
MANDATORY FAMILY MEDIATION IN INDIAN FAMILY LAW : A FEMINIST CRITIQUE

Gunjan Nayyar, Jindal Global Law School, O.P Jindal Global University

ABSTRACT

The establishment of family courts in India was propelled by the rise of popularity of ADR methods around the world and the ratification of CEDAW. This was seen as a watershed movement in India's legal history: a feminist victory bound to usher in a new era of justice that catered to ameliorating the inherent inequities ingrained in the traditional judicial system which created structural hurdles for women seeking justice. The family courts were unique in their functioning for they advocated mandatory mediation with a focus on reconciliation as one of the methods of removing the hurdles in women's fight for justice. However, after almost 3 decades since the establishment of the first family court in India, the author looks back on the harms that have been inflicted on the institution of the family and women's fight for justice by making family mediation aimed at reconciliation a mandatory requirement for seeking judicial relief. It is the author's contention that such an implicit focus on preserving the institution of marriage is antithetical to the strides made by the women's movement as it does not acknowledge the unique challenges faced by women in marital unions and is likely to push women into deeper violence, retaliation and uncertainty.

Introduction

India is a multicultural, multireligious, ethnically diverse country, reeling from a colonial hangover and therefore, has a very interesting family law system, wherein people from each religious group primarily fall under their own personal (religious) laws, in matters pertaining to marriage, divorce and succession, among others. In the years post-Independence, there has also been an emergence of secular family laws to accommodate the varying combinations of changing marital and familial norms. One of the most crucial and interesting developments in the field of family law adjudication has been the establishment of family courts that aim to promote ‘*conciliation*’ and ‘*speedy settlement of disputes*’ between the litigating parties. The establishment of these courts and the push towards introducing alternative dispute resolution as a possible means of adjudication between parties makes for an interesting analysis because the rise of ADR methods in adjudication of family disputes is usually seen as a feminist victory. And while the implementation of mandatory ADR Methods in Family Disputes was seen as a step towards de-formalization of the adjudicatory process in order to increase access to justice for women and ensure speedier trials, A question that begs to be answered is, “*Are mandatory conciliatory methods antithetical to the demands of the Feminist Movement?*” For the purposes of brevity and cohesion, I will be restricting my analysis to adjudication of marital disputes especially when intimate partner violence is involved. The analysis of the aforementioned question will primarily be based on a feminist jurisprudential lens, that builds on the theoretical framework provided by third-wave feminists. Additionally, the central provocations of this essay are posited on the basis of Srimati Basu’s seminal essay titled, “*Judges of normality: mediating marriage in the family courts of Kolkata, India*”,¹ as well as Elaina Behounek’s extensive ethnographic research on family mediation in America.²

In the late 1970’s, ushered by the conversations surrounding the role of women in family units and the popularization of feminist discourse in the popular imagination, a global movement for the creation of alternative dispute mechanisms besides trial courts, to address the unique problems faced by women was put into motion. This was further propelled by the UN declaring

¹ Basu, Srimati. "Judges of normality: mediating marriage in the family courts of Kolkata, India." *Signs: Journal of Women in Culture and Society* 37.2 (2012): 469-492.

² Behounek, Elaina, "Mediated Relationships: An Ethnography of Family Law Mediation" (2015). *Graduate Theses and Dissertations*. <http://scholarcommons.usf.edu/etd/5909>

the period between 1976-1986 as the decade for women with the central motto of promoting ‘access to justice and equity in legal processes’ for women.³ This movement was further strengthened by the ratification of the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”) in 1979.⁴ Article 15 of the CEDAW, suggested that all states party to the treaty take steps to make the legal system more accessible for women and eliminate barriers to entry for them.⁵ Parallel to these demands, another system of adjudication, i.e. ADR was cementing its place in the American legal system as a new and more efficient redressal mechanism due to its success in business and investment matters.⁶ The success of ADR methods in the 1970’s in delivering optimal and equitable outcomes for adversarial parties, the reduction in volume of cases and delays lead to demands for implementation of ADR methods to resolve family disputes.⁷ Additionally, it was seen that the adoption of ADR methods allowed specific subject matters to be brought out of the purview of normal trial courts and lead to the establishment of special courts.⁸ The success and popularity of these two parallel movements ushered in the trend of many countries establishing special family courts with an emphasis on ADR methods to increase access to justice for women.

The establishment of family courts in India can be contributed toward the demands put forward by the growing feminist movement in the 1970’s and 80’s, coupled with India becoming a signatory to the CEDAW.⁹ These demands led to the Committee on the Status of Women in India to undertake a policy analysis of the status of women in India. The report titled, “*towards equality*”, released in 1974 recommended the establishment of family courts in India.¹⁰ This was followed by the release of the 59th report of the Law Commission of India, in 1975 which dealt with the resolution of marital disputes.¹¹ The report suggested that the courts needed to adopt novel ways of resolving marital disputes as well as make reasonable efforts to facilitate settlement between the spouses prior to trial.¹² The establishment of family courts in India was

³ Supra Note 1.

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

⁷ Ibid.

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Agnes, Flavia. *Family Law: Volume 2: Marriage, Divorce, and Matrimonial Litigation*. Oxford University Press, 2011.

¹² Ibid.

also supported many feminist and legal scholars who felt that the adoption of ADR methods in family median would result in lesser delays, lack of corruption, suspension of excessive bureaucratic formalities.¹³ It was also felt that the establishment of these alternate family courts would result in speedy resolution. Other scholars championed this cause for they felt that the inclusion of ADR methods and suspension of formalized legal processes would prevent the alienation and discomfort felt by women and members of other marginalized groups, who have historically had little to no access to the law.¹⁴ The suspension of formal demands of the trial court would allow people of marginalized communities to air their grievances using normal everyday language as opposed to the flowery language of the law, giving them more control of their narrative.¹⁵ Some legal practitioners also highlighted the feelings of stress, fear, humiliation, invasion of privacy experienced by their clients in litigation proceedings and have suggested that the litigation process be made less intimidating.¹⁶ This sustained demand for the establishment of family courts finally culminated in the passing of the Family Courts Act (“FCA”) in 1984 and was formulated to deal with divorce, maintenance , adoption and custody matters.¹⁷ The enactment of the FCA resulted in the establishment of India’s first Family Court in Rajasthan, in 1987. These courts ushered in a new formula of adjudication where litigants could themselves express their concerns to the judge in an informal manner with the help of on-site counselors in the form of paralegals or social workers who would help the adversarial parties to negotiate settlements or reconciliation, as well as check on the progress of the cases post negotiation. The establishment of these courts was seen as a feminist victory, to the effect of family courts being referred to as women’s court, which was seen a sign of feminism no longer being an underdog but demanding power in the language of the law. The FCA ushered in the usage of ADR mechanisms for family mediation in a big way , for the statement of objects and reasons of the act reveal that the legislation was brought in “*to promote conciliation and secure speedy settlements of disputes*” in family affairs.¹⁸ Furthermore, ancillary material

¹³ Supra note 1.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid.

to the act reveals that preserving the institution of marriage is one of the primary goals of the Family courts.¹⁹

As Srimati Basu highlights in her essay, that family courts focusing on ADR mechanism have a very distorted and ambivalent view of marriage, divorce, the power relations operating within the confines of marriage as well as the disproportionate division of resources and infliction of violence on women.²⁰ The 1984 FCA act makes abundantly clear its motive to promote conciliation and dispute settlement between the adversarial parties. As advocate Susheela Gopalan notes that, conciliation is a slippery term for some legal practitioners could take it to mean conflict resolution while other practitioners might take it to mean the resumption of marriage through re-conciliation.²¹ Gopalan further highlights that this emphasis on preserving the institution of marriage through conciliation might push women back into deeper violence.²² It also important to acknowledge the goals of preserving the sanctity of the marital institution and serving the best interests of women are in direct opposition to each other due to the unique challenges faced by women in marital unions.²³ It has also not gone unnoticed that preserving the institution of marriage and keeping the dispute resolution system efficient at the same pedestal is a case of false equivalence and are at odds with each other.

The ethnographic survey undertaken by Srimati Basu in Kolkata's family courts not only reveals the possible harms and contradictions posed by placing an emphasis on reconciliation, but also highlights the inherently sexist and patriarchal attitudes ingrained within the judicial processes that recreate the structures of inequality, even within these supposedly feminist spaces. The councilors in these family courts measure their success and negotiation prowess by the number of families they are able to reunite, even in cases where there is significant intimate partner violence. These attitudes underscore the idea that reconciliation of the couple and preservation of the marital union is of the utmost importance and think of the occasional violence as a small price to pay for a patched-up marriage, instead of adopting an absolutely antiviolence stance.²⁴ This position is in direct opposition with feminist anti-violence stance in

¹⁹ Ibid.

²⁰ Supra note 1.

²¹ Ibid.

²² Ibid.

²³ Ibid.

²⁴ Ibid.

cases of domestic violence.²⁵ Even the judges who act as neutral arbiters, reveal that they are indeed encouraged to promote reconciliation between the parties which, in the absence of formal principles not only considerably widens the scope and function of a judge's power but also reproduce these systems of inequality.²⁶ Basu's conversations with the people at the family courts reveal that the focus on reconciliation between the marital parties makes them believe that the judges are leaning towards favoring women.²⁷ It has also been reported that the powers vested in the people through the implementation of the FCA are most enjoyed by people who are educated and have some social capital and power.²⁸ The same report reveals the problems faced by people with little to no literacy skills such as people being granted ex-parte divorce due to their inability to understand the summons or people being incarcerated for non-payment of maintenance without being able to comprehend the legal orders.²⁹ The same reports also reveal the attitudes of the judges who felt irritated when women filed parallel civil or criminal suits outside the family courts and saw these suits as a trick to influence the maintenance decisions. It was also noticed that judges became very unsympathetic when women have formal 498-A complaints for domestic violence and see a 498-A complaint as a vindictive and self-serving move by the wife.³⁰ They also remarked that filing a 498-A complaint amounted to the willful destruction of the matrimonial home as well as in direct opposition to the negotiation proceedings. This indifferent and callous attitude towards domestic violence is indicative of the larger problems associated with these ADR oriented redressal mechanisms. This sentiment has been echoed by feminist organizations who work with victims of domestic violence.

Elaina Behounek's research in this department suggests that 56 per cent of the mediators fail to recognize the signs of domestic violence and many fail to register cases of intimate partner violence even when there are obvious and visible signs of it.³¹ The insistence on adopting ADR methods in all matrimonial disputes ignores the reality of violence in marriages and do not account for the revictimization of the victim in cases of domestic violence.³² The ADR

²⁵ Ibid.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid.

³¹ Supra note 2.

³² Ibid.

processes also do not take into account the power differential operating within the marriage and thus, the inability of the victim to openly voice their concerns about the inflicted violence when there is a chance of the victim and the abuser of cohabitating together until the divorce proceedings and separation is finalized.³³ Additionally these processes do not take into account the fear of retribution at the hands of the abuser, the differential in bargaining power as well as the absence of any way to determine whether the abuser is willing to negotiate fairly.³⁴ Laura Nader who is one of the most vocal critics of the mandatory mediation proceedings in matrimonial disputes famously calls ADR “*coercive harmony*” and argues that the ADR processes are largely “*coercive, repressive and undemocratic.*”³⁵ Nader also puts forward the idea that these mandatory mediation provisions do not attend to issues of unequal power and resource distribution, while severely lacking accountability for its outcomes.³⁶ Other critics in the same vein argue that these mediation proceedings do not provide sufficient protection of women’s rights as they assume an equal standing between all parties involved.

Flavia Agnes in her book highlights the perils of the hasty and uncritical application of mandatory mediation for marital disputes as the courts have failed to employ a new dynamic approach towards family litigation and securing the goals of gender justice.³⁷ As Agnes points out one of the biggest shortfalls of this regime is that it fails to contextualize gender in an inherently patriarchal institution which is the judicial system.³⁸ Since the act does not reiterate its vision of achieving gender but instead highlights its commitment to persevering the marital institution, there is no incentive for judges to make “*this conceptual shift*” in the favor of women.³⁹ It is also worth remembering that a radical shift from one redressal mechanism to another would not be sufficient to bring about the required change and that instead what was required was that the system question its assumptions. Agnes further highlights that regulations operating under the cloak of neutrality in a deeply unjust and gendered society, will not yield outcomes that are consistent with gender justice norms.⁴⁰ In the same report, she also highlights

³³ Ibid.

³⁴ Ibid.

³⁵ Supra note 1.

³⁶ Ibid.

³⁷ Supra note 11.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ibid.

that there is a need for issuing guiding principles to judges of family courts for gender-just outcomes that are somewhat uniform across regions.⁴¹ The failure of these alternate resolution mechanisms highlights that the judicial system operates within a particular cultural and socio-legal context which is incognizant of the reality of women's experiences where economic dependence in marriages for food and shelter allows for acceptance of domestic violence as a virtue like that of sacrifice and tolerance.⁴² The failure of this project also brings to the fore the idea that legal reforms brought about by feminist lobbying will not necessarily produce gender-just outcomes.⁴³ Instead these outcomes are reliant on the nature of the institutions implementing these reforms. The unfolding of these cases highlight the vulnerabilities that are reproduced through marriage which uphold heterosexual privilege and traps women in these cycles of violence.⁴⁴ As has been proven time and again, impartiality of the justice system does not yield justice but instead imbibes the patriarchal order of the day.⁴⁵ Therefore, it is time that we as members of the legal community take stock of the situation and acknowledge the ways in which a system created for ameliorating ingrained inequities for women often lands them in situations that they need to escape.

⁴¹ Ibid.

⁴² Supra note 1.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Ibid.