long and expensive delays and the adversarial approach made the whole process extremely torturous for families already traumatized by disputes.

Keeping all these lacunae in mind the Family Court Act was passed in 1984, to bring under one umbrella all family issues- marriage, divorce maintenance, custody of children and adoption. We can say that when a person wants a matrimonial remedy and maintenance, instead of going to different courts, the Family Courts can provide service at a one place. This Act was also visualized as way to provide better and easier way to get gender justice for women.

The Family Court Act enacted in 1984, has come into force on various dates in various states, while in some it is yet to be notified. The Act it-self limits the establishment of Family Courts to cities or towns whose population exceeds 10 lakhs and leaves the discretion of establishing it in other areas to the State Government. At present there are 80 Family Court functioning in the country.
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The main objectives of the Family Courts Act are:-

1. Preservation of the institutions of family and marriage.
2. Settlement of family dispute with emphasis on conciliation rather than normal adversarial proceedings.
3. Making the right to divorce a practical and feasible reality rather than traumatic, by insuring speedy measures.
4. Make the welfare of women and children a prime objective in the proceeding with a case in court.
5. Providing counseling and professional mediation to try and settle the various disputes to the best interest of the parties.
6. As far as possible, forbid the entry of professional lawyer to represent the parties, to avoid unnecessary litigation.
7. The provide legal aid to petitioners or families if they are poor, uneducated and illiterate.

Important features of the Act :-

1. The Act has simplified rules of procedures and evidence of the Family Courts Act 1984. This apparently is to relieve the court of the shackles of procedures and technicalities so that they can deal quickly and in a more human manner with matters before them.
2. Lawyers who are not usually in favor of amicable settlements are prevented from appearing in Family Court without the express permission of the court. This is done to give the party themselves a chance to place the matter in the court and not let it fall into the hands of professionals.
3. The Act enables the courts to seek assistance of medical and welfare experts and social welfare organization. Also, proceedings are held in camera (privately)
4. Family Court was established to remedy certain lacunae in the existing legal system. It was argued that the formal legal system, with its adversarial proceedings was unsuited for the resolution for the family disputes.

5. Adversary proceedings by their very nature tend to promote discord between the parties and hamper the prospect of settlement or conciliation.

6. The formal rules of evidence and the Civil Procedure Code restricted the possible role that judges could play in helping the parties to arrive at an amicable settlement.

7. The Act provides for counselors who are to assist the court in the discharge of its functions.

8. It is important to point out that the Family Courts Act is only a procedural law and does not in any way alter the substantial right of the parties which are still guided by the personal laws. The Family Court Act merely substitutes for the procedures established by the Civil Procedure Court, it does not confer any substantive rights on the parties.

9. From the scheme of the Act it is very clear that there is a shift from formal adjudication of the disputes based on rights to conciliation of disputes based on the needs of the individuals concerned as well as those of the society (Ibid P.1735).

10. Through this enactment there is an attempt to relegate matrimonial issues from the public to private sphere within the formal legal system. ‘Private’ here used not in terms of ‘Private’ nature of proceedings, but with regard to manner and nature of proceedings in which all forces and influences outside the parties, concerned are removed and settlement is attempted by the judge. Family disputes are seen as problems between individuals, not concerning larger society.

11. The traditional adversary system is impersonal and objectivist in approach. The courts are bound by precedent which does not allow for contextual decision making. It has been held that family disputes are well situated to alternatives forums because the conflicts often involve a complex interplay of emotional and legal complaint.

The Family Courts have been setup to remedy these drawbacks. If the parties represent their own cases they can have more control over the decision making process. It remains to be seen to what extent the Family Court Act, remedies the evils of the formal legal system. While taking into account criticism of the functioning of traditional legal system it is also essential that we look into the actual functioning of the informal justice system in the Family Court. (Chapter on analysis of data and Conclusions and suggestions studies the functioning of the court).
Procedure, jurisdiction and service in the Family Court

The Family Courts Act, 1984 (Act no 66 of 1984) was enacted by the Indian parliament. "the act aims at providing for the establishment of Family Courts with a view to promote conciliation in, and secure speedy settlement of disputes relation to marriage and family affairs for matters connected therewith.

The act applies to all Indian states except Jammu and Kashmir. The establishment of Family Courts is done by the State Government with direction of the High Court. All cities or towns whose population exceeds one million, can establish a Family Court. The local limit of jurisdiction of the court is determined by the state government. The Family Court at Pune serves three areas, namely, Pune city, cantonment and Khadki. It is situated in the building of the Bharati Vidypeeth building near Alka theatre in Navi Peth, Pune. The working space of the court is situated on the seventh and ninth floor of this building. There are five courts within the Pune Family Court, each headed by a judge. One of these held the designation of principle judge to be appointed as a judge in the Family Court, the person must have at last seven years of experience as a civil court judge or should have been a member of a tribunal set up by the state. It is also necessity for the person to have practiced as an advocate of a high court for seven years at least. Preference is given to women judges who have requisite experience and qualification. During the course of the present research principle judges post was held by women for two terms. Academic qualifications and scholastic ability are also criteria for selection of judges. The court act also allows for association of social welfare organizations, family counselors and professionals in the field of social work, to aid the disposal of certain cases.

In 1987, the government of Maharashtra passed certain additional rules regarding the procedure to be followed by the Family Courts.

1. The petitioners or parties, who come to register their case at the family court, should not avail of the services of a legal practitioner. Only in exceptional cases where the petitioners cannot present a case in court, will the court give permission for an advocate to present the case. The petitioners will have to make an application to the court requesting service of a lawyer.

2. The court was also directed to maintain a panel of lawyers willing to render free legal aid and advice (section 7).

3. The appointment of counselors as officials of the Family Court, is a significant feature, which sets it, apart from the regular civil court. The appointment of the counselors is through the High Court. The Family Court in Pune has ten counselors holding degrees in professional social work and persons experienced in
working for family and child welfare. The function of the counselor is to study the petition and interview both parties with the aim of providing help in settlement of dispute. Ideally, the act envisages that the counselors main responsibility is to enable parties to arrive at a reconciliation. In this connection he/she can interview family, kin and neighbors. He /she can make home visits and also has right to get relevant information from the employer of any of the parties. Medical experts opinions can also be obtained in certain cases. It is important to note that he evidence records kept by the counselor, are totally confidential and are not presented as evidence before the court. Moreover, no counselor is called upon in respect of this information, notes or report. The role of counselor is ideally a very crucial one of mediator and arbitrator. It is expected that he /she can gather information regarding the home environment of the parties or problems better. The main aim is to ensure that the report of the counselor can guide the court to ensure welfare of women and proper recommendation for custody of children and guardianship. This report is also influential in assisting the court to settle the amount of alimony, amount of maintenance to be paid by the husband to his wife and children .The standard of living and income of litigants cannot be assessed unless the counselor makes home visits to determine these aspects., the role and sincerity of the counselor becomes pivotal as his work is not in the legal domain but on a humanitarian plane. In most cases the counselor submits reports to the court about the outcome of his word. It is only after counseling is done that the case proceeds to be settled before the judge.

In some cases, the two disputing parties come to some understanding about settlement of the conflict. In such a case they either compromise and go in for a divorce by mutual consent, or settle the matter and withdraw their petition. The rest of the cases then go on for settlement at the hand of the Honorable Judge, who passes the final decree or judgement. The proceedings of the case are held in camera (private) and lawyers cannot present the case in the presence resence of the judge.

1. Counselors are given the right to supervise the custody of children even after the divorce takes place. He/She can recommend any change in the arrangement if the welfare of the child is at stake.

2. Adoption of children by Indian and foreign parents, is a matter handled by the Family Court. The court takes assistance of the social welfare agencies (Like Shishu Adhar or Sofosh – society of friends of the Sassoon hospital, Pune) to scrutinize petitions.
Jurisdiction of the Family Court and the types of petitions processed in the court

There are seven main types suits or disputes registered and dealt with by the Family Court. They are given alphabetical indexing numbers, namely petitions 'A, B, C, D, E' and also Darkhast and Miscellaneous matters petitions.

**Petition A:** This is the main petition registered and is also numerically a very large group.

A person can register under this provision for divorce or dissolution of the marriage. He/She can present a law suit to declare the marriage null and void i.e. annulling the marriage in this case the marriage is made non-existent. This type of case involves marriage by fraud or force, or if one partner is already married and has deceived the spouse. Under petition A, a spouse can also demand for restitution of marital rights (RMR) or conjugal rights. This involves a direct intervention by the Family Court ordering one spouse who has deserted the other, to resume life together i.e. cohabitation. (The objective of the Family Court is to bring about conciliation as far as possible). In some cases, a spouse may register a case against the other spouse and ask for judicial separation, which means obtaining a court order to live separately but not take a legal divorce. This kind of petition is made so that the two partners can live away and due to objectively about the dispute. This is a step short of complete dissolution of the marriage, again emphasizing the court role as conciliatory drying to keep the marriage going by granting time and spatial separation to the disputing parties. In some cases, the petitioner can ask for custody of children and also for financial assistance called interim maintenance from the other party. The petition for divorce is the beginning of a complex process of dispute settlement wherein children family members and other factors like money and property are involved. Almost 8000 petition A's have been registered in the Family Court between 1989 and 1995 Therefore due weightage has been given to cases under this head in the sample selected for detailed study. (See chapter on methodology and chap on Analysis).

**Petition B:** is a case registered by one party against the other for what is legally termed Injunction. In some cases the marital relationship breaks down and there is severe stress or even violent interchange. In such cases, one spouse wishes that the other spouse must be restrained and legally prevented from access to the petitioner, his/her children, house or property. In many cases, the wife feels threatened by her husband or his family, so to protect herself and her children she lodges a petition for injunction against the husband and/or his family. This petitioners may also to prevent the other parent from meeting children, if the court feels it affects the child adversely. Injunction also is a way to protect property, house or jewelry belonging to one partner, being taken over, or divorce case is
proceeding in the court, the wife sometimes leaves in the marital home and she may need protection and a right to live there until the matter is decided in the Family Court. The court can also grant permanent injunction to one petitioner, whereby the other spouse may be prevented or meet children without prior permission.

**Petition C:** is a provision made for ensuring the welfare and care of minor children, whose parents are in process of separating or are already divorced. The Family Court Act 1984, lays special emphasis on the protection of women and dependents who may suffer financially and psychologically due to the trauma of divorce. A mother is normally considered the natural guardian (in Hindu Law) of the child and the custody is granted to her in majority of cases. Only, where she is unable to care for the child, due to lack of house, job or illness, the custody may be given to the father. A case for custody can be lodged by any party even after the divorce proceeding is over and custody is already granted to one parent. The other parent can lodge another ‘petition C’, to cancel the original order and take over the custody of the child. In most cases, when one parent is given custody, the court outlines certain specific days of the month or period of school holidays when the other parent has access to meet his child for a limited period. Where there is lack of confidence about the intentions of the partner who meets the child (like fear of kidnapping child), the Family Court allows the meeting to take place within the court premises in the children’s room, for a short period. Whatever the law tries to do to help, in custody cases the child and the parents undergo a very difficult situation and it is also often traumatic for the child.

**Petition D:** The Family Court has the responsibility of scrutinizing the various cases of orphaned or destitute children, who are put up for adoption by Indian or foreign parents. Various voluntary agencies in Pune like ‘Shishu Adhar’, Bharatiya Samaj Seva Kendra, Kusumbai Motichand Mahila Seva Gram, receive destitute children for care and rehabilitation. These agencies then send the available information about the child to the Family Court. The Family Court works under the jurisdiction of the Hindu adoption and maintenance Act 1956 and the Gardian and Wards Act of 1890. The social welfare agency prepares a detailed report about the child, health status, information of biological parents (if available). The social worker’s report of the prospective parents is also prepared by the social worker and submitted to court. The adoptive family is scrutinized carefully and in the case of inter-country adoption a bond for a substantial sum of money is obtained from the prospective parents. A sealed file is adoption in the Family Court. An yearly report with photographs is to be sent by the adoptive parents, to the Family Court. The court also works on this and keeps the Indian Council of Social Welfare informed of the cases executed. One important hindrance for smooth working in adoption cases, is the absence of a uniform adoption law for in-country and inter-country adoptions.
Petition E is a suit or proceeding with regard to maintenance money and payment of alimony. This petition is lodged by women who do not have any income or those whose maintenance amount fixed by the court needs to be enhanced. The highest number of cases registered in the Family Court are in this category.

Besides the above major petitions, the Family Court also accepts ‘Darkhast’ petitions from parsons who have not received maintenance and alimony as per court orders. The court then uses the Criminal Procedure against the defaulter and can also take criminal action. Muslim and Christian women can register cases in the Family Court in connection with non-payment of monthly maintenance for herself and children. Their other personal laws are different.

The details of the petitions above show that the objective of the Family Court is not to grant a quick divorce only. Rather the court has instituted many procedures which try for conciliation. Even after a divorce the custody of children and financial well fare has to be assessed by the court and it has the power to enforce the decree regarding payment of money for women and children.
References


7. Ibid., pp. 245.

8. Ibid., pp. 85.


11. Ibid., p. 84.

12. Ibid., p. 86.


16. Ibid., pp. 302.
17. Ibid., pp. 43.


19. Ibid., pp. 85.


22. Ibid., pp. 157.

23. Ibid., pp. 157.


27. Ibid., pp. 147.


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42. Ibid, pp.7.

43. Black, Donald, Cit., pp.1087.
