

LEGAL ISSUES ON ADVOCATES' RIGHT TO LEGAL REPRESENTATION BEFORE FAMILY COURTS IN INDIA

*Anupama Gupta**

*Ghulam Yazdani***

Abstract

Family Courts Act, 1984 is an important piece of legislation which aims at preserving the family values and in the stabilization of a sacred institution of marriage. In this context, section 13 was drafted in such a manner so as to minimize the involvement of lawyers before the family courts where emotional considerations outweigh all other considerations. Lawyers are generally presumed to promote delays in the disposal of matters due to obvious reasons of having vested monetary interests in adjournments. However, in the past few decades there has been a considerable rise in matrimonial litigations. With complexities in this field the role of advocates has become indispensable where these matters are not just limited to contending a civil matter. The Bar Associations are of the view that fair trial, which is an integral component of article 21 of the Constitution of India, is set to be obliterated due to section 13 of The Family Courts Act, 1984. Hence, it needs to be scrapped out from the Act. This paper is an elaborate research on the pros and cons of retaining section 13 of the Act along with its constitutional validity under article 19(1) (g) of the Indian Constitution read with section 30 of the Advocates Act, 1961.

- I. Introduction**
- II. Meaning and Role of *Amicus Curiae***
- III. Intent of the Legislature behind Section 13 of the Family Courts Act**
- IV. Constitutional validity of Advocate's Right to Legal Representation**
- V. Arguments in favour of Retaining Section 13 of the Family Courts Act**
- VI. Arguments supporting Abolition of Section 13 of the Family Courts Act dealing with Emotional Crisis during the Pendency of Litigation**
- VII. Other similar Legislations in line with Section 13 of The Family Courts Act**
- VIII. Difficulties in the Implementation of Section 13 of the Family Courts Act**
- IX. Conclusion**

I. Introduction

* Ph.D Research Scholar, Faculty of Law, Jamia Millia Islamia University (New Delhi).

** Associate Professor, Faculty of Law, Jamia Millia Islamia University (New Delhi).

A FAMILY is an inevitable, basic unit of social organization in a civilized society and therefore it is difficult to imagine how human society could function without it.¹ The quality of family life is determined not only at the parameters of a healthy and happy relationship between the parties concerned but also by that of the society at large. Unfortunately today, the myth of permanence and inviolability of marriage has been blatantly eroded and a phenomenon which has been growing over the last few years is turmoil within the family relationships and rickety marriages.² With a rise in the literacy rate, legal awareness and accessibility to courts a significant rise in matrimonial discords has been observed. While the institution of cases in the year 2009 was only 1732 but the same has risen to 25,396 in 2015.³ Long pending divorce cases, custodial disputes after separation of spouses and their maintenance *etc.* contributes further emotional and financial stress. Considering the delicate nature of these matrimonial disputes where the emotions of parties are at stake, the Law Commission of India⁴ and the Committee on the Status of Women in India in its report⁵ came up with a proposal to give special treatment to these matters by adopting an altogether different and a unique approach from that of an adversarial procedure. This is to ensure that a litigation related to family matters ought not to be measured in terms of failure or success as in ordinary civil or criminal matters, but as a social therapeutic problem which needs solution.⁶ It should be viewed as a litigation in which parties and their counsel are engaged in resolving family conflicts where humane considerations outweigh everything else.⁷ The underlying idea is to provide an amicable atmosphere for settlement by the law and that every reasonable effort ought to be made before the beginning of the trial. Thus, even the Civil Procedure Code, 1908⁸ was amended in 1976 to provide for a special procedure to be adopted in suits or proceedings relating to

¹Burgess and Lock, available at: <http://www.sociologyguide.com/marriage-family-kinship/Family.php>(last visited on Apr. 20, 2020).

²Malavika Rajkotia, *Intimacy Undone – Marriage, Divorce And Family Law In India*, (Speaking Tiger Publishing Pvt. Ltd., New Delhi, 1st edn., 2017).

³ Prem Kumar Barthal, “Brief Report on Family Courts at Delhi” 1(2) *Harmony, Delhi Family Courts Journal* 2 (Delhi Family Courts, 2016).

⁴ Law Commission of India, 59th Report, 1979.

⁵ Report on the Status of Women, Government of India, Ministry of Social Welfare, New Delhi 1971-74.

⁶ Paras Diwan, *Law of Marriage and Divorce*, 822 (Universal Law Publishing, Haryana, 7th edn. 2016).

⁷*Ibid.*

⁸ The Civil Procedure Code, 1908 was amended in 1976 by which Order XXXII-A was inserted which sought to “highlight the need for adopting a different approach where matters concerning the family are at issue, including the need for efforts to bring about an amicable settlement.”

matters concerning the family.⁹ To serve this purpose, the concept of family courts in India via The Family Courts Act, 1984 (hereinafter referred as the 'Act') was introduced for the first time in 1984 which aimed at adjudicating the matters like restitution of conjugal rights, judicial separation, divorce, child custody, disputes related to matrimonial property rights and maintenance *etc.*¹⁰ The primary object of family courts is to promote reconciliation and secure speedy settlements of disputes relating to marriage and family affairs. Therefore, section 13 of the Family Courts Act, 1984 came out to be one of those special provisions which seeks to follow the objectives of the Act by doing away with the compulsory requirement of engaging an advocate before a family court.

II. Meaning and Role of *Amicus Curiae*

Proviso to section 13 of the Family Courts Act, 1984 seeks to play an active role in the efficient and expeditious disposal of family matters.

According to section 13 of the Family Courts Act, 1984:

Right to legal representation – Notwithstanding anything contained in any law, no party to a suit or proceeding before a Family Court shall be entitled, as of right, to be represented by a legal practitioner.

Provided that if the Family Court considers it necessary in the interest of justice, it may seek the assistance of a legal expert as *amicus curiae*.

An *amicus curiae* is a friend of the court. He either voluntarily or on an invitation of the court and as per the instructions of the court submits his findings on a matter of law concerning which the court has a doubt or is mistaken. He plays a vital role in acquainting the court regarding those facts and circumstances of a case which is a must for a family court to know and understand for the proper disposition of the case.¹¹

⁹ Ghulam Yazdani, "Right to Legal Representation under Family Courts in India (Special Article)" *Mahila Vidhi Bharti* 81(1997). Also see, Ghulam Yazdani, *(Un) Desirability of Lawyers Before Family Courts* (Legal News and Views, Indian Social Institute, New Delhi, 1998).

¹⁰ Nuzhat Parveen Khan, *Women and the Law* 428 (Universal Law Publishing an imprint of LexisNexis, Haryana, 1st edn., 2016).

¹¹ Shrinivas Gupta and Preeti Misra, *E.L. Bhagiratha Rao's Marriage Laws and Family Courts Act* (Asia Law House, New Delhi 12th edn., 2017).

An *amicus curiae* acts as a volunteer who although doesn't hold any position to the matter but assists a court by expressing his views or making suggestions on the basis of his personal observations or findings regarding the matter under consideration. Counsels in court frequently act in this capacity when they happen to be in possession of a case or authority which the judge has not seen or does not at the moment remember.¹² A person may act as *amicus curiae* either voluntarily or on an invitation of the court, and not on instruction of any party to help the court in any judicial proceedings. It may happen that where a judge is doubtful or mistaken on a matter of law on a matter pending before it for adjudication then even a stranger to the case may express his desire to apprise the court, as *amicus curiae*. But, he may be permitted to be so heard only by the leave of the court. An *amicus curiae* may instruct, inform, or move the court on any matter of which the court may take judicial cognizance.¹³ For instance, where no guidelines have been laid by the superior courts or the concerned legislations are silent on the point of deciding the exact amount of maintenance to be awarded to a divorced woman, the court may appoint any person (preferably from the legal field or the one who bears a good experience on the subject) as *amicus curiae*. Such a person may assist the court in recommending some parameters that may help the court in arriving at a certain amount. Eventually, that may help the court in dealing with similar issues in future as well.

The provision pertinently deals with the appointment of a legal practitioner by the parties before a family court. As per the provision, a party to a suit or proceeding cannot be represented by a legal practitioner, as a matter of right, before a family court unless it is permitted by the court.

It is only in some appropriate cases that the proviso to section 13 confers upon a family court the discretionary power to appoint a legal practitioner as *amicus curiae* to meet the ends of justice. As such the provision does not impose a complete bar on the representation by a legal practitioner but it does impose a partial bar on a party prohibiting him to appoint a legal practitioner to plead his case as a matter of right. But at the same time this partial restriction of providing legal assistance to a party in the

¹²*Ibid.*

¹³Law Lexicon.

form of a legal practitioner is not confined in a watertight compartment.¹⁴ The court may grant the services of an advocate in the deserving cases, as the parties are not expected to be well versed in the legal niceties and procedural nuances of the court proceedings.¹⁵ For instance, the High Court of Orissa¹⁶ observed that in matrimonial proceedings, issues like custody of children, visiting rights, maintenance, alimony, apportionment of property *etc.* and in respect of such other issues, that may not be possible on the part of the parties to protect their own interest and they may not be in a position to visualize each problems or requirements, the parties may give up their rights or fail to safeguard them. If it so happens, the consequence would be either undue hardship or future litigation or both which deserve to be avoided. Though section 13 of the Act puts a bar for engagement of advocates by the parties in a family court, as a matter of right, Rule 27 of the Family Court (Orissa) Rules, 1990¹⁷ permit a party to take legal advice at any stage of the proceeding either at the time of conciliation or before the court. If the section 13 of the Act and the Rule 27 of the Family Court (Orissa) Rules, 1990¹⁸ are read together, it will be clear that though the party to a proceeding before a family court as a matter of right cannot be represented by a legal practitioner, he/she shall be entitled to take legal advice even before the court. Thus, it appears that section 13 of the Act does not impose an absolute bar for engagement of a legal practitioner by a party before a family court.

It may further be noted that there is no exhaustive list enumerating the circumstances in which the family court should or should not permit a legal practitioner from legally representing his client. However, several high courts and Supreme Court rulings have exemplified the circumstances under which a legal representation may be allowed. For instance, in *Komal Padukone v. Principle Judge, Family Court, Bangalore*,¹⁹ certain

¹⁴*Supra* note 10.

¹⁵*Rupesh @Rupeshwar v. Ku. Sidhhi Patel*, Criminal Revision No.538 of 2015, High Court of Chhattisgarh.

¹⁶*Sadhana Patra v. Subrat Pradhan*, AIR 2006 Ori 105.

¹⁷Family Court (Orissa) Rules, 1990, r. 27 reads: Party entitled to legal advice: A party will be entitled to take legal advice at any stage of the proceedings either before the counselor or before the court. A party in indigent circumstances will be entitled to free legal aid and advice. Also, *available at*: <https://www.latestlaws.com/bare-acts/state-acts-rules/odisha-state-laws/family-courts-orissa-rules-1990/> (last visited on May 10, 2020).

¹⁸*Ibid.*

¹⁹AIR 1999 Kar 427.

guidelines were issued to avert undue hardship to the parties by allowing legal representation such as:

- i) When one party has been permitted to be represented by a legal practitioner, such permission cannot under any circumstances, be denied to the other party.²⁰
- ii) Where the Respondent is served with notice of the proceedings, in such cases he may appear in person or through an authorized agent (including a legal practitioner).²¹
- iii) Where a family court has a large backlog of cases, and there is no possibility of taking up all cases listed on a day, it may restrict the requirement of personal appearance of parties to specified stages like conciliation and evidence²² etc.

However, in the case of *Sadhana Patra*²³ Justice L. Mohapatra drew a basic distinction between the legal practitioner appearing as an *amicus curiae* and a lawyer/advocate appearing for the individual party. A legal practitioner appearing as an *amicus curiae* is a friend of the court and is not the one appointed as a private counsel by the parties to action or to represent them in a partisan manner nor is he for their personal use and benefit. His function is not to take over conduct of a case for parties to litigation such as the authority to cross examine the adverse party. Although the court may hear the communications of an *amicus curiae*, it is within the discretion of the court whether it will need the advice given but has no right to complain if the court refuses to accept his suggestions. In other words, an *amicus curiae* cannot do all such acts as usually done by an advocate retained by a party in a judicial proceeding and his role is limited to rendering assistance to the court in matters of facts and law whenever required by the court.

Thus, the family court must at the very scrutiny stage assure on the point whether the advocates would be required during the proceedings and if so, at what stage of the proceedings. The court must contemplate the consequences if the party is denied to be

²⁰Flavia Agnes, II *Marriage, Divorce and Matrimonial Litigation, Family law* 309 (Oxford University Press, New Delhi, 3rd edn., 2018).

²¹*Ibid.*

²²*Ibid.*

²³*Supra* note 16.

represented through a legal representative, the extent to which his right to fair and efficient trial may get affected.

III. Intent of the Legislature behind Section 13 of the Family Courts Act

The provision had been enacted to ensure and to adhere to the constitutional imperatives as laid down in the Preamble which provides for 'justice- social, economic and political'.²⁴ Administration of justice can no longer be merely a protector of legal rights but must act whenever it is possible as dispenser of social justice as well. Bentham's 'Social Utilitarian' theory aptly supports the basis of section 13 which is aimed at achieving greatest happiness of greatest number in a society by reducing the extent of involvement of advocates in a family court system so that minimum adjournments and minimum exploitation of parties may be caused in getting justice.²⁵ The apex court in the case of *Abdul Jaleel v. Shahida*²⁶ held that family courts have been established with a view to promote conciliation and secure speedy settlement of disputes relating to marriage and family affairs and for the matters connected therewith by adopting an approach radically different from that adopted as in the ordinary civil proceedings.

IV. Constitutional validity of Advocate's Right to Legal Representation

It has been contended by the legal fraternity that section 13 of the Family Courts Act, 1961 is violative of fundamental freedom of a legal practitioner as enshrined under article 19 (1)(g)²⁷ of the Constitution of India.

There are two conflicting rights, one right is of the lawyer's right to practice their profession *vis-à-vis* the question of bread and butter and the second is of the parties before a family court for an expeditious and an efficient resolution of their dispute.²⁸ Before the commencement of the Constitution of India there were certain legislations like section 36(3) of Industrial Disputes Act, 1947, which restricted the representation

²⁴ Ghulam Yazdani, "Right to Legal Representation under Family Courts in India (Special Article)" *Mahila Vidhi Bharti* 81(1997).

²⁵ *Sadhu Ram Bansal v. P.B.Saukar* (1984) 3 SCC 410.

²⁶ AIR 2003 SC 2525.

²⁷ The Constitution of India art. 19 (1) (g) provides:
Protection of certain rights regarding freedom of speech *etc*:

(1) All citizens shall have the right -

(g) to practise any profession, or to carry on any occupation, trade or business.

²⁸ Ghulam Yazdani, *Family Courts –Problems and Prospects (A case Study of Uttar Pradesh* (2010), (Unpublished Ph.D. Thesis, Jamia Millia Islamia, New Delhi).

by legal practitioners or which excluded the legal practitioners from appearing before certain legal forums. The Industrial Disputes Act, 1947 being the existing law continued to be in force under article 372(1)²⁹ of the Indian Constitution.³⁰ In the case of *Paradip Port Trust, Paradip v. Their Workmen*,³¹ this provision was challenged before the Supreme Court as violative of section 30 of the Advocates Act, 1961. However, the Supreme Court refused to accept the contention by the reason that this special Act will prevail over the Advocates Act, 1961 which is a general piece of legislation with regard to the subject matter of appearance of lawyers before all courts, Tribunals and other authorities. In the case of *Leela Mahadeo Joshi v. Mahadeo Sitaramji Joshi*,³² Justice Saldanha while concurring with Justice Mehta by way of obiter remarked on certain additional aspects, which are essential for an effective and an efficient disposal of proceeding before the family courts. He pointed out certain issues which are generally faced by an appellate court while dealing with the impugned orders passed by family courts which restricts the engagement of lawyers. The significance of assistance by advocates was highlighted especially at the time of adjudication of a complicated or highly contested matrimonial dispute in the light of law and interpretation of provisions. Due to such restrictions, the cases at the trial stage had gone by default or were remanded by the high court or were to be entertained on appeal. It was felt that the uneducated and poor litigants are being totally handicapped in the conduct of their cases for want of legal assistance. The court also highlighted that even the educated and the rich find it difficult to follow the court procedures. Thus, that court opined that in the absence of convincing reasons, permission by lawyers ought not be refused. He further stated that adjudication of a complicated or highly contested matrimonial dispute in the light of law and interpretation of provisions by different courts over a period of time would require assistance from advocates. The Supreme Court of India in the cases of

²⁹Art. 372 : Continuance in force of existing laws and their adaptation:

(1) Notwithstanding the repeal by this Constitution of the enactments referred to in Article 395 but subject to the other provisions of this Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority.

³⁰*Supra* note 26.

³¹1977 SCR (1) 537.

³²AIR 1991 Bom 105.

*Lingappa Pochanna v. State of Maharashtra*³³ held that a litigant except an accused in criminal trial has no fundamental rights of being represented by an advocate.

While enacting section 13 of the Family Courts Act, 1984 the legislature brought such provision to enable the litigants to represent themselves while excluding the involvement of legal practitioners before a family court. This would not only be cost effective for the litigants but would save precious time of both the courts as well as of parties from inordinate delays on the part of the lawyers. However, this step led to wide criticism amongst the members of various state bar associations including Delhi Bar Association.³⁴ It was contended that section 13 of the Family Courts Act seriously violates an advocate's right to practice legal profession since it is a statutory right enumerated under section 30 of the Advocates Act, 1961. A similar controversy has arisen before the High Court of Rajasthan in case of *Ashish Davessar v. Union of India*³⁵ in a petition filed in April, 2019 challenging the Constitutional validity of section 13 of the Family Courts Act being violative of the fundamental freedom of a legal practitioner under article 19 (1) (g) of the Constitution of India as well as a brutal assault on the cherished right of free and fair trial of litigants before the family court. It is contended that the provision is not only unreasonable but arbitrary and beyond the interest of the general public being directly antithetical to public interest.³⁶ The lawyers find no element of direct and proximate nexus between section 13 of the Family Courts Act, 1984 and the object it sought to achieve.

In context of above discussion, section 30 of the Advocate's Act, 1961 becomes germane to the entire controversy and therefore elaborately explained as follows:

Section 30 of The Advocates Act, 1961- Explained

Section 30 of the Advocates Act, 1961 provides:

³³ AIR 1985 SC 339.

³⁴ The capital's legal fraternity was on strike in Dec, 1990 urging the Delhi administration to refrain from the establishment of family courts in Delhi. Unfortunately, the Government of the day in Dec. 1990 felt threatened by the lawyers' agitation, and stalled the establishment of family courts for time being. In fact the Delhi Administration had already made Family court rules and even got the financial budget sanctioned for the establishment of 10 courts. [See, Ghulam Yazdani, *Family Courts –Problems and Prospects (A case Study of Uttar Pradesh (2010)*, (Unpublished Ph.D. Thesis, Jamia Millia Islamia, New Delhi).

³⁵Civil Writ Petition No.7216/ 2019 D.B., High Court of Rajasthan (Pending).

³⁶*Supra* note 19.

Right of advocates to practice: Subject to provisions of this Act, every advocate whose name is entered in the [State roll] shall be entitled as of right to practise throughout the territories to which this Act extends,— (i) in all courts including the Supreme Court; (ii) before any tribunal or person legally authorised to take evidence; and (iii) before any other authority or person before whom such advocate is by or under any law for the time being in force entitled to practise.

Section 30 of the Advocate's Act, 1961 provides a statutory right to a legal practitioner to plead before 'all' courts including the Supreme Court of India or a tribunal. It was introduced by the Parliament of India with an aim to amend and consolidate the law relating to legal practitioners and to provide for the constitution of the Bar Councils and an All-India Bar. Unfortunately, the Act failed to achieve the aim with which it was introduced. This is due to the reason that section 30 of the Act could never come into force from the very inception of the Act. It was only on June 9, 2011 that this specific provision was made effective by a notification in an official gazette. Consequently, after 23 years of enforcement of the Advocates Act, 1961 the legislature divested the fundamental right of legal practitioners to legal representation before a family court while incorporating section 13 in the Family Courts Act, 1984. As a consequence only the presiding officers of family courts were conferred with the discretionary powers to decide on the requirement of a legal representation before them in a case.

Section 9A of the Maharashtra Restoration of Lands to Scheduled Tribes Act, 1975 had to face a similar fate due to non-enforcement of section 30 of the Advocate's Act as observed in the famous case of *Lingappa Pochanna*.³⁷ The Supreme Court refused to accept an advocate's right to practice before all courts and tribunals as an absolute right but a statutory right by virtue of section 30 of the Advocate's Act, 1961. However, the court expressed its inability to contribute anything substantial in getting section 30 enforced even after a lapse of 22 years till the date of pronouncement of this case. A person enrolled as an advocate under the Advocates Act is not *ipso facto* entitled to a right of audience in all courts unless section 30 of that Act is first brought into force.

³⁷*Supra* note 33.

Ironically, even after the enforcement of section 30 of the Advocates Act in 2011 the legislature has ignored to amend section 13 of the Family Courts Act to make legal representation mandatory before the family courts.

Nexus between the Advocates Act and the Family Courts Act

Section 7 of the Family Courts Act, 1984 reads as under:

Jurisdiction.—(1) Subject to the other provisions of this Act, a Family Court shall—

(a) have and exercise all the jurisdiction exercisable by any district court or any subordinate civil court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the Explanation; and

(b) be deemed, for the purposes of exercising such jurisdiction under such law, to be a district court or, as the case may be, such subordinate civil court for the area to which the jurisdiction of the Family Court extends.

Explanation.—The suits and proceedings referred to in this subsection are suits and proceedings of the following nature, namely:—

(a) a suit or proceeding between the parties to a marriage for a decree of nullity of marriage (declaring the marriage to be null and void or, as the case may be, annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of marriage;

(b) a suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person;

(c) a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them;

(d) a suit or proceeding for an order or injunction in circumstance arising out of a marital relationship;

(e) a suit or proceeding for a declaration as to the legitimacy of any person;

(f) a suit or proceeding for maintenance;

(g) a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor.

- (2) Subject to the other provisions of this Act, a Family Court shall also have and exercise—
- (a) the jurisdiction exercisable by a Magistrate of the first class under Chapter IX (relating to order for maintenance of wife, children and parents) of the Code of Criminal Procedure, 1973 (2 of 1974); and
 - (b) such other jurisdiction as may be conferred on it by any other enactment.

The term ‘Courts’ clearly accommodates ‘Family Courts’ within its purview as per section 30 (i) of the Advocates Act, 1961. Such inference may be drawn on the basis of the fact that the family courts are legally authorized to take evidence as the suits or proceedings of the nature mentioned in explanation to section 7(1) of the Family Courts Act, 1984, cannot be decided without taking evidence and conducting a full-fledged trial. The words used under section 30 (ii) of the 1961 Act “legally authorized to take evidence” are clearly indicative of the indispensable role of a legal practitioner before such courts at the time of recording of evidence. Due to these legal complexities the proceedings cannot be considered as a simple ordinary proceedings between spouses, but they also involve the issues relating to the determination of proprietary rights, declarations as to the validity of marriage, legitimacy of a person, guardianship and also injunctions *etc.* Thus, the adversarial nature of the suits and proceedings provided in the explanations to section 7(1) of the Act suggest the indispensable role of lawyers before a family court. The reason being that such proceedings require a full-fledged trial involving complex and intricate legal issues which for the obvious reasons cannot be conducted by the parties without assistance of an advocate. Furthermore, these suits and proceedings can’t be decided by the court without taking evidence. The suits and proceedings to be decided by the family court are not only beset with complex factual and legal issues, but even affect third party rights. Similarly, section 18 of the Family Courts Act, 1984,³⁸ empowers the family court to execute its decrees and orders in the

³⁸ Family Courts Act, 1984, s. 18 reads: Execution of decrees and orders.—(1) A decree or an order [other than an order under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974)], passed by a Family Court shall have the same force and effect as a decree or order of a civil court and shall be executed in the same manner as is prescribed by the Code of Civil Procedure, 1908 (5 of 1908) for the execution of decrees and orders. (2) An order passed by a Family Court under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974) shall be executed in the manner prescribed for the execution of such order by that Code. 7 (3) A decree or order may be executed either by the Family Court which passed it or by the other Family Court or ordinary civil court to which it is sent for execution.

same manner as those of civil court.³⁹ This obviously needs the engagement of an advocate so as to enable the decree holder to reap the fruits of the decree passed in his/her favor.

Further, the above arguments referred to *Nandana v. Pradeep Bhandari*⁴⁰ in its support whereby the High Court of Rajasthan had called section 13 of the Family Courts Act, 1984 as 'a remedy worse than the disease' requesting the legislature to have a relook at the provision. The court had expressed its huge disappointment with the manner in which the proceedings before the court were conducted without the involvement of a legal professional or his aid and advice. It was observed that by imposing such kind of restrictions on the lawyers by a legislative provision, the unequipped, clueless litigants are deprived from getting the services of a competent and responsible professional in their own case. Such restrictions have amounted to total loss of dignity and decorum of a family court, ending in relentless acrimony.

Controversy related to non-enforcement of section 30 of the Advocates Act

Non-issuance of notification giving effect to section 30 of the Advocates Act, 1961 was the subject matter of debate for many a decade. As a matter of fact, the Advocates Act, 1961 received the assent of the President of India on May 19, 1961. But, section 30 was brought into force much later in 2011 after an indefatigable effort on the part of the judiciary. It may be noted that while all other provisions of the Act, 1961 were brought into force much prior to section 30, it took more than another quarter of a century for the Central Government to have felt the necessity to notify section 30 of the Act.

In the pending petition of *Ashish Davessar v. Union of India*⁴¹ before the High Court of Rajasthan the petitioner contended that section 30 of Advocates Act, 1961 became law posterior to the Family Courts Act, 1984 by reason of the conscious will of the Parliament to leave the aspect of its enforcement to the executive and the executive thereafter in its wisdom brought it into force only on June 15, 2011 *i.e.*, much after the Family Courts Act, 1984 came into force. It is in that sense that section 30 of the Advocates Act is a subsequent law which has come into force. Section 5 of the General

³⁹*Supra* note 21.

⁴⁰1996 (2) WLC Rajasthan (234) DB.

⁴¹*Supra* note 35.

Clauses Act, 1987⁴² was sought to elaborate the manner in which a Central Act is brought into enforcement.

It may be seen that when a Central Act is not expressed to come into operation on a particular day, it is to be enforced on the day when it receives the assent of the President; and on the expiry of the day preceding its commencement it is said to be enforced as per section 5(3) of the General Clauses Act. However, this has a caveat that “unless the contrary is expressed”.

Judiciary played a proactive role in drawing the attention of the legislature towards the dormant situation of section 30 of the Advocates Act. In the landmark judgment of *Aeltemesh Rein, Advocate v. Union of India*⁴³ the Supreme Court while considering the view declared by the Constitution Bench in *A.K Roy v. Union of India*⁴⁴ had drawn an important observation. It was held that though the court has no authority to issue a writ of *mandamus* on the point of ordering the Central Government to enforce any statute or a provision of a statute, (as the same of exclusively within the domain of the Parliament), but should direct the government to decide on the question of whether to bring section 30 of the Advocates Act into force or not and if so, then within a reasonable time. Thereafter, the Ministry of Law and Justice by a notification dated June 9, 2011 brought into effect the provision *w.e.f.*, June 15, 2011. As a consequence all the lawyers have acquired a right to practice before all courts/tribunals and such other forum of India as a matter of right, which provision is having all the traits and effect of a subsequent legislation to override the restrictive covenants as contained in section 13 of the Family Courts Act. In the light of above observation the court declared the requirement of prior sanction of the family court to engage a lawyer virtually redundant. Hence, it may be submitted that section 13 of the Family Courts Act, 1984 read with section 30 of the Advocates Act, 1961 being violative of article 19(1)(g) and

⁴² General Clauses Act, 1987, s. 5 provides:

Coming into operation of enactments –

[(1). Where any Central Act is not expressed to come into operation on a particular day, then it shall come into operation on the day on which it receives the assent.

(a) in the case of a Central Act made before the commencement of the Constitution, of the Governor-General, and

(b) in the case of an Act of Parliament, of the President]

(3) Unless the contrary is expressed, a [Central Act] or Regulation shall be construed as coming into operation immediately on the expiration of the day preceding its commencement.”

⁴³ 1988 (4) SCC 54.

⁴⁴ AIR 1982 SC 710.

is not saved under article 19(6) of the Constitution of India needs to be amended or if required be completely removed from the Statute.

Similar kind of approach was adopted by the High Court of Punjab and Haryana in *Paramjit Kumar Saroya v. Union of India*⁴⁵ whereby section 17 of the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 was challenged on the grounds of violation of rights conferred to a legal practitioner under section 30 of the Advocates Act, 1961. The high court opined that section 17 of the Maintenance Act would not come in the way of legal representation after June 15, 2011 when section 30 of the Advocates Act, 1961 has come into enforcement. It was further clarified that all the judgments taking contrary views are based on section 30 not being notified. It was thus quoted:

While the said Act was being enacted, the absence of section 30 of the Advocates Act was known. Not having conferred that right under section 30 of the Advocates Act on the legal practitioner, the Parliament in its wisdom had found no reasons to give such rights under section 17 of the said Act. However, the situation has subsequently changed on account of section 30 of the Advocates Act having come into force. That being the status of the Tribunal, there has been intrinsic right in the advocate to practise before such a Tribunal in view of section 30 of the Advocates Act which cannot be taken away.

On similar lines, later the High Court of Kerala in *C.P. Saji v. Union of India*⁴⁶ also declared that section 13 of The Family Courts Act, 1984 has become redundant due to notification of section 30 of Advocates Act.

In the case of *M.R.F. Ltd. v. Inspector, Kerala Government*⁴⁷ The apex court went a step further by laying guidelines to test the reasonableness of the restriction imposed on the exercise of right guaranteed under article 19(1)(g). Speaking for the court, Saghir Ahmad, J. such considerations as follows:⁴⁸

⁴⁵Civil Writ Petition No.7282/ 2010, Punjab and Haryana High Court.

⁴⁶AIR 2012 Kerala 23.

⁴⁷1998 (8) SCC 227.

⁴⁸ *Id.*, para 14.

- (i) While considering the reasonableness of the restrictions, the Court has to keep in mind the Directive Principles of State Policy.
- (ii) Restrictions must not be arbitrary or of an excessive nature so as to go beyond the requirement of the interest of the general public.
- (iii) In order to judge the reasonableness of the restrictions, no abstract or general pattern or a fixed principle can be laid down so as to be of universal application and the same will vary from case to case as also with regard to hanging conditions, values of human life, social philosophy of the Constitution, prevailing conditions and the surrounding circumstances.
- (iv) A just balance has to be struck between the restrictions imposed and the social control envisaged by Clause (6) of article 19.
- (v) Prevailing social values as also social needs which are intended to be satisfied by restrictions have to be borne in mind⁴⁹. (There must be a direct and proximate nexus or a reasonable connection between the restrictions imposed and the object sought to be achieved. If there is a direct nexus between the restrictions, and the object of the Act, then a strong presumption in favour of the constitutionality of the Act will naturally arise.

Thus, on the basis of above discussion, it may be concluded that presence of section 13 in the Act is not only violative of a legal practitioner's right to practice law guaranteed under article 19(1)(g) of the Constitution of India but also a brutal assault on the right to fair trial of litigant public at large.⁵⁰ The restriction imposed by section 13 of the Family Courts Act, 1984 is not only unreasonable and arbitrary, but also beyond the interest of the general public. On the contrary, it is directly antithetical to public interest. There is no direct and proximate nexus between section 13 of the Family Courts Act, 1984 and the object sought to be achieved by it.

V. Arguments in favour of Retaining Section 13 of the Family Courts Act

The reason behind the introduction of section 13 of the Act was to attain two key objectives, namely, (i) amicable settlement of matrimonial disputes and (ii) expeditious settlement of such disputes without the formality of involving an advocate in the

⁴⁹*State of U.P. v. Kaushalya* (1964) 4 SCR 1002.

⁵⁰*Supra* note 13.

proceedings. Thus, speedy settlement of matrimonial disputes has become a primary requirement in the family courts. The practical utility and feasibility of section 13 has been analyzed by various high court and Supreme Court rulings, reports of relevant law commissions and other committees regarding the present family courts system in India.

According to the 59th Report of the Law Commission of India and the 1971-74 Report on the Status of Women the Committee on the status of women in India, the adversarial procedure would not be suitable for matrimonial litigation⁵¹ as these matters involve a certain degree of sensitivity and confidentiality. There is a general apprehension that allowing the lawyers' intervention in family courts would further procrastinate the disposal rate of pending matters as the lawyers are presumed to have vested interest in delaying the case by seeking adjournment dates frequently.⁵²

Another concern of the legislature behind the retention of the provision is to ensure that such courts should be able to conserve the family life rather than disrupting it; that they may result in constructive marriages rather than destructive ones; and that it may be preservative and not punitive of marriage and family.⁵³

VI. Arguments supporting Abolition of Section 13 of the Family Courts Act dealing with Emotional Crisis during the Pendency of Litigation

While conceding with the importance of a legal representative before a family court in the case of *Leela v. Mahadeo Sitaram*⁵⁴ The high court observed, "Most people are so upset in crisis, particularly in marriage crisis, as not even be able to file simple documents methodically, or even to think clearly and would gratefully employ a lawyer to employ themselves of another burden. It is, therefore, submitted that services of specially trained lawyers should be available to parties and their children. It should be realized that when we are thinking of different courts for family matters, we are thinking of different types of lawyers also".

⁵¹*Supra* note 21.

⁵²*Ibid.*

⁵³*Supra* note 40.

⁵⁴AIR 1991 Bom. 105.

Thus, it may be noted that while considering the unique nature of matrimonial litigation involving emotional relationships, it becomes extremely difficult for the parties to hold this mental trauma and defend their own interests. In such circumstances a person may be carried away by human feelings and emotions and may lose his normal ability to contemplate the future course of action due to the present dispute. A single step taken without legal consultation may lead to inevitable consequences of undue hardship and future multiple litigations.

In order to deal with legal nuances and technicalities in complex matters

Section 13 of the Advocates Act needs to be abolished as a lawyer's representation before a family court becomes imperative at the time of recording of evidence in case of dissolution of marriage due to cruelty and desertion. As per the Family Court Act, section 14, 15 and 16 empower the court to adopt summary procedure for recording evidence. The court may record the oral evidence of any person in gist or summary. The court may also rely on affidavits as part of evidence. These provisions of the Act have also attracted criticism from the member of the bar as they feel that the judge would play a major role recording evidence in gist as she /he perceives it and there is every likelihood of missing out an important point which may ultimately result in miscarriage of justice. Lawyers also feel that some of the cases in high court, arising from appeals of family court decisions, are dismissed due to non-adherence of legal technicalities. The absence of lawyers from the court may result in-presiding officer spending more time for each case as he has not only to be involved at the trial stage but also at the judgment stage for observing the legal technicalities.⁵⁵

While dealing with the litigants who are either poor/ illiterate/ women

The legal representation before a family court becomes inevitable where either the litigant is a woman or where the parties are poor or illiterate. Procuring the attendance of all the parties at each and every date of hearing may add further misery and hardship to the litigants. Thus, concern must be to avoid a person from getting totally handicapped in the conduct of his/her cases merely on the ground of want of legal

⁵⁵*Supra* note 42.

assistance.⁵⁶ Apart from these problems, such litigants would completely fail to understand the intricacies of law and rules of procedure. Hence, in the absence of legal assistance they would not be in a position to draft their own petitions.⁵⁷

Need of an expert even if the litigant is educated

The same set of problems may even be faced by an educated and professional litigant. Without possessing the formal legal knowledge drafting and pleadings may not be in consonance with the court requirements. And even if they succeed in drafting their own petition they would not be in a position to understand the implication of the allegation they make.⁵⁸ Moreover, such a person is not a legal expert who is well equipped with the skills of conducting an examination-in chief or a cross-examination. Thus, there are possible chances of miscarriage of justice if the parties are not allowed to be legally represented.

Huge discrepancies are noticed later at the appellate stage

In the case of *Rupesh @ Rupeshwar v. Ku. Sidhhi Patel*⁵⁹ it was noted by the High Court of Chhattisgarh that a matrimonial matter may suffer the worst when on reaching the appeal stage before the high court, it is disclosed that the evidence or pleadings are not in consonance with the legal requirements due to the absence of legal representation or that the replies or cross-examination are inadequate.

Inability of an ordinary litigant to understand case laws or to conduct trial

Without a lawyer it would be highly unjustified to expect from an ordinary litigant to be able to study the laws, rules, acquaint himself with court procedures and to conduct a trial of his own and at the same time be able to place before, the court the relevant case law.⁶⁰ Adding to this the other problem which may arise is that allegations like

⁵⁶ *Supra* note 15.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ Criminal Revision No.538 of 2015, High Court of Chhattisgarh.

⁶⁰ *Supra* note 15.

cruelty and desertion require fulfilling certain conditions and unless they are proved in court, the relief sought may not be granted by the court of law.⁶¹

Due to the above cited reasons the judicial system leans in favour of abolition of section 13 of the Advocates Act, 1961. Thus, it may be seen that the section is perceived as detrimental not only to the rights of an advocate but also to a litigant who is devoid of being represented by an advocate capable of presenting his case in a better way than himself before a family court. It is apprehended that if the provision is not modified according to the present complexities of matrimonial matters, then some serious legal implications may be ensued.

VII. Other similar Legislations in line with Section 13 of The Family Courts Act

Apart from Family Courts Act, there are still several other legislations which do not permit a legal practitioner to appear before a court/committee/tribunal as a matter of right. For instance: The Industrial Disputes Act [section 36 (3)];⁶² The Maintenance and Welfare of Parents and Senior Citizens Act, 2007 (section 17);⁶³ The Consumer

⁶¹ *Supra* note 42.

⁶² Industrial Disputes Act, 1947, s.36 reads as under: Representation of parties.-

(1) A workman who is a party to a dispute shall be entitled to be represented in any proceeding under this Act by--

(a) any member of the executive or office bearer] of a registered trade union of which he is a member:

(b) any member of the executive or other office bearer] of a federation of trade unions to which the trade union referred to in clause (a) is affiliated;

(c) where the worker is not a member of any trade union, by² any member of the executive or other office bearer] of any trade union connected with, or by any other workman employed in, the industry in which the worker is employed and authorized in such manner as may be prescribed.

(2) An employer who is a party to a dispute shall be entitled to be represented in any proceeding under this Act by--

(a) an officer of an association of employers of which he is a member;

(b) an officer of a federation of association of employers to which the association referred to in clause (a) is affiliated;

(c) where the employer is not a member of any association of employers, by an officer of any association of employers connected with, or by any other employer engaged in, the industry in which the employer is engaged and authorized in such manner as may be prescribed.

(3) No party to a dispute shall be entitled to be represented by a legal practitioner in any conciliation proceedings under this Act or in any proceedings before a Court.

(4) In any proceeding before a Labour Court, Tribunal or National Tribunal], a party to a dispute may be represented by a legal practitioner with the consent of the other parties to the proceeding and² with the leave of the Labour Court, Tribunal or National Tribunal, as the case may be].

Section 17 of the Maintenance and Welfare of Parents and Senior Citizens Act, 2007: Right to legal representation: Notwithstanding anything contained in any law, no party to a proceeding before a Tribunal or Appellate Tribunal shall be represented by a legal practitioner.

⁶³

Protection Act, 1986 (section 12); The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Rehabilitation) Act, 2013 [Rule 7(6)]⁶⁴ etc.⁶⁵

It is an irony of the Indian legal system that till now none of the enactments provide for the mandatory engagement of an advocate in any field of litigation unlike in following cases where the non-legal professionals in their respective professions are required to be engaged compulsorily:⁶⁶

Auditors, Chartered Accountants, Company Secretaries under the Companies Act.

- i. Chartered Engineers, architects under Town Planning or Municipal Act.
- ii. Doctors for Workmen's Compensation Act, Employees' State Insurance Act, prevention of Food Adulteration Act.
- iii. Chartered Actuaries for Insurance, Pension, Accident Claims etc.
- iv. Chemical, Mechanical Engineers for Customs and excise Acts.
- v. Marine/ Mining and Electrical Engineers for Marine, Mining and Electric Acts.

The above references exemplifies that the restrictions or replacements of advocates with social welfare agencies, counselors, officers ,other employees, medical and welfare experts is nothing new in the present legal system in India.

Thus, it may be clearly seen that as compared to other professions in India, at present the legal profession is one such profession which has suffered the most in respect of enjoying his right to profession in a complete and absolute manner. Furthermore, section 35(1) of the Advocates Act⁶⁷ makes an advocate vulnerable towards prosecution if he is found guilty for any professional or other misconduct while the same provision is inapplicable in case a non-advocate practices in the same field before all forums below the high court. Such discriminatory provisions further discourage the

⁶⁴Rule 7 (6): The parties shall not be allowed to bring in any legal practitioner to represent them in their case at any stage of the proceedings before the complaints committee.

⁶⁵*Supra* note at 19.

⁶⁶*Ibid.*

⁶⁷S. 35 (1): Where on receipt of a complaint or otherwise a State Bar Council has reason to believe that any advocate on its roll has been guilty of professional or other misconduct, it shall refer the case for disposal to its disciplinary committee. 1[(1A) The State Bar Council may, either of its own motion or on application made to it by any person interested, withdraw a proceeding pending before its disciplinary committee and direct the inquiry to be made by any other disciplinary committee of that State Bar Council.]

compulsory involvement of an advocate despite the fact that his presence is of utmost importance for a litigant to prove and win his case.

VIII. Difficulties in the Implementation of Section 13 of the Family Courts Act

According to the legal expert P.M. Bakshi, the family court is the only Indian legal system to confer on judges the power to make their own efforts to ascertain the truth and use their discretion to affect the settlements between the disputing parties.⁶⁸

These courts have the power not just to adopt or to follow but to lay down their own procedure to arrive at the truth of a matter or a settlement. In the absence of a clear framework, this can only lead to arbitrary disposal of cases which will in turn affect women adversely. The administration of justice is in the hands of judges who will declare judgments on the basis of their capabilities and intelligence.⁶⁹

The rules laid down by some of the state governments do not simplify the procedures but merely reproduce the Civil Procedure Code, 1908 (hereinafter referred as 'CPC'). The Code has laid down the procedures to be followed in civil courts and is meant for lawyers who are trained in legal technicalities and is extremely complicated. A litigant who is not familiar with the legal jargon, would not easily be able to follow the procedures. The Act and the Rules have excluded representation by lawyers without creating any alternative and simplified rules.⁷⁰

Since all technicalities of a civil court have to be followed, it is a myth that the Act does away with the need of the lawyers. In the family courts, legal issues of diverse religion based personal laws, pertaining to family affairs, are decided requiring a knowledge of law and procedure and that no one should be put in apposition of bartering away his or her legal rights to perceived benefits of a quick and friendly divorce at the cost of litigant's ignorance of laws and procedures in the country where majority of the people are illiterate. Primary mission of law is to cater justice for every aggrieved person. The

⁶⁸ P.M.Bakshi, "The Family Courts Act" *The Lawyers Collective* (Bom. Oct. 1991).

⁶⁹ *Supra* note 8.

⁷⁰ Flavia Agnes *Give us this day-Our Daily Bread: Procedure and case law on Maintenance* (Majlis, Bombay 1992)

Family Courts Act is, thus, a failure to provide for litigants to be represented through his advocates, it should be molded for people's benefit.⁷¹

IX. Conclusion

Thus it may be concluded that whatever may be the conflicting opinions on the subject, the role of lawyers in the courts cannot be underestimated as their presence and help is required where complicated questions of fact and law are involved as an appeal lies on both of these grounds. Moreover, in cases of Private International Law and in creating awareness about rights and obligations of the parties among the litigants, the lawyers' help becomes imperative. In any case, the court has the discretionary power to allow the litigants to be represented by a lawyer and it can do so with the help of *amicus curiae*, if necessary.⁷²

On the basis of above comprehensive discussion, it may be suggested that:

- a) The Bar and the Bench dealing with family matters must move with a will to find out the solutions to the existing problems in cases relating to family disputes and due attention should be given for the proper implementation of the provisions of the Family Courts Act so that the earliest necessary action may be taken at various levels of administration so as to preserve the institution of 'family' as an essential unit of the society.⁷³
- b) Family Court should adopt a practical and humane approach and arrange its work suitably having regard to the workload, in such a manner that the parties before it are not put to unnecessary inconvenience."⁷⁴

⁷¹*Ibid.*

⁷²*Supra* note 49.

⁷³*Supra* note 8.

⁷⁴*Supra* note 10.