

**RIGHT TO MAINTENANCE
UNDER CRIMINAL LAW - A CRITICAL STUDY**

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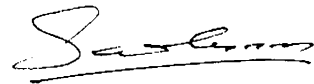
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CHAPTER ONE

INTRODUCTION

'The greatest happiness of the greatest number is the basis of judging the social, economic and political policies of a nation', asserts the principle of Benthamite. All human beings possess an equal capacity for pleasure and pleasure gets doubled when human care for each other. Therefore, a more desirable society is one where human beings work for one another and enjoy the pleasure derived from mutual co-operation and love. The basic social unit wherein we could observe the pre requisites of a welfare society is family. Family is described as a 'natural ethical community'.¹ The family is natural because its bonds are based on feelings that are intuitive and immediate. It has an ethical quality because the love that it imparts has an universal and spiritual quality. For proper and wholesome development of both men and women in a family, marriage is a must. Marriage, as an institution is necessary for the procreation of human race. Marriage as such gives the married partners, a status and impose mutual obligations and rights. The prime obligation that arises out of marriage is maintenance.

1.1 MAINTENANCE - AN OBLIGATION ARISING OUT OF MARRIAGE

The first man of this universe had no obligation as against other members. It arose only when he founded a family. The urge of sex, the animal instinct united him with woman.² The promiscuous sex was then

1. Subrata Mukherjee and Sushila Ramaswamy, August Bebel - *Woman in the past, present & future*, Deep & Deep Publications, New Delhi, 1996, p.XXVI.

2. *Id.*, at p.2.

unregulated and much animal like. It was perhaps, a scarcity of women or admiration of one particular woman that first roused in him the desire to keep her for permanent possession. When one took possession of a woman, other men followed his example. He obliged the woman to receive only his caresses and taking in return the obligation upon himself to regard her as his wife and to protect and bring up her children as his own. Thus arose marriage and the obligation to care for each other.³ This was a natural obligation. It got rooted as moral obligation in a social community. The modern welfare society imposes them as statutory obligation.

1.2 MAINTENANCE - A SOCIAL CONCERN

Maintenance has been a concern of not only weaker sections but of the society as well. For weaker sections it is a problem in the sense their very survival rest on the provision made available as maintenance. The concern of the society starts when one, despite having means, fails to provide maintenance to his dependents. Such members are forced to fall upon the state for assistance or else take a career detested or prohibited by the society. Either of them is not towards promoting the interest of the society and hence its concern. Marriage is the basis of the family and family is the basis of the state. Any disruption at the level of marriage tends to affect the social interest and its development. Towards safeguarding the interest of parties at marriage and other members of the family, maintenance is recognised. Perhaps in realization of this and with an avowed object of preventing the consequences that may tend to arise out of poverty and destitution a right, parallel to one provided under personal laws, is made available under the criminal jurisprudence in India. The centurion old law had

3. *Id.*, at p.6.

its origin from England and withstood onslaughts of social and legal changes over the period.

1.3 MAINTENANCE - THE LEGAL CONCERN

Maintenance is not merely a legal right. It is part and parcel of basic human right. Section 125 of Cr.P.C. which intends to prevent starvation protects indirectly the basic human right of an individual. The human right concept is not the same as it made its presence in the global society. Now the social, economic and cultural rights acclaim position on par with that of civil and political rights, the traditionally recognised human rights. As member of the international community and having ratified the International Covenants and Declarations, India takes an obligation to fulfill the socio-economic needs of its population. Seen in that view, the provision reflects the individual well being, the central objective of the international community protected under various human rights conventions.

The provision reflects also the constitutional obligation that assures its citizen an adequate standard of living. The direction is no more an instruction alone. It has its role to uphold the spirit of Article 21 of the Constitution of India. As a measure of social justice the provision do fall within the sweep of Article 15(3) reinforced by Article 39 of the Constitution of India.

The personal laws of the Indian community viz., Hindus, Parsis, Christians and Muslims provide for maintenance or alimony. But these are mostly made available only to the married partners when they seek for matrimonial relief under their respective marriage laws. The law in this area is

cumbersome, expensive and lacks uniformity. The conflictive personal laws though have their own independent existence, has its influence to play on Section 125 Cr. P.C.

1.4 MAINTENANCE - A RIGHT UNDER CRIMINAL LAW

The right of maintenance provided under Section 125 of the Code of Criminal Procedure is something novel and unparalleled in Indian legislation. It shows a blending of the characteristics of criminal law, civil law and those of family law, but do not fall absolutely under any of these branches. In these proceedings, though initiated by or on behalf of destitute individuals, the state involves directly to see to the enforcement of purely a personal obligation. The state's interest in seeing to the due enforcement of a personal obligation is for the reason that any failure to fulfill such obligation will throw the liability on the state. Seen as the Common Civil Code of Maintenance the law has been subjected to wide interpretation that now, as it stands, no word in it is left un-interpreted. No other law in India had given rise to such storm of events as that one under Section 125 of Cr.P.C.

The provision remained as the first unifying law on the personal aspect of the non-homogenous religious communities in India. The Supreme Court of India in ***Bai Tahira v. Ali Hussain***⁴, ***Fuzlumbi v. K. Khader Vali***⁵, ***Mst. Zohra Khatoon v. Mohd. Ibrahim***⁶ and ***Mohd. Ahmed Khan v. Shah Bano Begum***⁷ upheld the secular characteristics of the provision. Of the

4. AIR 1979 SC 362.

5. AIR 1980 SC 1730.

6. AIR 1981 SC 1243.

7. AIR 1985 SC 945.

class for whom the benefit is intended, some are now governed by their own personal law. The Muslim Women (Protection of Rights on Divorce) Act, 1986 specifically excludes the application of this provision to Muslim divorced women. To assert the status of 'wife', the language of the provision has to be read in conjunction with the personal law of the parties. This raises serious doubts as to the secular characteristics of the law and the comprehensiveness of the relief provided in favour of a wife, child or parent.

Women though equal in population to their male counterparts, they do not enjoy the status on par with them. Women are honoured and even worshipped as goddesses but in real life they are relegated to a position much worse than a slave and kept always under sub-ordination. The subservient status is mainly rooted in the unique sexual function women performed as child bearers. During periods of pregnancy she became inferior and child birth and lactation forced her to look to her husband for assistance, support and protection. The occasional helplessness of woman at a time when physical strength alone was held in respect, was the origin for her subordination and the necessity for assistance. She was confined to bearing and rearing children and managing their homes. Even here, her contribution to the family was least considered. She was educated primarily to perform these tasks which in turn stunted their development and growth. Women's domestic role was held a reason to exclude them from political participation and thus they were reduced to a status of second rate beings. Women were denied property and inheritance rights making them economically dependent on men. Thus socially, politically and economically women were made to accept an inferior and secondary status and this was more justified and defended on grounds of custom and tradition.

Section 125 Cr.P.C. which provides maintenance as a substantive right do not extend the same to all married women. The legality of the marriage when tested in the light of personal laws leads to conflictive stand being taken by the judiciary. A second wife to a muslim husband is entitled to maintenance whereas not one under Hindu law. All divorced women excepting one belonging to Muslim religion are entitled to maintenance. A child whose marriage is void or voidable is also recognised with right of maintenance. But an innocent victim to a marriage practised on her by an unscrupulous male member is denied of maintenance. All these raise doubt as to the secular characteristics and the protective objective claimed by the provision.

Children are the assets of a nation and its living malleable potential. They are the future citizens on whose shoulders the destiny of our nation rests.⁸ The future of any nation is largely determined on how its children grow and develop. Childhood is the most formidable period of one's life.⁹ It is a time of learning and formation of habits. It is a time to receive love and affection.¹⁰ They need nurture and support. Children need to be provided with sound health, proper education and able personality development. Healthy development of a child is quite indispensable to make him lead a socially and economically productive life.¹¹ Sound mind is as essential as a sound body and education provides for this.

8. Singhvi, L.M. Dr. *Citizenship values, freedom on trial*, Vikas Publishing House Pvt. Ltd., New Delhi, 1991, p.234.

9. Nahamiah, Asha, *Lost childhood*, Indian Express, Nov. 10 1990.

10. Srinath Padma, *Those childhood years*, The Hindu, November 13 1988.

11. *About Who*, *Global Child Health News and Review*, Van Couver, B.C., Canada, Vol.(I), 1993 p.17.

Children constitute the foundation of life. The foundations can be strong only if parents and the state are sensitive to their responsibility to ensure optimal physical, mental, education and spiritual growth of children.¹² The condition in India is that the poverty and economical backwardness force children to engage in labour at an early age. Neglected and delinquent juveniles form a bulk of Indian population. Education though proclaimed free and compulsory is still beyond the reach of a vast segment of Indian population. On the front of health also the situation is neither better.

The upbringing of the child is the prime duty of parents. It requires care for his life and health and to provide for his maintenance. The obligation of maintenance in case of a child includes his education and stimulate the development of his emotional, social, intellectual and physical capacities to the best advantage. Section 125 provides for economical assistance in case of neglect of children by their parents. The right is promised to children who may not even realise the existence of such a right. To assert the right they need again to depend on others for they have no way to represent their own cause. The fact forgotten is that the state as well has an interest in moulding him as a responsible and participating member of the community.

Old age is the age of rest and meditation. But instances are not wanting wherein the aged population are uncared for by their wards and driven to be at the mercy of the society. Humanity demands children to take care of their parents at their old incapable age. The moral obligation is recognised under Section 125 Cr.P.C. The invoking of this provision reflects

12. Singh, Meherban, *Rights of parenthood*, Indian Express, May 22 1993.

disappearance of the humanity, love, and affection. The natural feelings might have disappeared from the hearts of present younger generation. Whether this would be the same in case of parents. How far they would be interested in taking a legal battle against their loved ones and to take the matter to a stage to send them to prison is a doubtful question. All these point to ineffectiveness of the law towards fulfilling its basic objective.

The social importance of the matrimonial jurisdiction of Magistrates' Courts is undeniable. It occupies the lowest hierarchy in the court's structure and is the most geographically widespread. Jurisdiction over matrimonial matters normally vests with the civil courts. With no power to entertain other matrimonial causes the Magistrate Court served as a domestic court to provide economic assistance to lakhs and lakhs of deprived and destitute population. The role played by the Magistrates' Court is more like that of a 'casualty clearing station' offering immediate assistance to people who were in retrievable difficulty. The jurisdiction now stands transferred before the British Model Family Courts. The suitability of these courts in Indian conditions has not been tested. The reality of the working system has not been subjected to any study herein before.

The law that we imported from England has changed a vast to suit the present conditions there. In India the law that has been passed some hundred years ago to suit the conditions then at existence has its force still without much reform. The social and economic condition of the Indian community is not the same as it existed prior to hundred years ago. Law must change and see to the progress of the community. The mandate under Article 44 of the Constitution remains a distant dream for long years. The Supreme Court of

India did remind the obligation on the part of the State towards fulfilling its obligation directed under the Constitution. But nothing effective has come off yet. All these necessitate review of the law and the system.

A comparative study of the law at England and France is as much essential to look for change. The very origin of the matrimonial jurisdiction before Magistrate Court is from England. The law in England has changed a lot to suit the needs of society. The French legal system which offers economical and social independence to woman can remain as a model for reform. A comparative study of these systems is vital to analyse our own law and its working system.

1.5 OBJECT OF THE STUDY

Some study has been made earlier, but no attempt has ever been made to make the study comprehensive and comparative. There exists also no information as to the working of the system. Hence the work is undertaken to provide first hand knowledge of the legal institutions that had handled and now handles annually large masses of deprived and neglected population. An investigation is also necessary to know the legal and social characteristics of the jurisdiction enjoined on the court so that this will help compare the law in the statute with the law and practice. The evaluation of the working system in the changed social atmosphere is also an urgent need of the hour.

1.6 METHODOLOGY ADOPTED

The methodology adopted is both doctrinaire and empirical. The problem is analysed in the light of the international instruments, constitutional provisions and other relevant statutory materials besides relevant case laws touching on the topic. The researcher is hopeful that the findings will help the state to bring in necessary changes so that the basic needs of larger population is attended to in a better way. For convenience discussions are made under various chapters.

1.7 SCHEME OF THE STUDY

The first introductory chapter begins with the historical survey, dating back to the sixth century, of the husband's social, moral and legal duty to maintain his wife and family. The need of this economic assistance to women and weaker sections in a changing social atmosphere is much emphasised. The subservient role henceforth played by women and the equality portrayed by law and practiced differently is well focussed.

The second chapter attempts to identify maintenance as one of the basic human rights. The origin of the human rights concept and its development thenceforth is traced. The world being one community poverty, hunger and starvation of mankind at one region tend to cause concern to its members at other region. Basic necessities are a must for human survival. The world community have come to recognise not only 'first' and 'second' generation rights but also 'third' generation rights. 'Third' generation rights are meaningless without assurance of the indispensable 'first and second' generation rights. The state as party to various covenants and treaty obligations impose itself a duty to provide the same to its citizen. They strive

to achieve the same through various means. The effectiveness of such measures is analysed in the light of Indian conditions.

The third chapter discusses in length the constitutional provisions protective of the social justice proclaimed under the Preamble to the Constitution. The fundamental rights assuring one the right to life and the directive principles imposing on the state an obligation to provide to its citizen an adequate standard of living have been taken for discussion. The concept of right to life which has undergone a vast reformation insisting the need to see the provision of maintenance under section 125 of Cr.P.C. in a different perspective not confined merely to provision of food is emphasised in the light of decided cases.

The fourth chapter discusses the right provided under the criminal law in its entirety. The historical background behind the incorporation of Section 488 in the old code of 1898 and the need for such domestic jurisdiction on the Criminal Court is brought to the fore. The role played by the Judiciary in transforming the provision into a comprehensive code under the 1973 code has also been focussed. The decisions such as *Bai Tahira*,¹³ *Fazlunbi*,¹⁴ *Zohra Khatoon*¹⁵ and *Shahbano*¹⁶ that lent support to retain the secularistic characteristics of the provision are highlighted. The political and legal changes that altered the ambit of Section 125 Cr. P.C.

13. *Supra*. n.4.

14. *Supra*. n.5.

15. *Supra*. n.6.

16. *Supra*. n.7.

have been discussed. The objectives as visualized by the provision and the class of people who benefit out of this has been brought to focus.

The fifth chapter deals with the social reality and the procedural hurdles in enforcement of a social legislation as one under Section 125. The hardships faced by the members while invoking the matrimonial jurisdiction has been identified in the light of case decisions and by an empirical study. A comparative evaluation of the old magistral court system with that of the present family court system has also been attempted.

Chapter six probes over the remedy made available under the personal laws viz. Hindus and Parsis. The sanctity of marriage under the Hindu law and the moral obligation of providing maintenance to near dependents has been analysed at length. The transformation of the concept of maintenance until the stage of codification and the principle of equality reflected under the Hindu matrimonial law has also been probed into.

Chapter Seven analyses the right of maintenance under the legal system of Muslims and Christians. The controversy over 'talak' under Muslim law has been critically evaluated. The concept of maintenance under the personal laws of Christians and that of Muslims is also traced. The possible ways and means of achieving the goal aimed under Article 44 of the Constitution have been identified.

Chapter Eight brings home a comparative analysis of the law and position prevailing in England. The origin of the family court jurisdiction of the Magistrate has been traced and the present working system has

been analysed in the light of Indian conditions. This will lend support towards strengthening the working system in India.

Chapter Nine gives a short semblance of French legal system. The concept of marriage and the functioning of the matrimonial legal regime has been traced to point the social and economical independence of women in France. The criminal justice system of France wherein neglect is identified as a crime is also highlighted. The *partie civile* concept that can substitute the matrimonial jurisdiction in India has been compared for practical value.

Chapter Ten, the concluding chapter summarizes the views with valid suggestions.

CHAPTER TWO

MAINTENANCE AS A BASIC HUMAN RIGHT

Human Rights are the idea of our time. They are products of the democratic world. The human rights, we talk of today are much reformed than the 'moral rights', 'natural rights' and 'rights of man', philosophers have debated for so long. But no time is ever really good for human rights. Despite the confident words of U.S. Bill of Rights, the French Declaration on the Rights of Man, and the Universal Declaration, they have not fared well either in principle or in fact.¹ Those with power have always found persuasive reasons to deprive the rights of those without it, either by their silence, coercion or otherwise. The post - 1945 phenomenal human rights concept includes now rights less commonly understood to fall under the rubric of human rights.² Besides classical human rights, socio economic rights have also been recognized and declared by national and international documents to fall within the purview of human rights. Yet another phenomenal change in the human rights jurisprudence is that individuals no longer are aliens under the international law and states no longer can avoid their human rights obligations towards their subjects.

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1. Louis Henkin, *The Rights of Man Today*, Stevens & Sons Ltd., London, 1979, at p.XIII.
 2. Jorge I. Dominiguez, *Enhancing Global Human Rights*, McGraw-Hill Book Company, 1980, p.25.

2.1 HUMAN RIGHTS - EVOLUTION AND GROWTH

"All human rights are universal, indivisible, and interdependent and inter-relate."³ So was observed on the characteristics of human rights when analyzed at the United Nations World Conference at Vienna in June 1993. Human rights are difficult to define. Generally, they are regarded as those fundamental and inalienable rights, which are essential for life as a human being.⁴ There is, however, no consensus as to what these rights should be. Human rights have, therefore, escaped a universally acceptable definition. The phrase have been undergoing a continuous evolution. The concern which it receives from the international community is such that it acquires new meanings in the developing universe. However, under contemporary international law, human rights are classified under three heads, "first, second and third generation" rights.⁵

The civil and political rights that derive from natural right philosophy of Locke, Rousseau and others and that have been traditionally been given priority by western states constitute the 'first generation rights'. The second generation rights are those economic, social and cultural rights that attained recognition in the twentieth century with the advent of socialism. Jurisprudential debate still prevails as to the human rights character of second generation rights.⁶ The idea of 'third generation'

3. Vienna Declaration and Programme Action on Human Rights 32 ILM 1661 (1993) G.A. Resolution 48/41, Dec. 20, 1993.

4. Rebecca M.M. Wallace, *International Law*, Sweet & Maxwell Ltd., 3rd Ed., 1997, p.205.

5. S.K. Verma, *An Introduction to Public International Law*, Prentice - Hall of India Pvt. Ltd., New Delhi, 1998, p.220.

6. Harris D.J. - *Cases and Materials on International Law*, Sweet & Maxwell, 1998, p.625.

of human rights emerged as recent as 1970s and is supported predominantly by developing states. The first two rights are enjoyed by the individuals and differ in themselves in that, the former imposes negative obligation on the state whereas the latter, a positive duty. The distinguishing feature of the third 'generation' right is that, the focus is on collective as opposed to individual rights, as in the case of first and second 'generation' rights. The right to development and the right to self-determination are two of the principal examples of third generation rights.⁷

The human rights movement represents the historical journey travelled by man ever since the beginning of an institutionalized political and social order.⁸ The road travelled has been historic and impressive with its origin in medieval European moral and political theory. The human rights philosophy was shaped by the writings of John Locke and Hugo Grotius, followed by Rousseau's principles of the social contract and Thomas Paine's 'The Rights of Man'.⁹ These rights were also regarded as natural rights as they were endowed by the creator and Supreme Being thus implying the authority for the proposition that "men are born free and equal in respect of rights" which are sacred and undeniable.¹⁰ Seen in the meaning as 'natural rights' this had given birth to the Magna Carta (1215) in

7. *Supra* n.4, p.206.

8. Remarks made by Justice Pathak in his Forword "*Human Rights in Changing World*", International Law Association, New Delhi, 1988, p.XI.

9. *Id.*

10. Sieghard, Paul, *The Lawful Rights of Mankind: An Introduction to the International Legal Code of Human Rights*, Oxford University Press, 1985, p.28.

England, the Bill of Rights in the U.S. Constitution (1791) and the Declaration of the Rights of Man in France (1789).¹¹

The birth of human rights jurisprudence is marked by the American and French revolutions of the 17th and 18th Century.¹² They stand testimony to vindication of certain human values and man's struggle to protect his basic rights. The more immediate reason for the genesis of international concern for human rights, were however, born out of the events connected with the origin and conduct of Second World War. The war, fiercest in human history, brought infinite misery and devastation. The league of nations was founded with dedication towards maintenance of peace.¹³ But the efforts failed with the outbreak of the second world war. It also awakened the world as to the futility of entrusting the protection of human rights, solely to the internal jurisdiction of nation states. Widespread conviction spread towards securing an effective international protection of fundamental human rights. A great deal of discussion took place in this regard. The Atlantic Charter (1941) and thereafter the Dumbarton Oaks proposals prepared the way for the United Nations Charter (1945).¹⁴ The development of human rights concept therein after is fast and universal.

11. Duda P.N. Dreams of Stils - Sidelights on the problems of sanction for enforcement of human rights, *supra* n.8, p.62.

12. Robertson, A.H., *Human Rights in the World*, Man Chester, 1972, pp.1-3.

13. Bowett D.W., *The Law of International Institution*, Steven and Sons Ltd., London, Forth Ed., 1982, p.1.

14. *Supra* n.8.

2.1.1 U.N. Charter

The U.N. Charter marked the formal realization that human rights are a matter for international concern. The Charter provides for a multi-purpose organisation the establishment of which is further reasons authenticated in the preamble. The Charter recognized human rights and affirmed its faith in protecting the same by competent international action. The theme of individual rights and freedom finding a place in an international treaty was not only unprecedented but was also a complete innovation in international law and relations. It is in this regard, principally, the United Nations differs from its predecessor, the League of Nations.

The U.N. Charter,¹⁵ the first of its nature, makes numerous references to human rights.¹⁶ The very opening words "We the people of the U.N." gives much emphasis on individuals rather than the states.¹⁷ Article 1 speaks at the very purpose of establishing the United Nations and articles 13, 55, 62 and 68 are some other provisions that specifically mention about human rights. By incorporating these provisions on human rights, it was responding not only to the past, but provide also for the long term needs of human society.¹⁸ Article 68 provided for setting up a Commission for Promotion of Human Rights. Pursuant to this and on the initiation taken by the Economic and Social Council of the United Nations (May 1946) came the Universal Declaration of Human Rights on 10 December 1948.

15. U.N. was constituted with the signing of a Charter on June 26, 1945 by the delegation of fifty states.

16. For the text, see Annexure I, *infra*.

17. Bhalla S.L., *Human Rights: An Institutional Framework for Implementation*, Docta Shelf Publications, Delhi, First Ed., 1991, p.1.

18. *Id.*, p.14-15.

2.1.2 Universal Declaration of Human Rights 1948

The Declaration is a unique and comprehensive international instrument covering the whole field of human rights. It contains an elaborate list of human rights intended as a common standard of achievements for all peoples of all nations. In context the Declaration is dominated by political values of the victor countries and is heavily based on the Magna Carta, the US Bill of rights and the Declaration of the Rights of Man, to which some economic rights were added on USSR suggestion. The implementation of the Declaration vests with United Nations, whose Charter is the organic law in the matter. This Declaration came really as a milestone on the road of human progress and in the words of Mrs.Eleanor Roosevelt was termed as 'the Magna Carta of all mankind'.

The Universal Declaration of Human Rights for the first time recognized certain of the basic rights of man, as an individual, as fundamental human rights which the subscribers to the Charter of the United Nations must always respect and honour. The human rights declared under the Universal Declaration are no longer the subject of guarantee only to individual nations but a guarantee of the world organization for all human beings anywhere in the world. Article 1 proclaims that "all human beings are born free and equal in dignity and rights". The Declaration further states that "everyone is entitled to all the rights and freedoms set forth in the Declaration without any distinction of any kind, such as race, colour, sex, language, religion, political or other status".¹⁹ Articles 2 to 21 deal with the traditional civil and political rights. Articles 22 to 28 of the Declaration set

19. Universal Declaration of Human Rights, Article 2.

forth, mostly in general terms the economic, social and cultural rights. They provide for right to security, right to an adequate standard of living and right to education.²⁰ Article 28 is most novel in that it declares that "...everyone is entitled to a social and economic order in which the rights and freedoms set forth in the declaration can be fully realised".

The Declaration, also called as Bible of Humanists, despite its innovative and welcome enumeration of the catalogue of human rights and fundamental freedoms, has failed to stir the human conscience.²¹ The words and deeds of the national governments in respect of human rights are often at much variance with the proclaimed standards in the Declaration.²² Despite its non-binding nature, the Declaration proved to be the starting points of a new legal order and it is profoundly claimed that the process of transformation from constitutionalism to internationalism of human rights issue, initiated by the Charter, received a great fillip with the adoption of the Declaration.²³

2.1.3 INTERNATIONAL BILL OF RIGHTS

To give binding effect to the Universal Declaration of Human Rights in the year 1966 the United Nations' General Assembly adopted three other covenants and legal instruments which defend and guarantee the

20. Articles 22, 25 and 26 of the Declaration. For the text, see Annexure 2, *infra*.

21. *Supra* n.17, p.33.

22. *Ibid*.

23. *Id.*, at p.34.

protection of human rights.²⁴ They are the International Covenant on Economic, Social and Cultural Rights 1966, the International Covenant on Civil and Political Rights 1966 and the optional protocol to the latter covenant. The Covenants are treaties binding on the states which ratify them and together they constitute the four corners of the mighty edifice of international human rights and are hence called the International Bill of Human Rights. In short they are the 'Magna Carta' for mankind.

2.1.3.1 International Covenant on Civil and Political Rights 1966

The Covenant on Civil and Political Rights recognizes the right of every human person to life, liberty and security of person, to privacy, to freedom from cruel, inhuman or degrading treatment and from torture, to freedom from slavery, to immunity from arbitrary arrest, to a fair trial, to recognition as a person before the law, to immunity from retroactive sentences and to freedom of thought, conscience and religion. Family is identified as the natural and fundamental group unit of society and protection is assured to the married partners and children.²⁵

2.1.3.2 International Covenant on Economic, Social and Cultural Rights 1966

The Covenant on Economic, Social and Cultural rights recognizes the right to work and a free choice of employment, to fair wages, to social security, to adequate standard of living, to freedom from hunger and for health and education.²⁶ States which ratify the Covenant acknowledge

24. *Supra* n.11, p.15.

25. Articles 23, 24 and 26. For the text of the Covenant. See Annexure 3, *infra*.

26. Article, 6, 9, 11 and 13. For the text of the Covenant. See Annexure 4, *infra*.

their responsibility to promote better living conditions for their people. State's reports on their progress in promotion of these rights are reviewed by a committee of experts appointed by the Economic and Social Council.

Both the Covenants show as many similar provisions as possible, the provisions of the preamble and of Articles 1,3 and 5 of the International Covenant on Civil and Political Rights are almost identical with the provisions of the preamble and of the Articles 1, 3 and 5 of the International Covenant on Economic, Social and Cultural Rights. The preamble to each Covenant serves as an introduction to the Articles that follow and sets forth general principles relating to the inherent dignity of the human person and portrays the ideal of freeman in accordance with the Universal Declaration of Human Rights. They reiterate the obligation of states under the Charter of the U.N. to promote human rights and reminds the individual of his responsibility to strive for observance of human rights. Both the preambles emphasize the unstinted commitment undertaken by the United Nations to the mankind. They seek to unfold the common object which are intended to be achieved through provisions enumerated under the Universal Declaration.

2.1.4 The Convention on the Rights of Child

The human rights field has been protecting children as human beings. There exist several convention and treaties protecting varying interest of the children. The chief and paramount among them is the Convention on the Rights of the Child. On 20 November 1989 the United Nations General Assembly has adopted by unanimity the Convention of the Rights of the Child which entered into force on 2 September 1990. The expression of so wide a consensus upon the opportunity of establishing a binding legal instrument for

global protection of children is the goal of an increased awareness concerning the many problems that affect children worldwide.

In fact the first initiation towards protection of the children began with the founding of a 'save the children' movement after the First World War. This led to the formulation of a formal document, 'Declaration of Geneva' in 1924 by the League of Nations. The document did not have much impact at that time. But after the horror of another world war in 1948, the Declaration of Geneva was revised and amplified, and the resulting text formed the basis of ten-point "Declaration of the Rights of the Child" which was unanimously adopted by the United Nations General Assembly on 20 November 1959.

The 1959 Declaration enumerated the principles and the entitlements for the care and protection of children. It is mainly concerned with economic, social and cultural rights. The Declaration does not mention the word 'rights' except in the title and preamble. Yet it must be noted that it was in the preamble of the 1959 Declaration that the problem of implementation of children's right was first mentioned. Based on this Declaration and by the untiring efforts taken by UN body with the co-operation of global nations came the Convention on the Rights of the Child, 1989.

The Convention covers a variety of aspects touching upon the interest of children. Besides protecting the civil and political rights and cultural rights it gives much emphasis on economic and social rights and provides for assuring social security to children.²⁷ The economic and social aspect

27. The Convention on the Rights of Child, Article 26. For the text, see Annexure 5.

includes right to adequate standard of living,²⁸ right to the highest attainable standard of health care,²⁹ right to education³⁰ and right to social security. The note worthy provision of the Convention is Article 3. It states "in all actions concerning children... the best interests of the child shall be a primary consideration."³¹ That is to say that whenever a child's right is in the process of being affected the focus must be on the child's welfare and not on its parents' or legal guardians' wills. The importance of the Article 3 lies in the fact that for the first time it grants children the right to their best interest. By doing this it becomes autonomous and its no longer a tool in the hands of parents or legal guardian. It follows that by the passing of this Convention children ought to be accorded also the right to the judicial review of cases in which there are apparent abuses of interpretation of the best interests clause.

Another contribution of utmost importance to the cause of children's protection is that states parties are bound to take all appropriate measures to prevent abuse and neglect of children.

In spite of the salient features of the Convention, it is not free from criticism. Rather than seeing the Convention as an attempt to group together the existing legislation's concerning children's rights, it should be seen as one setting rules for the protection of the children whose application has to be monitored by the UN body.

28. *Ibid.*, Article 27.

29. *Ibid.*, Article 24.

30. *Ibid.*, Article 28.

31. *Ibid.*, Article 3.

2.1.5 Regional Conventions

Responses on a continental basis have produced the three regional arrangements, the European Convention for the Protection of Human Rights and the Fundamental Freedoms and the European Social Charter concluded by the members of the Council of Europe, the American Convention on Human Rights adopted by the Organization of American States and the African Charter on Human and Peoples' Rights drafted by the Organization of African Unity.

2.1.5.1 European Convention for the Protection of Human Rights and the Fundamental Freedoms

The Council of European Organization founded in 1949 has grouped the Democratic European States. This has drawn a Convention towards safeguarding the human rights of their member states and is termed as European Convention on Human Rights. The Convention mainly incorporates civil and political rights enshrined in the Universal Declaration of Human Rights. The economic, social and cultural rights in the Universal Declaration find their way in the European Social Charter of October 18, 1961. By virtue of this Convention the contracting states undertake to secure to every one within their jurisdiction a number of human rights and fundamental freedoms which are set forth in the Convention.³² Of the several rights and freedoms protected under the Convention and its protocols the chief that touches upon the personal aspect of members are right to life,³³ right to liberty and security of person,³⁴ right to fair trial in civil

32. European Convention for the Protection of Human Rights and the Fundamental Freedoms, Article 1.

33. *Ibid.* Article 2.

34. *Ibid.*, Article 5.

and criminal matters,³⁵ and prohibition of retroactive criminal laws.³⁶ The right to respect for private and family life,³⁷ home and correspondence, freedom of thought conscience and religion, right to marry and found a family³⁸ and prohibition of discrimination and the enjoyment of rights and freedoms³⁹ has been given special mention.⁴⁰ The remedy in case of violation of any of the rights and freedoms as set forth in the Convention is left with the national authorities.⁴¹ The enjoyment of rights should be free from discrimination on grounds of sex, language, religion or origin. The Convention also has established an effective machinery consisting of a Commission, a Court, and the Committee of Ministers of the Council of Europe for effective enforcement of the undertakings by the contracting states.

2.1.5.2 The European Social Charter

The European Social Charter of 1961 also undertakes to promote the economic, legal and the social protection of family life by means of social and the family benefits.⁴² The contracting parties declare the intention to take all appropriate and necessary measures towards ensuring the effective

35. *Ibid.*, Article 6.

36. *Ibid.*, Article 7(1).

37. *Ibid.*, Article 8.

38. *Ibid.*, Article 12.

39. *Ibid.*, Article 14.

40. For the text, see Annexure 6.

41. *Ibid.*, Article 13.

42. European Social Charter, Article 16. For the text, see Annexure 7.

exercise of the rights of mother and children to social and economic protection.⁴³

2.1.5.3 American Convention on Human Rights 1969

The American Convention on Human Rights, which was drawn upon the European Convention on Human Rights, the American Declaration of the Rights and Duties of Man, 1948, and the International Covenant on Civil and Political Rights, 1966, reflects similar sentiments towards protecting the civil and political rights all along with certain socio-economic rights.⁴⁴ Specific rights related to family circle and the rights of minor children are also given special emphasis.⁴⁵ The Convention assures also the right to life⁴⁶ and the right to equal protection.⁴⁷ An obligation has also been imposed on that state parties to take measures for progressive development⁴⁸ and the obligation to respect the rights and freedom recognised by the Convention.⁴⁹ For the enforcement of Convention rights there exists two organs; the American Commission on Human Rights and the American Court of Human Rights. An Inter-American Commission on Human Rights was also created in 1960 and was re-established in 1969.

43. *Ibid.*, Article 17.

44. American Convention on Human Rights, Article 26.

45. *Ibid.*, Article 17 and 19. For text, see Annexure 8.

46. *Ibid.*, Article 4.

47. *Ibid.*, Article 24.

48. *Ibid.*, Article 26.

49. *Ibid.*, Article 1.

2.1.5.4 African Charter on Human Rights and People's Rights, 1981

The Heads of the Organization of African Unity (OAU) adopted the African Charter on Human Rights on June 17, 1981. This is the first human rights document that emphasized upon the peoples' rights i.e., the 'third generation' rights, viz., right of self-determination.⁵⁰ The Charter recognises family as the natural unit and basis of society and seeks for protection by the state.⁵¹ Every individual has been guaranteed certain rights and subjected to duties. For the enforcement of the rights and duties under the Charter no judicial or quasi judicial organ exists but their role is played by the African Commission on Human and Peoples' Rights.

2.2 RIGHTS PROTECTED UNDER THE CONVENTIONS AND COVENANTS

The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the European Convention on Human Rights, the American Convention on Human Rights and other special subject treaties have contributed towards a growing body of human rights law. They stand testimony to the fact that human rights are now universally recognized and that the governments know the yearnings of world community.

The international human rights law in the past have been viewed primarily as the protection of the individual against the arbitrary power of

50. African Charter on Human Rights and People's Rights, 1981, Article 22.

51. *Ibid.*, Article 18.

the state. They confined themselves in protecting the rights and freedoms of the individual, chronicled under the modern international instruments, as civil and political rights. The International Covenant on Civil and Political Rights, and the European Convention on Human Rights are the Conventions prominent on this aspect and protect rights such as right to life, right to equality, right to freedom of speech and expression, the free exercise of religion, right to travel freely and the right to form associations. The rights termed in the language of the 21st century as first generation rights are aimed at protecting the rights of the individual. Such rights in turn impose a negative duty on the nation states.

Then came the period, when we realized that classical rights and freedoms are not by themselves enough. Without Economic, Social and Cultural rights, the enjoyment of classical rights and freedoms cannot be meaningful. Civil and political rights are priceless and invaluable, because without them freedom and democracy cannot survive. But, when large masses of people in the developing and underdeveloped countries, are suffering from poverty, want and destitution, emphasis on civil and political rights alone will not be sufficient. If only social and economic rights are ensured to those large masses that they will be able to enjoy civil and political rights and in turn become equal participants in the democratic process. Hence, both categories of human rights are found equally important. Further, there is a close inter-linkage between the two because all human rights and fundamental freedoms are indivisible and inter-dependent. The promotion and respect for and enjoyment of one category of human rights cannot justify the denial of the other category of human rights. Thus came the stage for recognition of neo-classical socio economic rights termed as 'second generation' rights.

The second generation rights, aimed at protecting the economic, social and cultural aspirations of human beings vide the concept of human rights are right to work, right to just and safe conditions of work, right to receive fair remuneration and to organize and bargain collectively, the right to women and children to protection, a regime of social security and medical assistance and the like. The characteristic feature of these rights which distinguished themselves from that of 'first generation' rights is that they impose on the state a positive obligation. Prominent among the human rights conventions which embody these aspirations are the International Covenant on Economic Social and Cultural Rights and the European Social Charter.

In the evolution of human rights law, we have come to recognize a third category of human rights, put under the head 'third generation' rights. In contrast to the individuals rights protected under the 'first and second generation' rights, these are collective or group rights such as right to development, right to healthy human environment, right to peace and right to self-determination. The developmental right is enshrined in the Declaration on the Rights to Development.

2.2.1 Right to Life as a Human Right

The Universal Declaration sonorously declares that 'everyone has the right to life'.⁵² To say that all men have a right to life is to say that all men, who naturally attach paramount importance to survival, can claim to be left in peace and are entitled to have the claim recognized. To enjoy human rights

52. Universal Declaration of Human Rights, Article 3.

one must be a living individual. Right to life is thus a basic human right. When one is alive, to keep him so tend to arise other needs which are also protected by the human rights law. 'Every one', says the Universal Declaration in Article 25(1), 'has the right to a standard of living adequate for the health and well being of himself and his family, including food, clothing, housing and medical care and necessary social services'. The same objective is formulated again under Article 11(1) of the Covenant on Economic Social and Cultural Rights which reads as: 'The state parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The state parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent'.⁵³

A reading of Article 2(1) of the Covenant reveals that this obligation has been imposed on the state. It declares 'Each state party.....undertakes to take steps, individually and through international assistance and cooperation.....to the maximum of available resources with a view to achieving progressively the full realization of the rights'.⁵⁴ As the words reveal, the obligation of the state is coupled with 'available resources' and objective is 'progressive' in approach. The European Social Charter also contains a requirement for a decent standard of living, but this gains

53. Covenant on Economic, Social and Cultural Rights, Article 25 (1).

54. *Ibid.*, Article 21.

place in the context of fair pay for employed workers. Most of the international conventions recognize the right of everyone to the enjoyment of the 'highest' and best attainable standard of health, physical or mental.

2.2.2 Protection of the Family

Protection of the institution of marriage and family is a good example of a right that straddles the supposed distinction between civil and political rights on the one hand and economic social and cultural rights on the other. 'Men and women of full age', says Article 16(1) of the Universal Declaration, 'without any limitation due to race, nationality or religion have right to marry and found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution'.⁵⁵ And in paragraph (2) of the same Article present the words 'marriage shall be entered into only with the free and full consent of the intending spouse'. The goal appears almost in all the relevant treaties, both the Covenants, the European Convention and the Social Charter and both the American and the African treaties.

Marriages and families are so fundamental to human existence that one simply cannot put the rights they entail into a single category of convenience. They involve civil status, economic relationship, social structures and cultural customs and values. In all these fields, of course, much of the world is still far from realizing the rights to their citizens, now declared in the International Code. In many countries including that of India, women cannot be truly said to enjoy equal rights in relation to all the

55. Universal Declaration of Human Rights, Article 16(1).

aspects of marriage. Indeed in many places they are still regarded as chattels - first by their parents and then by their husbands - and 'their free and full consent' to marriage is a myth. The sorry state is that even countries which have ratified the Covenant indirectly imposing themselves an obligation, either keep silence over this state of affairs or defend such practices on the ground that, as sovereign states, they are entitled to maintain national customs.

Article 25(5) of the Universal Declaration emphasizes that 'motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection'. Similar sentiment in good measure is reflected by the treaties. All of them, in varying degrees, give the kind of protection their states parties must provide for mothers and children. This ranges from registration of births, through working condition for women and paid maternity leave, to elaborate provision to ensure that child labour will not be exploited and that children's education will not be prejudiced by any work they do within or outside the family.

2.2.3 Protection of the Rights of the Children

Children are the conscious of the nation. They are supremely important national assets and its living malleable potential. The future of the any nation is largely determined on how its children grow and develop. Childhood is the most formative period in once life: a time of learning and formation of habits. The stage represents the weakest part of human society. It is at the stage children depend for their survival on adults and are thus prone to be neglected. Such neglect in term culminates their exploitation in

different areas such as child labour, sexual integrity or else, adoption of a delinquent behaviour in the society.

Children require guidance and respect. A child left alone would not know how to cope with technology and intricate patterns of social behaviour. It needs to be taken by the hand and shown the direction to be followed. Contemporaneously it ought to be allowed to make its own way and, by so doing, express its unique and priceless individuality. Childhood is therefore a period which requires special care.

The Convention on the Rights of the Child remains as the spectrum of international legislation concerning children. The Convention comprehensively and as well as potentially protects children against any forms of abuse and neglect. Again by signing the Convention the individual nations bound themselves to implement the contents of the Convention. Furthermore, there is always the domestic law which has to reflect the principles of the Convention towards protecting the best interest of the child.

2.3 ENFORCEMENT OF HUMAN RIGHTS

Under the Charter, the U.N. is obliged to promote 'respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex language or religion'. In furtherance of this, the ECOSOC, in February 1946 established the Commission on Human Rights under Article 68 of the Charter. The Commission acts as a permanent machinery for the supervision of protection of rights. In addition, there exists also the Commission on Status of Women.

2.3.1 Mechanism for Enforcement

2.3.1.1 Human Rights Commission

The Human Rights Commission's work is related to standard setting, promotion activities and enforcement of human rights. Towards enforcement, the Commission is empowered to receive private complaints and after ascertaining the nature of the complaint, the government concerned may be invited to give its observation. In case of need, the Commission can investigate the alleged human rights violations, either by itself or through special working groups.

2.3.1.2 Commission on the Status of Women

The Commission has done a major job in the human rights area from the date of its very inception. It was charged with the function of preparing reports and making recommendations to the ECOSOC to promote rights of women. The Commission again played a pivotal role in norm creating for women's rights. It drafted the most extensive convention on women's rights - the Convention on the Elimination of All forms of Discrimination against Women 1979, which came to force on September 3, 1987. The Convention obligates state parties to eradicate all kinds of discrimination against women 'in effect' and in all walks of human activity. The Commission has succeeded in organizing a World Conference at Vienna wherein women's rights were recognized as human rights. Much progressive efforts have been taken thereafter by the Commission to promote the status of women. India has ratified the Convention on July 9, 1993.

2.3.2 Effect of Enforcement

Human Rights are now recognized world around. Specific rights are also formulated in the Covenants. The provisions are for the promotion and protection of human rights, whether it be "first, second or third generation" rights. The Universal Declaration of Human Rights enumerates various rights but they are not intended to be legally binding. As regards the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights neither of the Covenant is effective in its implementation, nor serve any useful purpose in the protection of human rights. The rights, provided in the civil and political covenant are required to be made available to the individuals by the ratifying states immediately after ratification. But the obligation does not extend beyond the submission of reports to the Human Rights Committee. As regards the Economic, Social and Cultural Covenant the rights recognized therein being non-justifiable the state parties are merely required to take steps individually and through international assistance and co-operation with a view to achieving progressively the full realization of the rights enumerated therein.

The ideals though emphasized in the convention or covenant the enforcement measures are not highly effective. In the case of Economic, Social and Cultural Rights, the task of supervising the obligations undertaken by the nation states rest with an expert committee while the task of implementation is entrusted to ECOSOC. The objectives of the world documents though imminent and necessary in the modern world, its realization can best be achieved only when the member states show a positive response and take moral inclination to implement the same.

Though many a countries responded positively and incorporated the ideals of the Convention in their national documents or legislation, few others still remain unperturbed over the changes that occur around them. Even countries which has ratified the Conventions and has taken a moral obligation to fulfill the same has not done much beyond the ratification.

Human Rights are a live issue in the world. But the existing implementation system has not served any useful purpose in the protection of human rights. The reality proves that it is completely ineffective. The absence of an effective international implementation machinery created a gap between the 'promises' and the 'performances'. So it is the responsibility of each state to ensure respect for the human rights within its jurisdiction. Individuals are the subjects of municipal law. The corresponding duty to provide these rights to the individuals rests on the states. States and individuals, are the two opposing subjects of rights and duties. If one fails to discharge its duties, other should have a right to enforce them under the international legal system. So that remedy may be provided and adequate relief may be given to the victims. Towards protecting the civil and political rights at least some remedy is available. But to enforce the Economic, Social and Cultural Rights, the individual has no remedy either as against the state or before the international forum.

The emergence of the human rights is much more than an intellectual achievement and much more than a method of reasoning or a method of organizing thought. The substantiation of international human rights norms is part of the larger process of attempting to reconcile law and equity, justice and mercy, equity and freedom. The reality being otherwise,

the development of human rights can only be in paper. The vast division of developed and underdeveloped countries pose an awesome picture. On the one hand, millions of people are still deprived of their basic necessities of life due to extremely bad economic and social conditions, while their affluent partners speak of their own human dignity, security, justice and equality. Unless they realise that mankind is one and human beings are equal and must enjoy at least the minimum of rights and freedoms, speaking of protecting global human rights, cannot but be a farce.

2.3.3 The Indian Experience

The scenario at Indian sub-continent neither look satisfactory. India has ratified the two Covenants in 1979. But nothing beyond ratification has been carried out to acclaim honour towards savior of human rights. It has failed even to perform the minimum obligation of submitting the report in time to the Human Rights Committee which it has undertaken by ratifying the Covenant on Civil and Political Rights. No reason whatsoever has been explained. Further it has not taken any step in amending the Constitution so as to make available to the citizens all the rights enshrined in the said Covenant, and the result is that the rights stipulated therein are not enforceable. India cannot feel proud and claim that human rights violations are not there in its territory.

The Directive Principles of the Indian Constitution which broadly incorporate the socio-economic rights enshrined in the Covenant on Economic Social and Cultural Rights are much part of human rights. They include within them such rights as the right to equal pay for equal work for both men and women, the right to protect the childhood and youth from

exploitation, the right to secure just and human conditions of work and for maternity relief, the right to work, the right to a decent standard of life and full enjoyment of leisure and social and cultural opportunities and the right to adequate and reasonable standard of living and right to free and compulsory education. What meaning these rights will carry when millions of ever-increasing Indian population starve and have no food to eat, no cloth to cover the naked body and no roof over their head to live. Our record in the areas of health, education and population control reflect much poorer than developing nations.

Leaving aside those rights ratified with reservation, other such rights which are ratified with an avowed obligation to fulfill the same towards its citizen, the government has not done much and many of the rights are yet to see the day of reality. Our hands are not clean even in respect of civil and political rights. To think of economic and social rights in such circumstances may be awesome. But civil and political rights cannot be acclaimed without re-structuring the socio-economic order. The governments' blind eye towards legislation passed fully in pursuance of the obligations which it has undertaken by the Covenant are examples for this. Thus the aspirations of our founding fathers to provide these rights to individual citizen remain just as justices proclaimed in the preamble.

2.4 MAINTENANCE - A HUMAN RIGHT AS WELL

Human rights are the live issue of the world. The modern concept of human rights do not belittle the importance of Economic, Social and Cultural Rights. The realisation of Civil and Political Rights cannot be without fulfillment of Economic, Social and Cultural Rights. The distinction arose

out of academic interest and based on the emergent need for protection of rights disregarded much by arbitrary actions. The political atmosphere has changed now to give equal importance to Economic, Social and Cultural Rights on par with Civil and Political Rights.

The importance of Economic, Social and Cultural Rights is well realised by all world communities, if not the world community would not have joined hand in formulating an international code and drafted a separate Covenant on Economic, Social and Political Rights. The ratification of the Covenant impose directly an obligation on the member states to take steps towards achieving the goal incorporated therein. The ratification thus imposes a positive obligation on that state.

Human rights whether it be civil or political rights or otherwise is a world concern. Infringement of the rights of a member of one society certainly wounds the humanity of the member living at another national boundary. Progressive thinking now treats all humans belonging to a single world community. Hence even without ratification of the Convention or Covenant all nations owe an international obligation to protect human rights of members in its own community.

Human Rights are legal rights, nonetheless differ from it in certain respect. Legal rights impose correlative duty on others. My possession of right impose on you a correlative duty. Similarly, when I owe a duty that means possession of a legal right by you. In the case of legal rights the rights and the duties devolve mostly between individuals and at times between an individual and state. But in the case of human rights the

significant feature is that, the right is always enjoyed on an individual either alone or in groups and the correlative duty remains always with the state. The nation states hence owe a duty, whether by ratification or otherwise, to fulfil such obligations which are imposed on them by the international norms. This in turn confers a right on the individual to enforce the same through legal process. When the obligation is ratified, the duty is much more to warrant sanction, for it is an intentional breach and willful neglect on the part of the state.

The subject of human rights, we thought earlier, was primarily concerned with the protection of individual against arbitrary power of the state. But now, the protection of the individual vis-a-vis his fellow men within his own country is largely considered the business of natural law. To put it in specific words, the basic human right of right to live ought not to be disrupted either by state action or inaction. The same is true with the economic, social and cultural rights. The obligation herein being a positive duty, not only any failure to provide such rights to the citizen is a violation but also the state's non-interference, when there is failure on the part of a member on whom the liability is delegated by the national legislation. As regards the obligation pertaining to the economic aspect, the state which has the primary obligation has delegated it to certain members who owe a moral duty and who can better assure the life and livelihood of certain members. It is imposed as a legal obligation to provide economic assistance to such members. The right though vested with the individual at all times, the duty transcends from the state to certain relatives vide statutory norms. The primary duty being always with the state, it has the obligation to see that the right to assistance is assured from the hands of such relatives.

Any failure on the part of relatives re-delegate the duty again to the state. Thus, the state should not only supervise the working measure of Section 125 of the Criminal Procedure Code, it should intervene when the right is denied to the member who are in their need of such economic assistance.

Legal Right of an individual is by definition an interest which has the protection of law. Right to maintenance is without dispute accepted as a legal right. Protection of legal right is in the first instance against the violation of human rights by state and include protection of human rights vis-a-vis his fellowmen in the community. Protection of the rights of individuals against state arbitrary action has given rise to human rights jurisprudence, now that it includes even acts by one individual as against another. The right to life assured to one thus needs to be protected as against not only by state action but also by such inaction on its part to stop disruption by another individual in the society. This applies not only to traditional rights classified under the head as civil and political rights, towards protection of which the human rights concepts emerged, but equally is applicable to economic, social and cultural rights. By ratifying the International Covenant on Economic, Social and Cultural Rights, 1966 the states have undertaken an obligation to provide to its citizen the basic economic, social and cultural requirements of its citizen. This is a positive duty, which in turn imposes a right on the individuals. The obligation is further strengthened by the constitutional provisions which are to direct a principle of state policy. The right provided thereunder though non-justifiable its inter-relation with other rights safeguarded under part III as fundamental, will certainly opt for judicial remedies. Courts in India have recognized such rights.

Even otherwise, the obligation ratified by the Convention and that has been incorporated in the national documents has been deduced as specific rights by legislation, either secular or personal. To people who are victims at their family level and who are in emergent need of economic assistance maintenance has been provided under Section 125 of the code, besides under other personal or matrimonial laws. The duty to maintain such of the relatives is imposed on the near relatives by statute. Thus the duty which the state owes has been delegated to individuals and this is possible since supporting such relatives is a moral and an equitable principle. Maintenance under Section 125 or under personal laws is nevertheless a right legally recognized. As the right assures directly the right to live which is necessary for keep life assured to be protected by the state, it not only remain as legal right but is also a human right. The state is the principal guardian of this right, though on moral consideration and legal force the role has been taken by the near dependence.

CHAPTER THREE

MAINTENANCE AS A CONSTITUTIONAL OBLIGATION

India represents a mosaic of humanity consisting of diverse religious, linguistic and caste groups. The human right value is dominant in the country and is well reflected in its national charter. The incorporation of human rights in the Constitutional enactment had its origin from the American and French Constitutions. The demand for human rights in India traces back to the 19th Century and by the developments that took place later. The patriotic flame has been kindled by the formation of the Indian National Congress in 1885. The Constitution of India Bill was introduced in 1895. A series of Congress Resolutions reiterated the demand between 1885 and 1919. The emergence of Mahatma Gandhi on the political scene gave the freedom movement a new impetus. The movement which till then remained as one morally anti-British has become a movement for the organization of rights of liberty for the Indian masses. The events that followed later paved way for liberation of Indian sub continent to be declared an independent dominion with the Constitution of India as its national document.

3.1 THE CONSTITUTION OF INDIA

The Constitution of India is the basic, fundamental and supreme law. It has given a place of pride for human rights. The Preamble sets the goal to be achieved by the new government. The Fundamental Rights and Directive

Principles remain as dual modes of realization of human rights value in India. The Directive Principles lay down the basic socio-economic policy of the government and provides the guiding principles for the governance of a country. The Indian Constitution which reflects the British system has the unique characteristic of uniting a population of over three-hundred million who are non-homogenous belonging to varying communities and speaking various languages. The Preamble, Fundamental Rights and Directive Principles constitute the more important features of our Constitution and they together remain as saviors of the basic human rights in India.

3.1.1 The Preamble

The Preamble speaks of the goals the Constitution is set to realize. An important goal of the Constitution as specified by the Constituent Assembly is 'building of an egalitarian social order and to bring a radical socio-economic transformation based on Justice-Social, Economic and Political'.¹ The Preamble reflects the sentiment of the Constitution builders. The basic human needs are food, clothing, treatment in disease, education and participation at the grassroots level in the governance of the country. The path to realize these basic needs is propounded by the Constitution as achieving a socialistic state which could be for providing Justice-social, economic and political; liberty of thought, expression, belief, faith and worship; and equality, of status and opportunity. The makers of the Constitution preferred and adopted a socialistic democratic state on the ideals taught by Mahatma Gandhi. The socialistic spirit of the Constitution had been

1. Quoted by Smt. Indira Gandhi in her Inaugural address at the seminar on 'Dynamic of Social Justice' on 31st October 1980 at New Delhi.

made explicit further by incorporation in 1976 of the words 'Socialist' and 'Secular' in the Preamble.²

3.1.2 Fundamental Rights

The Indian Constitution protects varying rights of the individual and is the charter on human rights. The chief among the rights protected vide the Constitution are described under Chapter III and termed as Fundamental Rights. They are the moral or natural rights.³ The whole conception of the rights is the protection of the individual liberty and freedom which has its root from the days of French Revolution.⁴ The very motive of incorporating these rights in the articles is to guarantee them in such a way that they are not deprived even under special circumstances. The chapter provides a number of rights to the individual. The expression 'fundamental' denotes that these rights are inherent in all the human beings and are essential for the individual for developing the human personality. They reflect the basic values of a civilized society and the Constitution makers have given them a place of pride in the Constitutional Charter.

Of the many rights provided under the Constitution in Part III, the right made available under Article 21 is paramount to human existence.⁵ It guarantees the twin freedoms of protection against deprivation of life and personal liberty. The later part of the same provision lays down that an

2. Words inserted by the 42nd Amendment Act in 1976, Section 2.

3. *Golaknath v. State of Punjab*, AIR 1967 SC 1643.

4. Observed by Jawaharlal Nehru, Lok Sabha Debates, Part II.

5. *Menaka Gandhi v. Union of India*, AIR 1978 S.C., p.597 at 620.

individual can be deprived of both of these rights by a procedure established by law. The right of life which is the most fundamental of all basic rights is also the most difficult one to be defined. It is not only a fundamental right, but a basic human right also. It is not confined merely against taking away of human life but has a wider application. In the words of Field. J., the term life means not mere animal existence.⁶ The inhibition against its deprivation extends to all these limbs and faculties by which life is enjoyed. The Supreme Court in ***Kharak Singh***⁷ held that the word 'life' as it occurs in 5th and 14th Amendment of the U.S. Constitution corresponds to Article 21 of the Indian Constitution. It means much more than animal existence.⁸

The word 'life'⁹ now is meant to include the right to basic necessities of life.¹⁰ Bhagwati. J., explains the right as one that includes the right to live with human dignity and all that goes along with it, namely, the basic necessities of life such as adequate nutrition, clothing and shelter over the head inclusive of other facilities.¹¹

6. *Munn v. Illinois*, 94 U.S. 113.

7. *Kharak Singh v. State of U.P.*, AIR 1963 SC 1295.

8. *Id.*, - p.1302.

9. In *Allgever v. Louisiana* (1897) 165 U.S. 578 the U.S. Supreme Court held the 'life' includes all personal rights and their enjoyment embraces the use and enjoyment of faculties, acquiring useful knowledge, the right to marry, establish a home and freedom of worship, conscience, contract, occupation, speech, assembly and press. Cited in Chander Shailja, Justice V.R. Krishna Iyer on Fundamental Rights and Directive Principles, Deep & Deep Publications, New Delhi, 1998, p.160.

10. *Francis Mullin v. Union Territory of India*, AIR 1979 SC 746.

11. *Francis Corolie v. Union Territory of Delhi*, AIR 1981 SC 748 at 753.

The right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and more particularly Clause (e) and (f) of Article 39, Article 41 and Article 42.¹² It includes protection of health and strength of the workers, men and women, the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in condition of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief. The global development in the sphere of human rights had given varying interpretation to the term 'right to life'.¹³

No person can live without the means of living. Hence right to life guaranteed under Article 21 includes the right to livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. This would not only denude the life of its effective content and meaningfulness but it would make life impossible to live.¹⁴

3.1.3 Directive Principles

Dharma is the supreme law of laws. It is Raja Dharma in which all living creatures take refuge. Raja Dharma denotes the obligations of the

12. *Bandhua Muktimorcha v. Union of India*, AIR 1984 SC 802.

13. *Olga Tellis v. State of Maharashtra*, AIR 1986 SC 180; Also in *State v. H.P.V. Umed Ram*, AIR 1986 SC 847; *T. Damodhar Rao Vs. S.C. Municipal Corporation, Hyderabad*, AIR 1987 A.P. 171; *Ramsharan Antayanuprasi v. Union of India*, AIR 1989 SC 549; *Chhetriya Pardushan Mukti Sangharsh Samiti v. State of U.P. and Others*, AIR 1990 SC 2060; *Subhash Kumar v. State of Bihar and Others*, AIR 1991 SC 420.

14. *Olga Tellis v. State of Maharashtra*, AIR 1986 SC 180.

state and demarcates the fundamental social and political principles. The Directive Principles of State Policy enumerated in Part IV of Indian Constitution are nothing but principles of Raja Dharma.

Many of the rights described as fundamental are primarily meant to protect persons who are already free from want and necessity. They are of little practical value and have no meaning to the hungry masses and homeless. The Constitution makers realized that mere adherence to an abstract democratic idea will not be enough and that if the Constitution was to survive it was necessary to secure to the people economic and social freedom in addition to political and civil freedom. Hence the Directive Principles are enunciated in the Constitution.

The Directive Principles impose a duty upon the state to perform its function. The provisions incorporated under Part IV of the Constitution, as per Article 37 reflects the objectives set forth in the Preamble of the Constitution. It serves as a key opener to Directive Principles and Articles 39, 44 and 45 impose specific obligations which the state has to fulfill towards the people of India. In a sense these are the moral duties for they are unenforceable directives. But their relevance cannot be simply disregarded.

Article 39 provides that the state shall direct its policy towards securing the citizen, men and women equally, the right to an adequate means of livelihood. Article 41 which is yet another directive principle provides that the state shall within the limits of its economic capacity and development make effective provision for securing the right to work in case of

unemployment and of undeserved want. The principles set forth in Articles 39(A) and 41 though not enforceable must be regarded as equally fundamental in the content of interpreting the fundamental rights.

Article 44 directs implementing a homogenous civil code that could be applied commonly on the varying communities speaking varying languages in India. Article 45 intends to educate the younger generation, a must for social and economical development. Indirectly it provides the right to education to a class of people in India.

The Directive Principles are not the whole but are some of the whole.¹⁵ The whole is the complete socialism which was made the goal for the country under Preamble. True the principles narrated here under are not to be enforceable before the court of law. But they are principles undertaken for implementation and should be the guideline in state policy. Even the principles which are undertaken remain still as 'pious wishes.'

The germ of socialistic government imposes a positive duty on the state to perform its functions fully in confirmation of the principle. The very nature of the principle are such they are non-justiciable and not enforceable as legal rights before the court of law. But it is not that they have no force at all before law. Dr. Ambedkar himself asserts those who disrespect the instruction have to answer before the electorate.¹⁶ The capture power policy

15. Shariful Hasan, *Supreme Court: Fundamental Rights and Directive Principles*, Deep & Deep Publications, New Delhi, 1998, p.18.

16. 18 CAD Vol.VII No.11, P.539. (23 Nov.1948).

has meant his words unrealistic. The Directives under Part IV of the Constitution are not enforced to the satisfaction by any government. They show neither the will nor tendency towards achieving the principles directed thereunder. This warranted courts interruption which interpreted the principles such a line to further and not to hinder the goals set out in the Directive Principles. They now show a desire to convert the Directive Principles into fundamental rights. Recognition of the right to education¹⁷ and the right to health¹⁸ are best instances on this line of thinking by the judiciary.

3.2 FUNDAMENTAL RIGHTS VIS A VIS DIRECTIVE PRINCIPLES

Fundamental Rights and Directive Principles elaborate the objective specified in the Preamble of the Constitution. Fundamental Rights are concerned with the freedom of the individual, whereas the Directive Principles embody the promise towards achieving a socio-economic set up for development of the nation. Both need to be in mutual harmony. While the rights described as fundamental are enforceable before the courts,¹⁹ the rights which are sought to be achieved by the Directive Principle, though proclaimed fundamental in the governance of the country are not enforceable by any court.²⁰ Any law inconsistent with any of the Fundamental Rights are declared to be void,²¹ but not so in the case of Directive Principles.

17. *Unni Krishnan J.P. v. State of Andhra Pradesh*, AIR 1993 SC 2178.

18. *Consumer Education and Research Centre v. Union of India*, J.T. 1995(1) SC 636.

19. Articles 32 and 226.

20. Article 37.

21. Article 13.

The sincerity of governments in adhering to the principles was ever in doubt which necessitated judicial intervention. The courts have shown a change in their approach towards Directive Principles. Now that both the parts of the Constitution are attempted to be implemented without sacrificing one for the another. The rights and principles adumbrated under two different parts of the Constitution are seem to be mutually adjustable and defined not to be superior over the other. None of the part is subservient to other. To ensure the liberty and dignity of the individual and as well as a cohesive socio-economic development of the society as a whole, a balance has been struck between both the parts of the Constitution. The concerted effort is towards giving effect to the Directive Principles of the Constitution. The recognition of right to education and right to health of a worker marks the trend towards this line of thinking by the judiciary. Still going a step further, views are also expressed suggesting interpretation of the Fundamental Rights in the light of the Directive Principles. M.P. Dube asserts that if at all one of the two species is to conform, it is the Fundamental Right that should be made to conform to and seek their synthesis with the Directive Principles of state policy and not vice-versa.²²

3.3 TOWARDS SOCIAL JUSTICE

The Preamble of the Constitution recites in sonorous words to establish a `socialist' society based on socio-economic justice. Independence from hunger privation, disease and ignorance are minimal human rights. Political independence without economic independence will be meaningless.

22. M.P. Dube, *Role of Supreme Court in Indian Constitution*, 1987 p.165.

The rights guaranteed under Part III can serve its purpose only when the people are endowed with socio-economic justice. A socialistic society can be established if only we honestly implement the socio-economic policy enumerated under Part IV of the Constitution. If not, rights guaranteed under Articles 14, 15 and 19 will be mere paper guarantees. Common man's interest is in the implementation of such principles that will serve him his basic needs and this without least doubt can be achieved through a socialist secular democratic state. The rights that are enshrined under Part IV of the Constitution are still under the process of its achievement even after 50 years of independence.

Fundamental Rights and Directive Principles of the Constitution reflect the differing dimensions of human right. Both intend to protect the basic right of human beings. For large masses of starving population assurance of socio-economic right is the prime necessity. An adequate standard of living to him is more precious than the rights protected as fundamental. A surviving population alone can enjoy the rights protected under Part III of the Constitution. Again the right to life assured to one under Article 21 imbibes within it the right to secure an adequate means of living.

India had fully realized significance and has incorporated this as a goal in the Preamble. Towards achieving this, the ways and means are directed under Part IV, which is no less than a mandate to the rulers. The Constitution imposed this directives as a positive duty to be adhered to in the policy of the governance. The Constitution drafters reposed full confidence that these rights will be enjoyed by the masses at the earliest possible time. But we cannot but admit the failure on this front. Lack of

seriousness on the part of rulers, warranted judicial intervention to uphold the validity of the principles. The rights specified in the Directive Principles are now recognized towards achieving the goal proclaimed vide the Preamble. In short the Preamble, Fundamental Rights and Directive Principles serve as guardian of basic human rights and can best be termed as conscience of Constitution.²³

23. Austin, G., *The Indian Constitution: Cornerstone of a Nation*, Oxford University Press, New Delhi, 1974, p.50.

CHAPTER FOUR

RIGHT OF MAINTENANCE UNDER THE CODE OF CRIMINAL PROCEDURE – THE CONCEPTUAL PERSPECTIVES

Public concern on wife battering gave the Magistrate courts, jurisdiction over matrimonial matters in England.¹ The experience and success of Magistrate's jurisdiction over domestic matters thrust interest on English rulers in India to practice the same in Indian sub-continent. The attempt was not only a success but served also as a unifying measure of varying religious and linguistic groups prevalent in India. Prior to this, personal civil matters were governed only under the personal law of varying communities. The position in India was the same as that of England then. Women here were denied property rights by way of succession. The prevalence of polygamy among Hindu and Muslim communities caused them also much hardship. The indissoluble concept of marriage held good and divorce was an anti-thesis among Hindu jurisprudence. Though the moral obligation to maintain one's wife, children and parents stood recognized in the ancient Hindu system, its enforcement was least resorted to, in the then existing social conditions. When the criminal law provided at this juncture maintenance, as an inexpensive summary relief, this served an easy access to the vast needy class.

1. McGregor, O.R., *Separated Spouses*, Gerald Duckworth and Co. Ltd., London, 1970, p.14.

4.1 THE CODE OF 1973 - INCEPTION

English Criminal Law was first established in British India in the year 1860. It was then the Penal Code that was passed into law as Act XLV of 1860. This was followed by the Act XXV of 1861 in the field of Criminal Procedure. This happens to be the first of three successive versions of the Code of Criminal Procedure. When the Penal Code was passed into law it was felt that a Code of Criminal Procedure would be natural, not to say necessary, addition to it. Such a code was accordingly prepared and the same was passed into law as the Act XXV of 1861. It brought together a large part of the laws and regulations then in force more or less in the manner of an English Consolidation Act. But the code was incomplete, and was also obscure and confused in its arrangement. When Sir James Fitz Stephen was legal member of council, the code was again redrawn, re-arranged and made to include a considerable number of subjects which, upto that time, had been either omitted or were provided under other enactments. The new Code became law as Act X of 1872. Yet another edition of the Code of Criminal Procedure had become law as Act X of 1882. This happened to be the revised version of the English Criminal Procedure. It had come into force on the 1st January, 1883. It gave for the first time a uniform law of procedure for the whole of India. The act was amended several times and most extensively in 1955 to simplify the procedure and speed up the trials. With the constitution of Law Commission and based on its report a detailed examination of the Code of Criminal Procedure, 1898 was done. This resulted in the suggestion of revamping the law to assure a fair trial, to avoid delay in investigation and to simplify the procedure. To suit the suggestions a draft bill, bill No.XLI of 1973 was introduced and this came to be passed as the Code of Criminal Procedure, 1973. The code was effectively put to use

in British India for nearly a century that as on now the code exists in its present form passed as Act of 1973.

4.2 MAINTENANCE UNDER SECTION 125

The code is mainly an adjectival law. The object of the code is to provide a machinery for the punishment of offenders violative of the substantive law. Infact, the two codes are to be read together. Some terms are specifically defined in the Criminal Procedure Code, but in the absence of such definition, the definitions set out in the Indian Penal Code are to be adopted. The code also provides machinery for punishment of offences under other enactments. It is however worth noting that the code is not purely an adjectival law. Other than principal provisions, there exist a great variety of subjects which are not purely procedural but nevertheless connected with criminal procedure. They are more substantive besides being procedural. Chapters VIII, X, XI and IX are of this nature. The first three are entitled under the caption 'Prevention of Offences' while chapter IX provides for order of maintenance to a set of people in the matrimonial circle. The chapter consisting of provisions 125 to 128 should be considered as a whole and is self-contained in nature.²

Section 125 is a provision of its kind. This existed as Section 488 in the old code of 1882. It is one of the major provisions of the code to be put in maximum use and also one which has undergone major changes by several amendments from the date of its inception. It is worthy to note that a provision of secular application was incorporated in the procedural law of

2. *Zubedai Smt. v. Abdul Khader*, 1978 Cr.L.J. 1555 at p.1558.

India when the whole Indian society was caste ridden and orthodoxial. Section 125 and the sister clauses (Sections 126 & 127) in very abstract sense impose a legal duty on persons who have a moral obligation to take care certain of his relations. Inversely, it provides maintenance as a right to all those dependents who but for these benefit would be driven towards destitution. The right can be enforced on failure by one to take care of his near relatives. The object of this provision as is spoken by Sir James Fitz Stephen, the pilot of this legislation, is "preventing vagrancy or at least preventing its consequences".³

The object of the provision is to serve social justice.⁴ It is enacted to protect derelict women and children and fall within the constitutional sweep of Article 15(3) reinforced by Art.39 of the Constitution.⁵ The provision is for the benefit of women, children and parents towards preventing their starvation.⁶ The prime object is to prevent vagrancy by compelling a person who despite means, neglects or refuses to maintain his wife or child or father or mother unable to support themselves.⁷ The object of the provision is to compel a man to perform the moral obligation which he owes to society in respect of his wife and children. By providing a simple, speedy but limited relief it seeks to ensure that the neglected wife and children are not left beggared and

3. Chandrachud .J observed in *Bhagwan Dutt v. Smt. Kamladevi* and another, AIR 1975 SC 83 at p.85.

4. *Jagir Kaur v. Jaswant Singh*, AIR 1963 SC 1521.

5. *Ramesh Chandra Kausal v. Veena Kausal*, AIR 1978 SC 1807.

6. *Bhagwan Dutt v. Kamla devi*, AIR 1975 SC p.83.

7. *Supra* n.4.

destituted on the scrap heap of society and thereby driven to a life of vagrancy, immorality and crime for their subsistence.^{7a} The relief provided under Section 125 of the Criminal Procedure Code can be enforced through the Magistrate Courts, spread all over the country. By affording an effective and speedy remedy without much expenditure, it intends to save the party entitled for maintenance from initiating a prolonged litigation before civil courts. It is more like enforcement of a moral duty which every father or husband or son owe towards their children or wife or parents respectively. The object is not to punish them for their past neglect but to prevent vagrancy which may set in because of failure on their part.⁸ It thus compels those who have a moral duty and who could support those people who are unable to do so.⁹

4.2.1 Scope of the Provision

The scope of Section 125 is very limited for it contemplates the passing of an order for maintenance alone where it is imminent but does not purport to protect rights which are purely conjugal, paternal or of civil nature. The order passed, if any, under this Section is subject to final adjudication by the competent civil court.¹⁰ It is also significant to note that the liability to pay maintenance under this Section is distinct from that under the personal law or civil law or custom governing the parties.¹¹ It is a

7a. *Supra* n.6, p.85.

8. *Kanniappan .M v. Akilandammal*, AIR 1954 Mad 427.

9. *Bashiram v. Nathu*, 1960 Cr.L.J. 1376.

10. *Nandlal Misra v. Kanhaiya Lal Misra*, AIR 1960 SC 882.

11. *Ishar v.Soniadevi*, AIR 1969 Punj 295.

measure in the alternative provided for destitute wives, discarded children and neglected parents. Again this is a distinct statutory right, which the legislature has recognized irrespective of the nationality or the creed of the parties. The existence of conjugal relationship is a condition precedent in the case of wife to make her eligible for an application under Section 125. The personal law of the parties has its relevance in ascertaining the validity of the marriage¹² and the existence of the status viz. husband or wife.

4.2.2 Nature of the Proceeding

A peculiar mode of procedure is devised for the enforcement of Section 125 of the Code. The right provided thereunder, though invoked before a criminal court, the proceedings are not strictly criminal proceedings.¹³ The proceedings though of civil nature, the Civil Procedure Code does not apply.¹⁴ The courts follow a summary procedure. Neglect to maintain a wife or child or parent is not an offence and an application under Section 125 is not a complaint.¹⁵ The provisions are not of penal nature but intended towards enforcement of a duty the default of which may lead to vagrancy.¹⁶ They are more preventive rather than remedial in nature and are certainly not punitive.¹⁷ The proceedings not being strictly criminal, the

12. *Yamunabai v. Anantrao*, 1988 Cr.L.J. 793.

13. *Vasudevan Nair v. Kalyani Amma Gouri Amma and Others*, 1970 Cr.L.J. 1173.

14. *Bharat Singh v. Bagirathi*, AIR 1966 SC p.405.

15. *Nalini Ranjan Chakravarty v. Smt.Kiran Rani Chakravarty*, 1965(2) Cr.L.J. 530.

16. *Savithamma (Smt.) v. Ramanarasimhaiah*, 1963 (1) Cr.L.J. 131.

17. *Supra* n.6.

person against whom proceedings are initiated is not an accused.¹⁸ The allowance of maintenance imposed as against the respondent is not punishment under the penal law of our country.¹⁹ Hence, the reason that an appeal does not lie as against an order of maintenance.

4.2.3 Maintenance - Meaning

Maintenance means appropriate food, clothing and lodging that are necessary for one's sustenance. But in an extended meaning, it includes also the expenditures that are incurred towards health and education. In case of children mere maintenance of the body is not sufficient. Provision has to be made for the child's development of mind and conscience.

4.3 PARTIES ENTITLED TO CLAIM OF MAINTENANCE

The self-contained provisions of the maintenance law under Criminal Procedure Code are protective of a class of people who but for this assistance would be left beggared and destitutes. Section 125 thus imposes an individual obligation towards the society to maintain some of his close relatives²⁰. The remedy as a statutory right is made available to all neglected wives, discarded divorcees, abandoned children and hapless parents regardless of their religion, community and nationality. The Supreme Court in the cases of **Nanak Chand**²¹ and **Mohd.Ahmed Khan**²²

18. *Karnail Singh v. Bachan Kaur*, 1955 Cr.L.J. 334.

19. *Ahmed Ali v. Sarfarajunnisa*, AIR 1952 Hyd 76.

20. *Mohd. Ahmed Khan v. Shah Bano Begum*, AIR 1985 SC 945.

21. *Nanak Chand v. Chandra Kishore Aggarwal*, 1970 Cr.L.J. 522.

22. *Supra* n.20.

clarified the applicability of this provision to all sections of the people irrespective of their personal law. It is more like a uniform law in this respect.²³ Subject to fulfillment of certain conditions, a class of members in the family relation related either by blood or marriage are entitled to avail themselves of maintenance under Section 125 of the Criminal Procedure Code. The class of people to whom the right is extended are:

- a) Wife
- b) Children, legitimate or illegitimate and
- c) Parents.

4.3.1 Wife's Right of Maintenance

The word 'wife' has been defined in the law *lexicon* as a married woman. But the phrase 'wife' under Section 125 of the Code includes two class of married women, viz. a woman of valid subsisting marriage and a divorced woman.

4.3.1.1 Wife - A Woman of Subsisting Marriage

The word wife means only a legitimate wife²⁴ and excludes other such relations. The claimant must be a legally wedded wife²⁵. The legality of the marriage is to be tested in the light of the personal law applicable to the parties. When marriage is denied by the husband, the factum of marriage should be properly proved. The burden of proof is on the applicant. But the standard of proof is not so heavy as in civil cases or towards prosecution of offences under Sections 494, 495, 496 and 497 of the Indian

23. *Ibid.*

24. *Supra* n.16.

25. *Supra* n.12.

Penal Code. Where there exists ground, a valid marriage could be presumed.²⁶ When a person signed the school admission register as father of the child, the marriage stands proved by his admission²⁷. Proof of valid and subsisting marriage is essential to claim maintenance. Where *prima facie* marriage is established, the court would order maintenance and the burden of proof will be on the party who disputes the validity of the marriage.²⁸ A Christian woman married to a Hindu male was held entitled to maintenance.²⁹ But a *Suyamariyadhai* form of marriage by two Roman Catholics and their living together as husband and wife for over five years was held to be not valid.³⁰ Execution of a registered document and making a declaration therein that the parties would be living as husband and wife would not confer the status of husband and wife.³¹ Whatsoever relation may be between a man and a woman, the woman is not entitled to claim maintenance unless she proves that she is in the status of wife, while she is presenting an application under Section 125. Long years of union or illicit relationship does not confer such right on the woman. Where there is no valid marriage, a woman is not entitled to claim maintenance even if she lived with a man for 12 years and has also borne him a child.³² When claim for maintenance was made by a woman who entered into marriage with a

26. *Gokul Chand v. Parwin Kumari*, AIR 1952 SC 231.

27. *S.A. Kaiser v. Noor Sahan*, 1980 Cr.L.J. 611.

28. *Mohan ram v. Badamo Devi*, 1974 Cr.L.J. 227.

29. *Govindan Nadar Sreedharan v. Retna Bai Pushpa Bai*, 1978 Cr.L.J. 1213.

30. *Divyanathan v. Jayarani*, 1984 Cr.L.J. NOC 10 (Mad).

31. *Punnakkal Sreedharan v. Vellali Padmini* 1992 Cr.L.J. 3562 (Ker).

32. *Ambalam v. Andiammal* 1939 Cr.L.J. 228.

man who was married already, the applicant was branded as 'illegitimate wife' and the claim was declined.³³

The applicant wife can seek aid of Section 50 of the Indian Evidence Act, 1872 to prove a marriage. Once a marriage was admitted by the husband and all ceremonies of marriage were performed, the court could not go into the question of legality of the marriage. The right is provided only to an abandoned wife and not to abandoned mistress, howsoever faithful she may have been to her paramour, and however badly she may have been treated by him.

For a wife to claim maintenance there should be a valid marriage between the parties. Only a wife is entitled to claim maintenance and a woman without attaining such status is precluded from seeking maintenance. A marriage proved illegal does not confer the status of wife on a woman and the right to get maintenance. The invalidity may arise out of solemnisation of a marriage in contravention of the provisions of the statute governing the parties. The chief grounds are as follows:³⁴

- (i) Marriage solemnised when the spouse from a subsisting marriage, living;
- (ii) Marriage between parties within prohibited relationship;
- (iii) Marriage between parties who are *sapindas*;

33. *Naurang Singh v. Smt. Sapla Devi* 1968 Cr.L.J. 1636.

34. All Personal Laws provide these elements for a valid marriage.

- (iv) Marriage between parties who have not attained the statutory marital age; and
- (v) Non performance of such rites and ceremonies as followed by the members.

Of the grounds that invalidate a marriage, the chief and controversial one is bigamous marriage. Under the old Code of 1898, a Hindu second wife whose marriage is solemnised prior to 1955 was not denied maintenance. Neither the marriage was void nor she denied the status as wife. But the subsequent marriage was a valid ground for either of the wives to refuse live with her husband and claim maintenance. After 1955, any such marriage solemnised during the survival of a living spouse, the marriage can be declared null and void and the second wife denied the status of wife. Her claim for maintenance is also not entertained. The same is the result when a wife takes second husband. But it is the woman who suffers the vices of male chauvinism. The case of **Yamunabai**³⁵ is a pathetic example of this sort.

Yamunabai was factually married to Anantrao by observance of rites under the Hindu personal law in the year 1974. Anantrao had earlier married one Smt. Lilabai who was alive and the marriage was subsisting when he married Yamunabai. She was not informed of the existence of the first marriage. Yamunabai lived with Anantrao for a week and thereafter left the house on grounds of illtreatment. She made an application under Section 125 of the Code which was dismissed. The matter which was taken to Bombay High Court was unsuccessful. Yamunabai ultimately

35. *Supra* n.12.

approached the Supreme Court through a special leave petition to seek justice. The issue involved before the court was whether a Hindu woman who married after the coming into the force of the Hindu Marriage Act 1955, a Hindu male having a living lawfully wedded wife can maintain an application for maintenance under Section 125 of the Criminal Procedure Code.

The Supreme Court interpreted the language of Section 125 in the light of Section 11 read with Section 5(i) of the Hindu Marriage Act 1955 and ruled that the marriage being void from the very inception, she was not a wife and hence not entitled to maintenance.³⁶ The Court did not concede the fact of intentional suppression of the early marriage by the respondent. The plea of estoppel was also turned down as being not available to defeat the provisions of law. The Court rejected the contention that the term 'wife' in Section 125 should be given a wider and extended meaning so as to include not only a lawfully wedded wife but also a woman married in fact by performance of necessary rites or following the procedure laid down under the law.³⁷ When pointed to the extension of the benefit to a divorced woman the court distinguished the law in respect of divorced woman then, and at present. The extension of the benefit to the divorced woman being through statutory amendment, pointed the absence of any such provision to extend the benefit to the appellant.³⁸

36. *Ibid.*

37. *Ibid.*

38. *Ibid.*

The Supreme Court ought to have realised a social realism and the plight of such victims, while giving a technical interpretation to the wife. A woman who has been kept in the dark about the husband's first marriage should not be made to suffer without any fault of hers. Her life has already been ruined because of the fraud committed by her 'husband'. Why should she be again made to suffer destitution and denied maintenance. No injustice will be caused if the erring husband is made to bear the liability. It is interesting to note that the legislature has extended the benefit towards a woman whose marriage has come to a cession on divorce. Similarly illegitimate children born out of wedlock are also provided with the relief. But unfortunately no such benefit is extended towards a woman of void marriage.

The word 'wife' means only a legitimate wife³⁹ and excludes other such relations. A marriage proved illegal does not confer the status of wife to a woman and the right to get maintenance. The Hindu second wife whose marriage is void under Section 5 and 11 of Hindu Marriage Act is not entitled to maintenance.⁴⁰ Similarly a wife taking second husband without divorcing her first husband is not entitled to maintenance, from the second husband as her marriage is illegal and void.⁴¹ But a woman who has been accepted and declared as wife notwithstanding absence of ceremonial marriage is considered to be a wife.⁴² It is true, the validity of marriage has to be established to avail maintenance. Personal laws prescribe qualifications

39. *Supra* n.16.

40. *Supra* n.12.

41. *Iswar Singh v. Hukum Kaur* 1965 (2) Cr.L.J. 449 (All).

42. *Bali Narayan v. Shiddheswari* 1981 Cr.L.J. 673.

to make a marriage valid and sustainable. But when illiteracy among women in rural Indian society is rampant and when even among educated elite population legal awareness is lacking, the reality at times is shocking. The decision of the Supreme Court in *Yamunabai* goes against the interest of women who fall victims of matrimonial gambling. On the facts and legality the case deserves a review by the apex court.

The object of Section 125 is to prevent destitution and culmination of vagrancy.⁴³ Again the remedy provided by the Magistrate while exercising the domestic jurisdiction under Section 125 Cr.P.C., is only very limited. The options are always open to the respondent to question the legality of the marriage before a competent civil court. Women have no absolute say in deciding their marital options and all arrangements pertaining to marriage inclusive of the choosing of her partner is predominantly done by elders, or close family relatives. Suppression of earlier marriage is a common affair, for this brings the man all fortune along with a new bride. Again, all communities excepting that of Christians consider polygamy as a regulated customary practice. It derives support either from religious belief, or divine command. After marriage when reality is known it is the woman who suffers the most. In the orthodox Indian society she can neither think of marrying again nor can seek permanent asylum at her parents house. She has the option only to lead a hostile life with the same male member who cheated her and ruined her future for the rest of her life, or else, take a career towards preventing which Section 125 Cr.P.C. has been formulated. Hence a re-thinking is imminent for necessary changes

43. *Supra* n.16.

either in the Code or in the judicial approach. If not, this will lead to punishing a victim twice, once by her so called husband and again by the judiciary.

When there is ground to presume a valid marriage, pleadings on the part of the defendant that the marriage is void, will not automatically disentitle the wife from getting maintenance. Unless the marriage on its face is stamped with indisputable illegality and the invalidity stares on the face, the court cannot dismiss the claim of maintenance.⁴⁴ The controversy on the validity of the marriage by pleadings of the parties is settled by the Supreme Court in ***Sumitra Bai v. Bhikhan***⁴⁵

Both the parties in the case adopted a technical approach on the factum of marriage. In an application for maintenance for herself and her minor daughter, the wife averred that at the time of marriage, the fact that her husband was already married was not known to her and on the knowledge of this the relationship strained and her husband neglected her. The plea of the husband on the other hand was that that marriage was void for want of ceremonial rites and by reason of fraud. He averred that the lady was pregnant by some one else which fact was concealed at the time of marriage and when he came to know of this she did not want to live with him. The Court did make the point clear that when pleadings show to prove the existence of a marriage at the time of marriage of the petitioner, the subsequent marriage will be a nullity and the provision can in no way extend the benefit.⁴⁶

44. *Purna Bahadur Bista v. Sanita Bista* 1984 Cr.L.J. 1145 (Sikkim).

45. AIR 1985 SC 765.

46. *Ibid.*

The approach taken by the Supreme Court in **Vimala v. K.Veerawamy**⁴⁷ is worth and deserves to be followed in such circumstances and this will go in consonance with the objective of Section 125 Cr.P.C. The ruling is being looked upon as one to rectify the injustice caused to a woman of second marriage in **Yamunabai**.

In **Vimala v. K.Veerawamy**⁴⁸, the appellant and the respondent got married according to Hindu rites and customs on June 30, 1983. On complaints of desertion and ill-treatment, the appellant moved the court for maintenance under Section 125 of the Code. The respondent resisted the claim on the ground that the appellant was not a legally wedded wife and that he had earlier married one Veeramma. The learned Magistrate awarded a monthly allowance of Rs.500/- holding that the first marriage had not been proved. On revision by the respondent the order was set aside as against which the appellant approached the Supreme Court by special leave.

The appellant nowhere had admitted the subsistence of a valid marriage which would render the marriage illegal. The respondent admitted his marriage with the appellant according to Hindu rites but claimed that the same was repudiated as void on the ground of the existence of his earlier marriage. The Court observed that Section 125 of the Code by an extended meaning to the term 'wife' includes divorced woman, who does not enjoy the status of wife. A second wife whose marriage is void on account

47. (1991) 2 SCC 375.

48. *Ibid.*

of the survival of the first marriage is not a legally wedded wife and hence not entitled to maintenance. But the law can be applied only when the first marriage was proved to be valid and legal. The burden of proving the same was on the respondent who having not relieved the burden by tendering strict proof of fact in issue, the Supreme Court restored the order of the lower court and awarded maintenance.

Much recently the Supreme Court in ***Dwarika Prasad Satapathy v. Bidyut Prava Dixit and another***^{48a} has ruled so as to extend the benefit of Section 125 even to a woman who is not married in strict consonance with the required procedures under law. The stand so far established by the courts is that only when the marriage is valid before law, maintenance can be provided to a wife. But liberalising the stand, the Supreme Court with a view to protect women who are victims of seduction by unscrupulous male members in the society has ordered maintenance in favour of such a woman.

In the above case a woman, Prava Dixit, has been seduced by one Dwarika Prasad Satapathy and this ultimately resulted in sexual relationship to end in pregnancy of the girl. On the mediation of elderly people, inspite of protest Satapathy married the woman in a temple. Within days of marriage a child was born. Satapathy neither cared to take his wife and child to his family nor provided them any assistance. Dixit filed a petition for maintenance which was ordered in her favour. The order was revised by the revisional court which cancelled the maintenance on the plea by her husband that the necessary ceremonies had not been followed and hence the marriage was not

48a. J.T. 1999 (8) SC. 329.

valid. When the matter reached the Supreme Court, Satapathy having not denied the relation and the birth of a child out of this and ceremony that was arranged for the marriage, the court ruled though the strict procedures were not followed, this amounted to establish a marriage and the relation of husband and wife. Reading the provision in the light of its objectives the court decreed maintenance in her favour.

4.3.1.2 *Divorced Woman's Right to Maintenance*

The right of a wife to maintenance under Section 488 of the repealed Code was based upon the existence and continuance of the conjugal relations. It was a condition precedent to a claim for maintenance. The factum of marriage or the cessation thereof was to be ascertained by reference to personal law of the parties. The right provided under the provision could be defeated by the husband by giving divorce. When divorce is a common affair in certain communities, this could well be made under their personal law. The Joint Committee took a study of this matter. The commission felt that in several instances, after a wife filed a petition under this Section on the ground of neglect or refusal on the part of her husband to maintain her, the unscrupulous husband frustrated her object by divorcing her forthwith. This compelled the Magistrate to dismiss the petition. Since divorce can be made easily under the personal laws applicable to some of the communities in India, this caused much hardship to the poorer sections of the community. The Commission hence suggested for extending the benefit of the provision to a woman who has been divorced from her husband, so long as she has not remarried after the divorce and proposed for necessary amendments towards securing social justice to women who belong to the poorer class.

To fall in line with the suggestions, when the new Code was drafted in the year 1973, vide an explanatory clause (b) to Section 125 changes were brought in. Now the Act provides that the term 'wife' includes a woman who has been divorced by her husband or has obtained a divorce from her husband and has not remarried. Though a divorce puts an end to the marital relationship for the purposes of this provision, the phrase 'wife' takes a wider meaning and includes a woman who is divorced or who obtains divorce either judicially or non judicially and who has not remarried. The provision with an extended meaning for 'wife' has its application to the needy class of all communities inclusive of Muslims.⁴⁹ The remedy is made available even to a woman who gets divorce on her own volition. For a Muslim woman the remedy was made available even if she got a decree for dissolution of marriage under the Dissolution of the Marriages Act, 1939.⁵⁰ Doubts as to the application of this provision to Muslim woman has been raised before the Supreme Court on more than one instance.⁵¹ In **Zohara Khatoon** case⁵² when the issue was raised again, the Supreme Court did consider the entire law on the subject and held that a Muslim wife whose marriage was dissolved by a decree of dissolution passed at her instance was entitled to maintenance.⁵³ Yet again, the issue was

49. *Bai Tahira v. Ali Hussain Fissalli Chothia*, AIR 1979 SC 362.

50. *Zohra Khatoon v. Mohd. Ibrahim*, AIR 1986 SC 587.

51. *Supra* n.49, *Fuzlunbi v. K. Khader Vali*, AIR 1980, SC 1730.

52. *Supra* n.50.

53. *Ibid.*

raised before the Supreme Court in *Shahbano Begam v. Ahmed Khan*.⁵⁴ The Court having already established the principle that Section 125 of the Code is applicable to all inclusive of Muslim in *Bai Tahira v. Ali Hussain Fidaali Chothia*⁵⁵ and *Fazlumbi v. K. Khader Ali*⁵⁶, re-emphasized the stand when the debate arose before it again.

On 23 April 1985 the Supreme Court of India confirmed the judgement of the Bhopal Magistrate Court which awarded Shahbano, a 75 year old Muslim divorced woman, a princely sum of Rs.25/- to be enforceable as against her husband, Ahmed Khan, a rich advocate by profession. The amount stood revised to Rs.179.10 per month by the High Court. The Supreme Court gave specific ruling on three points touching upon the Muslim personal law. Firstly, Section 125 was held to be applicable to Muslims also. Second, Quran does impose an obligation on the Muslim husband to make provision for or to provide maintenance to the divorced wife. And thirdly, reverting the stand taken in *Bai Tahira*⁵⁷, held that 'Mehr' is not a sum payable on divorce and hence does not fall within the meaning of Section 127 (3) of the Code.

The Supreme Court's decision gave rise to ugly happenings in the history of India. The controversy that arose over the judgement pressurized the central government to come with a bill to exclude the Muslim

54. *Supra* n.20.

55. *Supra* n.49.

56. 1980 Cr.L.J. 1249 (SC).

57. *Supra* n.49.

communities from the application of Section 125 Cr.P.C. This has come in the form of Muslim Women (Protection of Rights on Divorce) Act 1986. The one and only objective of this enactment was to nullify the judgement of the Supreme Court in **Shah Bano**. Even after the passing of the Act there is divided opinion among the High Courts as to the application or exclusion of Muslim divorced women from the purview of Section 125 Cr.P.C. A plain reading of the special Act will go to show its hasty drafting and its retrograde nature. It is unfortunate that the law still remains in the statute book of a country that proclaims social justice.

4.3.2 Children's Right of Maintenance

Children are considered national assets. Their proper moulding alone will make them proper citizens of tomorrow. The society and as well as the parents have a due role to play towards making a child. Neglect by parent or failure on their part to take proper care of their children should not drive them to take a criminal career. Section 125 provides for maintenance to children who are neglected or not cared for by their parents.

A father has a moral duty to maintain his child. In recognition of this, Section 125 Cr.P.C. entitles children whether legitimate or illegitimate to get maintenance from their father. Section 125(1) (b) extends this statutory right towards minor children born within or outside matrimonial wedlock, while clause (c) of the same proviso provides maintenance to a major child who though has attained the age of majority is not able to maintain itself, because of physical or mental abnormality or injury. With regard to married daughters, the liability to maintain lies with the husband. But in case of her being minor or married and her husband having no

sufficient means until the time she attains majority, the father may be required to pay maintenance allowance.

The earlier Code of 1898, vide Section 488 purposely omitted any reference as to age or minority of a child to be a qualification for claim of maintenance. Nor does it clarify the position of major children and married daughters. The phrase 'unable to maintain itself' was given utmost importance and that too, more peculiarly, to children of minor age alone, whether legitimate or illegitimate. The object might be to provide maintenance to all children, whether minor or major, until the time they are able to maintain themselves. But, this gave rise to the divergence of opinion among the courts in India. Some were of the view that the word 'child' means one who has not attained majority⁵⁸, while others were of the opinion that inability of the child to maintain itself is vital and the age of the claimant is immaterial.⁵⁹

The Supreme Court in ***Nanack Chand v. Chandra Kishore***⁶⁰ favoured the later liberal interpretation and held that 'child' in Section 488 does not mean a minor son or daughter and the real limitation is contained in the expression 'unable to maintain itself'. The court further said that though it is very unlikely to happen a son of 77 years unable to maintain himself can claim maintenance from a father who is 97 and has means. Inability of children to maintain themselves because of imbecility or deformity or other

58. *Amirthammal v. K. Marimuthu*, AIR 1967 Mad. 77.

59. *Saraswati v. Madhavan*, AIR 1961 Ker. 297.

60. 1970 Cr.L.J. 522.

handicaps is well within the ambit of the phrase 'unable to maintain itself'.⁶¹ The conflict was set at rest by the new code which made the position clear regarding minority. The word 'minor' is now defined in the explanation to mean a person who has not attained the age of 18 years. This goes in accordance with the provisions of the Indian Majority Act of 1875. Under Section 125 (1), all minor children who are legitimate or illegitimate, naturally born or adopted, married or unmarried are entitled for maintenance. In the case of minors, the inability to maintain themselves is apparent and the reason is not clear for the incorporation of the words 'unable to maintain itself' along with sub clause (b) of Section 125(1) which insists strict proof for the same. In the case of major children only those who suffer from mental or bodily disability which in turn disable them from maintaining themselves maintenance can be awarded. Thus the provision now gives greater emphasis on the inability of the child rather than its age.

4.3.2.1 Legitimate Children

Legitimacy is the status described to children born of valid marriage. All societies favour procreation within some form of legally sanctioned marriage. Marriage laws and customs universally condemn births out of wedlock and brandies them as illegitimates. Proof of marriage is essential to give legitimate status to child. The basis of an application for maintenance of a child is paternity irrespective of the legitimacy, or illegitimacy. Maternity may not be in dispute in a proceeding under Section 125 and neither has she any such obligation in respect of her children. The husband

61. *Ibid.*

of a valid marriage in case of legitimate children, and the father of the child in case of illegitimates, has been fixed with the liability. The burden of proving the paternity is on the applicant. If the paternity is not established the child is not entitled for maintenance.⁶² The rule regarding paternity is well reflected by the maxim '***Pater est quem nuptiae demonstrant***' meaning that he is the father whom the marriage indicates. In favour of this principle Section 112 of Indian Evidence Act raises a legal presumption towards legitimacy.

Birth of a child during the existence of a valid marriage or within 280 days after the dissolution of the marriage and the mother remaining unmarried until then will confer on the child legitimate status. This conclusive presumption cannot be rebutted other than proof of non-access. Birth of a viable child after 28 weeks duration of pregnancy being not biologically an improbable and impossible event, vide a presumption under Section 112 of the Indian Evidence Act, the child was awarded maintenance.⁶³ Section 125 Cr.P.C. does not provide for a preliminary enquiry as to the paternity of the child. But in maintenance proceedings the lower courts had followed a common practice to order preliminary enquiry as to the paternity of the child. This practice was deprecated by the Supreme Court in ***Gautam Gundu v. State of West Bengal***⁶⁴ wherein the court observed that this will tend to defeat the very object of Section 112 of Indian Evidence Act and would ultimately result in bastardizing a child. So legitimacy is not in issue to be

62. *Smt. Ahalya Bariha (a) Barihani v. Chhellia Pedhan*, 1992 Cr.L.J. 493 (Ori).

63. *Smt. Duktar Jahan v. Mohammed Farook*, AIR 1987 SC 1049.

64. 1993 Cr.L.J. 3233.

probed into in a proceeding under Section 125 Cr.P.C. and if the child is otherwise eligible it must be provided with maintenance.

4.3.2.2 Illegitimate Children

Children born out of wedlock are branded as illegitimates. All societies condemn such birth and it is these children who suffer the most both socially and economically, though they had no control over the circumstance of their birth. Illegitimate children are provided with maintenance from the early inception of this provision in the Procedural Code. The inclusion of illegitimate children within the ambit of this benevolent provision is highly reformatory. The avowed object behind this is to prevent destitution. But for the conduct of the parent, the child would not have been born. Punishing the child by denial of maintenance for the amoral act of its creators is unjust. Moreover, in the case of legitimate children, parental or familial affinity may be there for the child in conditions of suffering. But in the case of illegitimate children, who in most of the circumstances face social ridicule and lack parental affection, from either or both, the suffering would be extreme. This would also provide maximum opportunity to be driven as destitutes and in turn take up a criminal career. Hence the extension of the right in favour of illegitimate children also.

Neither the status nor the character of the mother is relevant for claim of maintenance on behalf of illegitimate child. Where a man or woman were held to be not legally married, but the child born out of their company, the child was declared illegitimate and provided with maintenance.⁶⁵ The

65. *Supra* n.31.

character of a woman, howsoever bad does not disentitle the illegitimate child if she proves that the man against whom she proceeds was the father of the child.⁶⁶ Where the marriage was declared void, the claimant was awarded maintenance for her daughter.⁶⁷ When paternity was proved by corroborative evidence, maintenance was awarded to a girl born to a unmarried woman as against the alleged father.⁶⁸

Both legitimate and illegitimate children are entitled to claim for maintenance under the Section 125 of the Criminal Procedure Code. When the paternity is established, the court is duty bound to pass an order of maintenance as against the respondent. Whereas, courts without any valid reason remit back the cases for fresh trial to ascertain facts as to the relationship between the mother and the respondent. Though followed by summary procedure cases under Section 125 prolong for years at the lower courts and when taken for revision leads to further delay in tendering the limited summary relief. Remittance of the cases for ascertainment of insignificant facts are on the increase and this prevents access to timely relief. This has to be checked, for this will cause much hardship to the claimant and result in unreasonable delay in the remittance of the limited summary remedy. Not in all cases interim maintenance is awarded. In the absence of such orders any delay by re-trial will defeat the very objective of Section 125. Remittance should be resorted to only when it is legally deserved. In a case before the Orissa High Court⁶⁹, when the wife failed to

66. *Dr. Chattukutty v. Janaki Amma*, 1972 Cr.L.J. 696.

67. *Motiram v. Ist Addl. District Judge*, 1992 Cr.L.J.1007 (All).

68. *Chaya v. K.G. Channappa Gowda*, 1993 Cr.L.J. 767 (Kant).

69. *Latdei v. Bishnu Charan Panda*, 1996 Cr.L.J. 156 (Ori).

establish the marriage which fact will go to prove the illegitimate status of the child instead of ordering remedy for children, the court remitted back the petition for ascertainment of the fact of illegitimacy of the child.

4.3.3 Parents' Right of Maintenance

The right of parents to claim maintenance was not recognized under the Code of Criminal Procedure until 1973. The corresponding provision in Section 488 of Criminal Procedure Code, 1898 did not make any provision to safeguard the right of either the father or the mother. This drew the attention of the Joint committee of the Parliament while redrafting the new code. The Committee considered the condition and felt that the right of the parents not possessed of sufficient means, to be maintained by their son should be recognized by making a provision. The Committee also suggested that where the father or mother is unable to maintain himself or herself the order for payment of maintenance may be directed to a son who is possessed of sufficient means. If there are two or more children, the parents may seek the remedy against any one or more of them. When the new code was drafted the right of such infirm parents was recognised. Interestingly the code uses the phrase 'father' or 'mother', but not parent. Perhaps the intention behind this might be to fix the obligation only on legitimate children and not on those issues born out of wedlock. The term mother in a restrictive sense means only a natural mother. Doubt may arise whether the phrase 'mother' used under Section 125 of the Code includes adoptive and step mothers. The personal law of Hindus includes step mother in its usage of the term mother.⁷⁰ Section 3(20) of the General

70. Section 20 of the Hindu Adoption and Maintenance Act, 1956.

Clauses Act refers 'father' to include adoptive fathers. Courts have recognized the right of adoptive mothers to claim maintenance under Section 125.⁷¹ But the position of step mother is still unsettled. Section 125 is a beneficial provision intended to curb social evil. Towards fulfilling this objective the term mother must be given a liberal interpretation to include step mothers also. Judicial opinion on this is not convergent. The High Courts of Orissa⁷² and Allahabad⁷³ have construed the word liberally and provided relief under Section 125 to step mother also. Whereas the Madhya Pradesh⁷⁴ and Andhra Pradesh⁷⁵ High Courts held that the term mother includes only natural and adoptive mothers but not a step mother. And hence rejected the petition claiming maintenance.

As referred earlier the non usage of the phrase 'parent' under Section 125 (1) (d) raises a doubt as to whether father or mother of an illegitimate child has any right to claim maintenance as against their children. No opinion has come so far from the judiciary. The global changes in the sanctity of marriage and motherhood definitely enjoin a need for protection of atleast the mother. She must be provided a right under Section 125 to be enforceable as against her child born out of wedlock.

71. *Oona Gowry Sankar Rao v. Oona Rajeswari* 1996 Cr.L.J. 1158 (AP).
Ram Chandra Balu v. Rakhma Bai, 1992 Cr.L.J. 1919 (Bom).

72. *Pitei Bewe v. Larimidhar Jena*, 1985 Cr.L.J. 1124 (Ori).

73. *Ganga Sharan Varshney v. Smt. Shakuntala Devi*, 1990 Cr.L.J. 128 (All).

74. *Rewalal v. Kamalabai*, 1986 Cr.L.J. 282 (MP).

75. *A.S.V. Prasada Rao v. A.V.Veni*, 1989 Cr.L.J. 673 (AP).

The code enables the Magistrate to make an order against a son for the payment of monthly allowance of maintenance to his father or mother who is unable to maintain himself or herself. The facts that need to be asserted before the court are:

- (i) The father or mother is unable to maintain himself or herself, and
- (ii) The person against whom the claim is sought has sufficient means to maintain his father or mother and yet has neglected or refused to maintain them.

The provision is one of general application and is not related to the personal law of the parties. Implicit in the provision is the statutory recognition of the obligation that a son who has sufficient means is bound to maintain his father or mother who is unable to maintain himself or herself. Moral indignation has no role to play towards enforcement of the right under this provision. Though the duty to maintain as between father and son is reciprocal, a son cannot refuse payment of maintenance to his father on the ground that his father has not fulfilled his parental obligation towards him at his younger age. An issue of interest of this sort was raised before the Patna High Court in *Pandurang Baburao Dabhade v. Baburao Bhauroo Dabhade and another*.⁷⁶

A father who had no source of income claimed maintenance from his son. The son admittedly was fairly well placed in the employment in Central Government. He contested the claim on the ground that after the death of his mother he and his younger brother were left uncared for by the father

76. 1980 Cr.L.J. 256.

who had married for the second time and that he was brought up and educated initially by his maternal grandfather and then by his aunt. The father having failed to fulfill his parental obligation of bringing up his children, the father did not have any right to claim maintenance and throw the responsibility of maintaining him at his children. The Trial Court and the Revisional Court negated the claim, where after the appellant approached the High Court. The Court did admit the fact of neglect by the father when applicant was much younger and was imminently in need of care. The Court further observed "Section 125(1) does not contemplate that the obligation to maintain an aged, infirm parent who is unable to maintain himself or herself can be enforced only if it is preceded by the fulfillment of the parental obligation to maintain and bring up the children during the childhood of the children"⁷⁷. Thus, the duty to maintain as between father and son though reciprocal the son cannot refuse payment of maintenance to his father on the ground that his father had not fulfilled his parental obligation towards him at his younger age.

4.3.3.1 Daughter's Obligation to Maintain Her Parents

A daughter's liability towards her parent is another issue that remained unsettled for sometime until the intervention of the Supreme Court to clarify the position. The use of the word 'his' in relation to Section 125(d) tends to give an impression that only sons have an obligation to maintain their father or mother and such an obligation is not there with the daughter. A normal interpretation will certainly exclude daughters from paying maintenance towards their father or mother. But such a rigid and

77. *Id.*, at p.258.

narrow interpretation cannot be adopted while enforcing a social welfare legislation like Section 125 of the Cr.P.C. For precision the legislation has omitted the word 'her' which if used might not have given rise to this conflict. Moreover, Section 2(1) of the Cr.P.C. read with Section 8 of the I.P.C. will certainly include daughter within the phrase 'his' under Section 125.

It is unfortunate that some of the courts in India have given the word 'his' its natural interpretation and denied the claim of maintenance by parents.⁷⁸ For the first time, the Kerala High Court recognized such a right and imposed the duty on daughters to maintain her parents.⁷⁹ The Court observed that it was as much the duty of a daughter to maintain her parents as it is the duty of a son. Then came the decision of the Supreme Court in ***Dr. Mrs. Vijaya Manohar Arbat v. Kasirao Rajaram Sawai and another***⁸⁰ which held that the word 'his' includes both male and female children. This appears to be a reasonable interpretation of the provision. The Court observed that maintenance of parents being a moral duty there was no reason why a daughter should be excluded. In spite of means, if a daughter is to make her parents starve denying the remedy under Section 125 it would amount to injustice. The Supreme Court did point the need of reading the word 'his' in Section 125 Cr.P.C. in conjunction with Section 2(y) of the same code with Section 13(1) of the General Clauses Act and Section 8 of the Indian Penal Code. The position of daughters who are married,

78. *Raj Kumari v. Yesodha Devi*, 1978 Cr.L.J. 600 (P&H).

79. *Areefa Beevi v. Dr.K.M. Sahib*, 1983 Cr.L.J. 412 (Ker).

80. 1987 Cr.L.J. p.977.

warrants a differential and cautious treatment. Even after marriage and having gone to live in another family, if she has her own means there is no bar in imposing the liability on daughters.⁸¹ Courts in India have recognized such a duty on the part of married daughters.

In ***Dr. Mrs. Vijaya Manohar Arbat v. Kashirao Rajaram Sawai and another***⁸², the appellant Dr. Mrs. Vijaya Arbat, a Medical Practitioner was the married daughter of the respondent Kashirao Rajaram Sawai through his first wife. Her mother died whereafter the respondent remarried and was living with his second wife. The respondent filed an application for claim of maintenance before the Magistrate from his daughter. The appellant raised a preliminary objection to the maintainability of the application on the ground that Section 125 (1) (d) of the Code does not entitle a father to claim maintenance from his daughter. The objection was overruled and the Magistrate held that the application was maintainable. Aggrieved by the order of the Magistrate, the appellant moved the High Court of Bombay in revision. The High Court having dismissed the revision the matter came before the Supreme Court. The Supreme Court emphasised by its ruling that the word 'his' does not exclude the parents from claiming maintenance from their daughter.⁸³

The social economic conditions of the society have changed a vast. Girls now have the right to own property on their own and the right to inherit property. A large number of them now take up jobs and are financially

81. *Ibid.*

82. *Ibid.*

83. *Id.*, at p.1102.

sound. They come to occupy responsible position at varying levels. Politically too they have now a say in the governance of the country. In short the condition and status of women is not the same as it prevailed decades ago. Equality exists now in reality. Moral obligations rest not on the basis of sex. Legal recognition of this moral right under the provision of Section 125 will not go away from its avowed objective. Moreover in the society which progressively controls birth at family level and where people too show inclination towards limiting the number of issues it seems more essential. For parents with mere daughters this will remain as an indispensable right too.

CHAPTER FIVE

RIGHT TO MAINTENANCE: PROCEDURAL HURDLES AND SOCIAL REALITY

The Code of Criminal Procedure that provides maintenance as a substantive right presents also conditions subject to which the right is extended to a claimant. Besides, the code specifies also the jurisdiction and the procedure to be followed in the enforcement of the right. The summary relief extended under Section 125 being mainly towards fulfillment of the basic objective i.e. preventing destitution and the culmination of vagrant behaviour on failure of such prevention, the procedures that are prescribed under the code are much simple.

5.1 BASIS OF THE CLAIM

An application under Section 125 of the Criminal Procedure Code, be it be by a wife, child or parent, will be entertained only on proof of following elements. The applicant needs to prove that the respondent has sufficient means and that he/she has neglected or refused to maintain him/her. In addition, he or she has to prove her inability to maintain himself or herself. On the side of the respondent the requisites are,

- (1) he should be having sufficient means and
- (2) there should have been neglect or refusal on his part to maintain the petitioner.

5.1.1 Inability to Maintain

Applicant's inability to maintain herself/himself is the *sine qua non* for a claim of maintenance under Section 125.¹ The claimant may be wife, child or parent, proof of their inability to maintain themselves is a condition precedent to grant maintenance and the burden of proving the same is on them. The phrase unable to maintain does not mean that he or she should be an absolute destitute,² standing with tattered rags on the street.³ If she for a while is taken care by some of her relatives that will suffice to prove that she is not in a position to maintain herself. A deserted wife, at the age of 50, working as a labourer for her survival, is entitled to get maintenance.⁴ The capacity to earn does not mean that he or she is able to maintain himself or herself.⁵ The potential ability to earn will not be considered. The 'able body' concept cannot be extended to the case of wife for this will defeat the very object of the legislation.⁶ The holding of an employment sometime back does not mean she has the capacity and is able to maintain herself.⁷

Instances are not wanting where the capacity of wife is also taken into consideration. Potential capacity of a woman is least considered for

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1. *Bindelal v. Smt. Kushma Devi*, 1988 Cr.L.J. NOC 19 (All).
 2. *Abdul Salim v. Najima Begum*, 1980 Cr.L.J. 232 (All).
 3. *Raman Kutty v. Kalyani*, 1971 Cr.L.J. 318.
 4. *Rewati Bai v. Jageshwar*, 1991 Cr.L.J. 40 (MP).
 5. *Vimal v. Sukmar Amma*, 1981 Cr.L.J. 210 (Bom).
 6. *Supra*, n.4.
 7. *Madhusudan Mishra v. State of Uttar Pradesh*, 1988 Cr.L.J. 1247 (All).

extending her the benefit. The High Courts of Karnataka⁸ and Kerala⁹ have taken the potential capacity of wife into consideration while determining her inability. The relevance of considering the income of wife, if any, has been discussed by the Supreme Court in *Bhagawan Dutt v Kamla Devi*.¹⁰ to settle the contrary views taken by some lower courts.¹¹ On dismissal of first application made 17 years earlier and change of circumstance in the meantime can force a woman to file a petition on the ground of her inability to maintain herself and the petition is not barred by *res-judicata*.¹²

In the case of children and parents, their age and conditions of life will prove their inability to maintain themselves. Where maintenance is claimed for the child, which is only about two years old, it is obvious that it is unable to maintain itself and no specific proof is essential to prove that the child is unable to maintain itself.¹³ Physical or mental defect on the part of major children disabling them to maintain themselves are entitled for maintenance. Any child above the age of 18 years not being disabled by either mental or physical deformity is presumed to be having sufficient means. Old age needs no further proof to establish one's inability. But in the case of wife this at times causes much hardship.

8. *Abdul Manaf v. Salima*, 1979 Cr.L.J. 172 (Kant).

9. *Saraswati v. Madhavan*, AIR 1961 Ker. 297.

10. AIR 1975 SC 83.

11. *Zoginder Singh v. Bibi Raj Mahindro*, AIR 1960, Punj. 249 and *Nanak Chand v. Chander Kishore*, AIR 1969 Del. 235 on the one hand and *Ponnasambalam v. Sarashathi*, AIR 1957 Mad. 693 on the other hand taken different view of the income or means of the claimant.

12. *Jana Bai v. Krishna Ravba Rithe*, 1993 Cr.L.J. 1183 (Bom).

13. *Norber v. Terasa*, 1971 Cr.L.J. 1496.

5.1.2 Sufficient Means

The person against whom the claim is made must have 'sufficient means' based on which alone maintenance can be allowed. The courts should be satisfied on this point and then pass the order.¹⁴ The words 'having sufficient means' do not signify only visible means of such things as real property,¹⁵ income, revenue, estate or employment. Besides pecuniary resources, it has its reference to the earning capacity of the individual as well.¹⁶ If one is healthy and able bodied it must be construed that he has the means to support his wife, child or parent.¹⁷ Even in case of insolvency of the husband, the capacity to earn being there on him it is material to construe that he has means.¹⁸ One's debt¹⁹ or young age and inability to get a job²⁰ or worldly renunciation²¹ does not provide ground to claim that he has not sufficient means. But physical infirmity and ailments on account of which one cannot earn is material.²² Income of other relations of the husband does not construe that he has means.²³

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14. *Hassan v. Raja Bibi*, 1973 Cr.L.J. 1019.
 15. *Dasarathi Ghosh v. Anuradha Ghosh*, 1988 Cr.L.J. 64 (Cal)
 16. *Kandasamy Moopan v. Angammal*, AIR 1960 Mad 348; *Chander Prakash v. Shila Rani*, AIR 1968 Del 174.
 17. *Gunni bai v. Babulal*, 1953 Cr.L.J. 1164; *Shri.Laisram v. Smt.Sakhi Devi*, 1965(2) Cr.L.J. 785.
 18. *Tarak Shaw v. Minto Shaw*, 1984 Cr.L.J. 206 (Cal).
 19. *Valliammai v. Dharmalinga*, AIR 1941 Mad 762.
 20. *Prabulal v. Paramatibai*, 1953 Cr.L.J. 868.
 21. AIR 1923 Rang 131.
 22. *Mohd Ali v. Sakine Begam*, AIR 1944 Lah 392.
 23. *Tara Chand v. State*, 1973 Cr.L.J. 1097.

The burden of proof that the respondent has sufficient means is on the applicant. But the burden is not heavy and can be based on preponderance of probabilities. On establishment of this, the burden shifts to the respondent to show that he has no sufficient means to provide maintenance.²⁴ In the absence of any such pleading, the Court will presume that the husband or father has means.²⁵ But omission to plead that the husband has sufficient means does not take away the right of maintenance.²⁶

Neglect or Refusal to Maintain

No order for maintenance can be passed unless neglect or refusal is there by a person against whom the petition is filed. Proof of neglect or refusal is the basis of the claim for maintenance and without such proof no order of maintenance can be made even though she is living separate in exercise of her statutory right.²⁷ The term neglect is used to signify failure on the part of a person bound to maintain his wife. In wider sense, it includes disregard of duty to maintain whether intentional or otherwise.²⁸ Neglect or refusal need not be express but may be inferred from the conduct of the parties.²⁹ It is a question of fact and no hard and fast rule can be laid

24. *Bai Tahira v. Ali Hussain*, AIR 1979 SC 362.

25. *Shri. Krishna Bahadur Pradhan v. Smt. Tikamaya Newar*, 1987 Cr.L.J. 1278 (Gau).

26. *Rameshwar v. Ramibai*, 1987 Cr.L.J. 1952 (MP).

27. *Mst. Dhan Kaur v. Niranjan Singh*, AIR 1960 Punj. 295.

28. *Ishar v. Soma Devi*, AIR 1959 Punj. 298.

29. *Bhikaiji v. Maneckji*, AIR 1925 Bom 259; *Mithlesh Kumari v. Bindhawasni*, 1990 Cr.L.J. 830 (All).

towards determining the same. Failure to maintain properly can amount to neglect, when maintenance provided is very meager and inadequate this amounts to neglect and Magistrate can entertain jurisdiction.³⁰ Mere failure or omission can amount to neglect in case of children on whom father has a duty.³¹ Subsequent marriage by husband is a clear proof of neglect.³²

In **Begam Subanu (alias) Sairabanu**,³³ the Supreme Court ruled that the right provided under the personal law of the Muslims does not disentitle the first wife to claim maintenance as against her husband when he marries subsequently. The case which came to the Supreme Court soon after its landmark decision in **Shahbano**³⁴ evinced much public interest over grant of maintenance to Muslim women. The question that came for consideration before the Supreme Court in the above case was whether a Muslim wife, whose husband had taken a mistress was entitled to claim maintenance from her husband. The point of interest was that since the husband is permitted by Muslim law to take more than one wife, can his second marriage afford a legal ground to the wife to live separate and claim maintenance. The Supreme Court while interpreting the explanatory clause to sub-Section (3) of Section 125 observed that they are matrimonial injuries that entitled a neglected wife to live separate and claim maintenance. The explanation has to be construed from the point of view of the injury to the matrimonial right of the wife and

30. *Daniatram Vyas v. Smt. Saraswathi Bai*, 1978 Cr.L.J. 806.

31. *Chand Begam v. Hyderbaig*, 1972 Cr.L.J. 1270.

32. Section 125 (3) of Cr.PC. 1973.

33. *Begum Subanu (alias) Sairabanu v. AM Abdul Gafoor*, 1987 Cr.L.J. 980 (SC).

34. *Md. Ahmed Khan v. Shabanu Begum*, AIR 1985 SC 945.

not with reference to the husband's right to marry again. The explanation has to be seen in its full perspective but not disjunctively. The Court decreed maintenance holding that the right of polygamy does not curtail the application of Section 125(1) to Muslim first wife.³⁵ Thus, even if personal law permits such a marriage both the wives are entitled, for it is neglect by husband as against other.³⁶ Similarly keeping a mistress will amount to neglect.³⁷

Impotency of husband and his inability to discharge his marital obligation amounts to legal and mental cruelty and this is a just ground for his wife to live separate and claim maintenance.³⁸ Imputing unchastity to wife, treating her with cruelty or ill-treatment that endanger the safety of a wife are conducts of neglect. But mere fear on the part of wife to live with her husband, does not entitle a wife to live separate and allege neglect on the part of husband.³⁹ Letter by husband asking his wife to comeback, otherwise the letter would be treated as divorce is a clear threat. His wife is justified to live separate and is entitled to maintenance.⁴⁰ Even when a husband has paid a lump sum as final settlement he cannot escape liability.⁴¹ In short, once it is shown that the wife is neglected and if the husband is unable to

35. *Supra* n.33.

36. *Ibid.*

37. Section 125(3) of Cr.PC 1973.

38. *Siraj Mohmed Khan Jan Mohmad Khan v. Hofizunnisa Yasikhan*, AIR 1981 SC 1972.

39. *Arputharaj v. Anjalai Ammal*, 1966 Cr.L.J. 482.

40. *Mst. Khatoon v. Mohd. Yamin*, AIR 1982 SC 853.

41. *Supra* Note 24.

prove that he has no sufficient means the Court can pass an order of maintenance.

5.2 JURISDICTION

Early from the inception of the Code in 1898, the jurisdiction to deal with matters connected with claim of maintenance or its execution of the orders made if any, vested with the Judicial First Class Magistrate. After 1984, with the passing of the Family Courts Act, the jurisdiction now rests with the Family Courts constituted to deal with family matters. The Family Courts Act specifically excludes the exercise of jurisdiction by the Magistrate Court.

5.2.1 Jurisdiction of the Magistrate Court

A Magistrate of First Class alone is given jurisdiction to entertain application for maintenance under Section 125 Cr.P.C.⁴² A Court which normally exercises criminal jurisdiction is seized of this matrimonial and purely civil jurisdiction to cater to the needs of a vast majority of deprived population. This is justified on the ground that it aims at the prevention of crime or at least the tendency to take up a criminal career. The procedure that is followed by this criminal court is somewhat peculiar which does not reflect either of the civil or of the criminal jurisdiction. The discretion provided under Section 125 is very vast. Again, the jurisdiction conferred on the Magistrate is not only adjudication of the claim for maintenance but includes also the power of enforcing the same through much coercive measures. Though the litigation is between the parties, the role played by the Court is dominant

42. Section 125(1) of Cr.P.C. 1973.

and indirectly reflects the state intervention in seeing effectively the enforcement of a moral duty which every husband has against his wife, every father has against his children and every son/daughter has against his/her parents. The imprint of English practice is well lit in the magistral system, to act as a 'casualty clearing stations'. With the passing of the Family Courts Act, the jurisdiction now stands shifted to the Family Courts constituted to deal with family and matrimonial matters.

5.2.2 Jurisdiction of the Family Courts

The persistent demand for English model Family Court resulted in the formulation of the Family Courts Act 1984, to bring under one umbrella all family issues, such as marriage, divorce, maintenance and custody of children. The central theme of the enactment is the preservation of the institution of marriage giving emphasis to 'conciliation' in disputes between married partners.⁴³

Family Courts Act, 1984

All family matters at present are entrusted to the District Judge (or delegated to a Sub-ordinate Court) who is well versed in ordinary civil and criminal trials. He tries family matters in usual manner with the normal adversarial procedure. In other words, the judge who tries claims for breach of contract or tort, claims for motor vehicle accidents, and crimes, like rape and murder, also tries all matrimonial matters including custody of children and spousal maintenance. It is now realized that adjudication of family matters is entirely a different matter. It has a different culture; it has a different

43. Preamble. Family Courts Act, 1984. For the text, see Annexure 12, *infra*.

jurisprudence. The resolution of family conflict requires special procedures. The procedures must be designed to help people in trouble, to reconcile and resolve their differences, and where necessary, to provide assistance. The Court adjudicating family disputes should function in a manner that it may tend to conserve and not disrupt the family life; it should be helpful and not harmful to individual partners and their children; and it should be preservative rather than punitive to family and marriage. It is, therefore, accepted that adversary system promotes ritualistic and unrealistic response to family problems.

The present system offers no legal protection to children. They are not represented by counsel and the Court does not have enough information to determine their best interest. More often than not, children are caught in the interspousal conflicts and become pawns, weapons and ultimately victims. The fact of the matter is that adversarial process precludes reconciliation and conciliation of inter-spousal and inter-parental conflicts. Thus, no Court which is engaged in finding out what is for the welfare of the family, whether a marriage has broken down or not, which spouse should have the custody of and access to children or which spouse needs support, should rest content with the assertions and contentions of the parties and evidence led by them to prove or disprove their assertions and contentions. The Court engaged in this task requires a less formal and more active investigational and inquisitorial procedure. In other words, it is not a litigation in which parties and their counsel are engaged in winning or defeating a legal action, but an inquisition in which parties, social workers, lawyers, welfare officers, and psychiatrists are engaged in finding out a solution to familial problems.

India has taken the necessary steps to form a new device for dealing for family matters. The Family Courts Act, 1984 has been passed to give special jurisdiction to all family matters.

5.2.2.1 Constitution of Family Courts

The Family Courts Act 1984, at the first instance, stipulates for the establishment of Family Courts for those towns and cities whose population exceeds one million. It also lays down that the State Government may also set up Family Courts for other areas.⁴⁴ Appointment of judges of Family Courts is to be made by the State Governments with the concurrence of their High Courts.⁴⁵ A Family Court may consist of one or more judges.⁴⁶ Where there are more than one judge, the State Government with the concurrence of the High Court will designate one of the judges as the principal judge and any other judge as additional principal judge.⁴⁷

Section 4(3) of the Act lays down the qualification of judges of the Family Court. A person who has at least seven years experience as a judicial officer or as a member of a tribunal or who has held a post for that duration under the central or a state government requiring special knowledge of law, or who has been an advocate of a High Court (or two or more High Courts in succession) for at least seven years may be appointed as judge of the family court. Other qualifications may also be laid down by the Central Government

44. Family Courts Act, 1984, Section 3.

45. *Id.*, Section 4(1).

46. *Ibid.*

47. *Id.*, Section 4(2)(b).

in consultation with the Chief Justice of India.⁴⁸ Women will be given preference for the appointment as judges of the Family Court.⁴⁹ Section 4(4)(a) also lays down that “every endeavour shall be made to ensure that persons committed to the need to protect and preserve the institution of marriage and to promote the welfare of children and qualified by reason of their experience and expertise to promote the settlement of disputes by conciliation and counselling are selected”.

There is some controversy as to what matters should come within the jurisdiction of the Family Court. The Act has brought all matters directly pertaining to the family, such as matrimonial causes, maintenance and alimony of spouses, custody, education and financial support to children, settlement of spousal property, and guardianship and custody of children under the jurisdiction of family court.⁵⁰ The Family Court has also been conferred jurisdiction for passing orders for maintenance of wives, children and parents.

5.2.2.2 Informal Procedure

The Family Courts Act opts to adopt a less formal procedure. Although Section 10 of the Act makes the procedure laid down under the Code of Civil Procedure, 1908 applicable to Family Court proceedings, it is also laid down that the Family Court is free to evolve its own rules of procedure and once the Family Court lays down its own rules of procedure they will override

48. *Id.*, Section 4(3)(c).

49. *Id.*, Section 4(4)(b).

50. *Id.*, Section 7(1) Explanation.

the rules of procedure laid down in the Code of Civil or Criminal Procedure. The Act itself contains some provision which indicates the informality of the procedure. The Family Court may receive as evidence any report, statement, document, information or other matter that may assist it effectually in resolving a dispute, irrespective of the fact that the same would be otherwise relevant or admissible under the Indian Evidence Act 1872.⁵¹

It is also not obligatory on the part of the Family Court to record the evidence of witnesses at length. It would be enough if the judge records or causes it to be recorded a memorandum of the substance of what witnesses have deposed. Such a memorandum is required to be signed by the judge and the witness, and once that is done it will form part of the record of the case.⁵² Where the evidence of a person is of formal character it may be given by affidavit and it will constitute part of the evidence in the case.⁵³ The same informality is maintained about the judgment of the Family Court. A judgment of the Family Court should contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision.⁵⁴ A decree or order of the Family Court may be executed by the same court or any other Family Court or by an ordinary Civil Court in accordance with the convenience of the party concerned.⁵⁵

51. *Id.*, Section 14.

52. *Id.*, Section 15.

53. *Id.*, Section 16.

54. *Id.*, Section 17.

55. *Id.*, Section 18(3).

No appeal lies against the interlocutory orders. Similarly, no appeal lies against the decrees or orders passed with the consent of the parties. As to other matters an appeal lies to the High Court both on facts and law.⁵⁶ All appeals are to be heard by a bench consisting of two judges. No second appeal is provided. But an appeal with the special leave can lie before the Supreme Court under Article 136.

5.2.2.3 *In camera proceedings*

The concept of Family Court insist for confidentiality of the court record which necessitates the proceedings to be conducted in camera. Section 11 of the Family Courts Act makes it obligatory on the part of the Court to hold the proceedings in camera if any party so desires. These may also be held in camera if the Court so deems fit.

5.2.2.4 *Exclusion of lawyers*

The Family Courts Act dispenses with the service of the lawyer. Section 13 makes it abundantly clear when it lays down: "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". However, the Family Court may seek the assistance of legal expert as *amicus curiae* whenever it considers that to do so is necessary in the interest of justice.⁵⁷

56. *Id.*, Section 19.

57. *Id.*, Section 13.

A perusal of Section 13 of the Act indicates that a party to a proceeding before the Family Court shall not be entitled as of right to be represented by a legal practitioner. The Act does not prescribe a total bar to representation by a legal practitioner which bar would itself be unconstitutional.⁵⁸ The intentment of the Legislature obviously was that the problems or grounds for matrimonial break-down or dispute being essentially of a personal nature, that it may be advisable to adjudicate these issues as far as possible by hearing the parties themselves and seeking assistance from counsellors.

5.2.2.5 Support service

Support or auxilliary service is an essential for family court and is part of the concept of Family Court. No Family Court system can succeed without a well organized support service. It is a logical concomitant of the Family Court system. The prime objective of the support service is to help parties at reconciliation, conciliation and to lesson adversial atmosphere.

The Family Courts Act does visualise some support services. Most of these services are to be brought into being under the rules. The Act stipulates for the association with the court proceedings of institutions or organizations engaged in the social welfare, of persons professionally engaged in promoting the welfare of the family, of persons working in the field of social welfare or any other expert in family law matters.⁵⁹ It also stipulates for the appointment of counsellors, officers and other employees necessary for the functioning of

58. *Leela Mahadev v. Mahadeo Sitaram*, AIR 1991 Bom 105.

59. Family Courts Act, 1984, Section 5.

the Family Courts system.⁶⁰ The Family Court may also secure the services of a medical expert or such other persons who are specialised in promoting the welfare of the family to assist it in the discharge of its functions.⁶¹

5.2.2.6 The Family Court - Whether a Step Forward or Backward

The objective of establishing Family Courts in India as is described by the Act is 'preservation of the institution of marriage' and settlement of family disputes, with emphasis on 'conciliation' and on achieving 'socially desirable goals'. Towards that end, the Act has simplified rules of procedure and evidence. This apparently is to relieve the courts of the shackles of procedural technicalities so that they could deal quickly with the matters and in a more humane manner. Lawyers who are perceived as obstacles in the path to amicable settlements are prevented from appearing in the Family Courts without the express permission of the courts. This is presumably to help women and men coming to the Family Courts to have more direct control over their lives rather than be left in the hands of mercenary professionals.⁶² Other important features of the Act enable the courts to seek assistance of medical and welfare experts and social welfare organisations, and hold proceedings 'in camera' if they or either of the parties to a case so desire. This appears to be an attractive package but in the long run may cause hardship to women.

The crucial departure of the Family Courts from the regular courts is the emphasis on "conciliation" and "settlement" rather than on the normal

60. *Id.*, Section 6.

61. *Id.*, Section 12.

62. Nagasaila. D, *The Hindu* dated 24th March 1991.

adversary proceedings. This could have two detrimental effects – at the individual level, women will have to pursue their own cases and at a broader level is the seeming “privatisation” of the family law.⁶³

The central theme of ‘preservation of the institution of marriage’ on the one hand and the emphasis on ‘conciliation’ on the other, look like total a contradiction when seen in the light of the provisions of the substantive law. The Family Courts Act is merely a procedural law and does not in any way affect the substantive law as it exists under Section 125 of the Criminal Procedure Code. The special enactment only attempts to regulate and modify the procedures placing the jurisdiction before the Family Courts. When changes are effected to modify the procedure suitable amendments need to be made also in the substantive law to make the working of the system easier. The attempts of the Family Courts to seek conciliation in all family matters of marriage and of divorce have taken a new concept in the modern society looking like a contradictory measure. Even in such other matters, true settlement cannot be achieved when two unequally placed people sit across the bargaining table before the Family Court. The notion of the assumption of equality between women and men will do more harm when the weaker section is deprived of legal assistance.⁶⁴

Lawyers certainly can play a constructive roll in the adjudication of disputes and more appropriately in family matters.⁶⁵ One important

63. *Ibid.*

64. *Ibid.*

65. Dr. G. Sadasivan Nair in his paper “Family Courts Act - A Critique of its Socio-legal Objectives” presented on the seminar on “The Family Court: Problems and Perspectives” held by the Cochin University of Science and Technology on 13th and 14th of January 1996.

professional skill of lawyering is to seek for conciliation, compromise and just settlement before entering into actual litigation. This is a pious obligation on the part of the lawyer as per his professional ethics. A professionally competent lawyer can successfully negotiate, conciliate and amicably settle family disputes.⁶⁶ The Family Court setup has presumed that lawyers will protract litigation and thus will pose a hurdle in settlement of family matters and hence, excluded from the Family Court. The Act now permits only lawyers to play the role of *amicus curie*.⁶⁷

Stand still 15 years after the passing of the Family Courts Act, in several States the Family Courts are yet to be constituted and even in States where steps have been taken to constitute such courts it is only partial. In several States, we could see the working of two parallel systems administering the same substantive laws. The working system as is evaluated by various academic bodies⁶⁸ and as well as by this research concludes that there is lack of efficiency to deal with all family matters with such effectiveness as is postulated under the Family Courts Act, 1984. The seminar⁶⁹ conducted in January 1996 at the School of Legal Studies, Cochin University of Science and Technology, has suggested bifurcation of the Family Court into Conciliation Centre and Family Court so as to play a constructive role for conciliation and for settlement respectively.⁷⁰

66. *Ibid.*

67. The Family Courts Act, 1984, Section 13.

68. Dr. Baig, M.A.A., "Family Courts : Is this an achievement" AIR 1992 J p.6; M.Stanley Fernandez, "Family Courts in Kerala" 1993 (1) KLT 42.

69. The Cochin University of Science and Technology conducted a seminar on "The Family Court : Problems and Perspectives" under the joint auspices of the State Legal Aid and Advice Board, Kerala and the Indian Society of Interdisciplinary Studies, Trivandrum on 13th and 14th of January 1996.

70. Report of the seminar.

5.3 THE PROCEDURE FOR CLAIM OF MAINTENANCE

The formal procedure for claim of maintenance by a wife or father or mother is to make a petition under Section 125 before the Family Court, if established for the area or before the Magistrate's Court, otherwise. In case of minors, the mother or any guardian can present a petition on their behalf. The applicant is heard. When the Court is satisfied that the applicant asking for maintenance has a *prima facie* case, the Court takes the petition on file and issues summons to require the appearance of the respondent. Before the Criminal Court both the parties are normally assisted by advocates, whereas before the Family Court their representation is specifically excluded. The parties are heard. When the respondent admits relationship and is prepared to pay maintenance, an order to that effect is passed. If the husband denies the relationship or denies payment on certain grounds justifiable or pleads inability for want of sufficient means, the matter is posted for trial. During trial, which is by summary procedure, parties and their witnesses are examined to adjudicate the dispute in their pleadings and mainly to establish the relationship, inability to maintain oneself and possession of sufficient means. The Court then passes an order either granting or dismissing claim for maintenance.

5.3.1 Award of Maintenance

The legislature has favoured monthly payment of maintenance an easier and convenient mode of payment under Section 125 Cr.P.C., without causing much hardship to the liable respondent and at the same time towards serving the basic objective on the part of the petitioner. The English experience might have also been a reason for this. Under Section 125 Cr.P.C. the Magistrate is required to award maintenance only at a

monthly rate. The amount has to be ascertained and must be fixed unless otherwise altered under Section 127 Cr.P.C. by change of circumstances. The order can only be for payment of money⁷¹ and not in any kind.⁷² The rate awarded should be determinate and fixed. The rate cannot be fixed on an abstract and hypothetical thing like capacity to earn.⁷³ It is also not permissible to make an order at a progressively increasing rate. In fixing the amount payable at monthly rate the Magistrate should exercise his discretion fairly. Lump sum payment of maintenance is not permissible by the provisions of this statute.⁷⁴

5.3.2 Interim Maintenance

Section 125 Cr.P.C. does not expressly empower the Judicial Magistrate to make interim order of maintenance. But considering the very object of the provision and the nature of the jurisdiction exercised by the Magistrate, the proviso must be construed to give an implied power to pass such orders. The respondent would have been maintaining the claimant in case of their living with him. But for his neglect there would not have been any claim for maintenance. When *prima facie* case exists in favour of the claimant no harm would be caused by an order for maintenance pending adjudication of the claim. Hence interim maintenance could be decreed. But the High Courts in India had divided opinion on this and the position is now

71. *Mukta v. Datta*, AIR 1924 Bom 332.

72. *Annapoorna devi v. Satrughra*, AIR 1960 Orissa 94.

73. *Mithlesh Kumari v. Bindhawasani*, 1990 Cr.L.J. 830 (All).

74. *Minati Binati Nayak v. Gourang Charan Nayak*, 1995 Cr.L.J. 3569 (Ori).

settled by the decision of the Supreme Court in **Smt. Savitri v. Govind Singh Rawat**.⁷⁵ The Supreme Court observed that there was no provision in the code authorizing the Magistrate to make an interim order of maintenance. But the code also did not expressly prohibit the making of such an order. The Court held that having regard to the nature of the jurisdiction exercised by a Magistrate under Section 125 of the Code, the said provision should be interpreted as conferring power to pass an order for interim maintenance.

The Court gave the relief with a humane approach. The hardships faced by the claimants pending disposal of these applications made under Section 125 of the Code, which also takes several months for being disposed of was taken into consideration. The Court further said 'whenever anything is required to be done by law and it is found impossible to do that thing unless something not authorised in express terms be also done then that something else will be supplied by necessary intendment'.⁷⁶ Such a construction was felt pertinent in the case to advance the object of the legislation under consideration. The Court also pointed to the procedures to be followed in such claims. The claimant should file an affidavit stating the grounds in support of her claim. Treating the affidavit as *prima facie* proof, the Magistrate can decide over passing an order for interim maintenance. In warranting circumstances the remedy can be extended even *ex parte*.

75. AIR 1986 SC 984.

76. *Id.*, at p.986.

The States of West Bengal⁷⁷ and Tamil Nadu have felt the need for an increase in the quantum payable as maintenance under Section 125 Cr.P.C and have brought in necessary changes. The State of West Bengal by an amendment in the form of the Criminal Procedure Code (West Bengal Amendment) Act, has increased the amount payable under Section 125 up to 'One thousand five hundred rupees' and further empowered the Magistrate to pass orders for interim maintenance and for the expenses of the proceedings. In the state of Tamil Nadu, the maximum ceiling of Rs.500/- has been revoked. This empowers the Magistrate with a wider power to order a sum taking into consideration varying facts and circumstances related to it. As regards the application of this provision in other States, the Magistrate is competent only to pass an order of a monthly allowance not exceeding five hundred rupees.

5.3.3 Amount of Maintenance

Section 125 of Cr.P.C. provides maintenance only as a summary remedy and hence the amount payable is much limited. The amount is so

77. The following amendments were made by the Cr.P.C. (West Bengal Amendment) Act, 1992 W.B. Act No.XXV of 1992 published in Calcutta Gazette, Extra., Part III, dated 22-4-1993.

S.125(1)—In sub-Section (1) of Section 125 of the principal Act,—

(1) for the words "five hundred rupees", the words "one thousand and five hundred rupees" shall be substituted;

(2) after the existing proviso, the following proviso shall be inserted:—

"Provided further that where in any proceeding under this Section it appears to the Magistrate that the wife referred to in clause (a) or the minor child referred to in clause (b) or the child (not being a married daughter) referred to in clause (c) or the father or the mother referred to in clause (d) is in need of immediate relief for her or its or his support and the necessary expenses of the proceeding, the Magistrate may, on the application of the wife or the minor child or the child (not being a married daughter) or the father or the mother, as the case may be, order the person against whom the allowance for maintenance is claimed, to pay to the petitioner, pending the conclusion of the proceeding, the expenses of the proceeding, and monthly during the proceeding such allowance as, having regard to the income of such person, it may seem to the Magistrate to be reasonable."

fixed by this provision that it fulfills modestly the needs and requirements of the wife. The objective of this remedy is not to enable the wife to live in luxury and make her feel that her living separate is profitable and thus impede any future possibility of reconciliation. The amount must be sufficient to keep her body and soul together. Again the relief being not permanent, since the parties are well permitted to agitate their rights before the competent civil forum, the limited monetary limit is purely a stop-gap arrangement. A tracing of the legislative history goes to show that the legislators are well aware of this.

The Code of 1898 provided for an order of maintenance for a monthly allowance not exceeding fifty rupees. The Bill of 1914 proposed an increase of the amount to Rs.100. However the proposal was rejected by the Committee of 1916. But by legislative changes in Britain, when the courts in India were empowered to issue summary orders in respect of British citizens up to an amount of £2 a week, vide the Maintenance Orders Enforcement Act of 1921, a change as regards Indian citizens was felt necessary to raise the monthly award of maintenance. A similar opinion was expressed also by the Select Committee. Hence, the Amending Act of 1923 enhanced the amount to Rs.100/-. Another change was effected by the Amending Act 1955, enhancing the amount to Rs.500/- with effect from 1.1.1956.⁷⁸ The newly enacted 1973 Code, though incorporated varying changes under Section 125 of Cr.P.C., retained the quantum, which still is applicable. But at no circumstance, the maximum amount should exceed Rs

78. Dinesh Chandra Roy, *Commentary on the Code of Criminal Procedure 1898* Vol.II, Eastern Book Company, Lucknow, 1970 p.1424.

500/-. The words 'not exceeding' should be given much emphasis. The remedy under Section 125 being summary, pending enforcement of any permanent right before the competent civil court, no severe objection has come against this paltry sum so far. But with the steady increase in the cost of living coupled with the heavy increase in the inflation rate, the monetary assistance of Rs.500/- awarded in favour of successful litigant appears to be very meager to enable one to lead a destitute-free life.

In fixing the maintenance, the status of the parties and the income of the opposite party need to be considered.⁷⁹ The discretion enjoined on the Magistrate should be exercised in such a manner that it does not permit the applicant to lead a luxury life and at the same time not to drive her to a starving life. It must be modestly consistent with the needs and requirements of the wife and the status her family is accustomed to.

The Magistrate has to exercise his discretion fairly in arriving at the quantum. In determining the amount of maintenance, the Magistrate has to consider several factors, related to effective enforcement of the provision. The capacity of the party alone does not weigh in this. On the part of respondent, his actual income, his own expenditure and that for his other dependents and his payment of maintenance to any other claimant is relevant. On the side of petitioner, her way of life and her own source of income are material facts to be evaluated prior to passing of an order under this provision.⁸⁰ He should strike a balance between the financial capacity

79. *Gurcharan Singh v. Sita*, 1973 Cr.L.J. 1628.

80. *Bhavan Duth v. Kamla Devi*, AIR 1975 SC 83.

of the opposite parties and the needs of the applicant having regard to their status.⁸¹ The circumstances of the case before him must also be taken into consideration.⁸²

The maximum amount which can be ordered as maintenance for each applicant is Rs.500/-. The words 'in the whole' in Section 488 of the earlier Code has been misinterpreted by some courts to mean that the maximum amount awardable inclusive of all the applicants regardless of their number. Thus when a wife makes a claim for herself and for her children the maintenance amount is restricted and limited to Rs 100/- the maximum then permitted by the Code. The Madras High Court in ***Kent v. Kent***⁸³ clarified the intention of the using of the words 'in the whole' not to mean 'in all' and be a ceiling for all claimants.⁸⁴ The Court ruled that every wife and every children whether it be legitimate or illegitimate could be awarded maintenance upto the maximum permissible under the provision.⁸⁵ Whereas the Bombay High Court did rule otherwise.⁸⁶ But now the judicial opinion is concurring with the meaning held in '***Kent v. Kent***' to mean that the words in the whole cannot be interpreted to mean that the total amount awarded for the wife, child, mother and father together cannot exceed Rs 500 and what it plainly means is that the Court cannot grant more than Rs 500 for each

81. *Bhanwari Bail v. Bharoon Lal*, 1973 Cr.L.J. 804

82. *Ramesh chander v. Veena Kausal*, AIR 1978 SC 1807.

83. 1940 Cr.L.J. 537.

84. *Prabha v. Sumatilal*, AIR 1954 Bom. 546(FB).

85. *Bulteel v. Bulteel*, AIR 1938 Mad 721.

86. *Palmerino v. Palmerino*, AIR 1927 Bom. 46.

one of the claimants,⁸⁷ The catena of decisions has interpreted that the words 'in the whole' means the maintenance award passed taking all the items on which claim is made but not for all the members of the family put together⁸⁸ It is for the sum total of individuals items for each claimant and the ceiling can very well exceed the maximum if there be a number of claimants.⁸⁹ This interpretation is obvious on the plain reading of the provision and is quiet reasonable in accordance with the social justice deserved to be achieved under this benevolent provision.⁹⁰

5.3.4 Date of Effect

Maintenance orders under Section 125 of Cr.P.C. is to take effect either from the date of order or from the date of application.⁹¹ Normally, the order is to take effect from the date of order but if the circumstances permit, the Magistrate can make the order to take effect even from the date of application. If the date is not mentioned in the order, the implied meaning is that it is to take effect from the date of order.⁹² Pendency of the application for long years is a reasonable circumstance to pass an order from the date of application. Where maintenance proceeding remained pending for more than 5 years without any fault on the part of the wife, the delay itself

87. *Syed Iqbal Hussain v. Syed Naramunnisa Begum*, 1992 Cr.L.J. 1823 (AP) *Hardev Singh v. State of U.P.* 1995 Cr.L.J. 1652 (All).

88. *Supra* n.82.

89. *Md. Basir v. Noor Jahan Begum*, 1971 Cr.L.J. 547.

90. *Supra* n.82.

91. Section 125 (2) of Cr.P.C. 1973.

92. *Con. mani v. Esther Pachikara*, 1981 Cr.L.J. NOC 76 (Ker.)

was a ground sufficient to order maintenance from the date of application.⁹³ But if the delay was due to laxity not only on part of the husband and the wife too was responsible for that, the order is to take effect only from the date of order.⁹⁴

The question as to the recording of reasons whether necessary or not is still an unsettled point between the courts in India. It has been held that a Magistrate is not required to give reasons for awarding of maintenance allowance to wife from the date of application.⁹⁵ But where it is not specifically so ordered, then maintenance has to take effect only from the date of order.⁹⁶ Hence recording of reasons is felt necessary. A reading of the provision also shows that under normal circumstances it may be from the date of order, a special mention is necessary to make the order take effect from the date of application which necessarily needs to substantiate the ground based on which the Court decided to extend the remedy to an earlier date i.e. from the date of application.

5.3.5 Execution of the Order of Maintenance

The maintenance order having been passed, it becomes the duty of the court itself to see that payments are duly made. The only legal obligation placed on the wife or the minor or parents in whose favour the order is

93. *Basant Lal v. State of U.P.*, 1996 Cr.L.J. 69 (All).

94. *Bhupender Singh Walia v. Varinder Kaur*, 1993 Cr.L.J. 1128 (P&H).

95. *Thulasi v. Lakman Rao*, 1996 Cr.L.J. 1160 (AP).

96. *Lokesh Parmeswar Uchil v. Lekha Lokesh Uchil*, 1995 Cr.L.J. 1661 (Ker).

made, is to present an application within one year from the date on which the amount becomes due. Section 125 (3) of the Code imposes such an obligation on the claimant to bring to the knowledge of the Court the breach of maintenance order by an application. When this is done, it is for the Court to get its own order enforced and see that it is complied with. The proceedings from that stage cannot be treated as one between the original parties. Non appearance of a party or its non-prosecution does not entail in dropping of the proceedings. The Court has every power to enquire into the reasons for non-compliance of the order and any failure on the part of the respondent to comply with the order without sufficient cause can empower the Court to issue a warrant for levy of the amount. Resumption of cohabitation after an order of maintenance is not a valid defence to counter an execution petition.⁹⁷

5.3.5.1 Warrant for Levy of Maintenance

When an application is made under Section 125(3) for recovery of the amount, the Court is seized of a duty to see the due compliance of the order. If without sufficient cause the respondent wilfully avoided payment of maintenance, it has the power to issue a warrant for levy of the amount. The power vesting with the Magistrate is similar to that of a civil court. The issue of warrant for levy of the amount due is in the manner provided for levying fines. Any further delay on the part of respondent without there being a justifying cause may lead to his imprisonment.

97. *Bhupinder Singh v. Daljit Kaur*, AIR 1979 SC 442.

5.3.5.2 Sufficient Cause for Non-Payment of Maintenance

The basis of invoking the jurisdiction of Magistrate is wilful neglect and refusal to pay maintenance on the part of respondent. Conjugal relation obligates a wife to live with her husband. If she fails to fulfill this obligation and refuses to live with her husband without there being sufficient cause this amounts to desertion. In such circumstances her living separate does not give her the right for maintenance. The respondent has sufficient cause and can offer to maintain his wife provided she comes and live with him.⁹⁸ But pretentious offer to avoid the legal responsibility is not permitted. If he himself is a cause for such separate living by his wife then such offers are not valid. Contracting another marriage with a woman or keeping a mistress are specifically provided as just grounds for the wife's refusal to live with her husband.⁹⁹ An order of adjudication as insolvent does not by itself a sufficient cause within the meaning Section 125(3) not to comply with the order. This will not bar the Magistrate from proceeding with the petition.¹⁰⁰

5.3.5.3 Sentence in Default of Payment of Maintenance

An application informing the Court of the breach of maintenance order passed by it arms the Magistrate with more powers to see to the compliance of the order. A willful neglect on the part of the respondent even after constraint measures being taken by the Court may lead to placing him under imprisonment. A sentence of imprisonment can be passed by the Magistrate so as to compel the respondent obey the order of the Court. But

98. Section 125 (3) of Cr.PC. 1973.

99. Explanation to Section 125 (3) of the Code of Criminal Procedure, 1973.

100. *Mylswami v. Muthammal*, AIR 1965 Mad. 77.

arrest and imprisonment can be resorted to only after exhausting all such coercive measures of recovery, as attachment and sale of movable property of the husband. This includes issuance of a warrant to the collector authorizing him to realize the amount as arrears of land revenue as provided under Section 421 of the Code for realization of fine.

An ambiguity prevailed over the period of sentence the Court can award in default of payment of maintenance. The earlier view was that the maximum sentence the Court can pass is one month for each month's default. Sentencing the respondent to periods more than this is observed illegal.¹⁰¹ Each complete one month's arrears was observed to make the respondent liable to a maximum term of imprisonment.¹⁰² Since the provision stipulates for presentation of an application for execution within a period of one year from the date on which it became due, Courts held that imprisonment cannot be to a period in excess of 12 months at the maximum.¹⁰³

Some of the lower courts absolved the liability of the defaulting respondent after he having undergone the sentence. The Supreme Court did make the position clear by its judgment in **Kuldip Kaur v. Surinder Singh**.¹⁰⁴ A person who without reasonable cause refuses to comply with the order of the Court to maintain his neglected wife or child would not be

101. *Antha v. Laxmi*, 1969 Cr.L.J. 572.

102. *Kantappa v. Sharanamma*, AIR 1967 Mys. 81.

103. *Moddari Bin v. Sukdev Bin*, AIR 1967 Cal. 136.

104. AIR 1989 SC 232.

absolved of his liability merely because he prefers to go to jail. Sentencing a person to jail is only a 'mode of enforcement' and not a 'mode of satisfaction'.¹⁰⁵ The liability can be satisfied only by making actual payment of the arrears. Keeping the defaulting husband / father in jail is only an alternative for ensuring/facilitating regular recovery of the maintenance allowance. The Supreme Court directed the defaulting husband to be put in jail till he makes the payment.¹⁰⁶ The imprisonment that is ordered is not a punishment but is merely a measure to make him pay the unpaid portion of maintenance.

The judgement of the Supreme Court has ruled that imprisonment is to be considered as a coercive method to effect recovery rather than a punishment for failure to make payment. This poses many problems such as, how he will find the resources to effect payment when he is in prison. Again what will happen to those arrears that accumulate when he is in jail.¹⁰⁷ Will not this amount to punishing the dependents for they will be deprived of any relief inspite of an order in their favour. This will also amount to punishing the new family to which a man has entered into after divorce. Family is an area where law should not have an easy access. Unless and until the constituents of the family command law to their aid it should keep itself away if it wants to keep the family intact.¹⁰⁸ The suggestion to constitute a separate fund managed by a board to give maintenance to the destitute women and children is a welcome device.

105. *Ibid.*

106. *Ibid.*

107. Dr.K.N.Chandrasekharan Pillai, "Maintenance: The Recovery Conundrum" The Academy Law Review 1989 Vol.13:2 p.247.

108. *Id* at p.252.

5.3.5.4 Period of Limitation

An application for the recovery of arrears of maintenance shall be made to the Court within a period of one year from the date of the order or from the date on which it became due.¹⁰⁹ No application filed after this period of limitation will be entertained nor executable.¹¹⁰ Maintenance becomes due on the date of passing of the order though it might have been granted from the date of application. The limitation of one year for recovery of arrears starts in such cases from the date of the order. The proviso is intended to prevent a person entitled to maintenance from being negligent and allowing arrears to pile up until their recovery would become a hardship or an impossibility. The expediency of the relief does not serve the purpose when the applicant is at lax or is not imminently dependent on the maintenance. Unlike civil courts, the Magistrate can allow arrears to aggregate only to a maximum period of one year if not ordered from the date of application. The provision is clear and in categorical terms puts an embargo on the powers of the Magistrate.¹¹¹ Where the application is filed for realizing the arrears accumulated for over three years and a half after the passing of maintenance order, the entire amount is not recoverable but only to a period of one year earlier to the date of execution application.¹¹² Pendency of revision before the Revisional Court is not a bar to delimit the period of limitation.¹¹³ Any revision, if pending before the Sessions Judge

109. Section 125 (3) of Cr.P.C. 1973.

110. *SK Abubakkar v. Ohidunnessa Bibi*, 1992 Cr.L.J. 2826 (Cal).

111. *Takkalapally Laxmamma v. Takkalapally Rangaiah*, 1992 Cr.L.J.266 (AP).

112. *Govind Sahai v. Prem Devi*, 1988 Cr.L.J. 638 (Raj).

113. *Iqbalunnisa Begum v. Habib Pasha*, AIR 1961 AP 445.

and if an order of stay has been granted, the period of limitation will not count. The operation of the order if not stayed the amount becomes due at the lapse of one year and it could not be said that the amount did not become due because of pendency of the case before Sessions Judge.¹¹⁴

5.4 TERRITORIAL JURISDICTION

The proceedings for maintenance may be taken by the wife against husband in any district (i) Where he is, or (ii) where he or his wife resides, or (iii) where he last resided with his wife or with the mother of illegitimate child.¹¹⁵ Section 126 specifically excludes the application of Section 177 which is normally applicable for criminal jurisdiction and any such contravention may turn the proceedings void.¹¹⁶ Under the old Code of 1882, only the Magistrate of the District where the husband resided had jurisdiction. This posed much hardship for the poor women. Hence, alternative fora have been designated by the legislature to enable a discarded wife to avail this summary remedy.¹¹⁷ Often a deserted wife is compelled to live with her relatives far away from the place where the husband and wife last resided together. The venue of the proceedings has been extended for her convenience to include the place where she may be residing on the date of the application for maintenance.¹¹⁸

114. *Bimala Devi v. Karna Mulia*, 1986 Cr.L.J. 521.

115. Section 126 (1) of Cr.P.C. 1973.

116. Section 461 (g) of Cr.P.C. 1973.

117. *Jagir Kaur v. Jaswant Singh*, AIR 1963 SC 1521.

118. 41st Law Commission Report p.306 para 36:10.

The intention of the legislature in using certain phrases, where he is, where he and his wife resides, or where he last resided with his wife, or as the case may be, with the mother of the illegitimate child",¹¹⁹ seems to have been to meet the needs and convenience mostly of the wife and children applying for maintenance. Of the three foras the first is applicable to all three class of people viz. wife, child and parents. The second applies only to a wife, where as, the third to both wife and child. An application by the father¹²⁰ or mother has also been entertained in the Court of the area where they reside.¹²¹ But the Andhra Pradesh High Court held otherwise.¹²²

Proceedings under Section 125 of Cr.P.C. can be instituted in any competent Court within the district in which the person proceeded against is, or where he and his wife resides or where he last resided with his wife.¹²³ Some High Courts gave a very strict interpretation to Section 126(1) and held that the proceedings should be instituted in a Court which is not only within such district but also one having jurisdiction over the place where the person is or where he or his wife resides or where the last resided with his wife.¹²⁴

119. 126 (1) of Cr.P.C. 1973.

120. *Ananth Gopal v. Gopal Narayan*, 1985 Cr.L.J. 152 (Kant).

121. *Ganga Sharan Varshney v. Smt. Shakuntala Devi*, 1990 Cr.L.J. 128(All).

122. *N.B. Bhikshu v. State of Andhra Pradesh*, 1993 Cr. L.J. 3280 (AP).

123. *Baleshwari Devi v. Bikram Singh*, 1968 Cr.L.J. 1296.

124. *Abdul Quayyum v. Durdana Begum*, 1974 Cr.L.J. 873 p.874 (AP).

The Law Commission did make the clarification and observed that the wording of Section 126(1) does not seem to justify the addition of any further restriction.¹²⁵ Further Section 462 of the Code specifies that no order of the Magistrate shall be set aside merely on the ground that the proceedings in the course of which the order was passed took place in the wrong district or other local area unless it appears that such error has in fact occasioned a failure of justice.¹²⁶

The word 'is' connotes the presence or the existence of the person in the district where the proceedings are taken. It is much wider than the expression 'resides'. The Supreme Court in **Jagir Kaur v. Jaswant Singh**¹²⁷ made a clear interpretation of the clause to set at rest the conflicting views taken by the High Courts. The facts of the case are that the husband came to India on a flying visit from Africa where he had been employed since 1930. The wife filed her application for maintenance against him in the district where he was staying during the visit. The Punjab and Haryana High Court held it was within the jurisdiction of the Magistrate under Section 488 (8) of Cr.P.C. The Supreme Court reviewing the decision held that the Magistrate had jurisdiction as the proceedings can be taken against any person in any district where he 'is'. The Court said that it is not limited by the *animus manendi* of the person or the duration or the nature of his stay. What matters is physical presence at a particular point of time.¹²⁸ The expression

125. *Supra* n.118.

126. *Ambalal v. Dhiben Dahyabai*, 1963 Cr.L.J. 594 at p.595.

127. *Supra* n.117.

128. *Id.*, at p.1525.

'resides' means something more than a flying visit and does not include a casual stay in a particular place and what is required is an intention to stay for a period, the length of the period depending upon the circumstances of each case.¹²⁹ It connotes some sort of permanent intention to stay at a particular place. It means both a permanent dwelling as well as temporary living in a place.¹³⁰ The expression 'last resided' similarly means the place where the person had his last residence, whether permanent or temporary.¹³¹ Since the proceedings are civil in nature, the remedy being a summary one, and the person seeking the remedy is ordinarily a helpless person, the provision should be liberally construed without injustice.¹³²

5.5 PRESENCE OF THE PARTIES

The procedure to be followed by the Magistrate while conducting proceedings under Section 125 has been prescribed by sub-Section (2) and (3) of Section 126. Sub-Section (2) requires the Magistrate to take all evidence in the presence of the opponent or when his personal attendance is dispensed with, in the presence of his pleader by following summons procedure. The procedure is mandatory and the word 'All' with which the sub-Section opens emphasizes the fact that no evidence shall be taken in the absence of such person or his pleader.¹³³ The proceedings do not

129. *Balakrishna Naidu v. Shakuntala Bai*, AIR 1942 Mad.666.

130. *Ananth v. Gopal*, 1985 Cr.L.J. 152.

131. *Supra* n.117.

132. *MotiRam v. First Add.D.J., Bareilly*, 1992 Cr.L.J. 1003.

133. *Nandh Lal Misra v. Kanhaiya Lal Misra*, 1960 Cr. L.J.1246,

vitiate when the evidence of the wife is recorded in the absence of her husband but in the presence of his counsel.¹³⁴

Insistence of the parties before the proceedings is one of the cardinal features of criminal jurisprudence and is in consonance with the doctrine of natural justice. Further, the presence of the parties may offer an opportunity for reconciliation.¹³⁵ It indirectly provides an opportunity to patch up the differences and to effect a change of heart and restore a life of conjugal happiness by offering to maintain his wife. Parting of married parties may happen on flimsy grounds. Their separation, which serves as an effective medicine to heal the wound, may bring in a union by their meeting at the proceedings and the litigants may opt for a chance to sink their differences and unite together. It might be otherwise also. In such circumstances personal persuasion may lead to mutual consent to live separate that may not aggravate the difference further and prevent further litigations. But when circumstances do not permit this, it may lead to protracting the proceeding. Hence alternatively the proceedings may be carried in the absence of the party, but in the presence of his counsel, by dispensing with the presence of the party. It is only for good reasons the personal attendance can be dispensed with and the presence of the pleader deemed sufficient. The provision does not permit passing of an order merely on the basis of affidavit filed by the parties.¹³⁶ For speedy disposal

134. *Arunkumar v. Chandranbai*, 1980 Cr.L.J. 601.

135. *Het Ram v. Ram Kumari*, 1975 Cr.L.J. 656 (All).

136. *Supra* n.133.

summons procedure is insisted by the provision. This should be mandatorily.¹³⁷ Thus recording of evidence becomes necessary even when the proceedings are conducted *ex parte*. Section 296 of the Code which permits the Court to receive the affidavit of any person whose evidence is of a formal character, does not apply to a proceeding under Section 125. Examination of parties becomes imminent to have knowledge of neglect or cruelty of the respondent, his income and the quantum fitting the circumstances.¹³⁸

Though all evidence must generally to be taken in the presence of the parties, when the other party is willfully avoiding service as attendance before the Court, the Magistrate on satisfaction of this may proceed to hear and determine the case *ex-parte*¹³⁹ Bi-party decision is always preferable to an *ex parte* one. Section 126(2) does not require the Magistrate first to record reasons for his satisfaction before he decides to proceed *ex-parte*. It is enough if such satisfaction viz. that the person is willfully avoiding service or willfully neglecting to attend the court is writ large on the record and reflected in the final order that is made.¹⁴⁰ What amounts to 'willful negligence' is a question of law though it is to be decided on the basis of given facts. Willful negligence cannot be inferred unless there was deliberate move to absent from court.¹⁴¹ The service referred to by this provision has to

137. *Naranappa v. Puttamma*, 1963 Cr.L.J. 787.

138. *Ramesh v. Jayshreeben*, 1982 Cr.L.J. 1460 (Bom).

139. *Balan Nair v. Bhavani Amma Valsamma*, 1987 Cr.L.J. 399 (Ker.) F.B.

140. *Supra* n.134.

141. *Kalika v. Jagdei*, 1975 Cr.L.J. 465 (All).

be effected only in the manner prescribed by the code.¹⁴² Other modes not being permitted will not be valid. Therefore, notice sent by registered post or its publication in the newspapers is not proper service and the defect is incurable.¹⁴³

An *ex-parte* order passed under the proviso to Section 126(2) can be set aside on good cause being shown on an application made within three months from the date thereof.¹⁴⁴ This could also be done on the condition of payment of costs to the opposite party¹⁴⁵. Though normally the period of limitation within which the application to set aside the *ex parte* order is computed from the date of order¹⁴⁶, a liberal and reasonable interpretation warrants, the date of limitation to start from the date of the knowledge of the aggrieved party.¹⁴⁷ This has no application if the Magistrate has proceeded to hear the case *ex-parte* without satisfying himself as to the deliberate avoidance of the respondent to face the litigation.¹⁴⁸

The procedure of deciding a matter *ex-parte* with reserved right to restore the same within a specified period is more a civil procedure and its practice in criminal jurisdiction is more novel and is observed only

142. Section 62 to 67 of Cr. P.C. 1973.

143. *S. Bhupinder Singh Makkar v. Narinder Kaur*, 1990 Cr.L.J. 2265 (Delhi).

144. *Kamla Devi v. Mehma Singh*, 1989 Cr.L.J. 1866.

145. Section 126 (2) of Cr.P.C. 1973.

146. *Parson Kaur v. Bakshish Singh*, 1971 Cr.L.J. 489.

147. *Meenakshi Ammal v. Somasundara Nadar*, 1970 Cr.L.J. 817 (Mad).

148. *Kembai v. Kajindar*, 1981 Cr.L.J. 690 (Kant).

under Section 125 of the Code. The remedy in such circumstances is not confined to merely in the filing of an application under Section 126, it could also be challenged under Section 397 by filing a revision.¹⁴⁹ It is also significant to note that the chapter which has prescribed no limitation for filing of an application has done so under two different circumstances, one for the restoration of an application decided *ex-parte* and the other, towards enforcing order of maintenance. Section 126 (3) empowers the Court to order payment of costs which may be just and necessary in the circumstances of the case, while dealing with an application under Section 125.¹⁵⁰

5.6 ALTERATION OF MAINTENANCE

An order passed under Section 125 must be in conformity with its terms, scope and intendment. Towards achieving this, Section 127 has been incorporated to alter the allowance by change of circumstances favouring either the claimant or the respondent or cancellation of the same when the applicant is no more eligible for the remedy available under Section 125. At any cost, the amount derivable under this provision should not exceed the maximum fixed statutorily. On proof of change in the circumstances¹⁵¹ of any person receiving maintenance under Section 125, the monthly allowance as ordered under the same Section to pay a monthly allowance to his wife, child, father or mother, as the case may be, the Magistrate is empowered to make such alteration in the allowance as he thinks fit.¹⁵² The change of circumstances envisaged under Section 127(1)

149. *Supra* n.139.

150. *Sourendra v. Nivedita* 1981 Cr.L.J. 194 (NOC) (Cal).

151. *Supra* n.147.

152. *Balak Ram v. State*, 1973 Cr.L.J. 750.

is a change of pecuniary or other circumstances of the party paying or receiving allowance, which could justify an increase or a decrease of the amount of maintenance.¹⁵³ The order of maintenance made in favour of the major son under the old Code, does not automatically cease to be effective on the coming into force of the new Code.¹⁵⁴ It must be deemed to have been made under Section 125 of the new code and could be cancelled under Section 127. With the passing of Muslim Women (Protection of Rights on Divorce) Act 1986, an order of maintenance granted in favour of divorced Muslim wife under Section 125 of the Code ceases to have effect.¹⁵⁵

Section 127 (3) deals with the effect of divorce that may tend to change the circumstances warranting for alteration of maintenance granted earlier. Remarriage of a divorced woman results in the cancellation of the order from the date of her remarriage.¹⁵⁶ The extension of the statutory remedy to divorced women under the new code necessitated the inclusion of this sub-clause under Section 127. Amounts paid as maintenance should not be in excess and more than what one deserves for her life style. The husband should be absolved from his obligation under Section 125 of Cr.P.C. if payment of lump sum under the customary or personal law is sufficient to substitute the maintenance allowance. The payment must be to obviate destitution after divorce and provide her with the wherewithal to maintain herself. The scheme of Section 127 (3)(b) is to recognize the

153. *Galrozobanu v. Kamarali*, 1974 Cr.L.J. 1438 (Bom).

154. *Jagir Singh v. Ranbir Singh*, AIR 1979 SC 381.

155. *Abubakkar v. Ohidunnessa Bibi*, 1992 Cr.L.J. 2826.

156. Section 127 (3) (a) of Cr.P.C. 1973.

substitute maintenance arranged by lump sum payment through the custom of the community or the personal law of the parties. But there must be a rationale between the sum so paid and its potential as provision for maintenance. Illusory amounts paid in the name of customary or personal law may be considered for reduction of maintenance rate but cannot annihilate the entire remedy provided under this provision.

Sub Section (2) of Section 127 permits the judicial Magistrate to take note of the remedy derived by the claimant through a competent civil court and vary or cancel the relief it has been providing to him or her. Alternatively, under Section 127(4), the civil courts are empowered to take into account the sum which has been paid to or recovered under Section 125 as monthly allowance while passing any decree for the recovery of any maintenance or dowry. This provision was also not there in the earlier code and one newly inserted by the Code of 1973.

An application for alteration is necessary before a Magistrate assumes jurisdiction under this Section. A mere allegation in the application for enhancement of allowance is not enough to establish the means of the husband. The Magistrate is empowered to enhance the maintenance allowance from the date it is asked for. It should not be confined to take effect from the date of the order.¹⁵⁷ Before modifying the order of maintenance the Magistrate must provide an opportunity to the opposite party of being heard. Modification of the order under Section 127 is permitted only to the extent of the alteration in the allowance. The Magistrate has no

157. *Bhagat Singh v. Prakash Kaur*, 1973 Cr.L.J. 719.

jurisdiction to go into the propriety or otherwise of the order originally made under Section 125.

5.7 RIGHT OF MAINTENANCE UNDER SECTION 125 VIS-À-VIS RIGHT UNDER OTHER PERSONAL LAWS

The remedy provided under Section 125 is parallel to one provided under civil or personal law. Hence the Magistrate Court¹⁵⁸ while exercising this domestic jurisdiction under Section 127 and the civil court¹⁵⁹ while seized of a matter for the recovery of any maintenance or dowry mutually have to take cognizance of the remedy extended by the other. When it is brought to the notice of the Magistrate that a decree for maintenance has been passed by the civil court, it is the duty of the Court to consider whether that decision of the civil court leads to the consequences that the order passed by criminal court should be cancelled or varried.¹⁶⁰ On a finding given by the civil court subsequent to the passing of an order under Section 125, the Magistrate should alter his finding.¹⁶¹

A decree given by the civil court cannot be ignored because final determination of a civil right by a civil court must prevail against a like decision by a criminal court.¹⁶² It is obligatory on the part of a Magistrate to follow the judgment of a competent civil court specifically on the point of

158. Section 127 (2) of Cr.P.C. 1973.

159. Section 127 (4) of Cr.P.C. 1973.

160. *State v. Nagappa* AIR 1968 Mys. 12.

161. *Vanajakshamma v. Gopal Krishna*, AIR 1970 Mys. 305.

162. *Ramesh Chandra v. Mrs. Veena Kousal*, AIR 1978 SC 1807.

maintenance and consequently to vary or cancel the order it made earlier.¹⁶³ The findings of the civil court will prevail over that of a Magistrate's Court.¹⁶⁴ An order for maintenance under Section 125 will not be automatically wiped out by a subsequent civil court decree for maintenance¹⁶⁵ but the right to alter the remedy provided already is there under Section 127(2). Such power if relates to cancellation can have only prospective operation from the date of cancellation.¹⁶⁶ However, views taken by Bombay,¹⁶⁷ Madhya Pradesh¹⁶⁸ and Calcutta¹⁶⁹ High Courts differ on this.

5.8 COPY OF THE ORDER OF MAINTENANCE

Section 128 describes the right that vests with the claimant for maintenance under Section 125 of Cr.P.C. to receive without payment a copy of the order of maintenance on successful litigation. This part of the provision is supplement to Section 125(3) and empowers any Magistrate within whose jurisdiction the respondent happens to be, to provide a copy to the claimant after ascertaining his identity and non-payment of the allowance.

163. *Bhagwant Singh v. Surjit Kaur*, 1981 Cr.L.J. 151.

164. *Teja Singh v. Chhoto*, 1981 Cr.L.J. 1467.

165. *Nagendra v. Premavathi*, 1973 Cr.L.J. 1677.

166. *Indra Kumari v. Raj Kumar*, 1973 Cr.L.J. 1556.

167. *Sangavva v. Kariyappa*, AIR 1942 Bom. 258.

168. *Hari v. Rani Devi*, 1952 MP 53.

169. *Kalyani v. Nirmal Kumar*, AIR 1957 Cal. 115.

5.9 CIRCUMSTANCES THAT DISENTITLE THE RIGHT OF MAINTENANCE TO WIFE

On marriage the wife gets a right to be maintained by her husband. Though a moral obligation it is not an absolute right. In deserving circumstances the husband can refuse payment of maintenance and raise them as defences. Section 125 (4) enumerates three different circumstances which disentitle a wife to receive maintenance under Section 125(1) of Cr.P.C. These are conditions subject to which a wife will be eligible for maintenance under Section 125(1). If maintenance has already been ordered the same may be cancelled on proof of these circumstances. The conditions apply only to a wife and not either to children or parents.

5.9.1 Living In Adultery

The term 'adultery' takes different meanings under different laws. In popular sense it means 'breach of the matrimonial tie by either party' to a marriage. Under criminal law though a male member is liable for punishment for the crime of adultery, a woman cannot be an offender or even an accomplice. Matrimonial laws recognize this as a conduct condemnable and permit either severance of the matrimonial tie or separation judicially.

The law of maintenance under Section 125 views the matrimonial misconduct of adultery in a different way in that it takes cognizance only when it is in aggravated form. The phrase used under Section 125(4) and repeated again under Section 125(5) is 'living in adultery' which means not a single act but continuous act of adultery.¹⁷⁰ Occasional lapses from virtue

170. *Pachayammal v. Perumal*, 1964 (1) Cr.L.J. 105.

is not intended by the words.¹⁷¹ It refers to a course of conduct and means something more than a single lapse from virtue.¹⁷² Continuous adulterous conduct is what is meant by 'living in adultery'¹⁷³ On proof of such conduct the wife under Section 125(4) is disentitled to avail maintenance from the magistral jurisdiction. If an order for maintenance has already been made, the same could be called for cancellation under Section 125(5).

Morality goes along with legal norms. Provisions of maintenance to wife is to fulfill a moral obligation. Denial of this right under specific circumstances is again in consonance with this norm. But judicial decisions interpreting the phrase 'living in adultery' is sparse and much liberal to raise a suspicion whether morality still holds good before law.

A plain reading of Section 125(4) seen in the light of judicial interpretation means a conduct which is more than a single lapse from virtue. Occasional or momentary lapse is condoned as far as Section 125 is concerned. Again an accidental sexual trespass may not fall within its ambit. But when the conduct of the woman is highly blameworthy, the protective arms of the legislature should not be extended too much to turn a blind eye to moral norms. Unfortunately the decisions by some of the High Courts are reflective of such a trend in India. Birth of an illegitimate child requires no more proof for an aggravated misconduct on the part of a married woman. But that fact alone will not weigh and disentitle a woman from getting maintenance from her husband. The Rajasthan High Court has ruled

171. *Ram Saran v. Somanwati*, 1964 (1) Cr.L.J. 483.

172. *Thanickachalam Pillai v. Dhakshayani*, 1966 Cr.L.J. 221.

173. *Rachita Rout v. Basant Kumar Rout*, 1987 Cr.L.J. 655 (Ori).

that continuous adulterous conduct with a single person did not amount to living in adultery.¹⁷⁴ The Bombay High Court has gone still further to recognize sex as a right for woman even outside matrimonial wedlock. The rulings, to put in a harsher language, are perverse and are devoid of any rational.

The question 'whether a divorced wife who is living in adultery is bound by sub Sections (4) and (5) of Section 125 of the Code of Criminal Procedure' remains yet to be given a concrete answer. The Kerala High Court in its judgment **M.Alavi v. T.V. Safia**¹⁷⁵ has held that Section 125(4) has no application to a woman who has been divorced by her husband. The reasoning adduced by the Learned Judge is that a divorced woman can never be committing adultery even if she has got promiscuous sexual relationship with another person. The Court further held that the term wife used under Section 125(4) would only mean a woman whose marriage relationship is in existence and that a divorced woman will not come within the amplitude of Section 125(4).¹⁷⁶ Though not referred to, the decision is in followance of the ruling held by the full bench of the Kerala High Court in **Mariyamma v Mohd. Ibrahim**.¹⁷⁷

Under the old Code of 1898, the term 'wife' used in Section 488 did not include a divorced wife. The benevolent provision had its application only

174. *Sarla v. Mahendra Kumar*, 1989 Cr.L.J. 729 (Raj).

175. AIR 1993 Kerala 21.

176. *Id.*, at p.22.

177. AIR 1978 Ker. 231 overruling *Kunhi Mohin v. Pathumma*, 1976 KLT 87.

on wives whose marriages were subsisting and for children, whether legitimate or illegitimate. Hence, a wives' claim for maintenance had been sabotaged technically by the husband by divorcing her judicially or under their personal laws.¹⁷⁸ When the Code was re-drafted in 1973, the legislators in their wisdom thought it fit to include an explanatory clause (b) to sub Section (1) of Section 125, whereby even a divorced woman was brought within the ambit of the term 'wife'. The extended definition included even women who obtained divorce from their husband on their own volition, in spite of opposition from their husband.¹⁷⁹

The legislature thus imported a legal fiction so as to include a 'divorced wife' within the term 'wife' to enable a her to claim maintenance.¹⁸⁰ The object of re-enactment has been averred by the Joint Committee in the following words: 'The benefit of this provision should be extended to a woman who has been divorced from her husband, so long as she has not remarried after the divorce. The Committee's attention was drawn to some instances in which, after a wife filed a petition under this Section (Section 488) on the ground of neglect or refusal on the part of her husband to maintain her, the unscrupulous husband frustrated the object by divorcing her forthwith thereby compelling the Magistrate to dismiss the petition. Such divorce can be made easily under the personal laws applicable to some of the communities in India. This causes special hardship to the poorer section of the community who become helpless. The

178. *Md. Ibrahim v. Jai Ihoon Bivi*, AIR 1951 Mad. 831; *Md. Shamsuddin v. Noor Jahan*, AIR 1955 Hyd. 144; *Mst. Fazil v. Ali Mohd.*, 1975 Cr.L.J. 1228 (J&K).

179. *Manpekkata Nanu v. Mampekkaat Vasantha*, 1985 1 Crimes 1111 (Ker).

180. *Supra* n.24.

amendments made by the Committee, are aimed at securing social justice to women in our society belonging to the poorer classes.¹⁸¹ The claim for maintenance can be refused to a wife under Sub-section (4) of Section 488 of the old Code on certain grounds, such as

- (I) if she is living in adultery
- (II) if without any sufficient reason, she refuses to live with her husband, and
- (III) if they are living separately by mutual consent.

On proof of any of the above facts an order of maintenance made in favour of any wife can also be cancelled under Sub-section (5) of the old provision. The above Sub-section had been inserted without any change in the new Code of 1973 as Sub-sections (4) and (5) of Section 125. When the new code has given a new dimension to the term 'wife' by including within its orbit even a divorced woman, whether such conditions which are imposed on wife to entitle maintenance will be applicable to divorced woman also. Or in other words, the grounds enumerated under Sub-section (4) and (5) of Section 125 of the Code would be applicable only to woman whose marriage is subsisting. In *Velukutty v. Prasanna Kumari*¹⁸² the Kerala High Court has ruled that the few grounds namely refusing to live with the husband without sufficient reason and living separately by mutual consent are not applicable in the case of a divorced wife.¹⁸³ The

181. Report of the Joint Committee on the Code of Criminal procedure Bill, 1970 p. XIII.

182. 1985 Cr.L.J. 1558.

183. *Id.*, at p.1560.

learned Judge did not consider the ground of adultery occurring in Sub-section (4) and (5) of Section 125 as there arose no such case.

An order of divorce is sufficient reason for a divorced woman to refuse to live with her past husband as there exists no marital obligation to be fulfilled between divorced partners. So a husband, who had divorced or from whom a woman had obtained divorce cannot insist his past wife to come and live with him. As long as she remains unmarried she will be entitled to get the benefits of this provision.

Mutual consent to live separately will arise only when there exists the relationship of husband and wife. In the case of divorced woman as there exists no such relationship the ground of living separately by mutual consent which disentitles a wife to get maintenance has no application. Even a woman who gets divorce by mutual consent will be able to get the benefits of this provision.¹⁸⁴ The question now remains to be resolved is whether the ground of 'living in adultery' has any application on divorced woman.

The term 'adultery' has its own meaning at different laws. Though a married woman is not punishable for her adulterous act under the Criminal Law, yet she may be sanctioned by a petition for divorce under matrimonial laws¹⁸⁵ *contra*, under Section 125, it gets a new meaning in that a single

184. *Sadasivam Pillai v. Vijayalakshmi*, 1987 Cr.L.J. 765 (Ker).

185. Section 13(1)(i) of Hindu Marriage Act, 1955.
Section 27(1)(a) of Special Marriage Act, 1954.
Section 10(2)(3)(4) and (5) of Indian Divorce Act, 1869.
Section 32(d) of Parsi Marriage and Divorce Act, 1936.

lapse from virtue is condoned and only those who are 'living in adultery' are disentitled to claim maintenance. Continuous adulterous conduct is what is meant by the words 'living in adultery'. The summary remedy under Section 125 is refused to an unchaste woman as the evils of vagrancy which the law wants to prevent has already occurred.¹⁸⁶

Marriage, as an institution, is the bedrock of a society. It imposes certain specific obligations on the parties to marriage. The husband is duty bound to maintain his wife and the wife must be virtuous and live with her husband. Manu insists on the protect of aged parents, a virtuous wife and an infant child even by doing hundred misdeeds.

The object of Section 125 and sister clauses is prevention of vagrancy or atleast preventing its consequences.¹⁸⁷ A class of people who but for the assistance would possibly become destitutes are covered by these provisions. The class consists of hapless parents, abandoned children, neglected wives and discarded divorcees. Of them, parents and children are entitled to maintenance on mere proof of their inability to maintain themselves. No other eligibility condition need be proved. The defendant too cannot disown liability on any specific ground. But as regards a 'wife', which term for the purpose of this provision means two classes of people, other conditions exist. Likewise the husband also can defeat the claim on specific grounds. Some of the provisions in Chapter IX apply only to wife, some others to divorced and some to both. This means that all rights, duties and disabilities etc.. provided for and against a wife will not be made

186. *Supra* n.170.

187. *Jagir Kaur v. Jaswant Singh*, AIR 1963 SC 1521.

applicable to a divorced woman.¹⁸⁸ The condition subject to which a wife will be able to get maintenance will also be applicable to a woman, who though not a wife now, is covered under the new definition. This pertains to Section 125(4) and (5) of Cr.P.C. which disqualify her from claiming maintenance on the ground of her living in adultery. Here technical Interpretation that she being a divorced woman cannot commit adultery has no application. If it is so, then it is nothing short of keeping a blind eye to immorality. If she lives with another man without marriage or leads an immoral life, is it the object of the provisions that her past husband should shoulder the burden?

But for the new definition to the term 'wife', a divorced woman cannot claim maintenance under this provision. It is also true that adultery being a matrimonial offence cannot be committed by a woman who is not a wife. Bringing oneself within the extended meaning of 'wife' just to derive the benefit and relieving her away from the ambit of the definition when the question of conduct arises cannot be in consonance with the avowed object with which the term was redefined. The legislature never contemplated that what normally a wife is not entitled, would be given to the divorcee in whose favour a limited benefit has been conferred under the inclusive definition of Section 125 vide explanation (1)(b) of Criminal Procedure Code. Age old concept that a divorced woman cannot commit adultery does not apply to her as long as time she derives benefit from her husband under these provisions. When even after cession of marital relationship a woman incurs liability on her past husband social moral requires that she abore some duty to check her immoral conduct. It does not permit her to lead a promiscuous

188. *Supra* n.182.

sexual life at the expense of one who is related to her as husband once. While declaring the secularistic characteristics of Section 125, Justice V.R. Krishna Iyer observed in **Bai Tahira v. Ali Hussain**¹⁸⁹ that every divorced wife, Muslim or non-Muslim otherwise eligible, was entitled to the benefit of maintenance allowance.¹⁹⁰ For a divorced woman the eligible conditions to entitle her for maintenance are.

- (i) that she is not able to maintain herself and
- (ii) that she has not remarried.

The only ground on which the husband can refuse to pay her maintenance is that she is living in adultery.¹⁹¹ Whereas subsequent to an order of maintenance the same may be cancelled on proof of any one of the following five grounds:

- (i) that she is living in adultery¹⁹²
- (ii) that she has remarried¹⁹³
- (iii) that she has received whole of the sum under any customary or personal law,¹⁹⁴
- (iv) that at the time of divorce she had voluntarily surrendered her right to maintenance,¹⁹⁵ and
- (v) that a competent civil court has by its decision given alternate remedy.¹⁹⁶

189. *Supra* n.24.

190. *Ibid.*

191. The Code of Criminal Procedure, 1973 Section 125(4)

192. *Id.* Section 125(5).

193. *Id.* Section 127 (3)(a).

194. *Id.* Section 127 (3)(b).

195. *Id.* Section 127 (3)(e).

196. *Id.* Section 127 (2).

Hence the decisions passed in **Mariyamma v. Mohammed Ibrahim**¹⁹⁷ and **M. Alavi v. T.V. Safia**¹⁹⁸ by the High Court of Kerala excluding the application of Sub-section (4) and (5) of Section 125 of Cr.P.C. to divorced woman needs rethinking. In this respect the stand taken by the Madras High Court seems to be acceptable to acclaim social justice. In **S.S.Manickam v. Arputha Bhavan Rajam**,¹⁹⁹ Justice Rathnavel Pandian of the Madras High Court observed that even a woman who has been divorced from her husband or has obtained a divorce from him is entitled to maintenance from him till she gets remarried, provided she is not living in adultery till such time.²⁰⁰ The learned Judge made it clear that the other conditions enumerated under Sub-sections (4) and (5) of Section 125 are not applicable to such a divorced woman.²⁰¹ The same is the view taken by the Kerala High Court in **Velukutty v. Prasanna Kumari**.²⁰² The quintessence of the judicial pronouncements made in **S.S. Manickam's**²⁰³ case is that 'mutual fidelity is the legal duty and moral obligation both on the part of the husband and that of wife. Even by choosing to live apart from her husband for no acceptable reason, the wife loses her right to obtain maintenance as per the strict letters of Section 125 of the Criminal Procedure Code, a fortical' when

197. *Mariyamma v. Mohd. Ibrahim*, AIR 1978 Ker. 231.

198. AIR 1993 Ker.21.

199. 1980 Cr.L.J. 354.

200. *Id.*, at p.358.

201. *Ibid.*

202. 1985 Cr.L.J. 1558.

203. 1980 Cr.L.J. 354.

she is leading an adulterous life.²⁰⁴ In *Yeluri Mangatayaru v. Yeluri Seshavataram and another*²⁰⁵ the Andhra Pradesh High Court had dissented from the view taken by the Kerala High Court in *Mariyamma's*²⁰⁶ case and ruled that on the facts it has come out that the wife was living in adultery and continued to live in adultery even after the divorce, she was not entitled to claim maintenance.

The law as is today is that no woman can fairly claim a right to be kept by two men. Advocating such conduct would be contrary to morality and basic principles. The onus of proof being on the husband in such cases, if he succeeds in proving such deprecating conduct by a divorced wife, the court must decline to pay her maintenance, invoking the aid of Sub-section (4) of Section 125. If she has been in favour of an order, on proof of the same it must be cancelled under Section 125(5). It is worthwhile to note here that cancellation of such orders is possible under most of the personal matrimonial laws.²⁰⁷ It is also significant to note that the legislators who had taken pain to bring the divorced wife within the ambit of the term 'wife' had not excluded them from the purview of the application of Sub-section (4) and (5) of the benevolent provision. Unfortunately not a single case has gone yet to the Supreme Court to clarify the position.

204. *Ibid.*

205. 1990 Cr.L.J. (NOC) 8.

206. *Supra* n.197.

207. Section 18(3) Hindu Adoption and Maintenance Act, 1956.
Section 25(3) of Hindu Marriage Act, 1955
Section 37(3) of the Special Marriage Act, 1954
Section 4(3) Parsi Marriage and Divorce Act, 1936.

In these circumstances two possible things could be done to alleviate the misinterpretation caused by judicial verdicts. If the object of Section 125 and sister clauses is just to enforce an obligation to maintain the wife arising out of the matrimonial bond, it deserves to be amended as suggested by the Law Commission²⁰⁸ deleting the phrase 'if she is living in adultery', occurring in Sub-sections (4) and (5) of Section 125. Or else, if we consider fidelity as one inter linked with matrimonial obligations we must clear the application of such Sub-section even to divorced woman who but for an extended meaning will be away from the ambit of Section 125 of Cr.P.C.

5.9.2 Refusal to Live with her Husband

A wife is not entitled to any allowance if she, without sufficient cause, refuses to live with her husband. Marriage throws an obligation on the wife, to live and co-habit with her husband. Only on reasonable grounds she is justified to live separate from him. Neglect, cruelty, ill treatment, impotency, extra-marital relationship, remarriage are sufficient grounds to justify separate living by a wife. The burden of proving this is on the woman. But when the parties are judicially separated or by an order of divorce their matrimonial relation is severed there is no justification on the part of a husband to compel his wife to come and live with him. The clause does not apply to a divorced woman.

208. The Law Commission in its 132nd Report on Section 125 and related provision of Cr.P.C. had felt that Sub-sections (4) and (5) of Section 125 serve as fetters imposed on the wife and suggested deletion of the phrase 'if she is living in adultery' from the two Sub-sections.

5.9.3 Living Separate by Mutual Consent

A wife is not entitled to receive allowance of maintenance from her husband if they are living separate by mutual consent. 'Mutual consent' means a consent on the part of the husband and wife to live apart. Divorce by mutual consent does not imply living separate by mutual consent. Mutual consent to live separate must be the result of desire by both the parties for amicable settlement. It implies nullification of the matrimonial obligation of maintaining as against each other.

5.10. CANCELLATION OF THE ORDER

The Magistrate is empowered to cancel any order made in favour of a wife on proof of any of the grounds enumerated above. There is no provision in the Section for cancellation of the order of maintenance made in favour of a child or father or mother. Judicial opinion differs on the effect of cancellation. Some are of the view that it takes only prospective effect while others have favoured retrospective operation.

5.11 REVISION OF THE ORDER OF MAINTENANCE

The order granting maintenance cannot be subjected to an appeal. The Code does not provide right of appeal. But a limited and qualified revisional power is conferred under Section 397 of the Code with a Sessions Judge and High Court. The jurisdiction is circumscribed.²⁰⁹ The Session Judge can invoke the revisional jurisdiction to interfere with the order by the lower courts when the decision rendered is patently or grossly erroneous or

209. *Arefabanu Majidkhan Pattan v. Mohammed Hanif Hussainmiya and another*, 1995 Cr.L.J. 2881.

there was no compliance with the provisions of law and that there was a violation of the statutory requirements. The interference would also be justified if it is found that the findings of fact, which was germane to the main issue to be decided by the revisional court was not in consonance with the evidence which were brought before the trial court. The exercise of the inherent powers of the High Court to review the orders of maintenance passed by lower courts was criticized by the Supreme Court in **Rajathi v. C.Ganesan**.²¹⁰ In this case the High Court entertained jurisdiction over payment of maintenance under Section 125 of the Code of Criminal Procedure. The Court set aside the orders of the lower courts on the premise that the wife was living separately without any reasonable cause and that she was able to maintain herself. The Supreme Court when seized of this matter observed that it was not necessary for the High Court to examine the whole evidence threadbare to exercise jurisdiction under Section 482 of the Code.²¹¹

5.12 WORKING OF THE SYSTEM

The first formal step for a wife, child or parent who wishes to obtain maintenance is to make a petition under Section 125 before the Family Court, if one is established for the area or before the Magistrate's Court, for such other areas. The applicant is heard. When the court is satisfied that the applicant asking for maintenance has a *prima facie* case, the Court takes the petition on file and issues summons to require the appearance of the respondent. Before the criminal court both the

210. AIR 1999 SC 2374.

211. *Id.*, at p.2378.

parties are normally assisted by advocates, whereas before the Family Court their representation is specifically excluded. The parties are heard. Where the respondent does not deny the relationship or is prepared to pay maintenance, an order of maintenance is passed in favour of the claimant. If the relationship is denied or the respondent denies payment on certain grounds or pleads inability for want of sufficient means, the matter is posted for trial. During trial, which is summary in nature, parties and their witnesses are examined to adjudicate the dispute based on pleadings and mainly to establish the relationship, inability to maintain oneself and absence or possession of sufficient means. The Court then passes an order either granting or dismissing the claim for maintenance.

The procedure as described above though looks much simple, the disturbing findings of this research is that the real working system is ill-suited to achieve the basic objective of preventive destitution, proclaimed under Section 125 of the Criminal Procedure Code. The choice of the forum for claim of maintenance is more decided by the counsel rather than the claimant. No specific arrangement has been made before the criminal courts either before or after the passing of the Family Courts Act to receive petitions for maintenance. It is one among the other activities dealt before the criminal court. This takes months for the claimant to see the petition being taken on file. The process for appearance of the respondent is as per the provisions of the Criminal Procedure Code. The dilatory process takes months together to secure the presence of the respondent before the Court. Even after appearance, no specific time limit is followed for filing of reply. This keeps the woman waiting for justice for long. The procedure though summary, prolong for years making the poor woman run every time

to the Court as an accused. Lack of judicial officers at several courts aggravate further the situation. Finally, even after the matter is decided in favour of the woman, no immediate relief comes to her as she needs to file a separate execution petition. If the respondent takes the matter for review, the condition of the woman becomes much worse. A survey of the judicial decisions by the High Courts go to show that the wife in several instances has been kept in waiting even for years to avail the so called summary remedy under Section 125 of the Code.

No official information exists as to the exercise of the matrimonial jurisdiction by the Magistrate Court or the Family Court. Neither public records give statistical records of the disposal of claims by the needy class. Hence the only means left to explore the social result of this summary provision is by survey method. The survey for this purpose consisted of a sample of Magistrates' Courts and Family Courts representative of the other courts in India. The valid conclusion derived from this is expected to reveal the real working system. The social characteristics of the claimants and the real effectiveness of the summary jurisdiction have been assessed by an interview with the wives and husbands who seek for or resist the claim of maintenance before the Magistrate Court. A model questionnaire served this purpose.²¹²

The Magistrates' Courts situated in the district of South Arcot in Tamilnadu served as sample for the functioning of criminal courts. The Family Court situated at Pondicherry and the reports on the functioning of

212. For the model of the questionnaire, see Annexure 18.

the Family Courts in Cochin, Thirupati and Madras served also an useful purpose for the study of the Family Court's working system. The court records have been perused, the learned Magistrates and the court staff have been interviewed to assess the real working system. The court staff provided sufficient information for the work. The judicial officers extended much co-operation to the study and gave passive hearings to the questions posed to them. The opinion of the spouses who invoked the criminal court jurisdiction and that of the Family Court has been collected to assess their status, the effectiveness of the provision in affording relief and the real success of the courts with matrimonial jurisdiction.

Good records are important in the administration of justice and more particularly in the exercise of a jurisdiction where many people resort to remedy. Very few courts maintained an excellent record. The followance of summary jurisdiction is doubtful when the docket sheets of maintenance cases showed numerous hearings for no valid reason. No separate matrimonial proceeding has been arranged from their normal business. Only very few criminal courts had special arrangement to deal with the maintenance claims. All other courts dealt such matters as one among several other criminal cases. Many Magistrates shared their concern over the working of the system. Vacancy of postings in several criminal courts kept the matrimonial cases in dormancy along with other criminal cases. The parties in such instances, are made to come to the court just to know the dates of next hearing. The court staff, by and large, were highly cooperative. A perusal of the records revealed that in several instances maintenance is not afforded to the claimant even after a year. Payment of interim-maintenance has been resorted to in few instances. Very few

advocates showed interest in early settlement, while others were against forced settlements. They averred that they cannot resort to such measures without valid consent from their parties. In several courts the execution petitions remained without due action. Instances are not wanting wherein before any decision being arrived before the criminal court the matter has been taken to the Session's or High Court for revision.

The atmosphere before the criminal court no doubt is unconducive for conducting of matrimonial disputes. But by special arrangements, Magistrates can play a constructive role as matrimonial judges. The Magistrate jurisdiction certainly invoked fear in the mind of respondents. The shifting of the Magistrate's jurisdiction to Family Court is certainly a welcome device as far as giving a favourable atmosphere for adjudication of matrimonial matters. Reconciliation no doubt is an effective way of adjudication. But when the mere invoking of the criminal courts jurisdiction aggravated the strains between the married spouses, a court following an adversarial procedure cannot effectively bring in conciliation between the parties.

An empirical study has been carried out consisting of the claimants and respondents before the Magistrate Courts situated in the territorial limits of Tamil Nadu. For convenience the criminal courts located at Cuddalore, Chidambaram, Villupuram, Uludurpet and Panruti have been chosen for the study. No family courts have been constituted in these areas and the jurisdiction under section 125 Cr.P.C. remained solely with the Magistrate Courts. The litigants were interviewed in the court premises. Assistance of their advocates were sought in needed cases. Many were reluctant and only

172 responded. Of this, 104 were petitioners in the status of wife and the remaining the respondent husbands. The claim in several cases by a wife included also maintenance for their children.

The contents of questionnaire were read to the petitioners and their response recorded. The claimants before the Magistrate Courts mostly belong to the poorer sections of the society. Illiteracy was dominant among them and many of them were not economically viable to pay even the fee for their advocates. They were taken care mostly by the relatives or parents. A good number of them said that they are surviving on their own self by hard labour. No one was aware of the significance of the criminal jurisdiction. Majority of them expressed their willingness to join their husband and live with them. Several of the petitioners were not provided with maintenance even after more than a year of filling of their petition. In no case, interim maintenance was provided.

The opinion of the respondents were mainly lack of sufficient means on their part to pay separate maintenance to their wife. Few expressed their willingness to live with their wife on condition of withdrawal of the petition for maintenance. Some in spite of means, were unwilling to pay maintenance. The measure of sentencing did not deter them. Denial of marriage and accusation of adulterous conduct on the part of wife were cited as main reasons for refusal of maintenance. In some instances matrimonial dispute has been pending between the parties.

The opinion of the claimants before the Family Court gives a different picture. The Family Court constituted at the Union Territory of Pondicherry

served as a sample. The family court judge has provided utmost co-operation for the study. The learned judge gave much credit to the working of the family court system. But litigant women expressed that they are not able to put forth their cases ably. Some were of the view that settlements attempted by the court were undeserving in their case.

The summary provisions under Section 125 though intended for speedier, inexpensive and effective relief in the form of maintenance, the real working system fails to fulfill the said purpose. The establishment of Family Courts has not changed the position. Hence there arises the need to amend not only the law under Section 125 but also to strengthen the working system so that the objectives claimed under the Code are not merely in statute.

CHAPTER SIX

RIGHT TO MAINTENANCE UNDER PERSONAL LAWS – HINDU AND PARSI LAWS

Marriage, as an institution is the bedrock of a society. The obligation of maintenance that arise with marriage primarily concern the individual, and secondarily the society. Stability of the society depends largely upon the stability of individual homes. Breaking up of the marriage has its direct bearing upon the society.

The matrimonial laws in India owe their existence to religious beliefs. The law at present is much fragmented and lacks uniformity. Conceptually Hindus, Muslims, Christians and Parsis have their own laws and in the area of maintenance they show unanimity to certain extent. But the object for making such provision and the class of people to whom the right is extended differ one from another. Again the concept of the marriage and its solemnization is not the same in all religious communities. The provision of maintenance has its direct bearing also on the validity of the marriage, for only when the marriage is valid the spouse will be entitled for maintenance. Hence, a discussion on the concept of marriage and the law of maintenance under various personal laws is imminent.

Maintenance as such is an emergent economic assistance to help one in need to assure him the right to life. Its extension should not be limited

by application of personal laws. The Constitution directs under Article 44 a common civil code. The mandate has been given little attention and the provision is kept at dormancy for more years than necessary. Unification of the laws is a must to achieve social progress. This will avert conflict of laws. Towards discussing the personal laws of varying communities viz., Hindus, Muslims, Christians and Parsis, the law relating to Hindu and Parsis alone confined to the area of maintenance has been made here.

6.1 UNDER HINDU LAW

The Hindu law has the most ancient pedigree of any familial system of jurisprudence. To suit the needs of society it has undergone several modifications as per the demand and call of circumstances. The concept of maintenance is well recognised under the Hindu Law and the doing of censurable acts are condoned if done with a view to provide maintenance.

Hindu Concept of Marriage

The marriage among Hindus is one of the essential pious sacrament.¹ It is a union of flesh with flesh, bone with bone and this sacred tie is believed to subsist even after the death of the husband.² The relationship between husband and wife imposes upon each of them certain legal marital duties and gives each of them certain legal marital rights. The rights and duties are now absolutely fixed by law. The chief among the duties imposed on the husband is to maintain his wife and relatives.

1. Dunkan J. Derrett M, *Introduction to Modern Hindu Law*, Oxford University Press, Bombay 1963 p.137.

2. Preeti Sharma, *Hindu Women's Right to Maintenance*, Deep & Deep Publications, New Delhi, 1990, p.1.

6.1.1 Right to Maintenance under Ancient Hindu Law

Maintenance has been an important aspect of Hindu law. No other system of law devotes so much attention to the law of maintenance as the Hindu legal system. Among the Hindus, maintenance was not merely a legal obligation but also a moral one. The Hindu concept of maintenance has its origin in the principle of *Jus narula*. According to this principle, the wisdom and experience of man-kind ought to be for the best of the community.³ The pre-code law for Hindus is 'Dharma Shashtra'. It is the Indian classical 'Science of righteousness'. This consisted of body of principles that governed all behavioral patterns of Hindu society. The Hindu law recognizes the necessity of maintenance founded upon the dictates of natural justice supported by the theory of co-ownership, personal liability, moral duties and relationship.⁴

6.1.1.1 Maintenance as Personal Obligation

A Hindu is under a legal obligation to maintain his wife, his minor sons, his unmarried daughter and his aged parents whether he possesses any property or not. The obligation to maintain these relations is personal in character, and arises from the very existence of the relation between the parties.⁵ The words of Manu is reflective of this principles by its observation, "The aged parents, virtuous wife and an infant child must be maintained even by doing hundred misdeeds"⁶.

3. *Id.* at p.75.

4. *Ibid.*

5. Mulla, *Principles of Hindu Law*, N.M. Tripathi Pvt. Ltd., Bombay (1990), p.549.

6. *Ibid. cited.*

The Hindu sages in most unequivocal and clear terms laid down that maintenance of certain persons, is a personal obligation. Since in the social structure of Hindu society the joint family system occupies an important place, the law of maintenance has a special significance in Hindu law. All members of a joint family, whatever be their status and whatever be their age, are entitled to maintenance. The Hindu law has all along recognised that a Hindu has a personal obligation to maintain certain near relations, such as, wife, children and aged parents. Hindu law also recognises that the one who takes another's property has an obligation to maintain latter's dependents. The manager of joint Mitakshara family is under a legal obligation to maintain all male members of the family, their wives and their children. The obligation to maintain these persons arises from the fact that the manager is in possession of the family property.

The same principles apply to cases governed by the Dayabhaga law. But in applying these principles, it is to be remembered that there can be no co-parcenary according to that law between a father and sons. Thus under both the schools, a father is under a personal obligation to maintain his minor sons. Later on, sonship becomes a very important institution. A son is essential for attaining heaven and paying the religious and secular debts of the forefathers, thus, the maintenance becomes both a moral and legal obligation of the father so that the son may exist for the fulfilment of the aforesaid duties. The religious duty with subsequent changes in the Hindu society transformed into a legal right.

In Hindu law, a child was never looked upon as '*fillius nullius*'.⁷ The question of maintenance of children as well as of others is looked at not from the point of view of legitimacy or lawful relationship, but from the point of view of responsibility. Our sages did not merely impose an obligation to maintain the children but the like obligation was also imposed on the children to maintain aged and in-firm parents.

Since a son was deemed to be essential for the salvation of a Hindu, the wife, being giver of the son, had also attained a very high position. It is remarkable to note that in Hindu law, particularly in Hindu family, the position of wife has always been very high. Unlike the Roman family, where the wife had no legal status as wife in her husband's house-hold, the wife in Hindu house-hold, including the joint family, was considered as queen of the house. And the Smritikaras, one after the other, placed her at a very high pedestal. She was '*Ardhangini*' an equal participator in all the sacrifices and in the performance of religious and secular duties. She was '*Dharampatni*' '*Jaya*', a friend and counsellor.⁸ The Hindu law hence imposed a personal obligation to maintain an obedient and faithful wife. In Vedic times, the wife was looked upon forming half the body of the husband.

The law of maintenance assumed special importance in Hindu law on account of the fact that the entire structure of the Hindu society was based on the joint family system, which also implied jointness in property. It was implied in the joint family structure that every member of the joint family would be maintained out of the joint family funds.

7. *Supra* n.2 at p.76.

8. *Id.* at p.77.

It was the moral and legal obligation of the head of the family to look after all the reasonable wants of the members of the family. At the earliest stage of development of Hindu society, the law of maintenance was fully developed, because it was the only right which the members of the joint family could claim. If the father refused or failed to maintain the members of the family, they could openly revolt against him and their claim to maintenance had the full support from the society and if there need be, it could be enforced by the authority of the state.

The importance and extent of the right of maintenance necessarily arises from the theory of an undivided family. The head of such a family is bound to maintain its members, their wives and their children to perform their ceremonies and to defray the expenses of their marriages. In other words, those who would be entitled to share in the bulk of the property are entitled to have all their necessary expenses paid out of its income. The right of maintenance includes persons who by reason of their personal disqualification are not allowed to inherit, such as an idiot, the mad man and the rest. Such persons are excluded from inheritance on partition but are given, in lieu thereof, maintenance, while their male issue, if not disqualified, are entitled to inherit, the wives and daughters of disqualified persons, are till marriage, entitled to be maintained. Most of the old texts clearly show that the Karta of a joint Hindu family was under a legal obligation to maintain all male members of the family, their wives and children.⁹

9. *Id. at p.80.*

The later developments in the rules of Hindu law gave birth to the notion of separate property and the right of partition. Although the Hindu family continued to be joint the entire fabric of Hindu society continued to be based on the joint property, yet its rigour was whittled down by recognising that in certain circumstances a member of the Hindu joint family could acquire and hold separate property independently of the joint family.

The 'Patriarchal' power was curtailed when the right of partition was given recognition by the Hindu society. Originally, the joint property could not be partitioned. But later on the partition not only became legal but maritorious.

6.1.1.2 Maintenance Dependant on Possession of Property

The concept of maintenance is also important for those persons, who for one reason or the other are not entitled to take a share either on partition or on succession, but since they belong to the joint family and since they would have taken the property or a share in it, it is the duty of the person who takes the property that he should maintain them. Such persons are, the children, the wife and parents.

With the emergence of the concept of separate property and partition, the law of maintenance came to be confined in its application to only certain classes of persons who could not take a share in inheritance or partition on account of their sex, or physical or mental deformity. These persons fall into the following two categories:

- (1) Those whose claim to maintenance arises by virtue solely of the relationship with, and irrespective of the possession of property by, the person against whom the claim is to be exercised, and
- (2) Those whose claim depends upon the possession of the property by such person.

The co-parceners jointly own the joint family property. No female could ever become a co-parcener and all female members were maintained as other members of the joint family. No female could ever ask for a partition of the joint family property, but if and when partition did take place on the asking of a co-parcener, a few specified females were entitled to a share in lieu of her right to maintenance. However, she got only a limited state in such property and so could not dispose of it during her life except for legal necessity or benefit of the estate and on her death, it reverted to the original co-parceners or their heirs.

A female could never be the manager of a joint family property, not even if there was no male member of joint family capable of managing the joint family property.¹⁰ Starting from a point where the patriarch was the absolute owner of all the family property and despotic ruler with power of life and death over his descendants, the course of development had reduced the Patriarch to the position of a manager with limited rights, had given other members of the family legally enforceable rights and had recognised the separate property of individual members of the family. But all these had not brought as much change in the position of women as men. The liberalisation

10. *Supra* n.1, p.22-23.

worked over-whelmingly in favour of the male members of the joint family other than the manager. Women were forgotten either consciously or unconsciously in all these processes.

There existed also another class of people for whom also the right of maintenance is recognised under the ancient Hindu law. The right of this class to maintenance has nexus with personal relationship and is limited to the wife, the parents and infant child. It does not include the grandson.

Stridhan

The position and status the Hindu law assigned to a woman was of dependence and submission. The inferior and dependant position of woman was because of the fact that she enjoyed an unequal proprietary rights under the ancient Hindu law. They were considered incompetent to perform sacrifices and to read Vedas. According to Smrities, property was intended for the performance of religious ceremonies. The person who use to hold the property was in the obligation to perform religious rites, rituals and ceremonies and he was considered as a sort of trustee for the performance of those rights. Since women were considered incompetent to perform ceremonies, her right to property was minimised. *Stridhan* alone remained to be the absolute property of woman.¹¹ *Stridhan* constituted all those properties a Hindu female received by way of gift from her relations which included mostly movable property.¹² Under the ancient Hindu law *Stridhan* was classified based on various factor such as source from which the property was acquired

11. Dr.Paras Diwan, *Hindu Law*, Wadhwa & Company, Allahabad, 1995. p.1256.

12. *Guramma Bhatar Chanbassappa Deshmukh v. Mullappa Chanbassappa*, AIR, 1964. SC 510.

and the status at the time of acquisition and the school to which she belonged. The main source of *Stridhan* besides other includes property obtained in lieu of maintenance. *Stridhan* being absolute property women had full power of management like the karta of a Hindu joint family. She had the right to use and enjoy the property for her sustenance and maintenance during her life time. The power of alienation was restricted. The order of succession in *Stridhan* varied under the different schools. The anomaly now stands rectified with the passing of the law of succession. Now that under Section 14 of the Hindu succession Act, 1956, property of a female Hindu is considered to be her absolute property.

Thus, the ancient Hindu law entitled three class of persons for maintenance:-

- (a) those who are members of the joint family and have a right to maintenance against the joint family property, until the time partition is effected.
- (b) those who are members of the joint family but are not qualified to take a share in the property either on partition or succession, have a right of maintenance against those who have taken the property.
- (c) those who are entitled to maintenance for the reason that they are related to the person who owes a personal obligation to maintain them irrespective of the fact they possess any property or not.

Starting from the point of patriarchal society, followed by the vesting of the right with the manager and descending down to the stage of joint ownership by co-parceners, at all stages of the Hindu society women were not given any specific right over the property nor the right to manage the same for others. A female could never be the manager of the joint family property, even in the absence of a male member capable of managing the joint family property. Though the concept of '*Stridhana*', was recognized it accrued to the women more as gifts at the time of marriage. The denial of

property rights to women was perhaps actuated by the selfish interest of male members in the society who wanted that their women should live under their supremacy and tutelage and should not ever become independent. To suppress this injustice women were given a limited right to assure their needs of maintenance.

6.1.2 Statutory Intervention: Pre-codification Laws

There were some legislations prior to codification of the Hindu Law which dealt with the right of maintenance. These legislations however have no practical value now but for historical valuation of the concept these legislations are discussed in brief.

(a) The Native Converts Marriage Dissolution Act, 1886

The first legislative measure to protect the right of maintenance towards women happens to be the Native Converts Marriage Dissolution Act, 1886. The Act protected the maintenance rights of Hindu women whose husband converted to another religion. It empowered the court to pass a decree ordering the husband to maintain his Hindu wife during her life time.¹³

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13. The Converts Marriage Dissolution Act, 1886.
Section 28: Power to court to award alimony - If a suit be commenced under the provisions of this Act, and it appears to the Court that the wife has not sufficient separate property to enable her to maintain herself suitably to her station in life and to prosecute or defend the suit, the court may, pending the suit, order the husband to furnish the wife with sufficient funds to enable her to prosecute or defend the suit, and also for her maintenance pending the suit. If the suit be brought by a husband against a wife, the Court may by the decree order the husband to make such allowance to his wife for her maintenance during the remainder of her life as the Court shall think fit, and having regard to the condition and station in life of the parties. Any allowance so order shall cease from the time of any subsequent marriage of the wife.

(b) Hindu Women's Right to Property Act, 1937

The inequality of rights over property arose a wave of renaissance and paved way for reforms towards ameliorating the condition of women in the Hindu society. The first step towards this was initiated by the passing of a Bill by Dr.G.V.Deshmukh to provide women a right over property. The Bill was passed into law as the Hindu Women's Right to Property Act, 1937. The legislation marks the beginning of several other legislation's being passed towards emancipating the condition and status of women in Hindu society.

The object of the bill as indicated by the preamble was to remove the existing disability from which the Hindu women suffered in respect of their right to property obtained by inheritance or partition. The intention of the Act was to bring in the principle of equality for holding property by male or female. It provided that the property of a Hindu dying intestate would devolve upon the wife, mother, daughter, and the wife of a pre-deceased son along with the sons and all would have equal share in the property. But the Select Committee to which the bill was referred deleted the daughters from the purview and the absolute interest provided to the widow on the property was altered to enjoy only a limited interest. Even otherwise the act was reformative and had much more positive features not observed thenceforth in the Hindu society. The enlarging of the right of maintenance even to widow was the chief among them. The Act was repealed with the passing of the Hindu Succession Act, 1956.

(c) The Hindu Married Women's Right to Separate Maintenance and Residence Act, 1946

The Hindu law principle is that the husband is bound to maintain his wife and the wife is not allowed to a separate maintenance from him unless circumstances or the behaviour of the husband warrants so. The wives' right to maintenance and her conjugal duty to live with her husband and be obedience stand in a reciprocal relation to each other. If she refused to live with her husband without just cause, she is not entitled to maintenance. In recognition of this principle, the Act provided a Hindu married women the right to maintenance and separate residence under specific circumstances.¹⁴ Cruelty, desertion, conversion of religion, bigamy besides inflection of loathsome disease on the part of a husband are provided as circumstances and valid grounds to seek the right of maintenance even while living separate from her husband. The law has been repealed by the passing of the Hindu Adoptions and Maintenance Act, 1956.

6.1.3 Maintenance under Codified Hindu Law

The process of codification of the personal law of Hindus resulted in the legislation of a special statute to deal the matters of adoption and maintenance. The Hindu adoptions and Maintenance Act, 1956 which remains to be the personal law for Hindus deals exhaustively the provision of maintenance. Provision of maintenance is also dealt incidentally under yet another part of codified Act, the Hindu Marriage Act, 1955,

6.1.3.1 The Hindu Adoptions and Maintenance Act, 1956

The Act is a part of the codified Hindu law. Though the enactment

14. Section 20 of the Hindu Married Women's Separate Maintenance and Residence Act, 1946.

is not exhaustive of the law of maintenance,¹⁵ yet in respect of all matters pertaining to maintenance, the code supersedes the rules then prevailed among the Hindu community.¹⁶ The law recognized the rule that a Hindu is under a legal obligation to maintain his wife, minor sons, his unmarried daughters and his aged parents, whether he is possessed of any property or not. The obligation to maintain them is purely personal and arises from the very existence of the relationship between them.¹⁷ The Act gives a statutory recognition of this obligation. A reformatory feature of the statute is that it imposes the duty not only on male members but on females too. Other than wife, children and aged parents the Act provides maintenance to a widowed daughter-in-law and a class of dependents. The paramount condition is that the claimant should be a Hindu. No other person is entitled to claim maintenance under the provisions of the Act.

Maintenance - Meaning

Maintenance under section 3(b) of the Hindu Adoptions and Maintenance Act, 1956 has been defined as including,

- (i) in all cases, provision for food, clothing, residence, education and medical attendance and treatment;
- (ii) in the case of an unmarried daughter, also the reasonable expenses of and incident to her marriage.

15. The Hindu Adoptions and Maintenance Act, 1956 Section 2(2).

16. *Id.* Section 4.

17. *Devanai Achi v. Kasi Viswanathan*, AIR 1957 Mad. 766.

Parties Entitled to Maintenance

(a) Right to wife live separate and claim maintenance

The right of wife to maintenance is an incident of the status of matrimony. The obligation is personal and the Hindu Adoption and Maintenance Act, 1956 provides that a Hindu wife whether married before or after the commencement of the Act, shall be entitled to be maintained by her husband during her life-time.¹⁸ Thus a mandatory duty is imposed on the husband to provide maintenance to his wife throughout her life. The right is enforceable before the civil court and takes retrospective operation in the sense that women who are married prior to 1956 are also made eligible to avail maintenance.

The condition precedent for the application of the provision is that she must be a legally wedded wife. The marriage solemnized between the woman who seeks maintenance and the person against whom the petition is filed must be valid before law. The obligation of the husband to maintain his wife is personal in character and arises from the very existence of the marital relationship between the parties. The liability is one created by law and exists independently of possession of property.¹⁹

The Hindu Adoption and Maintenance Act, 1956 also provides yet another statutory right to the Hindu wife whereby she can choose to live separate, under specific circumstances, and still can claim maintenance.²⁰

18. The Hindu Adoptions and Maintenance Act, 1956, Section 18.

19. *Narayanaswamy v. Padmanathan*, AIR 1966 Mad. 394.

20. The Hindu Adoptions and Maintenance Act, 1956, Section 18(2).

But this is subject to certain conditions.²¹ It is imposed as a matrimonial duty on the wife to reside and live with her husband. But if the circumstances are such to injure the basic dignity of humanity or of matrimony or if the very life and health of the wife is endangered, the wife has a right to refuse to live with her husband. The grounds that justify separate living of the wife from her husband without forfeiting the claim for maintenance are as follows:

- (a) desertion by husband.
- (b) cruelty.
- (c) husband suffering from virulent leprosy.
- (d) husband having another wife living.
- (e) husband keeping a concubine in his family house, or habitually living with concubine elsewhere.
- (f) if husband has become a convert to another religion.
- (g) other justifying cause.

An order of separation and maintenance availed by a wife remains suspended if parties choose to resume cohabitation and will be revived on their separation again.

Though a woman married prior to the passing of the Act is considered wife and extended the benefit after the passing of the Hindu Marriage Act 1955 insisting for monogamy, the usage of the clause 'wife' even to woman who are married subsequent to the existence of wife is ambiguous and lacks clarity.

21. *Id.* Section 18(3).

A Hindu wife who herself is not chaste or who sought for conversion to another religion is dis-entitled to avail any remedy under Section 18(2) of the Hindu Adoptions and Maintenance Act, 1956. This disqualify her to live separate and claim for maintenance. A single act of infidelity will be sufficient to deny her maintenance, but this needs clear proof. As to payment of interim maintenance under the provisions of the code the judicial opinion is divided.

Divorced womens' right of maintenance

Marriage among Hindu society is sacred and is believed to last even after the death of the parties. The concept of divorce is unknown until 1955, when the Hindu Marriage Act was passed to liberalize the marriage concept. The matrimonial courts while exercising jurisdiction under the Hindu Marriage Act had been given power to take stock of the economical needs of the parties and pass necessary orders. Hence the relief of maintenance under the Hindu Adoptions and Maintenance Act, 1956 is limited to that of a 'wife' alone which term for all purposes means a woman whose marriage relationship is valid and subsisting.

The divine concept of indissoluble nature of Hindu marriage is a thing of past. Now in the modern age divorce is a necessity. It is looked upon as strengthening the institution of marriage and as a mark of emancipation of fair sex. Now divorce is considered as an escape valve for the release of undesirable tension that result out of marriage. The Law Commission of India too had favoured such a view vide its 71st Report. Though divorce legally dissolves the marriage tie it can neither erase the past nor create an unrelated future. It merely adjusts the relationship to restrict the

flow of obligation between the parties. Thus divorce is not the end of the whole episode and certain relationship and obligations do survive.

In an ongoing marriage, the parties little bother about the economical needs and expenses of the family. But, when the marriage tie is snapped the problem of adjustment of financial relation arises. Hindu Adoptions and Maintenance Act, 1956 limits its concern over wife until the time the marriage is a going affair, but fails to extend any remedy after divorce.

Unlike the husband, the divorced women is in a different status after the dissolution of marriage. The institution of marriage and its abrupt termination would certainly alter the position of the parties, more adversely the women folk. For those women who are not economically independent divorce is the end of life. The divorced woman of a middle class strata find their remarriage difficult and most of the times they are forced to lead a life of a desolate lone voyager, if not as servant at the houses of their relatives.

The notion of equality cannot be applied when unequal economical status was the rule. Legally a woman may not be the wife of her husband after divorce but the Hindu tradition and her social life insists her to consider herself as the wife of her divorced husband. A widow might be in a better position than that of her divorced partner. She may atleast enjoy the right of succession or atleast the sympathy from her family members and in-laws, which may not be the case of a divorced woman. Presuming that the Hindu concept of marriage continues even after divorce, the matrimonial court extends the remedy at the time of passing of an order for divorce or for an order of judicial separation or restitution of conjugal right. The secular

provisions of Section 125 of the Criminal Procedure Code do extend such a relief to a woman who is either divorced or who sought for divorce from her husband. On this line, a change for extension of the benefit to even divorced women is warranted under the Hindu Adoptions and Maintenance Act, 1956.

The relief provided under Section 18 of the Hindu Adoptions and Maintenance Act, 1956 is distinct from one provided either under the Hindu Marriage Act 1955 or under Section 125 of the Criminal Procedure Code. The remedy provided under the personal law is a permanent statutory right. This is in recognition of the moral obligation that arises out of matrimony. Whereas, the matrimonial law provides maintenance only as an ancillary relief to the parties with a view to provide them economical assistance pending or at the disposal of a matrimonial dispute. With regard to Section 125 of the Criminal Procedure Code the right of maintenance provided thereunder is secular and is made applicable to all communities inclusive of Hindus. The relief is much limited and the jurisdiction vests with the criminal courts. Pendency of an application for maintenance before one forum does not oust the jurisdiction of the other. But however the civil court can take into consideration the relief if any passed by the Magistrate Court at the time of passing an order for maintenance.

(b) *Children's right of maintenance*

The obligation to maintain one's children is a personal duty and arises out of the personal relationship. Earlier, a father had such a duty only in respect of legitimate children. Under the Hindu law a child was never looked upon as 'fillius nullius' and the question of maintenance of children is looked upon only from the point of view of responsibility and not based on

legitimacy. Only the father had such an obligation and it was towards both legitimate or illegitimate children. The Hindu Adoptions and Maintenance Act, 1956 imposes an obligation on either of the sex to maintain his or her legitimate or illegitimate children.²² The liability extends only until the age of minority.²³

Unmarried daughters however, are entitled to avail maintenance until the time they are unable to maintain themselves.²⁴ The condition of minority does not apply to her and is up to the discretion of the court. The mere fact that an unmarried daughter is highly educated will not dis-entitle her the right to claim maintenance, if she is not actually earning.²⁵ Section 20(3) of Hindu Adoptions and Maintenance Act, 1956 speaks not of the capacity to earn an income but only the existence of sources of income and ability to maintain herself with such income. Maintenance in the case of an unmarried daughter includes also the reasonable expenses of and incidence to her marriage.²⁶

(c) Parent's right to maintenance

Maintenance of aged and infirm parents is a personal obligation arising out of the existence of the parent-child relationship and is quite

22. *Id.* Section 20(1).

23. *Id.* Section 20(2).

24. *Id.* Section 20(3).

25. *Laxmi v. Krishna*, AIR 1968 Mys. 288.

26. *Chandra v. Nanag*, AIR 1975 Del. 175.

independent of the possession of any property, ancestral or self-acquired. Under the old Hindu law, the obligation to maintain one's aged father and mother was imposed on the son alone and daughter had no such obligation. The modern Hindu law imposes such an obligation both on sons and daughters. But this is not absolute. One is required to maintain his/her aged or infirm parent only when the latter is unable to maintain himself or herself, out of his or her own earning or property. If they possess means, which is sufficient to maintain themselves, the son or daughter is relieved of this obligation.

The term 'parent' in ordinary usage means only natural parents, i.e., father and mother related by blood. The old Hindu law did not include step-parents' within the definition. But the Hindu Adoptions and Maintenance Act, 1956 adds an explanatory clause to include 'child-less step-mother' within the expression of parent. However the child-less step-father is still excluded from the purview of the expression of 'parent'.

(d) Maintenance of other members

Other than wife, children and parents, Hindu Adoptions and Maintenance Act, 1956 extends maintenance to other class of people also. The widowed daughter-in-law and a class of dependents are provided with the relief of maintenance. In the case of widowed daughter-in-law, the right is enforceable against her father-in-law. This could be possible only when she has no means to maintain herself and that her father-in-law is possessed with sufficient means over which a right vests with the daughter-in-law. Even this limited right will cease to exist on the remarriage of the daughter-in-law.

A much similar duty is imposed on the successor over the property of a deceased to maintain a volley of relatives described precisely by the code as 'dependants'.²⁷ They could be classified to fall under the following five heads:-

- (i) parents
- (ii) spouse
- (iii) children
- (iv) lower descendants, and
- (v) descendant's widows.

The right enforced herein is neither moral nor personal but purely out of the enjoyment of property over which the claimants, described as dependents, have a claim.

Rate of Maintenance

The Act practically reiterates the old-age rule that the rate of maintenance is entirely a matter of discretion by the courts. Under section 23 of the Hindu Adoptions and Maintenance Act, 1956 exclusive discretion to determine the amount of maintenance payable in respect of wife, children or aged or infirm parents is given to the concerned court. While determining the amount the courts are called upon to have due regard to certain facts and circumstances.²⁸ The facts that are relevant to determine the amount of maintenance in case of a wife, children or aged or infirm parents are:-

27. The Hindu Adoptions and Maintenance Act, 1956 Section 21.

28. *Id.* Section 23(2) and (3).

- (a) the position and status of the parties
- (b) the reasonable wants of the claimants
- (c) if the claimant is living separately, whether the claimant is justified in doing so,
- (d) the value of claimant's property and any income derived from such property, or from the claimant's own earnings or from any other source, and
- (e) the number of the persons entitled to maintenance under this act.

Alteration of the Order of Maintenance

The amount of maintenance decreed by the court or agreed between the parties can be altered with change of circumstances justifying such alteration.²⁹ An order of maintenance passed could be a charge on the estate of the deceased under special circumstances.³⁰ The right of maintenance cannot be absolved by transfer of the property. By due notice, the same may be enforced as against the transferee.³¹

6.1.3.2 Maintenance under the Hindu Marriage Act, 1955

Under the Common Law of England, on marriage properties of the married woman devolve on the husband who was required to maintain his wife during coverture and as well as on divorce. In case of divorce, the obligation extends until the time she remains unmarried. The ecclesiastical law had power to pronounce a decree for alimony while pronouncing a

29. *Id.* Section 25.

30. *Id.* Section 27.

31. *Id.* Section 28.

decree of divorce - 'a mensa et thoro'. The practice continued even after transfer of matrimonial jurisdiction to the secular courts. The principle was further extended to even void and voidable marriages. The concept which prevailed in England was imported to Indian conditions first by the secular marriage law, the Special Marriage Act, 1954 and then in the Hindu Marriage Act, the year next. Until this time divorce is an antithesis of marriage under Hindu law.

Divorce was thought as repugnant to the sacramental character of Hindu marriage. But circumstances forced a reform and the Hindu population grudgingly accepted divorce when parliament enacted Hindu Marriage Act, 1955. Divorce was thus recognized and Sections 24 to 27 of the Act made provisions for maintenance and alimony as ancillary relief not only to the parties to the marriage but to their children also. The matrimonial court can exercise the power while adjudicating a matrimonial dispute. The provisions may be made either as alimony pendente-lite or as permanent alimony and maintenance.

(i) Interim Maintenance

During the pendency of matrimonial proceedings or on successful conclusion thereafter the parties are entitled to claim maintenance. Technically in English parlance termed as 'alimony', the right has been made available under the Hindu Marriage Act, 1955. The law is founded on the presumption that a wife who is not being maintained by her husband has the right to such maintenance. It confers on the court the power to grant interim maintenance and for the expenses of the proceedings when in pendency and for permanent alimony on successful completion of the

matrimonial dispute. Almost all the Indian matrimonial statutes extend such a benefit, but the provision of such a relief to both husband and wife under the Hindu Marriage Act, 1955 is something reformatory. Generally, it is only the wife who is entitled to the right of maintenance but under the Hindu marriage Act, the right of the husband to claim alimony pendente lite and litigation expenses has also been recognised, if he has got no independent source of income for his maintenance and to defray the litigation expenses. In the respect the Act departs from other matrimonial legislations in India.

The object behind the provision is two fold: firstly, to prevent vagrancy resulting from strained relation between the husband and wife, and secondly, to ensure that the indigent litigating spouse is not handicapped in defending or prosecuting the case due to want of money.³² On the breakdown of the marriage, not infrequently, it so happens that the husband pays nothing for the support of his wife and children and the wife has to fall back upon her parents and relatives to fend her immediate needs. It is thus the object of this provision to prevent vagrancy.³³ Reasonableness too demands extension of such a relief in favour of a needy spouse. Had not the parties drifted away from one another the spouse from whom support is sought would have in any case supported the other spouse entailing financial burden. Hence, it is but natural to make the husband bear the cost of maintaining his wife pending disposal of any dispute and until some permanent relief is provided to her.

32. *Ramchandra v. Kawsalya*, AIR 1969 Mys.76.

33. *Bhuneshwar Prasad v. Dropta Bai*, AIR 1963 MP 259.

(a) Procedure

An application for maintenance can be made at any time during the pendency of proceedings. But prudence demands that the same is made at the earliest point of time either when filing the petition as petitioner or before the filing of written statement as respondent. The phrase 'petitioner' used in Section 24 means the claimant for maintenance but not the petitioner in the main petition to exclude the respondent.³⁴ It is the duty of the court to provide the wife with maintenance and expenses at the first instance.³⁵ The court can exercise its inherent power to stay further proceedings until the time the husband complies with the order.³⁶

(b) Basis for the claim of maintenance

The basis of the claim for interim maintenance is that the claimant has no independent income to support herself. The emphasis is on independent income. Facts like that the claimant is in possession of property, from which no income accrues, or her likelihood to inherit a huge property, or her potentiality of earning since educated are not valid defences. Nor the fact, that she is maintained by her parents, brothers or relatives deny her the right to claim interim maintenance. Once the averments that she has no sufficient means to maintain herself are established the court should pass an order for interim maintenance.

34. *Rameshwar Nath v. Nanta Devi*, AIR 1957 Punj. 85.

35. *Lotika Ghosh (Smt.) v. Nirmal Kumar Ghosh*, AIR 1968 Cal. 68.

36. *Supra* n.33.

The pendency of a main petition claiming for a substantial relief alone will entertain jurisdiction for ancillary relief. The usage of the expression 'in any proceedings under the Act' in all the Sections 24 to 27 of the Hindu Marriages Act, 1955 will clear the proposition. Proceedings under this Act means proceedings under Section 9 to 13 of the Hindu Marriage Act, 1955. Appeal is a continuation of the original proceedings and hence appeal filed as against the decree of the lower court is a proceeding under this Act.

Claim for children

Judicial opinion is divergent on the point whether the court while granting maintenance under Section 24 has power to include maintenance for children under the custody of wife. The High Courts of Patna³⁷ and Jammu & Kashmir³⁸ had refused payment of maintenance to children whereas the same is extended by many other courts in India. A reasoned interpretation will mean the courts have such powers under section 24. Children are the offsprings of the marriage and when once a spouse seeks the support for subsistence during the pendency of a litigation it must include the offsprings dependent on such spouses as well. The courts have jurisdiction under Section 26 of the Hindu Marriage Act and it will be too technical a view to force the wife and children to misery adopting an interpretation to exclude them from maintenance allowance. This may tend to force the wife to initiate another legal battle for their support which may lead to multiplication of litigation.

37. *Ban Ken v. Anjali*, AIR 1972 Pat. 80.

38. *Puran v. Komla*, AIR 1981 J&K 5.

The basis of the liability under Section 24 is the result of factum of marriage. So even if the main petition is dismissed or withdrawn the liability arising therein until that date cannot be denied. But if the main petition itself is dismissed, there can be no question of making any order thereafter. Even when the validity of the marriage is denied and is in issue in a matrimonial proceedings, the court has jurisdiction to grant maintenance pending a decision.

(c) Date of effect of order

There exists difference of opinion among the High Courts as to the point when from an interim maintenance could be ordered, i.e., whether it should be from the date of starting of the proceedings or from the date of application for interim maintenance. The view taken by a Division Bench of the Punjab and Haryana High Court³⁹ is noteworthy in this aspect. Towards fulfilling the very objective of this provision, the court held that the applicant would be entitled to maintenance during the pendency of the proceedings even if the petition is dismissed or decided finally, or if an appeal or revision is pending or disposed of by the appellate courts. The Kerala High Court following its own decision in *Radhakumari v. K.M.N Nair*⁴⁰ went further and held that interim maintenance could be ordered for the entire period although an application for interim maintenance was made at the appellate stage.⁴¹

39. *Sohan Lal v. Kamlesh*, AIR 1984 P&H 332.

40. (1982) KLT 417.

41. *Nalini v. Velu*, AIR 1984 Ker. 214.

The conduct of the parties has no relevance in granting of interim maintenance. Allegation of adultery or any other matrimonial misconduct are relevant towards award of interim maintenance.⁴² The right under Section 24 should be made available to a wife who is unable to support herself without any reference to her conduct.⁴³

(d) Expenses of the proceeding

During the pendency of the proceedings, the wife can claim not only maintenance but also 'necessary expenses of the proceedings'. The 'expenses of the proceedings' is an expression of wide import to include fees of a competent lawyer, court fee, process fee and expenses of the witness, expenses for getting paper prepared including typing and Xeroxing charges. The mode of payment of the expenses is by way of a lump sum. Section 24 does not mention that the payment of expenses should be made by way of a lump sum, nevertheless, the nature of the expenses is somewhat of a fixed nature to be made separate by lump sum.

(ii) Permanent alimony and maintenance

The concept of permanent alimony is borrowed from English law. The object of the provision seems to be that the marriage which was once regarded as indissoluble was allowed to be severed in the larger interest of the society and the same consideration of public interest and social welfare require that wife be not thrown on the street to carve out for herself.

42. *Lallubhai v. Nirmal bai*, AIR 1972 Guj. 174.

43. *Dwarkadas Gurmukhidas v. Bhanuben*, AIR 1986 Guj. 6.

The law of permanent alimony and maintenance after divorce is essentially the creature of statute. The ecclesiastical courts in England never allowed alimony after divorce. But the parliamentary practice which provided maintenance while granting divorce by private Act had been recognized by the Matrimonial Causes Act 1857. This conferred on the divorce court power to order the husband to pay the wife such sum of money or such annual sum of money for any term not exceeding her own life as the court thought reasonable. The right was recognized by subsequent matrimonial legislations and now is presently contained in the English Law under section 23(1)(a) of the Matrimonial Causes Act 1973.

The Hindu Marriage Act, 1955, vide its provision, empower the court to grant permanent maintenance either to the wife or husband on application being made for the purpose.⁴⁴ In this respect the right is recognized as one of equali-jura. The relief is ancillary to the granting of substantive relief provided under the Act. An application for maintenance under section 25 of the Hindu Marriage Act 1955 may be made either during the pendency of the substantive pension or at any time subsequent thereto. But when the main petition is dismissed or withdrawn no application for this ancillary relief can be entertained. The question whether dismissed order of the court is a decree within the meaning of Section 28 has been considered in *Dashan Singh v. Mst Daso*⁴⁵ and ruled against.

44. The Hindu Adoptions and Maintenance Act, 1956 Section 25.

45. 1980 HLR 454 (Raj).

The usage of the phrase 'wife' or the 'husband' under Section 25 of the Hindu Marriage Act reflects lack of accurate draftsmanship of the legislature. When once the decree of divorce is ordered the parties cease to be husband and wife. Hence technically they cannot lay a petition for permanent alimony or oppose the same in such capacity. But the courts have taken a broader view and held that 'wife' in the Sub-section means divorced wife or wife of an annulled marriage. The word 'wife' in the ambit of this provision should be construed to mean a person who would have been the wife but for the decree of divorce passed by the trial court.

Sub-section (2) of Section 25 of the Hindu Marriage Act contemplates variance, modification or cancellation of the order passed under Sub-section (1). Again under Sub-section (3), on proof of marriage or unchastity on the part of the claimant, the court is vested with the power to cancel the relief which it provided earlier. While fixing the amount of permanent alimony and maintenance the court takes into consideration several factors some of which have laid down by the statute and some others have been evolved by the courts.

6.2 MAINTENANCE UNDER THE LAW OF PARSIS

The descendents of the ancient Magi of Persia came as emigrants to India. The threat for their life and religion forced the followers of Zoroaster to migrate to this country.⁴⁶ Their law rested on tradition and compilation by

46. Beri, P.P. *Law of Marriage & Divorce in India*, Eastern Book Company, Lucknow P.45

their learned man. With their arrival in India 717 A.D. upto 1865, they had no recognized law to govern their social relations. Their ancient custom having fallen into disuse the handful of strangers who settled in Western India gradually adopted much of the law and usage of the Hindus in Matrimonial Matters.⁴⁷

There existed a state of 'lawlessness' in matrimonial matters among the Parsis. They were left without any law governing their social and moral duties and obligations. Each man did as seemed good in his own eyes. The necessity for special legislation regulating the law of marriage and divorce was felt much by the Parsis and the efforts of Sir Joseph Arnold led to bring a bill, passed as Parsis Marriage Divorce Act, 1865⁴⁸. The Act was largely fashioned after the Matrimonial Causes Act, 1857 of England. The law has been replaced by the Parsi Marriage and Divorce Act, 1936, to keep step with the changed norms in matrimonial behaviour. The Act has been further amended in 1988 by the Parsi Marriage and Divorce (Amendment) Act, 1988.

Marriages and Divorces among the Parsis have been regulated by the Parsi Marriage and Divorce Act, 1936. The Act provides for the constitution of Matrimonial Courts⁴⁹ and appointment of Marriage Registrars.⁵⁰ The essential requisite for a valid marriage are:

47. *Peshotem v. Mehr bai*, ILR 13 Bom, 302.

48. *Supra* n.1 at p.46.

49. The Parsi Marriage and Divorce Act, 1936 Section 18.

50. *Id* Section 7.

1. Parties be not related within the prohibited degrees of consanguinity or affinity.
2. Marriage be solemnized in the Parsi form of Ashirvad Ceremony by a Priest in the presence of two witnesses;
3. Parties having attained a minimum age of marriage 21, in the case of male and 18, if female⁵¹.

The Act also provides for registration of marriage. The law enumerates a large number of grounds for divorce⁵². The 1988 amendment has provided for divorce by mutual consent.⁵³

The concept of marriage and divorce in Parsi community as is reflected by the Parsi Marriage and Divorce Act shows much similarity to the law governing Hindus. The special feature of the code is that it treats the matrimonial home as joint property.⁵⁴

Maintenance

The law providing for maintenance among Parsis is there under the provision of the Parsi Marriage and Divorce Act, 1936. The law correspond much to the provisions of the Hindu Marriage Act, 1955 and Special Marriage Act, 1954.

51. *Id* Section 3.

52. *Id* section 32.

53. *Id* Section 32-B.

54. *Id* Section 42.

(i) Alimony Pendente lite

During the pendency of any suit, either the wife or the husband who has no means for his or her support can claim as against the other for allowances referred by the statute as alimony⁵⁵. Any payment made during the pendency of a proceeding between the parties is called as alimony pendent lite. The amount awarded may be payable as weekly or monthly sum. The payment could be also for the expenses of the suit. The right of alimony made under this provision is extended not only in favour of a wife but also to a husband. Not the sex that matters but only the possession of means that is taken into consideration for the award of alimony.

(ii) Permanent Alimony

At the time of disposal of any suit, on an application being made for the purpose, the Court can order permanent alimony or maintenance⁵⁶. In the case of alimony it is normally paid as a gross sum whereas the case of maintenance it is paid monthly or periodical. Any such payment if made as maintenance can extend up to the lifetime of the plaintiff. The Court ought to take into consideration such facts that are relevant to the passing of an order as the defendants' own income and other property, the income and other property of the plaintiff, the conduct of the parties and other circumstances of the case. In case of need, the Court can also create a charge on the properties of the defendant.⁵⁷

55. *Id* Section 39.

56. *Id* Section 40.

57. *Id* Section 40(2).

With change of circumstances of either party an order that has been made earlier may be varied, modified or rescinded.⁵⁸ Much similar to the provision governing the Hindus, the Court is also vested with the power to vary or cancel the order on proof of remarriage or unchastely on the part of the one in whose favour the order has been passed.⁵⁹

58. *Ibid.*

59. *Ibid.* Section 40(A).

CHAPTER SEVEN

RIGHT TO MAINTENANCE UNDER PERSONAL LAW – MUSLIM AND CHRISTIAN LAWS

India has been for centuries a multi-religious and multi-ethnic society and yet it has the distinction of maintaining unity in such diversities. The social relationship of people in India is governed by one's own personal law. Muslims and Christians in India, like other religious groups such as Hindus and Parsis have a separate personal law of their own covering matters pertaining to marriage, divorce, maintenance, inheritance and custody of children. The law relating to maintenance governing the religious minorities of Muslims and Christians is dealt here under for comparative value.

7.1 MAINTENANCE UNDER MUSLIM LAW

The Islamic Law was introduced in the Indian sub-continent in the early eight century and has its own value today¹. The personal law is constitutionally recognized² and judicially enforced. It has now become an integral part of the Indian civil law system. The members of Muslim community have high regard for their personal law and consider this to be one of their distinct religious based possession.

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1. David Pearl, *A Text book of Muslim Law*, Croom Helm, London, 1979 21.
 2. Article 225 of the Constitution of India.

The concept of marriage, divorce and maintenance under Muslim law is distinct and vary much to the concepts reflected under the personal laws of other Muslim communities in India. The concept of marriage, today, has undergone a complete change. The primary cause of the family is no more for mere biological reasons. Today marriage is considered as a means to achieve something useful and satisfying social goals, such as social harmony, well being of the weaker sections. Protection of the woman and children and healthy development of human species are the prime obligations that arise with marriage. The concept of marriage as is reflected by the personal laws of all the religious communities in India fail to realise the said objective. Social and economic oppression of woman has been on the increase inspite of our acclaim for social justice and human rights value. The law of maintenance under the Muslim law has been focused so to compare the same with other personal laws to gain support for reforms.

Shariate

The British legislature enacted the Shariate act in 1937³ and it is known as the Muslim personal law. It is the Islamic code of life and the common belief among Muslims is that it is divine. Many central legislations are applicable to Muslim communities in the areas of interstate succession, female property, gift, marriage, dissolution, dower, guardianship, maintenance, trust, wakfs, adoption etc. They are all governed by the Muslim Personal Law (Shariat), Application Act of 1937. A short narration of the position regarding maintenance law alone is made relevant.

3. The Muslim Personal Law (Sheriat) Application Act, 1937.

Concept of Marriage

Marriage (nikah) has a fundamental role to play in Islamic Jurisprudence. Almost every legal concept revolves around the central focal point of the status of marriage⁴. Marriage under the Mohammedan law is essentially a civil contract⁵. Its validity depends on proposals on one side and acceptance on the other. The law does not insist upon any particular form in which the contractual performance should be effected or that the union should be evidenced by any writing, nor is the presence of witnesses essential for its legality. When put to writing this is termed as marriage contract (Kabin-nama). Among the Sunnis, though the presence of witnesses is considered necessary to the validity of a marriage, their absence only renders it invalid which is cured by consummation. Infact, a marriage contract, as a civil institution, rests on the same footing as other contracts. The parties retain their personal rights against each other and as well as against strangers, and according to the majority of the schools have power to dissolve the marriage tie⁶, should circumstances render this desirable.

Religiously the marriage is recognized in Islam as the basis of society. Though it is a contract, it is also a sacred covenant. As an institution it leads to the upliftment of man and is considered to be the means for continuation of the human race. Though polygamy is allowed,

4. *Supra* n.1.

5. Tahir Mohmood, *The Muslim Law in India*, 2nd Ed. 1982 Law Book Co. p.45.

6. Muslim Women too can avail divorce under the Dissolution of Muslim Marriage Act, 1939.

temporary marriages are forbidden. Marriage legalizes connubial relationship and imposes on the husband several obligations, the prime among this being the duty to maintain his wife. Mahr (Dower) is an integral part of the marriage. The idea of sale is latent in the law of mahr⁷. Mulla defines it as 'a sum of money or other property the wife is entitled to receive from the husband in consideration of marriage'⁸. But others have a view that it is not consideration over the contract of marriage but only an obligation imposed by the law on the husband as a mark of respect for the wife⁹. The view gains support from the fact that non-specification of dower at the time of marriage does not affect the validity of the marriage. It is something in the nature of a nuptial gift which a Muslim undertakes to make to his wife¹⁰. The amount is fixed by agreement between the parties. The amount of mahr can be settled before marriage, or at the time of the marriage¹¹. It may even be settled after the marriage. The amount of dower is an actionable claim and the wife can recover the same from the husband.

Concept of Divorce

The law relating to divorce under Muslim law is complicated and does not fully represent the true law of Islam¹². The law is very liberal and

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7. Fyzee, *Outlines of Muhammadan Law*, 4th Ed., Oxford University Press, Delhi, 1978 p.133.
 8. Mulla, *Principles of Mohamedan Law* 18th Ed. N.M. Tripathi Pvt. Ltd., Bombay, 1985 p.308.
 9. Syed Ameer Ali, *Mohammedan Law*, Vol.II, The English Book Store, New Delhi, 1985 p.477.
 10. Paras Diwan, *Muslim Law in Modern India*, Allahabad Law Agency, 1993 p.95.
 11. *Kapor Chand v. Kedar Unnisa*, (1950) SCR 748.
 12. *Supra* n.5 at p.95.

the dissolution of marriage can be effected both statutorily or non statutorily. When divorce is obtained judicially in accordance with the provisions of the Dissolution of Muslim Marriages Act, 1939, it is a statutory form of divorce. This is least resorted to and is very cumbersome in nature. But the most common practice is the non-statutory divorce where parties on their own volition terminate the marriage by exercise of the right vesting with the husband. Though various forms of non-statutory divorce exist, the simplified and controversial form of divorce is 'Talaq-al-bida't' a popularly termed as triple talaq wherein on the utterance of the word talaq consecutively for three times the matrimony stands repudiated. Major reforms have been effected on the law of divorce in all most all Muslim communities including that of Pakistan¹³, but the law in India is yet to see the lights of reform.

7.1.1 Concept of Maintenance

The Muslim law imposes a duty on every Muslim to maintain his wife, aged parents and children¹⁴. Marriage makes it the man's responsibility to love his wife and provide her with support. This duty is more moral than legal. The obligation to maintain one's wife is personal and almost absolute. After passing of certain age it may not be possible for a person to earn his livelihood and he may also may not be having any source of income. Similarly, a child remains at the receiving end because of its tender age.

13. Lucy Carroll, *Recognition in English Law of Extra-Judicial Divorces effected by English Domiciliaries: The Privileged Position of a Pakistani's Talaq vis-à-vis an Indian's Talaq*, JILI 1980 Vol.22:2, p.271-274.

14. Qureshi. M.A., *Muslim Law of Marriage, Divorce and Maintenance*, Deep & Deep Publications. 1995 p.296.

The obligation of a Muslim to maintain members other than his wife arises only if the claimant has no means or property out of which he or she can maintain himself or herself¹⁵.

Under the Muslim law, maintenance is known as 'nafqah'¹⁶. This includes food, raiment and lodging. Hedaya defines maintenance as all those things which are necessary for the support of life¹⁷. Maintenance is the right of the wife to be provided at the husbands expense, and on a scale suitable to his means, with food, clothing, housing, medical expenses, etc., and includes even the expenditure met on servants, which on the social status of wife cannot be dispensed with¹⁸.

7.1.2 Parties Entitled to Maintenance

7.1.2.1 Maintenance of wife

Maintenance to wife is a lawful right which she can enforce as against her husband. A wife whose marriage was performed in accordance with the Muslim law and who has attained an age at which she can render conjugal rights to her husband is entitled to receive maintenance. Maintenance is the lawful right of the wife enforceable as against her husband. The obligation to maintain one's wife arises in the following two circumstances:- first, on account of status arising out of valid marriage, and

15. *Ibid.*

16. *Id.*, at p.297.

17. Charles Hamilton, *The Hedaya commentaries on the Islamic Law*, Kitab Bhavan, New Delhi 1985, p.392.

18. Jamal J. Nasir, *The Status of Women under Islamic Law and under Modern Islamic Legislation*, Graham & Trofmon, London, 1990 p.59.

secondly, on account of pre-nuptial agreement entered into between the parties to the marriage, or between the parents in case both the parties or one is a minor.

A Muslim husband is bound to maintain his wife of a valid marriage. Such obligation is not there if the marriage is void or irregular, excepting under one circumstance, where a marriage is irregular for want of witnesses. Maintenance is due only to a wife who has been regularly married (Sahih). If the marriage is irregular, such as when the husband married her while in iddat for another husband, or if the marriage is void, being one solemnized between persons of prohibited relationship, the obligation is unenforceable and if any amount has been paid as maintenance can be rightfully demanded back. The obligation imposed on the husband is personal and absolute. He is bound to maintain his wife even if she is rich and has means of her own, notwithstanding that the husband is without any means. It is immaterial that the wife is Muslim or non Muslim as regards payment of maintenance¹⁹. But if the wife has not attained puberty, the obligation cannot be enforced until the time she attains puberty. The right to maintenance of wife is a debt against the husband and has priority over the right of all other persons. She has also the right to pledge the credit of her husband towards providing her maintenance. The obligation to maintain is subject to a condition that the wife remains faithful to him and obeys all his reasonable commands.

19. *Supra* n.14 at p.299-300.

One of the remarkable features of the Muslim matrimonial law is that, marriage being a contract, the parties are permitted to enter into mutual agreements either at the time of marriage or subsequent thereto and impose thereby conditions regarding their marital relation. The most usual and common stipulation made between them relates to the residence of wife and payment of periodical maintenance either during the subsistence of the marriage or at its dissolution. A wife may also stipulate that on the happening of certain contingency she will be entitled to live separate and claim maintenance. Payment of a sum for the wife's personal expenditure termed otherwise as Kharach-i-pandan is also recognized by marriage contract.

Kharacha-i-pandan

Among the Muslims, it is customary to give a married woman a sum of money periodically for her personal expenditure. This is effected normally by the marriage contract, and is termed as kharacha-i-pandan or newa-khori²⁰. This literally means betel box expenses and is a personal allowance to the wife. Kharacha-i-pandan is the absolute property of the wife and she is at liberty to use it according to her sweet will. The husband takes no control over it. In ***Khawaja Mohammed Khan v. Nawab Hussain Begum***²¹ it was held that the right is enforceable against the father-in-law and that even when she lives away from her husband. The wife may not be compelled to come and live with her husband. The amount payable under

20. *Banney Sahib v. Abida Begum*, AIR 1922 Oudh 251.

21. (1910) 37 IA 152.

this head is distinct from that payable as maintenance and can be enforced by a wife even when she lives separate²².

7.1.2.2 Maintenance to a Divorced Woman

The obligation of a husband to maintain his wife subsists not only during coverture but even upon dissolution of the marriage by divorce or annulment. The personal laws of all the religious groups in India have statutory provisions imposing an obligation on the husband to maintain his wife. The obligation extends until the time she gets remarried or is disqualified for any other reasons. As regards Muslims, this is a topic of controversy. The predominant view that prevails among Muslims scholars is that a divorced wife is entitled to maintenance only during the period of 'iddat' and not later. The notion of divorce does not extend beyond a short waiting period called 'iddat'²³. The Muslim law does not recognize any obligation on the part of man to maintain his wife, whom he has divorced²⁴.

The remedy though not available to her under the Muslim personal law had been extended to her by the secular law under Section 125 of the Criminal Procedure Code. Even when the provisions were on the anvil, it faced stiff opposition from orthodox Muslims as it enabled the court to award maintenance beyond the three months 'iddat' period. The

22. *Ali Akbar v. Mst. Fatima*, (1929) ILR 11 Lah. 85.

23. Tahir Mohmood, "*The Muslim Women (Protection of Rights on Divorce) Act 1986, Perspectives and Prospects*", Indian Bar Review, Vol.13(2), 1986 p.222.

24. Kusum, *Maintenance of Divorced Muslim Wife: A Critique of the Proposed Law*, JILI, 1980 Vol.22:3, p.408.

Government then too capitulated on the issue. The discussion which stood terminated was reopened just to satisfy orthodox Muslims. The provision finally emerged with changes whereby if post divorce entitlement under personal law realised by the divorced wife, this would be taken into account, and if maintenance has been granted earlier, it could be cancelled²⁵. The secular law had its application to all section of the Indian community inclusive of Muslims. The Supreme Court did recognize the right of Muslim divorce woman in **Bai Tahira v. Ali Husain Fidalli Chothia**²⁶ and **Fuzlumbi v. Khader Vali**²⁷. The Court therein took the view that the divorced Muslim woman is entitled to apply for maintenance under Section 125 of the Code. The Supreme Court re-emphasized the stand in **Shah Bano**²⁸, when a scrupulous rich husband sought to escape the application of Section 125 on the ground that provision of maintenance to a divorced wife beyond the 'iddat' period was contrary to Muslim law.

(a) Shah Bano Controversy

Neglected and denied of maintenance by her husband, an advocate by profession Shah Bano, an old Muslim woman sought for remedy through maintenance. She moved a petition under Section 125 of the Criminal Procedure Code before the Court of learned Judicial Magistrate (First Class), Indore. Thereupon, the husband divorced her by an irrevocable

25. Section 127 (3) (b) of the Code of Criminal Procedure, 1973.

26. AIR 1979 SC 362.

27. AIR 1980 SC 1730.

28. *Mohd. Ahmed Khan v. Shah Bano*, AIR 1985 SC 945.

talaq and pleaded that she ceased to be his wife, and hence not entitled to maintenance. The learned Magistrate directed her husband to pay a princely sum of Rs.25/- per month as maintenance. In revision, the High Court of Madhya Pradesh enhanced the amount to Rs.179.20 per month. Whereupon, her husband took the matter before the Supreme Court by special leave. The Supreme Court was charged with the task of deciding whether Section 125 of the Code is applicable to Muslims without interference of their personal law. They had also such issues to decide as, whether under the Muslim personal law there remains any obligation on the husband to provide maintenance to his divorced wife and the circumstances that would absolve this duty on the husband after divorce.

The Supreme Court by its judgement decided in 1981 upheld the validity and application of Section 125 to Muslim community²⁹. The Court went further to analyze the religious texts and Quranic versions on the topic of maintenance in respect of divorced Muslim woman. The Court held that Muslim personal law did make provision for maintenance to divorced Muslim woman. It also held that a divorced Muslim wife is entitled to apply for maintenance under Section 125 and that, mehr is not a sum which under the Muslim personal law, is payable on divorce³⁰. The Supreme Court took also the opportunity to review its own judgement decided in Bai Tahira³¹ and held that mehr, not being payable on divorce does not fall within the meaning of Section 125 (3). The judgement became highly controversial and

29. *Ibid.*

30. *Ibid.*

31. AIR 1979 SC 362.

created history. The Muslim leaders felt that the decision is an encroachment into the divine nature of Muslim personal law. The law laid down by the Supreme Court though welcomed by substantial members of the Muslim community, the storm of protest raised by the communal leaders suppressed their interest in the law.

The Muslim circles reaction to the Shah Bano judgement was quite unfavourable. Their main apprehension was that, first the alleged attempt of the Court to reinterpret certain Qur'anic verse; and, secondly the admonition to the State in respect of uniform civil code which according to them amounts to a judicial stricture on Muslim personal law on a whole³².

While the Muslims were so viewing the judgment quietly, anti-Muslim elements went into swift action and, showing the judgment out of proportions, projected it as a virtual death warrant on Islamic law. Involved in this game were, consciously or unconsciously, many eminent publicmen, prominent lawyers and academics as also various organizations and institutions. As a result, religious sentiment of the Muslims were badly hurt-not so much by the wording of the *Shah Bano* judgment itself as by its projection by others as an anti-Islamic law ruling of the highest court of justice in the country. They then decided to act with strength and unity. Muslims organizations and individuals, under the leadership of the All India Muslim Personal Law Board, started a countrywide agitation and evolved a near

32. *Supra* n.23 at p.225.

consensus in major sections of the Muslim citizenry of India in favour of the move to demand statutory protection of their personal law³³.

The then Prime Minister of India, Thiru. Rajiv Gandhi realised the gravity of the situation and with a view to pacify the Muslim communal leaders initiated discussion with them. Meanwhile at the instance of Muslim members then Law Minister A.K. Sen introduced in the Lok Sabha the Muslim Woman (Protection of Rights on Divorce) Bill, 1986. The option being left with the Government either to amend Sections 125-128 of the Criminal Procedure Code or to pass the bill to supersede the judgment of the Supreme Court in Shah Bano, the Rajiv Gandhi Government preferred the later and thus came the Muslim Woman (Protection of Rights on Divorce) Act, 1986.

(b) *The Muslim Woman (Protection of Rights on Divorce) Act, 1986*

The law has been specially enacted to have application only to a divorced woman belonging to Muslim community. The phrase divorced woman is defined under section 2(a) as "to mean a Muslim woman who was married according to Muslim law, and has been divorced by, or has obtained divorce from, her husband in accordance with Muslim law". Thus it excludes the married woman and children from the application of the Act. The phrase '*iddat*' is defined as the period in respect to divorced Muslim woman as: (i) three menstrual courses after the date of divorce, if she is subject to menstruation, (ii) three lunar months after her divorce, if she is not subject to

33. *Ibid.*

menstruation; and (iii) if she is enciente at the time of her divorce, the period between the divorce and the delivery of her child or the termination of pregnancy, whichever is earlier.

(i) Payment of mahr and maintenance

Section 3 of the Act provide for maintenance, payment of mahr and return of properties belong to the divorced woman.

Payment of maintenance

Clause (a) stipulates for a reasonable and fair provision and maintenance for the wife during the period of *idda* by her husband. The clause uses the words by her 'former husband'. It has been over-looked that during the period of *idda* he is not a *former* husband; he is the *present* husband, and that is why he is required to maintain her - that is the basis of maintenance, the fundamentalists too concede.

Payment of Mahr

Clause (c) stipulates for the payment of the remaining amount of dower, whether prompt or deferred. The deferred dower has to be paid, as that is the stipulation of every marriage contract, and the prompt dower, or any remaining portion of it has to be paid, in case it has not been paid soon after the marriage.

Return of properties

Clause (d) lays down that all the properties given to the Muslim with before or at the time of marriage or after the marriage by her relatives, or the relatives of her husband or his friends should be paid to her.

In case, obligations stipulated under clauses (a), (c) and (d) are not fulfilled, the same have been made enforceable by an application in the Magistrate's Court. The Magistrate is required to pass an order ordinarily within a month of the presentation of the application by the wife. The order if not complied with, the Magistrate is empowered to realize the same from the husband as if it is a fine. The husband can also be sentenced to a term of imprisonment which may extend to one year or until payment is sooner made.

(ii) Claim for children

A divorced woman is entitled to be paid for the maintenance for her children under Section 3(b) of the Act. The Act stipulates that a divorced woman shall be entitled to where she herself maintains the children born to her before or after her divorce, a reasonable and fair provision and maintenance to be made and paid by her former husband for a period of two years from the respective dates of birth of such children. On the failure of the husband to make this payment, coercive machinery for the realization of the same is laid down in Sub-sections (3) and (4) of Section 3.

(iii) Claim by divorced women

Section 4 of the Act imposes an obligation on certain relations other than the husband to maintain a divorced unmarried Muslim woman who has no means to maintain herself. These relations are those who would be entitled to inherit her property in the event she dies. Children and parents of the divorced woman are imposed with preferential obligation to maintain the divorced woman. Section 4(2) of the Act lays down that if a divorced woman fails to get maintenance from her relatives as specified in Sub-section (1) or

there are no such relatives in existence, then the Magistrate can order payment of maintenance to her from any State Wakf Board established under Section 9 of the Wakf Act, 1954 or under any other law, functioning in the area in which the woman resides.

An illusory provision in the form of Section 5 has been incorporated in the Act whereby an option by the Muslim male and divorced wife can bring the jurisdiction under the Code of Criminal Procedure.

(iv) An Act - against the principles of the social justice

The Muslim Woman (Protection of Rights on Divorce) Act, 1986 reflects hasty drafting and fails to embody accurately the principles of Muslim law. It is quite ironical that the Act has been named, the Muslim Woman (Protection of Rights on Divorce) Act, while it takes away whatever right have been guaranteed to Muslim divorcees, by the holy Quran³⁴. It fails to provide a realistic and practical alternative solution to Section 125, to alleviate the hardships of divorced Muslim woman. The law has inturn set only a retrograde precedent³⁵.

The Code on plain reading looks ambiguous and reflects lack of draftsman skill. It vaguely mentions 'provision and maintenance' together without defining in any way the word provision. The Act requires that after the period of 'iddat' the divorcee would be looked after by her

34. Asghar Ali Engineer, *The Shah Bano Controversy*, Orient Longman Ltd., Bombay, 1987 p.14.

35. Lucy Carroll, *The Muslim Women (Protection of Rights of Divorce) Act, 1986: A Retrogressive Precedent of Dubious Constitutionality*, IJIL 1986 Vol.28:3, p.364.

parents and other relatives who are likely to inherit from her. She thus gets a right under the code to claim maintenance from her parents and relatives before a court of law. Where is the need for a woman to claim maintenance if she possess properties worth for succession. When a divorced woman has no relatives or any one of them has not enough means the Act also provides that the Magistrate can order maintenance to be paid by the State Wakf Board. Seen in the ambit of the constitution of Wakf Board's the divorced woman is treated more like a destitute beggar.

All eminent jurist of Islam agree to the proposition that the mother will have custody of male children up to the age of 7 or 8 and that of female children until the age of puberty and at times even until their marriage, and the father has to pay the upbringing of the children³⁶. But the Act provides only for two years. What will happen to them after this two years period? Is not the provision contradictory to the tenets of the Muslim personal law.

The Act also fails to fulfill the present social needs of Indian community. It is nothing short of a sin being committed as against women in general and to Muslim women in particular. The enactment of such a provision in the name of religion and in the guise of law cannot but bring shame to a country that acclaims social justice. The Act is discriminatory and cannot with stand the constitution validity³⁷. The old age concept of polygamy and triple talaq have done sufficient damage to the women in the Muslim community. Now that, by excluding the application of Section

36. *Supra* n.34 at p.15.

37. Krishna Iyer.V.R, *The Muslim (Protection of Rights on Divorce) Act, 1986* Eastern Book Co., Lucknow, 1987 p.17-18.

125 to Muslim woman they have driven the divorced woman to pillar and post for economical assistance for her survival. The Muslim communal leaders can have the satisfaction that they have retained their personal law sacrosanct but in real sense defeated the very basic secular characteristics of the law under the Criminal Procedure Code and the very objectives of the provision.

The law is subjected to vide criticism by the academic circle. Justice Krishna Iyer who vehemently opposed the bill comments on the bill as "...the bill to kill the Shahbano decision is the unfortunate political product of a creative genius for plural injustices. The bill is an injustice to our Republic's secular creed; it is an injustice to women's basic rights and, therefore violative of human rights; it is an assault on the egalitarian policy of our constitution; it is a vindictive challenge to Muslim women by selling the soul of the State's humanism to obscurantist fundamentalists; it is an injustice to the holy Koran which insists on a reasonable provision (mataa) for the maintenance of divorced women; it is an injustice to the 21st century because it throws us back to the 6th century to buy Islamic votes through the noisy illusion of electoral monopolists whose hold on the liberal Muslim intelligentsia..... it is an injustice to family integrity because it is fraught with potential for litigation between close relatives. It is an injustice to the judicial process because, functionally speaking, the provisions appetise these destitute to several cases in search of a pittance; it is an injustice to national stability'.³⁸

38. *Id.*, p.12.

The special enactment in spite of all its drawbacks and retrogrative nature is justified by eminent Muslim jurists. Dr.Tahir Mohmood in his writings trace the historic jurisprudence for limitation of the right of maintenance on divorced woman³⁹. According to him, under the Islamic terminology, a woman who has never got married is called 'bakira', whereas one who got married but whose marriage no longer subsists, whether on account of the death of her husband or due to divorce, is called 'thayiba'. Both of these women fall in the general category called 'ghayr mutazawajat', women not living in matrimony and differ from 'mutazawajat', women who are living in matrimony. The regulation of rights and duties under the Islamic law is based mainly on this classification and every woman falls under either of these categories. A Muslim woman after divorce is thus equated to 'bakira', a virgin and given more privileges and a higher status. The expression divorced woman is thus observed by him to be repugnant to the true socio-legal concepts of Islam⁴⁰.

The concepts of marriage, divorce and family under the Islamic law as traced by Dr. Tahir Mohmood show much difference from that which exists in another religious communities in India⁴¹. Unlike the Hindu counterpart, a Muslim woman is not transplanted into the husband's family after marriage. The girl marries only an individual and not the family. The marriage and her relation remains merely with her husband and the notion of 'in-laws' is unknown under Muslim terminology. Though a girl is married to her

39. *Supra*, n.23, p.223-224.

40. *Ibid*.

41. Interview with Dr. Tahir Mahmood, *Supra* n.34 at p.135.

husband, she keeps her relation intact with her father's family even after marriage. All her rights and privileges in the family of her birth remain intact even after her marriage. She does not become part and parcel of her husband's family. Again the marriage here is not a perpetual union. Islamic law, without any hesitation or vengeance allows dissolution of marriage at the instance of both husband or wife⁴².

To a woman who was once married but has lost her husband, Islam does not put on her the label of the misfortune of widowhood. Similarly, if a woman's marriage is dissolved, whether at her own instance or at the instance of her husband, Islam does not put on her the stigma of being a divorcee. For both these cases Islam has provided a short waiting-span called 'iddat'; and in Islamic law and sociology a woman remains a "widow" or a "divorcee" only during that short period which in no case can extend to more than a few months. After that, she is regarded in Islam as the mother of her sons and daughters, if she has any. In the absence of children, like a 'bakira' (i.e., a virgin) she is regarded as the daughter of her parents or, in their absence, as the granddaughter of her grandparents, or the sister of her brothers and sisters, or the niece of her uncles and aunts-and so on. In no case however, once the 'iddat' period is over is any woman to be regarded in Islam as the 'widow' of a deceased man or the 'divorced wife' of a living man. The label of widowhood which reminds the woman herself and others of her misfortune, and the label of being a divorcee which back stigmatizes the woman and subjects her to indignity, both are foreign to

42. *Id.*, at p.135-136.

Islamic law and Islamic society. Both are repugnant to the Islamic concepts of women's honour, self-respect, social status, dignity and freedom⁴³.

Yet another reasoning put forth by the learned jurist to exclude the right of maintenance to divorced woman is that, Christian and Hindu religion which once prohibited divorce have come to legalize this to meet the exigencies of time. It evolved all along a new law on divorced woman's maintenance, introducing it as the liability of the divorced husband. The new law evolved, as per the contention of the learned jurist could not have relevance for the Muslim society for they had a meticulous matrimonial law since 7th century A.D⁴⁴.

In spite of all such contentions, the special enactment lacks reasonableness and is an apparent contravention to the provisions of the constitutional law. The Quoranic versions as traced by the Supreme Court did emphasize extension of the right of maintenance to divorced woman⁴⁵. The interpretation of the languages of the Quo'ran should not be construed as an encroachment into the personal law of Muslim. When reform is necessary to suit the social conditions, insistence on the followance of an old orthodoxial personal law cannot but be a fundamentalistic approach. The demand of Article 44 of the Constitution is for one citizenship and one family law. The mandate still remains unrealised. The Muslim community itself can play a constructive role and

43. *Supra* n.23, p.223.

44. *Ibid.*

45. *Supra* n.28 at p.951.

they themselves can initiate a beginning to codify a law that can remain common and best suited to all irrespective of religion, caste and creed.

(v) Maintenance during `iddat' period

The right of divorced woman to claim maintenance upto the `iddat' period is well recognized under the Muslim law. She is entitled to maintenance even if she pronounced divorce on herself under talaq-i-tafweez or gets an order of divorce under the Dissolution of Muslim Marriage Act, 1939⁴⁶. The right is available to her even if she converts to other religion during this period. The divorced wife is entitled to maintenance during the period of `iddat' or till she is informed, whichever date is later⁴⁷. The relationship of husband and wife will be deemed to continue till the wife is informed of divorce and maintenance of `iddat' will continue from the date of knowledge of divorce⁴⁸.

The period of `iddat' upon divorce is three menstrual courses (if the wife is in that stage) or otherwise three lunar months. In case the wife is pregnant, the period would extend up to the time of delivery⁴⁹ or abortion even if it extends beyond the period of `iddat', i.e. three months. If however the wife delivers before that period the period of `iddat' will terminate with that event. A divorced Muslim wife becomes entitled to her unpaid dower (mahr) which becomes payable immediately on divorce. Also under the Dissolution

46. *Merjan v. Khardir Baksh*, AIR 1929 Oudh 927.

47. *Rasheed Ahamed v. Anisa*, AIR 1932 PC p.25.

48. *Mohameed Hanifa v. Pattamal*, 1972 KLT, 512.

49. Shafi'i's *Risla, Islamic Jurisprudence* (Translated by Majid Khadduri), Hopkins Press, Baltimore, 1961 p.168.

of Muslim Marriages Act, 1939, a wife on dissolution becomes entitled to her unpaid mahr and maintenance during the period of 'iddat'.

7.1.2.3 Widow's Right of Maintenance

The wife's right of maintenance ceases on the death of her husband. Muslim law never recognized the status of widow-hood. There remain contrary opinions as to the continuation of maintenance if the lady is pregnant. The Hanafi law denies her maintenance even in such deserving conditions⁵⁰ whereas the shia law and Sunni law authorities are divided in their opinions. Some were of the view that on the death of her husband if wife is pregnant, she be provided with maintenance until delivery, out the share over which the child born to her will have inheritance.

7.1.2.4 Maintenance of Children

Prior to the advent of Islam the birth of the child imposed no obligation on the father. Parents were under no duty to maintain them. Then came the time when female children were regarded as misfortune and buried alive. Prophet Mohammed condemned the treatment of those younger generation and said that it will be the duty of the father to maintain his children. He also declared that where the parents were old and unable to support themselves the children should provide for their support. Quo'ran declares that parents are under a duty to maintain their children and of educating them properly. The obligation primarily rests with the father. If the father willfully neglects and deserts his children, legitimate or

50. *Supra* n.17 at p.407.

illegitimate and refuses to maintain them when he has means, he is liable to punishment at the discretion of Kazi⁵¹.

The duty to maintain the children is there on the parent until the time they attain the age of majority. The father is more obliged to provide maintenance to the children. The obligation continues even when the child is in the custody of mother. The fact that he has divorced his wife does not alter the position. On attaining majority the father is not bound to maintain his issues unless they are incapacitated because of disease or physical infirmity. Where the father is in strained condition while the mother is in able position the liability will be there on her to maintain her children. Where the father and the mother, as well, not able to maintain their children, the grand father will take the obligation to maintain them and he can very well recover the sum he had spent maintaining the children from the father later on.

7.1.2.5 Maintenance of aged parents

The children are bound to maintain their parents when they have means. Under Hanafi law even when they are in able condition to earn their livelihood they can claim maintenance from their children. This is more a duty of moral sanctity. When there are more than one person to maintain, the liability should be apportioned according to the shares to which such persons would be entitled for inheritance⁵².

51. *Supra* n.9 at p.431.

52. *Ibid.*

7.1.3 Quantum of Maintenance

No unanimous opinion prevails as to the quantum payable as maintenance to wife. Generally the social condition of parties will be taken into consideration before awarding maintenance. For a wife, other factors that are taken into consideration are the income of the husband, the status of wife, her living condition and her needs in the society. Hedaya observes that regard should be paid to the rank and condition of both the husband and wife⁵³. Same is the view expressed by Tyabji⁵⁴.

7.1.4 Mode of Payment

Discretion is always there with the awarding authority to pay maintenance either monthly or even for shorter periods. For a wife, maintenance allowance can even be paid daily under the Shia law. Under the Hanafi law, the payment is made monthly and in deserving circumstances annual payment is also made.

7.2. MAINTENANCE UNDER CHRISTIAN LAW

The Common Law of England was made applicable to Indian Christian on many subjects, including marriage and divorce, on the ground that it was based on the principles of equity, justice and good conscience.⁵⁵ But this led to divergence of judicial opinion. To relieve the state of doubt and confusion, an Act was passed in 1852 by the British Parliament. The

53. *Supra* n.17, p.408.

54. Faiz Badruddin Tyabji, *Muslim Law*, N.M.Tripathi Pvt. Ltd., Bombay, 1968. p.265.

55. Beri, B.P., *Law of Maintenance and Divorce*, Eastern Book Company, Lucknow, 1982 p.27.

Act authorised solemnization of marriage of Christian in India, in the presence of Marriage Registrar to be appointed by the Government, for the native converts to Christianity.⁵⁶ This was later followed by the Indian Christian Marriage Act, 1872.

7.2.1 Christian Law of Marriage

The law in respect of Christian Marriage is now contained in and the marriages are governed by the Indian Christian Marriage Act, 1872. Basically, the law reflects the general pattern of the English Common Law. The code repeals and embodies the provisions of several prior acts which are taken from the numerous English matrimonial acts. As regards Roman Catholics their personal law, commonly known as canon law is still applicable. The law under Christian Marriage Act appears outdated in comparison to other matrimonial laws in India. A bill to amend the law, entitled the Christian Marriage and Matrimonial Causes Bill, was pending before the parliament in 1962, but lapsed when the House of People was dissolved.⁵⁷

Marriage as understood in the Christian world means the voluntary union for life of one man and one woman, to the exclusion of all others, entered into some form recognised by the *lex loci*. The marriage among Christians is a civil contract and as well as a religious sacrament. The contract of marriage, by which man and woman are conjoined in the strictest society of life till death or divorce shall separate them, is the most ancient,

56. *Id.*, at p.28.

57. Shiv Sahai Singh, *Unification of Divorce Law in India*, Deep & Deep Publications, New Delhi, 1993 p.31.

the most important, and the most interesting of the domestic relations. Though correctly designated a civil contract, it differs in sundry points from all other civil contracts; and chiefly in this, that it is indissoluble at the will of the parties. For which reasons and because of certain mysterious expressions of high import respecting it in the sacred writings, it has also been deemed a divine contract, upon the ground of its having been so constituted by the circumstances of its original institution in the case of our first parents, and by the fact of its subsequent elevation into the character of a symbol, or type, emblematical of the union of Christ with his Church.⁵⁸ Hence, among Roman Catholics, marriage is considered a sacrament.

Marriage among Indian Christians are looked at from two stand points, viz., the law of the land and the Canon Law.⁵⁹ Marriage performed in the compliance with the law of the land governing the parties will make the marriage valid and the offspring legitimate. The Christian Marriage Act was intended to apply to the marriages of all Christians in India including marriages when one of the party is a Christian. The marriage has to be solemnized in accordance with the provisions of the law. Marriage solemnized otherwise shall be void. The marriage under the Christian Marriage Act may be solemnized by such persons as specified under Section 5 of the Act. This includes Marriage Registrar who are appointed by the State Government under Section 7 of the Act.

58. *Supra* n.1 p.28.

59. *Supra* n.3.

Procedure

The Act provides a special procedure. One of the parties intending marriage is required to give notice in writing to the Marriage Registrar by whom the marriage is intended to be solemnized.⁶⁰ The notice must be in the prescribed form, stating the full description of the parties to the intended marriage, their dwelling place, duration of residence and the church or any other place where the marriage is to be solemnized; and, if either of the persons concerned has resided in the place mentioned in the notice for more than a month, then this fact also must be stated in the notice.⁶¹ On receipt of the notice, the Registrar is required to enter it in the prescribed register and to publish or secure the publication of such notice as mentioned in the Act⁶² and thereafter, on being required by, or, on behalf of the persons by whom the notice was given, shall issue a certificate of such notice having been given; but such a certificate can be issued only after the expiry of four days from the date of the receipt of the notice.⁶³ The registrar must satisfy himself that no lawful impediment exists so that the certificate may not be issued. If the issue of such a notice has been forbidden by the father, and in his absence by any other guardian or the mother of the minor, if either of the persons intending the marriage is a minor, then no certificate can be granted by the Registrar even after the expiry of four days from the date of the notice.⁶⁴ A further requirement of the

60. The Indian Christian Marriage Act, 1872 Section 38.

61. *Ibid.*

62. *Id.*, Section 39.

63. *Id.*, Section 41.

64. *Id.*, Section 44.

law, before a certificate can be issued is that one of the persons intending the marriage must appear before the Registrar and make a solemn declaration that he, or she, believes that there is no impediment of kindred or affinity, or other lawful hindrance, to the intended marriage.⁶⁵

If the Marriage Registrar refused to issue a certificate, on the ground that he is satisfied that the notice forbidding the marriage by the father, the guardian or the mother is justified, then either of the parties intending marriage may apply by petition to a Judge of the High Court of Calcutta, Madras or Bombay if the district of the Registrar is within the limits of any of the aforesaid towns, otherwise to the District Judge of the district within which the Registrar functions and the Judge of the High Court or the District Judge, as the case may be, after holding a summary inquiry shall pass such orders as he may consider proper and such order shall be binding and final on the Marriage Registrar.⁶⁶ The Marriage Registrar is also entitled, in case of doubt, to apply by petition to a Judge of the aforesaid High Courts or to the District Judge and seek for a direction.⁶⁷

After the copy of the notice has been entered in the prescribed register by the Marriage Registrar, the marriage must be solemnized within two months, if otherwise all proceedings taken after the notice becomes void.

65. *Id.*, Section 42.

66. *Id.*, Section 45.

67. *Id.*, Section 48.

Indian Foreign Marriage Act, 1903

Yet another Act of the Indian legislature which has a direct bearing on the solemnization of marriages of Christians and even of non-Christians, is the Indian Foreign Marriage Act, 1903 (14 of 1903). In 1892, a law was promulgated in England, providing for solemnization of marriages before the Marriage Officers in England of persons, one of whom was a resident in England and the other in a foreign country, on production of a certificate of notice of marriage obtained in such a country. In 1903, the same rule was made applicable to the British colonies and to India because it was represented to the Government that in some cases where one of the parties to the intending marriage was not residing in England, but resided, say, in India, and desired to have his or her marriage solemnized by or in the presence of a marriage officer in England, but could not qualify for a certificate of a notice of marriage by residing in England for the prescribed time on account of the exigencies of service or some other good reason, it caused much hardship to the parties concerned. In order to remove this hardship, the above law was promulgated in England providing that a certificate of notice having been given, of the intending marriage, to a competent officer in the foreign country, the British Colony or in India granted by such officer would be sufficient to enable the marriage officer in England to solemnize the marriage of the parties concerned.⁶⁸

68. *Supra* n.1 at p.31.

Concept of Maintenance

The Common Law of England followed the 'doctrine of unity' whereby, after marriage the wife enjoyed no separate entity for it merged with that of her husband. Hence no separate relief as maintenance was extended to married women. Later courts recognized the right of married woman to pledge her husbands property for her essentials. Then came the period when courts are empowered to decree the divorce *a mensa et thoro* an order equivalent to our judicial separation.

Maintenance stood recognised as a natural and moral obligation in the Christian domain. Bentham observes in his Theory of Legislation, "The end of man in this contract might be only the gratification of a transient passion, and that passion satisfied, he would have had all the advantage of the union without any of its inconveniences. It is not the same with the woman; the engagement has for her very durable and very burdensome consequences. After the troubles of pregnancy, after the pains of childbirth, she is charged with the cares of maternity Thus a union which would give the man nothing but pleasures, would be for the woman the beginning of sufferings, and would lead her to inevitable destruction, if she had not secured beforehand for herself, and for the germ which she nourishes in her bosom, the care and the protection of a husband. 'I give myself up to you,' she says, 'but you shall be my guardian in my state of weakness, and you shall provide for the fruit of our love.' Here is the beginning of a partnership, which would prolong itself through many years, though there were but one child; but successive births form successive ties; as time advances the engagement is prolonged; the bounds first assigned to it presently disappear, and meanwhile there is opened a new

course of reciprocal pleasures and duties".⁶⁹ Maintenance thus is a natural obligation that arises with marriage.

An approach of humanitarianism also warrants a just provision for maintenance to woman. The woman has an additional interest in the indefinite duration of the union. Time, pregnancy, nursing, cohabitation itself, all conspire to diminish the effect of her charms; and she must expect that her beauty will decline at an age when the energy of the man is still increasing. She knows that, having worn out her youth with one husband, she will hardly find another; while the man will experience no such difficulty. Accordingly, foresight will dictate to her this new clause in the agreement: "If I give myself unto you, you shall not be free to leave me without my consent." The man, in his turn, demands the same promise; and thus on both sides is completed a lawful contract, founded upon the happiness of the parties."⁷⁰

"It seems then, that marriage for life is the most natural marriage, the best adapted to the wants and the circumstances of families, and, in general, the most favourable to individuals. If there were no laws to ordain it, that is, no laws except those which sanction contracts in general - this arrangement would always be the most common, because it is best adapted to the reciprocal interests of the parties. Love on the part of the man, love and foresight on the part of the woman, the enlightened prudence and affection of parents - all conspire to imprint the character of perpetuity

69. Cited in *Supra* n.1 at p.32.

70. *Id.*, at page 33.

upon this alliance."⁷¹ Thus the obligation of maintenance under Christian Law is not only a natural obligation but also one that fulfills humanitarian approach.

7.2.2 Law of Maintenance

The Law of Maintenance as regards Christians in India is found in the provisions of Indian Divorce Act, 1869. It provides interim as well as permanent maintenance. The Indian Divorce Act distinguishes interim maintenance and permanent maintenance by referring them by expressions *alimony pendente lite* and permanent alimony. The wife is entitled to interim maintenance during the pendency of matrimonial proceedings. At the disposal of any such proceedings the parties are entitled for permanent alimony.

7.2.2.1 Alimony pendente lite

The duty of the husband to maintain his wife has been the permanent feature of the Common Law. In pursuance of this policy when matrimonial disputes arise between the spouses, provision is made for grant of *maintenance pendente lite* i.e. maintenance allowance during the pendency of litigation.⁷²

The object of this is to provide fund to the needy spouse to prosecute the proceedings and maintain herself. Under Section 36 of the Indian Divorce Act the wife alone is entitled for maintenance. The grant of

71. *Ibid.*

72. The Indian Divorce Act, 1869 Section 36.

maintenance is purely the discretion of the court but it has to be exercised on sound legal principles.

The application for *maintenance pendente lite* should be made as early as possible after the service of notice to avoid the contention that the applicant was able to maintain herself for long enough and the application was futile. The application should be supported by an affidavit and must describe as far as possible all particulars regarding the financial position of either parties and the number of dependants depending on them. The petition must be served on the husband and on being satisfied of the truth of the statement courts should provide maintenance pending the disposal of the main petition. The application must be determined before deciding the main petition. If otherwise it would defeat the very objective with which the provision was incorporated in the court. It is more like a duty imposed on the court to see the circumstances and provide support to the spouse in need.

Quantum of maintenance

The exact amount of alimony to be awarded under section 36 of the Indian Divorce Act depends on various circumstances of the parties. The amount may vary according to the rank and life of the husband and the number of children for whose support the husband may be ordered to pay. If the net income of the husband is large or is subject to fluctuation, the court need not necessarily observe the one-fifth ratio prescribed under the code.⁷³ The ceiling of one-fifth of the net income can however in no case

73. *Ibid.*

be exceeded. In fixing the quantum of temporary alimony, the court can take into consideration the earnings of the wife and value and income that arise from properties owned by her.

Enforcement of the right

An order for *maintenance pendente lite* can be enforced under the Code of Civil Procedure. The court can even stay the proceedings or refuse to take on file the reply of the respondent to the main petition unless and until he obeys the order of *maintenance pendente lite*.

7.2.2.2 Permanent Alimony

The Indian Divorce Act, 1869 remains to be the earliest statute in India that has provided permanent alimony consequent to a matrimonial dispute. This could be granted under Section 37 if a decree of dissolution of marriage was made absolute or a decree of judicial separation was granted in favour of the wife. Alimony is to be secured either by way of a gross sum of money or such annual sum of money for any term not exceeding her own life, as having regard to her fortune and to the ability of the husband and to the conduct of the parties which the court thinks reasonable. Court is also empowered to discharge, modify or suspend such an order to such an extent as it is considered fit.⁷⁴

74. *Id.* Section 37.

7.2.2.3 Alteration of the Order of Maintenance

An order for permanent alimony having been passed the same may be altered when circumstances warrant.⁷⁵ Where the husband becomes incapable to make such payments because of any cause the court may either discharge or modify the order, or temporarily suspend the same as to the whole or any part of the money so ordered to be paid. Any such order passed earlier may be revived when the court deems fit.

75. *Ibid.*

CHAPTER EIGHT

LAW OF MAINTENANCE IN ENGLAND

Marriage in England remained a formless and uncertain contract during medieval times.¹ The church exercised exclusive control over matrimonial matters. The marriage law was simply canon law and marriage as such was regarded as an indissoluble union.² The informality permitted by the Common Law had a disastrous consequences over family and economic interests.³ This led to the passage in 1753 of Lord Hardwick's Act, the avowed aim of which was the suppression of clandestine marriage and adverse proprietary consequences of such unions.⁴ The effect of this Act was to require rigid compliance with formality in the regularization of marriage, together with an insistence that all marriages be celebrated in a Church of England or Chapel. Further, parental consent was required for the marriage of persons aged under twenty one, the penalties for breach of these provisions were severe, and included not only the invalidity of the marriage itself but, in certain cases, the criminal penalties of transportation and death.

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1. S.M. Cretney, *Principles of Family Law*, Sweet and Maxwell, London, (1990), p.6.
 2. O.R. McGregor, *Separated Spouses*, Gerald Duckworth and Co.Ltd., London, 1970, p.1.
 3. John Dewar, *Law and the Family*, Butterworths London, 1989, p.24.
 4. *Id.*, p.25.

The legislation came under attack for two reasons. First, by insisting on celebration according to the rites of the Church of England, exempted in case of Jews and Quakers, the Act displayed little tolerance of religious dissent; and second, the system of parochial registration of marriages was extremely inefficient. For these reasons, certain provisions of the Act were repealed in 1823⁵ and, more importantly, the Marriage Act 1836, together with the Birth and Deaths Registration Act of the same year, introduced a Civil Procedure for the formalizing and recording of marriage. Although the law as to formality has been amended many a times,⁶ this dual framework of religious and civil formality remains the basic framework of the modern law.⁷

The effects of marriage:

Marriage as an organizing legal concept ascribes rights and remedies to family members. One such chief objective achieved by marriage is economic and physical protection of weaker family members. The status right attaching to marriage, frequently considered the most significant as the right of spouses to claim maintenance from each other, either during the currency of the marriage or following a divorce. This right is not available to those who are merely cohabiting.

In England there existed the common law fiction that husband and wife were one person, that person being the husband. By marriage, the husband and wife were one person in law, the very being or legal existence

5. Marriage Act 1823.

6. Much significant changes have been effected by the Marriage Acts of 1886 and 1949.

7. *Supra.* n.3, at p.25.

of the woman was suspended during the marriage or at least is incorporated and consolidated into that of the husband.⁸ The husband had a duty to keep himself and not be a charge on the community, and keeping himself involved keeping his wife because they were one person and the person was indisputably at law, the husband.⁹ De Mont morency has put this in his 'doctrine of henosis' and comments in an anatomically graphic way as 'the creator took from Adam a rib and made it Eve; The Common Law of England sought to reverse the process, to replace the rib and to remerge the personalities'.¹⁰ The law recognized the wife as 'bone of his bone, flesh of his flesh, and no man did ever hate his own flesh so far as not to preserve it'.¹¹ Under the law of England, so long as the wife was 'helpful to him and lived with him the husband was bound to provide for her.' Thus the common law directly did impose an obligation on the husband to maintain his wife.

The law of maintenance in England has a long cherished history. The common law recognized the duty to maintain and thus provided it as a right. The husband was bound to maintain his wife to an adequate level through the provision of a house and other necessities, such as food and clothing. This non-reciprocal obligation had been there on the husband in the context of the contractual and property owning disabilities to which married women were subjected to by the common law. A husband was

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8. Blackstone, *Commentaries on the Laws of England*, Vol.1, Of the Rights of Persons, p.442.
 9. *Supra.* n.3, at p.6.
 10. Glanville Williams, 'The unity of Husband and Wife', 1947, 10 MLR, p.16.
 11. *Hyde J. in Manby v. Scott*, (1660) Smiths Ladies Cases, 13th ed, p.6. cited in *Supra.* n.2, at p.6.

entitled to own the wife's properties and in turn he was obliged to maintain her by providing with necessaries. She enjoyed as such no specific right of maintenance but only an indirect assistance. She was entitled to pledge her husband's credit for the supply of necessaries under the 'doctrine of necessity'. This is because English law instead of laying down the general code of financial rights and obligations, usually prefers to confer rights of access to the court, which can exercise its wider discretion. Maintenance as such was a right rather than a remedy and principle rather than procedure.¹²

Manby v Scot¹³ remains to be the earliest reported case eliciting the policy of the common law courts in awarding maintenance relief. The Exchequer Chamber in 1663 held finally that the common law declined any jurisdiction in matrimonial affairs but provided a partial remedy by way of the law of agency which permitted a wife to pledge her husband's credit for necessaries. The precedent laid the proposition that a wife's right to maintenance as such was enforceable exclusively before the ecclesiastical courts, limited as the right was. The remedy of spiritual censure was in harmony with the notion of moral rather than practical enforcement of marital obligations.

8.1 PARLIAMENTARY JURISDICTION OF MAINTENANCE

The rigorous theory of indissolubility of marriage posed much inconvenience to marriage partners. Hence by the end of the 17th Century a

12. *Supra.* n.1, at p.323.

13. *Supra.* n.2.

cumbersome and expensive escape from the inconveniences of indissoluble marriage was provided for a very small number of husbands wealthy enough to proceed by Private Act of Parliament.¹⁴ By express enactment such Acts provided that the wife should not be left destitute. Later the House of Commons came to have a functioning known as the "Ladies Friend", an office usually filled by some member interested in the private business of parliament, who undertook to see to it that any husband petitioning for divorce made suitable provision for the wife.¹⁵ Although claims relating to the maintenance of the wife were not inserted in the Bills, the practice was that it would not pass through the Committee in the Commons unless husbands had entered into bond to secure modest income for their wives. The Private Act divorces were abolished in 1857 and the Jurisdiction was transferred to the secular courts.¹⁶

8.2 ALIMONY BEFORE ECCLESIASTICAL COURT

The parliamentary jurisdiction permitted only a small number of husbands to avail divorce, whereas, for the rest of the population, the only remedy for matrimonial difficulties was the divorce *mensa et thoro* (the equivalent of a modern judicial separation). This could be granted only by the ecclesiastical courts on the grounds of the respondent's adultery or cruelty.¹⁷ If the wife was the successful petitioner, the general rule seems to

14. *Id.*, at p.1.

15. *Ibid.*

16. Matrimonial Causes Act 1857.

17. *Supra.* n.2, at p.2.

have been to award her one third of the husbands' income.¹⁸ If the husbands' conduct had been particularly bad or if his income came largely from his wife's property which he had acquired on marriage, the court might award as much as one half. The only sanction available to the ecclesiastical courts had been excommunication. After 1813, imprisonment by a writ de contumace capiendo was substituted but there is no record that it was ever successfully utilized.¹⁹ This Jurisdiction was later transferred to the secular courts in 1857 when Private Act divorces were abolished in England.

8.3 MAINTENANCE BEFORE SECULAR COURTS

8.3.1 Right Under Matrimonial Causes Act 1857

The common law though recognized the right of maintenance, the remedy has not been extended to all class of destitute women. With the passing of Matrimonial Causes Act 1857, the divorce jurisdiction thenceforth enjoined on ecclesiastical or parliament was transferred to the secular courts which had also the power to order maintenance relief. Thus the parliamentary principle transcended as statutory right. The state had its own interest to protect while transferring this obligation to the husband who deprived his wife of her property rights.²⁰ The series of legislation that succeeded the 1857 Act kept the principle sacrosanct. The divorce law underwent a major reform in 1969²¹ and this necessitated also a change over the proprietary

18. *Ibid.*

19. *Ibid.*

20. The state is liable to pay income support if one has no means under the Social Security Act, 1986.

21. Divorce Reform Act, 1969.

rights of married women.²² Then came the Matrimonial Causes Act, 1973 whereunder maintenance or alimony can be availed during the currency of marriage or at its dissolution. The remedy can fall under any one of the following heads.

(a) Separation and Maintenance Agreements

A married couple whose relationship has broken down can formalize their financial position with respect to each other by private agreement. Where spouses have separated amicably and wish to avoid legal proceeding as far as possible or where they may simply wish to clarify arrangements quickly and flexibly or where they may have separated without immediate intention of seeking a divorce it may be appropriate for the parties to enter into a separation or maintenance agreement. These are agreements privately negotiated and enforceable as contracts. A separation agreement will usually provide for the release by each party of the duty to cohabit, but may also provide for the income maintenance, property distribution and child custody.²³ A maintenance agreement is similar, but will be concerned only with financial terms. Both types of agreements, being basically contracts, must comply with the rules for the formation of contracts.

Separation and maintenance agreements though supplant the role of courts in deciding issues of finance and property, the role of courts is retained in two ways. Where the agreement in question satisfies the statutory definition of a 'maintenance agreement', first any provision in such

22. Matrimonial Proceedings and Property Act, 1970.

23. Matrimonial Causes Act 1973, Ss. 34(2) and 35(2)

an agreement purporting to restrict any right to apply to a court for an order containing financial arrangement shall be void;²⁴ and secondly, there is jurisdiction in the High Court or Magistrate Courts to lay application to alter the agreement itself. For this purpose, a 'maintenance agreement' means any agreement in writing made between the parties to a marriage which either (a) contains financial arrangements, made during or after the dissolution of marriage; or (b) is a separation agreement containing no financial arrangements, and where there is no other agreement in writing containing financial arrangements between the parties.²⁵

Private agreement though offer the parties a degree of autonomy in the determination of the consequences of the end of their relationship, possesses some features which make them less attractive. From the point of view of the party obliged to make payments, usually the husband, he is deprived of the additional tax advantage available when such orders were made by the court and from the point of view of the recipient, it necessitates court action for enforcement.

(b) Orders for Maintenance

Where the parties have not entered into any enforceable maintenance agreement and have no immediate intention of petitioning for divorce, other than the remedy open before magistrate courts they can make an application to a divorce court under Matrimonial Causes Act 1973, under Section 27 on the ground that the other party has failed to provide reasonable maintenance for the applicant, or has failed to provide or to

24. *Id.*, S.34(1)

25. *Id.*, S. 34(2).

make a proper contribution towards, reasonable maintenance for any 'child of the family'.²⁶

On an application under Section 27 of the Matrimonial Causes Act 1973, the court may make one of the following orders:-

- i. Unsecured or secured periodical payments to the applicant;
- ii. a lump sum to the applicant;
- iii. unsecured or secured periodical payments to, or to someone on the behalf of, a child to whom the application relates;
- iv. a lump sum to such a child, or to someone on that child's behalf.²⁷

The powers of the Divorce Court under Section 27 of Matrimonial Causes Act 1973 are wider when compared to the powers of Magistrate Court to pass similar orders. There is no limit on the size of lump sum that may be ordered, but there is no power to order the transfer of property as this is not a 'proceeding ancillary to divorce'. The provision concerning variation, revocation, duration and enforcement of orders for periodical payments are similar to those governing periodical payments ordered by a Divorce Court in proceedings ancillary to divorce. The Court has also power to order payments of interim maintenance under imminent circumstances.²⁸

26. *Id.*, S. 27(1).

27. *Id.*, S. 27(6).

28. *Id.*, S. 27(5).

(c) Orders for Alimony

Under the pre-1970 law, the continuing support obligation after divorce was overtly dominated by moral consideration and was based on the set guidelines derived from parliamentary practice. In making orders for maintenance, the courts were concerned in protecting the public purse and to shield women from 'temptation' and, most of all, deter against irresponsible rejection of marriage vows.²⁹ Further, the liability of husbands to maintain their ex-wives could be diminished if the wife had committed adultery or was otherwise guilty of matrimonial offence. The general reform of divorce law implemented in 1970 altered this legal construction of the economic construction of divorce. The new approach ignored the moral justice concept and emphasized the need for the financial needs of the parties and to place them in a position of minimal loss.³⁰ The legal framework presently governing the distribution of property and income on divorce focus much attention on the needs of the parties and that of the children.³¹ Besides, it postulates 'clean break theory' and the principle of equality.³² The salient features that existed in the Matrimonial Property and Proceedings Act 1970 are now re-drafted and exist under the Matrimonial Causes Act 1973.

(d) Reform of the Law

The Act equalized the liabilities of husband and wife to provide for each other on divorce and gave more extensive re-adjustive powers on the

29. *Supra.* n.3, at p.200.

30. *Wachtel v. Wachtel*, (1973), 1 All. E.R. 829, C.A.

31. B.K. Sharma, *Divorce Law in India*, Inter-spousal conflicts in relation to maintenance, property and custody of children, Deep and Deep Publications, New Delhi, 1989, p.23,33-35.

32. *Ibid.*

courts, primarily based on the need of the parties.³³ The overriding objective was to place the parties in the position in which they would have been had the marriage not broken down, the principle christened as the 'principle of minimal loss'.³⁴ The effect of this new statutory regime was to alter 'the legal axes of regulation of the family' in such a way as to reveal the marriage contract to be an economic or financial one rather than a contract based on sexual fidelity and moral obligation.³⁵

The statutory guidelines, and in particular the overriding principle of minimal loss, had become a 'crumbling edifice' by the end 1970, owing to the fact that in most cases it was impossible to fulfill. Research had also shown the less inconsistency among county court registration who were responsible for deciding the majority of the cases, the justifiability of a continuing support obligation after divorce was widely questioned, most effectively by pressure groups acting on behalf of ex-husbands and second wives.³⁶

The Law Commission of England considered the matter in a discussion paper (1980), in which a range of alternative models for reform was discussed. The final report of the Commission did not suggest recourse of the law but suggested certain 'changes of emphasis' within the statutory

33. Matrimonial Causes Act 1973, S. 25.

34. *Wachtel v. Wachtel*, (1973), 1 All. E.R. 829, C.A.

35. *Supra*. n.3 at p.200.

36. *Ibid*.

framework laid down in 1970. The changes of emphasis suggested by the Law Commission were, (a) to give greater priority to the needs of children, (b) to place greater emphasis on the need of the parties to make them self sufficient following divorce and (c) to promote the use of the so called 'clean break concept' in financial matters, which results in a once-and-for all financial settlement involving no continuing economic links between the parties.

8.3.2 Matrimonial and Family Proceedings Act, 1984

The proposals were embodied in the Matrimonial and Family Proceedings Act 1984 which effected certain amendment to the Matrimonial Causes Act 1973. The Act faced wider criticism. First, the objectives of the Act were urged to be contradictory. For example, according priority to the needs of children may be inconsistent with the priority to be accorded to self sufficiency and the clean break, since it may not be in the best interests of the children for the wife to go out to work or to be dependent on Government's welfare benefit. Yet another argument is that the 1984 Act was founded on the myth on the existence of a large groups of ex-wives living parasitically on the earnings of their ex-husbands, which gets support from very little evidence. The reduction of ex-wives right to maintenance without increasing the public support available to women through the benefits system, on the lines recommended by the Finer Committee has also been criticized to be highly unfair.

The empirical evidence suggests that the economic position of women following divorce depends partly on their social class, partly on their continuing status as mothers, and partly on their ability to find a new

partner.³⁷ This de-facto position has effectively been consolidated in law by the Matrimonial and Family Proceedings Act 1984. By emphasizing the needs of children, this has done much to reduce the significance of the distinction between spouse maintenance and child maintenance. The Act further represents a further shift in the legal regulation of marriage and divorce, from a financial and economic relationship to a relationship centered on the presence and needs of children.³⁸

8.3.3 Right Under the Amended Act

An application for ancillary relief is made either in the divorce petition or in the respondents answer to the petition when the divorce is to be defended.³⁹ If the divorce is undefended it could be claimed by the service of a notice in prescribed form.⁴⁰ The application is made to the court seized of the divorce petition, that is, to the county court where the main petition is undefended and to the High Court where defended. In the former case, there is no time limit on the application which may be made at any time following the decree of divorce, provided the court is prepared to grant leave⁴¹ and provided also that the applicant has not since remarried.⁴²

37. *Id.* at p.204.

38. *Ibid.*

39. Matrimonial Causes Rules 1977, r. 68(1).

40. *Id.* Form 11, r. 68(3).

41. *Id.* r. 68(2).

42. Matrimonial Causes Act 1973, S. 28(3).

8.3.3.1 Procedure

The application must be accompanied by an affidavit setting out the applicant's financial position.⁴³ This will include details of the applicant's income, assets and outgoings. The other spouse must then file a similar affidavit in answer.⁴⁴ The obligation to supply an affidavit in answer is ultimately enforceable by means of an application to court for directions.⁴⁵ The court may direct that failure to supply one will render the spouse liable to committal for contempt of court.

Either party may then request further information from the other by letter, or in the event of non-compliance, by court direction for discovery of documents.⁴⁶ The relevant documents will be any item that provides information as to the parties financial position, which may include bank accounts, building society and other savings accounts, wage slips, tax returns, business accounts, credit card accounts, and details of pension entitlement, insurance policies and share holdings. The courts also have the power to prevent or set aside dispositions made or about to be made with the intention of defeating claims to financial relief.⁴⁷ The court may order that a child be separately represented in ancillary applications by a solicitor or guardian ad litem. Although, the fact finding powers of the court appear considerable, to overestimate their efficacy would be a mistake.

43. Matrimonial Causes Rules 1977, r. 73(2) amended by MC(A)R 1984 and 1985.

44. *Id.* r. 73(1).

45. *Id.* r. 77(6).

46. Matrimonial Causes Rules 1977, r. 77(4), (5).

47. Matrimonial Causes Act 1973, S. 37.

There exist variations in practice as to the use made by them by courts and more often the information furnished by parties in affidavits is found to be not reliable and failure to supply affidavits is much widespread.⁴⁸ Difficulties are greater when the whereabouts of the husband is not known.

8.3.3.2 Orders that may be Passed by the Court

The orders that may be passed by the court under the provisions of the Matrimonial Causes Act are as follows:-

(a) Maintenance pending suit and interim orders

The court may order such payments for the applicant's maintenance 'as it thinks fit' for the period between the presentation of the petition and the decree absolute of divorce.⁴⁹ The purpose of the order is simply to ensure adequate provision for the applicant until the court is in a position to make a full order,⁵⁰ that is, at any time from the granting of a decree of divorce onward.⁵¹ Since the order is for a temporary period only, and is not made with the assistance of full information as to the parties' resources nor as part of a wider financial settlement, the level of order is likely to be less than that awarded as a full order. Maintenance pending suit is not available for children, since full orders for maintenance may be made in their favour from the presentation of the petition.⁵²

48. *Supra.* n.3, at p.200.

49. Matrimonial Causes Act 1973, S. 22.

50. *Peacock v. Peacock*, (1984) 1 All.E.R .1069.

51. Matrimonial Causes Act 1973, S. 23(1).

52. *Id.*, S. 23(2).

(b) Income maintenance

Once a decree has been granted, the court may order payment of income maintenance to be made by either party to the marriage in favour of the other party and this will take effect from the date of the decree absolute.⁵³ Orders may be made in favour of any 'child of the family' under the age of eighteen taking effect from the date of the presentation of the petition.⁵⁴ Orders may also be made in favour of children of the family aged over eighteen where the recipient is undergoing full-time education or training, or where there are 'special circumstances'.⁵⁵ An example of the latter might be where the child is handicapped.

Usually, the spouse with custody of the child will apply for maintenance on their behalf, and the court may order payment to be made to that person.⁵⁶ However, the statute does permit payment directly to the child, and the precise form taken by the order may be influenced by tax considerations.

Income maintenance order that may be passed may either be for secured or unsecured periodical payments. An unsecured order passed in favour of a spouse cannot last beyond the death of either party or the remarriage of the recipient spouse. A secured order similarly terminates

53. *Id.*, S. 23(1).

54. *Id.*, S. 23(1), (2), 29(1), (3).

55. *Id.*, S. 29(3).

56. *Id.*, S. 23(1) (d) to (f).

on remarriage, but not on the death of the liable spouse.⁵⁷ Secured or unsecured payments in favour of children of the family should initially be made only up to the age at which the child may leave school, and in any case not beyond eighteen years.⁵⁸

(c) Lump sums

The court may order that one party to the marriage transfer a lump sum of money to the other spouse both for that spouse's benefit and for the benefit of any child of the family.⁵⁹ Application must be made before the applicant remarries and, where the order is in favour of a child, before the child reaches the age of sixteen.⁶⁰ Once a lump sum has been transferred, it does not present the problems of enforcement encountered in relation to orders for periodic maintenance. Lump sum payments are rarely resorted to and depends on wealth of the parties.

8.3.3.3 Enforcement of the Orders

There exists variety of methods of enforcing a divorce court order for maintenance. These are either aimed at the liable spouse's income or at his property. The former category includes; judgment summons, which requires the liable spouse to attend before a judge who may make such orders as he thinks fit and an order under the Attachment of Earnings Act

57. *Id.*, S. 28(1).

58. *Id.*, S. 29(2).

59. *Id.*, S. 23(1),(c),(f).

60. *Id.*, S. 28(3), 29.

1971 ordering the liable spouse's employer to deduct a certain amount from the salary paid to the liable spouse and to forward it to the court. The later category includes; a garnishee order, directing any third debtor of the liable spouse, such as bank to pay this as debt to the applicant to the extent necessary to discharge the arrears; a charging order, creating a charge on the property of the debtor which if necessary can be followed by an application for sale of the charged properties; and a warrant of execution, entitling the creditor to seize the property of the liable spouse and sell it to satisfy the debt. The maintenance orders passed by the divorce court can also be registered with the magistrates' court, in which case the order is enforceable by more coercive measures. The enforcement procedure before the domestic court is highly effective and one largely preferred by married women in England.

8.4 MAINTENANCE BEFORE MAGISTRATES' COURT

The Magistrates' Court occupies the lowest position in the hierarchy of courts, but is the most geographically widespread in England.⁶¹ It usually consist of three lay magistrates, advised and assisted by a qualified clerk. Although it is primarily concerned with criminal law, it also sits as a 'domestic' court to hear matrimonial or domestic matters or as a juvenile court to hear child care matters, such as care proceedings.⁶² Magistrates sitting in the domestic or juvenile courts are selected from a panel of experienced and specially trained magistrates.

61. *Supra.* n.3, at p.8.

62. *Ibid.*

The origin of the magistrates jurisdiction in domestic matters lies in the Matrimonial Causes Act 1878. The jurisdiction acquired by Magistrates has no counterpart in the procedure of the ecclesiastical courts and has a long history of interest. Physical violence over married women had been a private and common affair in England and went unnoticed until 1870. It became a matter of public and political issue thereafter. The law then at existence were ineffective. The Magistrates were empowered to make only protection orders to prevent deserting husbands laying their hands on their wives hard earned income.⁶³

It was by the untiring works of the social reformers like Serjeant Pulling and Francies Power Cobbe that awareness over the cause and the need for legislation felt in England.⁶⁴ Women were then subjected to much atrocities and brutal treatment at the hands of their husbands. Wife battering was a common affair. Illusage of women was so systematic and so little hindered by the strong arms of the law that some areas were popularly termed as kicking districts.⁶⁵ The two reformers raised their voice against such atrocities and voiced their concern through various means. While Pulling's efforts were to repress violence against wives, the idea of Cobbe was to see a way out to the problem. Her writings portrayed the real ill-status married women among working class enjoyed in the English society. She suggested such pathetic woman be given the power of separating herself and children from the miserable condition they were in.

63. Matrimonial Causes Act 1857, S. 21.

64. *Supra.* n.2, at p.12.

65. *Id.* p. 13.

Frances Power Cobbe was more realistic when she writes 'The only thing really effective, I considered, was to give the wife the power of separating herself and her children from her tyrant. Of course, in the upper ranks, where people could afford to pay for a suit in the Divorce Court, the law had for some years opened to the assaulted wife this door of escape. But among the working classes, where the assaults were ten-fold as numerous and twenty times more cruel, no legal means whatever existed of escaping from the husband, returning after punishment to beat and torture his wife again. I thought the thing to be desired was the extension of the privilege of rich women to their poorer sisters, to be effected by an Act of Parliament which should give a wife whose husband had been convicted of an aggravated assault upon her, the power to obtain a separation order under Summary Jurisdiction.'⁶⁶

Miss Power Cobbe wrote articles on the subject for reviews and published a pamphlet, 'the truth on wife torture'. Further she sought help from several members of Parliament to introduce a bill which she had drafted. Lord Penzance, who was about bring a Bill into the House of Lords to remedy defects concerning the costs of intervention by the Queens' practor in matrimonial causes took notice of the writings of Cobbe and read this in the House of Common. He wasted no time to add a clause in his Bill giving assaulted wives the relief that has been proposed by Miss Power Cobbe.⁶⁷ The response was such that the Bill passed without opposition.

66. *Id.*, p.14.

67. *Id.*, p.12..

The Bill provided that a husband convicted of aggravated assault upon his wife should pay to his wife such weekly sum as the Court of Magistrate may consider to be in accordance with his means. The Act also enabled the Court to give legal custody of any children of the marriage under the age of ten to the mother. The working class wives, thus acquired a statutory right to maintenance against their husbands.⁶⁸

Lord Penzance's Modest Legislative Contribution sparked off more sweeping reforms in 1886 and in 1895. The Married Women (Maintenance in Cases of Desertion) Act 1886 gave a more direct and economically useful remedy to wives, wherein married women could establish that her husband was able to support her and his children but has refused or neglected to do so and had deserted them. The Act enabled the Magistrates Court to award her maintenance up to a limit of \$ 2 a week.⁶⁹

The Summary Jurisdiction (Married Women) Act 1895 marked the crucial stage in endowing married women with right to maintenance. The Act was significant in conferring a general matrimonial jurisdiction on Magistrates Courts. They were given extensive powers which in certain respects were wider than those of the High Court. Apart from consolidating the provisions of the 1878 and 1886 Acts, the Act gave much wider powers to Magistrates in passing maintenance orders. The 1895 Act contained the nucleus of grounds for complaint that appear compendiously in 1960 Act.⁷⁰

68. *Id.*, p. 14.

69. *Id.* p. 15.

70. *Ibid*

Much changes in the divorce law has been effected by the Divorce Reform Act 1969. The substantive law of divorce administered in the County and High Court has been reformed.⁷¹ Despite this the Magistrate Court continued to dispense with the more limited relief provided to them. But the dual system of matrimonial relief became more obvious, by its unfairness, wherein, one system catered almost exclusively, the needs of poor. To reduce this disparity in the two jurisdictions, the Domestic Proceedings and Magistrates' Courts Act 1978 was enacted on the suggestions by the Law Commission. The Law Commission played a pivotal role in transforming the role of the Domestic Court into that of a 'Casualty Clearing Stations' offering immediate assistance to those marriages in trouble. Now those who were in retrievable difficulty could be assisted through the various orders available in the Magistrates Court and those who were not would be passed on to the divorce court for termination of their marriages.

8.4.1 Domestic Proceedings and Magistrates' Courts Act 1978

Domestic Proceedings and Magistrates' Courts Act 1978 (in short DPMCA 1978 referred hereinafter) empowers a Magistrate sitting as Domestic Court to resolve family matters between husband and wife. The Magistrate was given the power to award maintenance to either of the spouses and children of the family on certain grounds. For the benefit of children though there remains also such other Acts,⁷² the domestic jurisdiction exercised by the Magistrates under DPMCA 1978 is the often used practice.

71. *Supra.* n.3, at p.171.

72. GMA 1971, CA 1973, FLRA 1987.

8.4.1.1 Procedure

Proceedings are initiated by the laying of a complaint⁷³ and the service of summons.⁷⁴ The application is heard by three Magistrates whose number must comprise one member of each sex. The powers of the Magistrates are more limited than those of the Divorce Court, in that, there is no power to grant a divorce or to order the transfer of items of property. There are only limited powers towards discovery of the parties means, passing interim or substantive orders of maintenance, and variation or revocation of any such orders passed. Legal aid is not available for applications to the Magistrate Court, but the parties may apply for assistance by way of representation. Default in the payment of maintenance may lead to enforcement proceedings by the Magistrate.

8.4.1.2 Grounds for an Order of Maintenance

An applicant seeking a financial order from the Magistrate Court has to establish any one of the grounds set out in section 1 of the DPMCA Act 1978. The grounds enumerated thereunder are:

*(a) - that the respondent has failed to provide reasonable maintenance for the applicant.*⁷⁵

The Act gives no guidance as to what has to be established to make out the above ground. But the Court has to find that there has been failure

73. Domestic Proceedings and Magistrates' Courts Act 1978, S.30(2).

74. Matrimonial Causes Act 1980, S. 51.

75. DPMCA 1978, S.1(a).

even after the applicant being guilty of some matrimonial misconduct or that the parties have separated without having made an agreement about continued financial support. In practice the Court will consider such matters as the means and needs of the parties in determining whether there has been a failure to provide reasonable maintenance. The concept of reasonable maintenance has not been defined in the legislation. The identical grounds contained in the code⁷⁶ applicable to the High Court and County Court on identical grounds are also considered to decide whether there has been failure to provide reasonable maintenance on the part of the respondent.⁷⁷ All the special circumstances such as income, earning capacity and other financial resources of the parties as well as, their conduct, if it would be inequitable to disregard it, have to be taken into consideration by the Magistrates.

(b) - *that the respondent has failed to provide, or to make proper contribution towards reasonable maintenance for any child of the family.*⁷⁸

The expression 'child of the family' is very widely defined in the Act⁷⁹ and has the same meaning, as it has in Matrimonial Causes Act 1973, to mean and include;

76. Matrimonial Causes Act 1973.

77. *Id.* S. 27(3) and DPMCA 1978, S. 63(2).

78. DPMCA 1978, S.1(b).

79. DPMCA 1978, S. 88.

- (I) a child of both of those parties; and
- (II) any other child, not placed with those parties as foster parents by a local authority or voluntary organization, who has been treated by both of those parties as a 'child of the family'.

The definition includes all children of both parties to the marriage whether legitimate, legitimated, adopted⁸⁰ or illegitimate.⁸¹ The Act goes much further, and makes the existence of a biological or formal legal relationship, such as adoption, between the child and the spouses irrelevant. Whether a child is within the definition depends simply on whether or not the child in question, has been 'treated as a child of the family' by both parties.⁸² The test of treatment is purely objective and is immaterial for the purpose of deciding whether a child falls within the definition.

The Court has not been given specific guidance in determining what is reasonable maintenance for the purpose of deciding whether the ground of complaint has been made out. But when once the ground has been made out the Court is given the guidance whether to exercise its power and if so in what manner.⁸³ Although failure to provide for a spouse and failure to provide for children are separate grounds of complaint, since the needs of the mother and the child are obviously interrelated,⁸⁴ the Court may on

80. Adoption Act 1976, S. 39(1).

81. C.A. 1989 and FLRA 1987 S. 1.

82. *W (R.J) v. W (S.J)* (1971)3 All. E.R. 303.

83. DPMCA 1978, S.3(1).

84. *Northtrap v. Northtrap* (1966)3 All. E.R. 797.

proof of either ground make any order set out in Section 2(1) of the Act. But always the welfare of the child receives first consideration.⁸⁵

(c) - *that the respondent has behaved in such a way that the applicant cannot reasonably be expected to live with the respondent.*⁸⁶

The object of including this ground is to enable a spouse to leave the other without endangering his or her claim to maintenance. This ground in substance is identical to the fact evidencing breakdown of marriage for the purpose of divorce.⁸⁷ Adultery could presumably be brought within this ground though there is no specific mention of it. Whether a single act of adultery could be described as 'behaviour' is not clear.

(d) - *that the respondent has deserted the applicant.*⁸⁸

Desertion has the same meaning as in the law of divorce,⁸⁹ but it is not necessary to show that there is a minimum period of desertion.⁹⁰ The purpose of including desertion as a ground is to enable a spouse to seek an order for maintenance even though he/she is being reasonably maintained.

8.4.1.3 Bars to the Making of an Order

The chances for reconciliation between the parties is given paramount importance and this will limit the exercise of marital jurisdiction by the

85. DPMCA, 1978 S.3(1), as amended in M & FPA 1984 S. 9(1).

86. DPMCA 1978, S.1(c).

87. Matrimonial Causes Act 1973, S. 1(2)(b).

88. DPMCA 1978, S.1(d).

89. Matrimonial Causes Act 1973, S. 1(2)(c).

90. 2 years under Matrimonial Causes Act 1973.

Domestic Court. The DPMCA 1978 requires a Court hearing an application under its provisions to consider whether there is any possibility of reconciliation between the parties to the marriage in question. If at any stage, the Court considers that there is a reasonable possibility for the same, it can adjourn the proceedings so as to enable reconciliation attempts.⁹¹

Again, as the proceedings under the Act are subject to the general rule applicable in Magistrates' Courts⁹² an application except on the ground of desertion must be made within six months from the date of cause of an action.

8.4.1.4 Orders that Can be Made

If the applicant satisfies the Court any one or more of the grounds in section 1 of DPMCA 1978, it is open to the Court to make one of the following orders.⁹³

(a) An order that the other party shall make to the applicant such periodical payments, and for such term, as may be specified in the order.⁹⁴

Prior to the passing of this Act the Magistrates' Courts were empowered to pass orders for weekly payments.⁹⁵ The practice had been

91. DPMCA 1978, S.26(1).

92. Magistrates Courts Act 1980, S. 127.

93. DPMCA 1978, S. 2.

94. DPMCA 1978, S.2(1)(a).

95. M.P. (MC) Act 1960, S. 2(1)(b).

done away with the 1978 Code. Now it is possible to make a limited term order by which time the applicant can adjust to new circumstances, find a job and become self-supporting.⁹⁶ The Court has discretion as to the period of the order, but it cannot grant an order that precedes the date of application nor beyond the death of either party.⁹⁷ Any such order which has been passed by the Magistrate may cease to have effect on the direction of the High Court or County Court entertaining proceedings of divorce or nullity,⁹⁸ or on the remarriage of the party.⁹⁹ Cohabitation by parties is neither a bar to the making nor enforcement of an order but it should not exceed six months period.

(b) An order that the other party shall pay to the applicant such lump sum as may be so specified.¹⁰⁰

The Act provides for a 'lump sum order' to meet maintenance expenses for the purpose of enabling any liability or expenses reasonably incurred in maintaining the applicant or any child of the family to whom the application relates. But the lump sum awarded must not exceed £1000.¹⁰¹ The lump sum orders may be made on several occasions subject to not exceeding the maximum limit.¹⁰² There is no power to vary the amount of a

96. *Khan v. Khan* (1980), 1 All. E.R. p.355.

97. DPMCA 1978, S.4(1).

98. *Id.*, S. 28(1).

99. *Id.*, S. 4(2).

100. *Id.*, S. 2(1)(b).

101. *Id.*, S. 2(3).

102. *Id.*, S. 20(7).

lump sum order, but the Magistrates Court has the general power to allow time for payment or to order payments by installments.¹⁰³

(c) Orders to make periodical payments in respect of a child of the family.¹⁰⁴

An order of this nature takes effect from the date of application up to the attainment of the age of sixteen, by the child.¹⁰⁵ The tax advantage which existed at one point of time no more is in existence.

(d) Orders for a lump sum payment to or for the benefit of each child of the family.¹⁰⁶

Herein to the lump sum payment should not exceed £1000, although it would be open to a Court to make separate lump sum awards to both a spouse in his or her own right together with a further sum either to the spouse on the child's behalf or directly to the child.

Factors Relevant to the Making of an Order

In exercising the domestic power, the Magistrates' Courts are required to take into account several factors related to the passing of an order for maintenance. The list of factors that need to be considered by the Court are exhaustively narrated under Section 3 of the DPMCA 1978.¹⁰⁷

103. Matrimonial Causes Act 1980, S. 75(1).

104. *Id.*, S. 2(1)(c).

105. *Id.*, S. 5.

106. *Id.*, S. 2(1)(d).

107. DPMCA, 1978. S. 3

8.4.1.5 Consensual Separation and Voluntary Maintenance

Where the parties have agreed to separate, so that there is no desertion, and where one party has been providing the other (or a child of the family) voluntarily with de facto maintenance, it is open to the recipient to Apply to Court to formalize the maintenance payments in a court order under the DPMCA 1978.¹⁰⁸ The advantage of this is that it enables a spouse to regularize what may be an erratic and unreliable source of income. This provision differs from Section 6 in that the applicant need not prove an agreement to make provision, merely the fact that it has been provided in the past will be sufficient. An applicant must show (a) that the parties have been living apart for a continuous period of more than three months, (b) that neither party has deserted the other and that (c) one party has been providing the applicant or a child of the family with periodical payments. If these conditions are satisfied, the Court may order that the respondent make periodic payments to the applicant or to, or for the benefit of, a child of the family. There is no power to order lump sums. A Court cannot order a respondent to pay more than either (a) the court would have ordered if the application had been made under section 1, or (b) a sum that in aggregate over a three month period exceed the aggregate amount actually paid by the respondent in the three months preceding the application.

Consent Orders

Either party to the marriage may apply to a Court under Section 6 of the DPMCA 1978, for an order formalizing an agreement made between

108. *Id.*, S. 7.

the spouses that one spouse shall make financial provision to the other. 'Financial Provision' in this context refers to any of the orders that are within the powers of the Domestic Court. Before making the order, the Court must be satisfied (a) that there is agreement by the paying spouse to making the provision,¹⁰⁹ which may be proved either orally in Court or in prescribed documentary form if the paying spouse is not in Court,¹¹⁰ and (b) that there is no reason to think that it would be contrary to the interests of justice to exercise its powers.¹¹¹ Further, if the proposed provision includes provision for a child of the family, the Court must be satisfied (c) that the provision proposed provides for or makes an adequate contribution towards the financial needs of the child.¹¹² If either of these last two conditions are not satisfied, it is open to the Court to suggest alternative arrangements which do satisfy these conditions. If the parties agree to what the Court proposes, the Court's proposed terms will be incorporated into the court order.¹¹³

Interim orders

On an application under Section 1, 6 and 7 of the Act, the Court may make an order for interim maintenance at any time before making a final order, either granting or dismissing the application. Interim maintenance may also be awarded where a Domestic Court refuses to make an order on the ground that the case would be better heard by the High Court, or by

109. *Id.*, S. 6(1)(a).

110. *Id.*, S. 6(9).

111. *Id.*, S. 6(1)(b).

112. *Id.*, S. 6(3).

113. *Id.*, S. 5.

the High Court itself on ordering the case to be reheard by magistrates.¹¹⁴ The period of maintenance up to three months may be specified by the Court; if not, an order will terminate on the magistrates making a final order, or at the end of three months following the making of the order, whichever is the earliest.¹¹⁵ An interim order may be renewed for a subsequent term, subject to the same time limits.¹¹⁶ There is also a power to make interim custody orders.¹¹⁷

8.4.1.6 Duration of Orders

The Court normally makes an order for a specified period extending up to 12 months. Even if ordered for a specified period, the order is subject to change of circumstances that are statutorily prescribed as

(a) *Effect of remarriage*: Periodical payment orders made in favour of a spouse is unenforceable after the remarriage of the spouse.¹¹⁸ The effect is the same even in cases where the remarriage is void or voidable.¹¹⁹ But the remarriage by a spouse will not alter the orders that are made for a child.

114. *Id.*, S. 19(1).

115. *Id.*, S. 19(5).

116. *Id.*, S. 19(6).

117. *Id.*, S. 19(1)(ii).

118. *Id.*, S. 4(2).

119. *Id.*, S. 88(3).

(b) *Pendency of Divorce or Matrimonial Proceedings*: Divorce do not automatically determine the orders made by the Magistrates Courts. Indeed they often continue with much force.¹²⁰ But if the marriage is declared void, the order becomes ineffective since no order could properly be made unless the parties were lawfully married.

If matrimonial proceedings are started, the Divorce Court has power¹²¹ to cease the order of a Magistrates' Court for periodical payments. This power is normally exercised to enable the Court to pass wholly a new order. But the common practice is that the petitioner will not seek financial relief from the Divorce Court, but will continue to rely on Magistrates' order even after divorce.¹²²

(c) *Cohabitation*: An order can be obtained notwithstanding that the parties to the marriage are living with each other at the date of the making of the order.¹²³ But if they continue to live so, or subsequent to an order having been made if they resume co-habitation, for a continuous period of six months the order will cease to have effect.¹²⁴

8.4.1.7 Variation and Revocation

Orders for periodical payments made under Sections 1, 6, 7, 11 and 19 of the Act may be varied, revoked, suspended or revived on the

120. *Supra*. n.1, at p.364.

121. DPMCA 1978, S.28.

122. *Supra*, n.1, at p.364.

123. DPMCA 1978, S.88(2).

124. *Id.*, S. 25(1) and (2).

application of either party to the marriage, or, in the case of an order made to or for the benefit of a child of the family, by the child himself or herself if he or she is over sixteen.¹²⁵ In exercising the powers of variation, the Court shall have regard to all the circumstances of the case, including any change in any of the matters to which the Court was required to have regard when making the order to which the application relates.

8.4.1.8 Registration of Divorce Orders

Where the husband is in paid employment and when he has failed to make at least one payment he is required to pay through an order of divorce, the spouse in whose favour such an order has been made can register the same with the Magistrates' Courts, where after, the earnings of the liable spouse will be attached. The effect of registration is to give the Court of Registration the same power over the order for the purpose of enforcement and variation as if it were an order of that Court.¹²⁶ The court can then direct the liable spouse's employer to deduct a certain amount from the spouse's earnings and to remit the amount to the Court.¹²⁷ An empirical study of the divorce Court orders registered for enforcement in the Magistrates' Court has shown that they are least effective and at times the husband with a view to avoid the liability has given up the employment.¹²⁸

125. *Id.*, S. 20(1)-(6), (10) and (12).

126. Maintenance Orders Act 1958, S. 3(1).

127. Attachment of Earnings Act 1971, S. 6.

128. *Supra.* n.3, at p.103.

8.4.1.9 Maintenance for Children

Children were also entitled to obtain maintenance from their parents via two procedures, (i) proceedings under Section 9 of the GMA 1971 for the resolution of disputes over custody, and affiliation proceedings under the Affiliation Proceedings Act 1957. The Family Reform Act modified the procedure and now under section 11(b) of the GMA 1971 parents, married or unmarried, can apply for financial provision orders for their 'children'. The order may be for periodical payments, secured or unsecured, or through lump sum payments. All factors relevant towards passing such an order as provided under GMA 1971 is applicable. The duration of payments will be the same as is provided under DPMCA 1978. The earlier discussed maintenance agreements can also be entered into by an agreement between the parents.¹²⁹

8.4.1.10 Enforcement of the Magistrate Order

The orders passed by the Magistrates' Courts will specify the payment should be made to the Court,¹³⁰ who then will remit the payment to the recipient or, if the 'diversion procedure' is applicable, to the DHSS.¹³¹ Once arrears have accumulated to a certain amount, the clerk notifies the recipient, who may then request the clerk to initiate enforcement proceedings.¹³² It is then up to the Magistrates to decide how to exercise their discretion to remit the whole or part of the arrears.¹³³ At no

129. GMA 1971, S. 12.

130. Magistrates Court Act 1980, S. 59.

131. Department of Health and Social Security (DHSS).

132. Magistrates Court Rules 1981, r. 40(1).

133. Matrimonial Causes Act 1980, S. 95.

circumstance the Magistrate should enforce arrears payable more than one year before the date of the application. Towards the realizing the arrears anyone of the following measures are followed.

(i) *Distress*:- This is an order of Court enabling the police to seize goods of the liable spouse in order that they may be sold and the proceeds used to discharge the arrears.¹³⁴ This means of enforcement is rarely used.

(ii) *Committal to prison*:- Any default by a liable spouse to pay the maintenance arrears may lead to his committal to prison.¹³⁵ Before committing a defaulter to prison, the Court must be satisfied, after an inquiry in the presence of the defaulter, that (a) the default was owing to his willful refusal or culpable neglect and (b) that an attachment of earnings order, if available (see below), is not a more appropriate order to make in the circumstances.¹³⁶ The period of imprisonment that may be ordered depends on the amount of arrears, subject to a maximum of six weeks.¹³⁷ Imprisonment does not discharge the arrears, but arrears will not usually be regarded as accumulating during the period of imprisonment¹³⁸. It is open to a Court to suspend a committal on condition that payments are made regularly and arrears discharged.¹³⁹

134. Matrimonial Causes Rules 1981, r. 54.

135. Matrimonial Causes Act 1980, S. 93.

136. *Ibid.*

137. *Ibid*

138. *Id*, S. 94.

139. Matrimonial Causes Act 1958, S. 18(1).

(iii) *Attachment of earnings*¹⁴⁰:- Where a liable spouse is in paid employment, the most effective method of enforcing financial provision will be attachment of the earnings by an order under the Attachment of Earnings Act 1971. This is a Court order directed to the liable spouse's employer to deduct a certain amount from the spouse's earnings and to remit the amount to the Court¹⁴¹. The effectiveness of the order will obviously depend on the husband being in paid employment.

8.5 WELFARE BENEFITS

As a welfare state England provides also a third system of family law, operating alongside those of the Divorce and Magistrates Courts, to assuage the needs of those families who are separate or divorced. There is always a close link between marriage breakdown and single parenthood, in that most single parents, majority of whom are women, are either divorced or separated. There is also a close link between single parenthood and poverty. Earlier the National Assistance Act, 1948 provided contributory benefits. As the scheme is felt ill-adopted, the law in this area has been changed. Presently the Social Security Act, 1986 that came into force in April 1988 provides a 'safety net' guarantee of a minimum level of income to the needy class, as state benefit. Other welfare measures include family credit,¹⁴² child benefit¹⁴³ and one parent benefit¹⁴⁴. Family benefit is available to families with low income.

140. Attachment of Earnings Act 1971, S. 1.

141. *Id.*, S. 6.

142. Family Credit (General) Regulations, 1987.

143. Child Benefit Act 1975; Child Benefit (General) Regulations, 1976.

144. *Ibid.*

Child benefit is paid to anyone with responsibility of a child. It is non taxable and is payable by monthly cashable orders. One parent benefit is an additional benefit payable to single parents in respect of the first child of the family.

CHAPTER NINE

LAW OF MAINTENANCE IN FRANCE

'Code Civil' is the Code of Rules of Civil Law in France. The law is a Napoleonic Code and reflects the principle of Roman Law. In a concise and simple statement it presents the law relating to persons, family, matrimonial regimes, property and successions. Marriage in French termed as 'Mariage' can be defined as a divine Institution whereby the spouses put in common all the elements of their life. In other way it can be termed as a juridical and solemn act by which a man and woman establish between them an union which conditions, effects and dissolution are imperatively regulated by Civil Law. Articles 144 to 228 of the Civil Code enumerates the legal characteristics of marriage.

9.1 CONCEPT OF MARRIAGE

Capacity to Marry

A man under 18 and a woman under 15 years of age may not marry,¹ but a dispensation may be obtained for good reasons.² Marriage is based on the consent of the parties to enter into it.³ No one can enter into

1. Code Civil, Art.144

2. *Id.*, Art.145.

3. *Id.*, Art.146.

a second marriage before the dissolution of a first marriage.⁴ Minors who are below the age of 21 may not enter into the marriage without the consent of their parents.⁵ But if there is disagreement between the father and mother, the division of opinion amounts to consent.⁶ If the father and mother are dead, or are otherwise incapable of giving their consent, the consent of the grandparents is required.⁷ An illegitimate minor child requires the consent of the parent or parents by whom he has been legally recognized,⁸ or, in their default, of the *conseil des tutelles*.⁹ Parental consent is sovereign and it cannot be over ruled by judicial authority.

Marriage between lineal ascendants and descendants is prohibited between collateral,¹⁰ marriage is prohibited between brother and sister,¹¹ uncle and niece, and aunt and nephew.¹² Likewise the marriage between parties allied by marriage in the direct line e.g. between father and daughter-in-law as between son and step-in-mother is also prohibited. But it is interesting to note that a dispensation may be obtained for marriage

4. *Id.*, Art.147.

5. *Id.*, Art.148.

6. *Ibid.*

7. *Id.*, Art.150.

8. *Id.*, Art.158.

9. *Id.*, Art.159.

10. *Id.*, Art.161.

11. *Id.*, Art.162.

12. *Id.*, Art.163.

between persons allied by marriage in direct line, when the person who created the relationship is dead and between uncle and niece and aunt and nephew.¹³

Celebration of Marriage

The first step towards the celebration of marriage consists of the future spouses submitting to the Registrar of Marriages a Medical Certificate, not more than two months old, stating that they were medically examined with a view to contracting marriage.¹⁴ Having received the certificate the Registrar will display a notice of their intention on the registry's notice board and keep it so affixed for ten days.¹⁵ The marriage may be celebrated only after the tenth day, not counting the day on which the notice was posted.¹⁶ If the marriage is not celebrated within one year from the first day on which the marriage could have been celebrated, a new publication is required.¹⁷ However the *Procureur de la Republique* of the district can dispense with the requirement of publication, or with the ten-day interval, or with the submission of medical certificates, for grave causes such as imminence of the death of one of the parties¹⁸ or of the birth of a child.

13. *Id.*, Art.164.

14. *Id.*, Art. 63.

15. *Id.*, Art. 64.

16. *Ibid.*

17. *Id.*, Art. 65.

18. *Id.*, Art. 75.

If opposition to the proposed marriage is filed with the Registrar he must await the outcome of the proceedings. If there is no opposition, or if the matter has been settled by order of the Court, the Registrar may proceed. The future spouses must file with him an extract from the Register of births,¹⁹ not more than three months old if issued in France and not more than six months old if issued abroad, certifying their births. If such an extract cannot be produced, a certificate of notoriety (*acte de notoriété*) must be filed.²⁰ No remedy lies against the issuance or the refusal to issue the certificate of notoriety.²¹ In the case of a minor spouse, consent of the parents or their representatives must be filed with the Registrar.

The marriage must be celebrated in a public ceremony before the Registrar of Marriages in the locality where one of the spouses has been continuously domiciled or residing for at least one month at the date of the publication of the notice of the intention to marry.

The marriage ceremony takes place at the town hall²² in the presence of two witnesses. The Registrar will read to the spouses Article 212, 213, 214 (para 1) and 215 (para 1) of the Code dealing with the duties of husband and wife and will ask the parties whether they have made a marriage contract. If such contract is in existence, he will record the date of such contract and the name and address of the notary who certified

19. *Id.*, Art. 70.

20. *Id.*, Art. 71.

21. *Id.*, Art. 72.

22. *Id.*, Arts. 165-166.

it. He will then receive the declaration of the parties that they take one another as husband and wife, and shall declare them married. He shall then make a record of the fact under Article 76. He will also note on the record of birth of each spouse that the marriage was celebrated and the name of the other spouse. The 'marriage lines', the copy of the entry in the marriage registrar adduce proof of the marriage.

Marriage entered into abroad between French parties or between a French party and a foreign party is valid if it was celebrated in accordance with the rules there applicable and if it did not contravene the provisions as to capacity to marry contained in the French Civil Code.²³ A marriage celebrated abroad by French Diplomatic or Consular Officers between a French citizen and a foreigner, if it was celebrated in accordance with French law is also valid.²⁴

Opposition to Marriage

Opposition to the celebration of marriage may be taken by a person married to one of the parties²⁵ or by parents and ascendants of the parties.²⁶ Failing ascendants, opposition may be taken by brothers, sisters, uncles, aunts and cousins, if they are of age.²⁷ Opposition may be taken only when the consent of the family council to the marriage of a minor has not

23. *Id.*, Art. 170.

24. *Ibid.*

25. *Id.*, Art. 172.

26. *Id.*, Art. 173.

27. *Id.*, Art. 174.

been obtained, as required in Article 159, or when the opposition alleges mental incompetency.

Such opposition is to be submitted to a Court of Grande Instance, which will rule on it.²⁸ The future spouses may, however, petition the Court to lift the opposition and the Court must give its decision on the petition within ten days.²⁹ An appeal from the Court's decision must be decided within ten days.³⁰ If the opposition is overruled, the opposing party, other than ascendants, may be held liable in damages.³¹

Annulment of Marriage

A spouse whose consent to the marriage was not voluntary, or who did not give his consent, or who was in error as to the person of the other spouse, may petition for annulment of the marriage.³² Action for annulment will not, however, be maintained after the petitioning spouse cohabited with the other spouse for six months after having acquired full liberty of action or after the became aware of the error in the person of the other spouse.³³

Only those persons whose consent to the marriage was required but not obtained can dispute the validity of the marriage.³⁴ No one,

28. *Id.*, Art. 177.

29. *Ibid.*

30. *Id.*, Art. 178.

31. *Id.*, Art. 179.

32. *Id.*, Art. 180.

33. *Id.*, Art. 181.

34. *Id.*, Art. 182.

including the spouses can petition for nullity after having approved of it expressly or tacitly.³⁵ Action must be brought within one year after having acquired notice of the marriage, and in the case of a spouse, after he attained the age when he could give his consent to the marriage.³⁶

The validity of marriage entered into when the parties has not attained the minimum age, when solemnized without consent, when it happens to be subsequent marriage and when there is affinity may be challenged by the spouses and by the interested parties. A marriage that was not celebrated publicly and before the proper Registrar of Marriages may be attacked by the spouses, all interested parties, and the public ministry.³⁷ No one can claim to be the spouse of another person unless there is a record of the celebration of the marriage in the Register of Marriages, except when such records were destroyed or lost.³⁸

A marriage that is declared null will nonetheless take effect concerning spouses and their children, if it was contracted in good faith.³⁹ If only one of the spouses entered into the marriage in good faith, it will take effect only in favour of that spouse and the children of the

35. *Id.*, Art. 183.

36. *Ibid.*

37. *Id.*, Art. 184.

38. *Id.*, Art. 194.

39. *Id.*, Art. 197.

marriage.⁴⁰ If none of the spouses entered into the marriage in good faith, it will take effect only in favour of the children of the marriage.

9.2 OBLIGATIONS ARISING OUT OF MARRIAGE

By entering into marriage, the spouses bind themselves to feed, maintain and educate their children.⁴¹ On the other hand, the children are bound to support their parents and other ascendants, if they are in need.⁴² The estate of a deceased spouse is bound to support the surviving spouse if he is in need.⁴³ A person who is bound to support another person may be ordered by the Court to receive such person into his home and support him in lieu of support payments.⁴⁴

Duties and Rights of Spouses

The spouses have a mutual obligation of fidelity, support and assistance.⁴⁵ Together they ensure the moral and material needs of the family.⁴⁶

If the marriage contract does not provide otherwise, both spouses contribute to the costs of the marriage according to their ability.⁴⁷ If one

40. *Id.*, Arts. 201-202.

41. *Id.*, Art. 203.

42. *Id.*, Art. 205.

43. *Id.*, Art. 207.

44. *Id.*, Art. 210.

45. *Id.*, Art. 212.

46. *Id.*, Art. 213.

47. *Id.*, Art. 214.

spouse fails to carry out this obligation, the other spouse can hold him to it by proceedings. The spouses are obliged to live together.⁴⁸ They determine the place of their residence by mutual agreement.

Each spouse has full legal capacity.⁴⁹ Each spouse may authorise the other to act for him in the exercise of the power conferred on him by the law of matrimonial property.⁵⁰ Each spouse may enter on his own into contracts for the maintenance of the household and for the education of the children.⁵¹ The other spouse is jointly liable on such contracts.⁵² He will not be liable, however, where the expense is clearly excessive and unwarranted.⁵³ Installment contracts may be entered into only by both spouses acting in agreement.⁵⁴

Each spouse may open a bank account or a stock account in his own name without the consent of the other.⁵⁵ Each is presumed to have the right to dispose freely of the money or valuable paper so deposited. The wife is free to exercise her profession without the consent of her

48. *Id.*, Art. 215.

49. *Id.*, Art. 216.

50. *Id.*, Art. 218.

51. *Id.*, Art. 220.

52. *Ibid.*

53. *Ibid.*

54. *Ibid.*

55. *Id.*, Art. 221.

husband and she can, in the course of that profession, dispose of and bind the private property she owns individually.⁵⁶

Each spouse is entitled to his income and salary and may freely dispose of it after having discharged his share in the expenses of the marriage.⁵⁷ The property acquired by the wife with her income and salary from the exercise of her profession is under her administration, and she may freely enjoy it and dispose of it.⁵⁸

9.3 MATRIMONIAL RÉGIMES

The matrimonial régime is characteristic of the French legal system. Matrimonial régime in France means the sum of rules governing property rights between spouses, rules which may operate both during the subsistence of marriage and its determination by death, divorce or in some other means.⁵⁹ This is also characterised as the régime legal, that is the régimes imposed by law, as contrast with a régime conventional, or contractual régime chosen by the parties.⁶⁰ At the time of marriage the parties have option to enter into a contract to regulate their property rights in the absence of which the legal régime have force.

56. *Id.*, Art. 223.

57. *Id.*, Art. 224.

58. *Ibid.*

59. Neville Brown, L. *Amos and Walton's Introduction to French Law*, 3rd Ed., Clarendon Press, Oxford, 1967, p.253.

60. *Id.*, at p.254.

9.3.1 Marriage Contracts and Matrimonial Property Systems

The spouses may make arrangements with respect to matrimonial property as they deem fit, but such agreements may not be contrary to good morals and the provisions of the Civil Code applicable thereto. The spouses cannot contract out of legal provisions governing their rights and duties in marriage and out of those governing parental power and custody. They may make gifts both *inter vivos* and testamentary, but they may not provide for any modification of the succession on intestacy.

The spouses may declare before celebration of the marriage that they wish their property to be governed by any of the matrimonial property systems provided for in the Civil Code. Failing any declaration that would displace the applicability of the system of community property, or modify it, their property will be governed by the rules of community property.

A marriage contract must be made by notarized act before the celebration of the marriage. A certificate issued by the notary that a marriage contract has been made must be handed to the office of the Registry of Marriages before the celebration of the marriage. The certificate of marriage notes whether a marriage contract was made or not. Where a marriage contract was made, it becomes operative upon the celebration of marriage; where none was made, the spouses are presumed to have their property governed by the rules of community property. After the celebration of the marriage, the system of matrimonial property under which the spouses were married may be changed only by order of the Court.

After two years of marriage under any of the matrimonial property systems, the spouses may modify or completely change it by a notarized act, which must be approved by the Court. The change is effective upon the spouses as of the date of the court order, and upon third parties three months after the change has been endorsed on the record of the marriage in the Registry of Marriages. In case of minor who is capable of entering into marriage may make all such marriage contracts with the consent of those whose consent is required for him to be married.

The legal régime recognises three distinct patri monies: that of the husband, wife and that composing the community. Upon dissolution of the community, the normal cause of which is the termination of marriage, the spouses take their respective shares in the hitherto common stock. The assets of community is clearly demarcated.⁶¹

9.3.2 Community Property

Community property is set up automatically where the spouses fail to make a marriage contract, and also where they declare without any formality that they are entering into marriage under the system of community property.

(i) Assets and Liabilities of the Community

Community assets are all property acquired by the spouses together and individually during marriage as a product of their labour or as income from their separate property. All property, whether movable or immovable, is presumed community property unless it is shown that it is the separate property of one of the spouses.

61. Code Civil, Art. 1401.

Each spouse keeps title to his separate property. Only that income from separately owned property which a spouse does not use up falls into the community. Upon dissolution of the marriage, the spouse has a claim against the community for the return of such income for the last five years. Personal clothing, proceeds of a claim in damages, money due to him from his debtor, recurring benefits due him (like retirement benefits), and generally all property of a personal nature and all rights that attach to his person are also part of the separate property of a spouse. Property owned by the spouses at the time of the celebration of the marriage, as well as that which they each acquire during marriage by inheritance or gift, is separate property. Only gifts made to them jointly fall into community property. Any accession to separate property is separate property, as is property acquired by exchange for separate property.

The liabilities of the community are comprised of payments in support of children, debts contracted by the spouses to run the household and educate the children, and all other debts incurred by one or the other spouse during the community system as further elaborated below. Debts owed by the spouses on the day of the celebration of the marriage, and those that encumber any property inherited or obtained as a gift during marriage, are their separate liabilities.

All debts incurred by the husband during community are satisfied from community property, subject to compensation of the community property by the husband in proper cases. All debt incurred by the wife during community that arise without any contract, those which arise by contract to which the husband consented or which were authorized by a court order, and those incurred for the purpose of running the household or educating the children

are satisfied from the community separate property. Any other debts incurred by the wife are satisfied from her separate property.

A debt that has been incurred by one of the spouses and is entered into the community may not be satisfied from the separate property of the other spouse. Such debt enters the community only by consent of the other spouse, and his separate property does not answer for it. Where, however, the debt is incurred by the wife with the consent of the husband, it may be satisfied from community property or the separate property of either spouse. If it is satisfied from the community or the separate property of the husband, these funds may be compensated in proper cases from the separate property of the wife.

The wife who exercises a profession binds only her separate property by her professional activity. The community or the separate property of the husband can be bound only by an express agreement to be so bound. The ordinary law of property is not applicable to the common property of the matrimonial régime. All the assets of the spouses fall into the community with exception of immovables owned separately at the time of marriage are subsequently acquired by gift or succession.⁶² By way of presumption movable and immovable properties also fall into the community.

62. *Supra* n.59 at p.255-256.

(ii) Administration of Community and of Separate Property

The cardinal feature of the régime of community is that the husband is empowered to administer the common stock property. The principle of unity of the administration in the husband befits his title as head of the community and head of the family.⁶³ The Code originally gave him almost absolute power of administration and disposition. But later limitations were imposed upon his autocracy to check fraud and invalid donations. He is responsible for negligence. He may alienate community property with the limitations imposed on him by law, as mentioned below. He may not make gifts *inter vivos* of community property, even to set up his children, without the consent of his wife. His testamentary dispositions may not exceed his share in the community. If he bequeaths a chattel owned by the community, the donee can obtain possession of it only if on partition of the community property it is allotted to the husband's heirs. If it is not so allotted, the donee has a claim for the full value of the chattel on the share of community property allotted to the husband's heirs and on the separate property of the husband. The husband may not without the consent of the wife sell, encumber, or lease immovables and commercial property of the community.

Where one of the spouses is incapacitated and so unable to administer the community, the other spouse may, by order of the court, be invested with his powers. Such spouse has then the powers of the spouse for whom he acts. He must obtain court authorization for dispositions for which he would need the consent of the incapacitated spouse. In circumstances

63. Code Civil, Art. 1388.

where a spouse exceeds his powers with respect to community property, the other spouse may, unless he has ratified such act, demand its annulment within two years from the day on which he acquired notice thereof, but not later than two years from the dissolution of the community.

Each spouse has full title and administration of his separate property. If one spouse entrusts the other with the management of his separate property, the rules of agency apply. Where one of the spouses is incapacitated and so unable to administer his separate property, the other spouse may, by order of the Court, be authorized to administer it. The community must indemnify the separate property of the spouses for any advantage taken therefrom and vice versa.

(iii) *Dissolution of the Community*

The community is dissolved by the death of one of the spouses, the declaration of disappearance of one of the spouses, divorce, judicial separation, separation of property, or a change in the system of matrimonial property.

Upon dissolution of the community, each spouse takes his separate property and the community property is partitioned. Each spouse must list his claims against the community and what he owes to the community. If there is a balance in favour of the community, it must be brought in. If there is a balance in favour of the spouse, he can take it out. It will be first levied on ready cash, then on movables, and finally on immovables of the community. If both spouses have a balance against the community, the wife's is taken out first. The husband may levy only against the community property, whereas the

wife may, in case of insufficiency, levy also against the separate property of her husband. All claims bear interest from the day of the dissolution of the community. After all claims have been satisfied, the remaining community property is partitioned equally between the spouses. A spouse who conceals or diverts an asset is not entitled to share in it. If the community is dissolved by the death of one of the spouses, the surviving spouse has a right to have food and habitation and expenses of the sorrow paid from community property for a period of nine months. It is a personal right of the surviving spouse.

The spouses may by marriage contract modify the provisions governing community property as to demarcate the properties or towards administration of the community property. The spouses may also provide by way of marriage contract that their property will be governed by the system of separation of property. In such instance, each of them retains the administration, enjoyment, and free disposition of his property. They contribute to the expenses of marriage in accordance with the provisions of the marriage contract, and failing such provisions, in accordance with the provisions of the marriage contract, and failing such provisions, in accordance with their capabilities. Each spouse may prove, by all means of proof, that he is the owner of a particular property. Property to which neither spouse can show title belongs to them equally as tenants in common. When the management of the property is interested to the other, the law of agency applies.

9.4 SYSTEM OF PARTICIPATION IN ACQUIRED PROPERTY

When the spouses declare that they enter into marriage under the system of participation in acquired property, each of them retains the administration, enjoyment, and disposition of his property. The system operates like the system of separation of property until its termination. Upon dissolution of the system, each spouse is entitled to one half of the net value of acquisitions of the other spouse. The original property includes all property belonging to a spouse at the celebration of the marriage and that which he or she acquired later by inheritance or gift. The final property includes all property belonging to a spouse at the termination of the system. In the case of divorce, judicial separation, or termination of the system of participation in the property acquired, the system is terminated as of the day of the filing of the petition. The property is valued as of the date of the termination of the system. Where the final property exceeds in value the original property, a case of participation arises. The gains of both spouses are compared, and the spouse whose gain was smaller participates in one half of the excess realized by the other spouse. The amount to which the spouse is thus entitled is due in cash, which in case of inability on the part of other spouse may lead to the surrender of the property.⁶⁴

The present code in operation refashions the régime and emphasis for a full and independent capacity of married woman. The reform adopted a bolder view that the wife should retain the administration of her property and as a necessary consequence the right to enjoy the income a produce. To put it otherway, the community will no longer have the usufruct of the separate

64. George E. Glos, *Comparative Law*, Fred B. Rothman & Co. Colorado. 1979, p.96.

property of the spouses, nor will the husband have control of his wife properties in his role as administrator of the community. The principle of the unity of administration over the three funds that coexist under the régime of a community is thus conclusively abandoned.⁶⁵

Despite support in the French Parliament, the new legal régime did not adopt a system of joint administration of the community. The traditional principle of vesting the administration of the community still remains with the husband. But the principle is largely eroded by the requirement for him to obtain his wife's consent to most important transactions affecting the common property.⁶⁶ Each spouse now retain the administration and enjoyment of his or her separate property, including the right to dispose of such property at will.⁶⁷

Dissolution of Marriage

Marriage is dissolved only by the death of one of the spouses or by divorce.⁶⁸ A woman cannot marry again before three hundred days have elapsed from the dissolution of her previous marriage.⁶⁹ This does not apply to a woman who gives birth after the death of her husband, nor to a woman who produces a medical certificate attesting that she is not pregnant.⁷⁰ The President of a Court of grande instance may lift this

65. *Supra* n.59, at p.380.

66. Code Civil, Art. 1422.

67. *Id.* Art. 1428.

68. *Id.*, Art. 227.

69. *Id.*, Art. 228.

70. *Ibid.*

limitation upon evidence that the woman has not cohabited with her previous husband for the last three hundred days.⁷¹

9.5 MAINTENANCE BEFORE THE CRIMINAL COURT

The well established legal system in France provides women an improved legal status. Their economical status is much improved and reflects an effective administration of a welfare state. The economical independence and the freedom of choice in marriage of woman in France has not necessitated the establishment of a legal system as that of ours to give matrimonial jurisdiction to Criminal Courts. Provision of security by the Government to children and unemployed and the effective operation of the matrimonial regime at marriage has not necessitated a similar structure as that of ours in France. In spite of the in the area of personal affairs any neglect on the part of parent to take care of their children is considered a violation and made liable for punishment.

Neglect as a Crime

Neglect on the part of father or mother, or husband to maintain and take care of their children or wife is considered a misdemeanor under the French Penal Code.⁷² Similarly any failure on the part of one to provide alimony ordered by the Civil Court is also considered a misdemeanor and is punishable with fine and a imprisonment.⁷³

71. *Ibid.*

72. French Penal Code, Art. 357(I).

73. *Id.*, Art.357(II).

The 'Partie civile'

An interesting feature of the French legal system is that at criminal trial, a civil claimant who claim damages can implead himself as party and can not only see to the effective criminal prosecution as against the violator but also can avail the civil remedy before the Criminal Court itself. This setup under French law is termed as 'Partie civile'. Such a party is not directly concerned with the administration of the justice but by providing an opportunity to the injured party, duplication of proceedings is averted. The attainment of relief before such Criminal Court will act as res judicata, preventing the civil party from invoking the matter again before the civil forum. By this structure relatives of the family such as a wife, parent or children who have been neglected and not provided with support essential for their survival can not only prosecute the relative who owes the duty to maintain them and also get maintenance in the form of damages.

CHAPTER TEN

CONCLUSION AND SUGGESTIONS

To maintain one's wife and children is a natural obligation. The first man of this universe had no such obligation. It arose with marriage.¹ The subservient status of wife, children and parents justified provision of maintenance in their favour.² Maintenance is not only a concern of the individual but also a concern for the society. In recognition of this, the centurion old law under Section 125 of Cr.P.C. provides for maintenance as a right to discarded wives, neglected children and parents not cared for. The basic objective of the provision is prevention of destitution. Besides, it tends to prevent starvation protecting indirectly the basic human right.

Human right is a world concern. It's genesis and growth was out of state's concern over individual rights. An analysis of the international instruments reveal, the concern the world community has in the protection of human rights.³ Right to life is given paramount importance under the international conventions and covenants. Special protection is extended to family and children. The present study reveals the inadequacies in the

-
1. Chapter 1, p.1, *supra*.
 2. Chapter 1, pp.5-8, *supra*.
 3. Chapter 2, pp.15-17, *supra*.

implementation of human rights and the failure on the part of individual nations, with special emphasis to Indian condition.⁴

The evolution and growth of human rights concept is primarily to protect the civil and political rights, which are now classified as 'first generation' rights'.⁵ The main concern then was to protect the individual as against the arbitrary powers of the state.⁶ Progressive thinking later led to the recognition of economic, social and cultural rights, within the concept of human rights.⁷ These rights are now classified as 'second generation' rights. Right to life is a 'first generation' right. The state has a primary duty to protect the life of all Individuals. To enjoy life one must be alive for which he must be assured of an adequate standard of living. Assurance of an adequate standard of living is nonetheless a 'second generation' right. The present study reveals the strive of a larger number of population in India for this basic economic and social right. Developed countries now work for achievement of 'third generation' rights, viz. rights such as right to development and right to self-determination. This reflects the vast difference between developed and developing nations. The state of affairs in India is not only a shame on the part of a welfare state, which proclaims for social justice, but also reflects the failure on its part to fulfil the international obligations which it has undertaken by ratification of the global conventions and covenants.

4. Chapter 2, pp.18-30, *supra*.

5. Chapter 2, pp.15-17, *supra*.

6. Chapter 2, p.17, *supra*.

7. Chapter 2, p.16, *supra*.

Provision of maintenance to wife, children and parents assures them an adequate standard of living. It is thus a basic human right. The state is obliged to assure this right to every individual in the society. Towards fulfilment of this obligation, the state has provided this as a right under Section 125 of the Cr.P.C. Similar provisions are also there under various laws touching on the personal aspect of various religious groups in the Indian community. Mere legislation will not be sufficient towards fulfilling the international obligation on the part of the state. The state should also see the true realisation of these rights by the deprived class.

Though provided as a right, all needy class do not derive the benefit. Even for those who approach the Court for the remedy, the relief is not always within their easy reach. The procedural hurdles and the snail paced disposal of cases by courts add more vow to the problem. The state resorts to supervise the enforcement of this right only in emergent situations as in the case of Section 125. Towards fulfilling the basic requirements of a larger population and towards protecting their basic human rights the state ought do to something more than this.

In India the human rights concept have been synthesised and this remains as an integrated fabric of preambular promise and under various other constitutional provisions.⁸ The Preamble, the Fundamental Rights and the Directive Principles all are part of the same constitutional scheme and aim at the establishment of a free and an egalitarian social order based on Rule of Law. The Preamble consciously set out quintessence of human rights

8. Chapter 3, pp.44-54, *supra*.

which represents the aspiration of the people who have established the Constitution.⁹ The constitutional goal of socialistic society can be achieved only by emancipation of the people from the centuries old shackles of poverty and ignorance. The Directive Principles under Part IV of the Indian Constitution embodies and scientific certain fundamental, individual, non-justiciable rights which are primarily meant to protect and promote the basic human rights of the people.¹⁰ Article 39(a) enables the people to seek socio-economic justice. It assures an adequate standard of living to every citizen and puts this as an obligation on the part of the state.

Provision of maintenance which assures one his adequate standard of living is thus Protective of the basic human right. The present study has identified this as an International obligation. It is also a Constitutional directive to protect the fundamental right to life. Towards fulfillment of this obligation, other than legislation the state has to provide social assistance. This can be in the form of social security.

No law in India touching upon the personal aspect of family life is uniform. Even the laws that govern individual religious communities are not comprehensive. The Hindu law is not applicable to all Hindu population. The Christian law reserves application of canon law. Several aspects of Muslim communities are yet to see codification. As regards maintenance, the personal laws in India reveal unanimity in recognizing the right.¹¹ At times of dispute, the matrimonial courts are also empowered to order for alimony.

9. Chapter 3, p.45, *supra*.

10. Chapter 3, pp.48-51, *supra*.

11. Chapter 6 and 7, pp-152-222, *supra*.

The concept of maintenance is an important aspect of Hindu law.¹² It had its origin as the principles of *jus-narula*. Dharma Shashtra does recognize this obligation. The theory of co-ownership, personal liability, moral duties and relationship justified the concept of maintenance under Hindu law.¹³ Statutorily the right had been recognised early from 1886, much prior to any law in India recognising such a right.¹⁴ The Hindu Adoption and Maintenance Act, 1956 is the codified personal law of Hindus in matters pertaining to maintenance. The law imposes as a personal duty on the Hindu male to provide maintenance to his wife on justifiable grounds. She can live separate and yet claim maintenance if circumstances are justifiable. This remedy is open only to wife but not extended to divorced woman. The child and parent are also entitled to maintenance. A person who succeeds over the property of a deceased is bound to maintain the 'dependants'. The rate of maintenance is unspecified by the code and thus gives wide discretion to the court. As to payment of interim maintenance the judicial opinion is divided.¹⁵

Pending matrimonial dispute, either party to a marriage can seek maintenance as against the other and this is referred as alimony. The English concept of provision during the pendency of litigation is well-lit in the procedure followed under the Hindu Marriage Act, 1955.¹⁶ The law is much

12. Chapter 6, p.153, *supra*.

13. Chapter 6, pp.154-161, *supra*.

14. Chapter 6, p.162, *supra*.

15. Chapter 6, pp.164-174, *supra*.

16. Chapter 6, pp.174-182, *supra*.

liberal in that it provides this right not only to a woman but also to the male partner of the marriage. The relief provided hereunder may either be temporary, pending disposal of the proceedings or permanent. The personal laws of Parsis and Christians too provide for similar relief.¹⁷ As regards Muslims, the obligation of maintainance in respect of wife, children and parents is well recognised.¹⁸ But as to payment of maintenance to divorced women opinions differ and the controversy over this culminated by the Supreme Court decision led to the passing of the Muslim Women (Protection of Rights on Divorce) Act, 1986.¹⁹ The law currently in force excludes the application of Section 125 of the Cr.P.C. to a divorced Muslim woman.²⁰ However, as to payment of maintenance to divorced women until the time of "Iddat", the opinion is unanimous.²¹

The law under Section 125 of Cr.P.C. so far, is looked upon as a common civil code at least for the personal aspect of maintenance. But its application is made relevant to the personal laws governing the parties. This led to conflicting stand being taken by courts. As the law now stands, a Hindu minor girl can enter into a valid marriage in contravention of the Child Marriage Restraint Act and still can claim maintenance either from her husband or father. A Muslim second wife can avail maintenance whereas a Hindu woman, howsoever innocent she may be, is not entitled to

17. Chapter 6, pp.182-186, *supra*.

18. Chapter 7, pp.211-222, *supra*.

19. Chapter 7, pp.195-208, *supra*.

20. Chapter 7, p.199, *supra*.

21. Chapter 7, p.208, *supra*.

maintenance. It is nothing short of an anarchy that all divorced women excepting one who belongs to Muslim community is provided with maintenance under the provisions of Section 125. All these reflect an anomalous situation. The present study reveals the lack of effectiveness on the part of the existing juridical system and also its failure to provide the urgent relief. It exposes also the existence of unnecessary protractive proceedings. To make the law really meaningful a constructive effort need to be taken to make the law not only effective, speedier and inexpensive but also one that will apply to all without regard to one's caste, creed and religion.

Constitution of India mandates the state to endeavour to secure for the citizens a uniform civil code throughout the territory of India. The enactment of a uniform civil code is a part of the process of secularism. It is part of our quest for a new and integrated national identity based on the composite culture of India and on enlightened rationalism. This is a vital area for our nation building and social development.

Heterogeneous, religious oriented personal laws were a concept of medieval times. A society which is compartmentalised by its laws can hardly become a homogenous unit. The non-implementation of the provision contained in Article 44 of the Constitution amounts to a grave failure of the Indian democracy. The vision under Article 44 is not for mere uniformity but for gender justice. Laws relating to marriage, divorce, maintenance, adoption, custody and guardianship affect the women most. A common civil code is hence necessary as all personal laws are discriminatory against woman. The religious members other than Muslims, namely Christians, Parsis, Jews have

not raised any noticeable voice against the mandate of Article 44. The Muslim resentment too is more influenced by communal leaders than by one's conscience.

The mandate under Article 44 is that the State shall 'endeavour to secure' a uniform civil code, not that it shall enact it straightaway. The accent was on the word 'endeavour and secure'. The framers of the Constitution were quiet aware of the himalayan difficulties likely to be faced on the way to the enactment of a uniform civil code. They were rather interested in the enactment of a code that would be accepted and actually practised by the people in their day-to-day domestic life.

Towards discharging the constitutional responsibilities, the Central and the State Governments have not done much beyond the enactment of the Special Marriage Act, 1956 and the codification of the Hindu Law. The Special Marriage Act, 1956 though intended to be applicable to all people regardless of one's caste, creed and religion, it is least resorted too even in the changed atmosphere in India. The law provides for a secular marriage and makes provision for interim and as well as permanent maintenance pending matrimonial dispute between the parties. With regard to Hindus the codified law is applicable to the majority of Indian population. When they could bring a law to be applied to the majority, what prevents them from bringing a common civil code directed under the Constitutional law is a mystery. The vehement opposition to the uniform civil code by the Muslim masses is the result of the government's failure to make them understand these issues in their true perspective. Undue weightage is being given in this aspect to the views held by conservative sections of the society. This cannot but be with political motivations.

The Supreme Court has been reminding the Central Government time and again of its constitutional responsibilities. But the sorry state is that relying on representations presented in the name of post cards the Government unashamedly submits an affidavit expressing its inability to comply with the mandate in the present social conditions. The time has come to consolidate and unify the personal law in such a way that the way of life of the whole country may in course of time be unified and secular.

The Constitution of India ushers for an egalitarian social order to render social justice to all its citizen. The founding fathers of the Constitution have devoted their thought and anxiety of the need to bring in a uniform civil code. The mandate under Article 44 of the Constitution had been kept dormant for more years than necessary. Social justice, equality and dignity of person are not mere words of the Constitution but are cornerstones of social democracy. Social justice is not a simple or single idea of a society but it is an essential part of complex social change to relieve the poor etc., from handicaps, penury to ward off distress and to make their life livable for greater good of the society at large. The aim of social justice is to attain substantial degree of social, economic and political equality, which is the legitimate expectation. It is the state's responsibility to lead the nation to a uniform civil code. The Government has to prepare the people gradually to accept the uniform civil code willingly and without compulsion. Government programmes designed to prepare the citizens to gradually accept the constitutional mandate can be achieved by wise exercise of authority by the government. What needs is the will but not narrow political mileage.

Lord Penzence's modest legislative contribution gave English Criminal Courts the jurisdiction over matrimonial matters.²² The success of the law and practice in England prompted the British regime to bring a similar legal system in the form of Section 488 of the Criminal Procedure Code, 1898 in India.²³ The law reflected a different objective from that exhibited by the personal laws then in force. The state's interest in the implementation of the right is obvious in the procedure and the law had its extensive and successful application in India. The law widened its application when it was redrafted as Section 125 of the Code of 1973. The Act then extended the relief in favour of divorced women and parents.

The law in its modified form seemed to be much more effective. The Judiciary played a constructive role in safeguarding the family jurisdiction of the criminal courts and in upholding the objectives reflected under Section 125 of the Criminal Procedure Code. The Supreme Court in various decisions starting from *Bai Tahira*²⁴ followed by *Fuzlumbi*²⁵ and *Zohara Khatoon*²⁶ did emphasize the secular characteristics of the provision. In *Yamunabai v. Anantrao*²⁷ the Supreme Court read Section 125 of the Cr.P.C. in the light of personal laws of religious communities and denied maintenance to women

22. Chapter 8, pp.240-243, *supra*.

23. Chapter 4, p.55, *supra*.

24. AIR 1979, SC 362.

25. AIR 1980, SC 1730.

26. AIR 1986, SC 587.

27. 1988 Cr. L.J. 793.

who are victims of bigamous marriage. This caused grave injustice to women. The decision has been given a refinement by subsequent rulings of the Supreme Court in *Vimala v. K.Veerasingh*²⁸ and *Dwarika Prasad Satapathy v. Bidyut Praba Dixit*²⁹ whereby now the relief of maintenance is extended even to such women until the time the 'husband' proves the invalidity of the marriage. The Court also recognised the need for awarding of interim maintenance in *Savitri's v. Govind Singh*.³⁰ The present study of analysis of judicial decisions reveal the difficulties in interpretation of various words such as 'wife', 'children' and 'parent' for whose protection the right is created.³¹ The difficulties in the receipt of maintenance by strict insistence of proof of inability, neglect and validity of marriage has been brought to the fore.³² The Courts' divided opinion as to mean the phrase 'living in adultery' and the misuse of the power of revision are also highlighted.³³ The changed socio-economic conditions in India which warrants imposition of liability on women is also critically analysed.³⁴

The *Shah Bano* verdict by the Supreme Court that gave rise to a controversy resulting in the passing of the Muslim Woman (Protection of

28. (1991) 2 SCC 375.

29. J.T. 1999(8) SC 329.

30. AIR 1986, SC 984.

31. Chapter 4, pp.62-82, *supra*.

32. Chapter 5, pp.89-95, *supra*.

33. Chapter 5, pp.132-143, *supra*.

34. Chapter 4, pp.84-87, *supra*.

Rights on Divorced) Act 1986 is also traced critically.³⁵ The law on its face is anti-woman and retrograde in its nature. It is violative of the basic constitutional principles. Its operation cannot but bring shame to a country which acclaims social justice. By this legislation, the Muslim community had succeeded in taking the law back to one that existed prior to 1973. The secular characteristics are ultimately under threat. The state being submissive to Muslim fundamentalists and hesitant to take the law back, the Supreme Court must declare this ultra vires.

The crave for setting a Family Court to bring under one umbrella all family issues, including that of maintenance, resulted in the passing of the Family Courts Act, 1984.³⁶ The family jurisdiction for maintenance which until then remained with the Magistrates' Courts thenceforth was transferred to the Family Court. Thus for a claim of maintenance, be it under different laws governing maintenance, the court that has the sole jurisdiction is the Family Court. The special enactment thus supersedes the general provisions under Section 125 of the Criminal Procedure Code.

An early conciliation and settlement certainly is a measure to safeguard the institution of marriage.³⁷ It is the bounden duty of the judiciary as well. Claim for maintenance marks the beginning of marital disruption. An effective conciliation certainly will mend the dispute between the married partners and will inturn safeguard the institution of marriage. But a close

35. Chapter 4, pp.74-75; Chapter 7, pp.196-208, *supra*.

36. Chapter 5, p.96, *supra*.

37. Chapter 5, p.103, *supra*.

scrutiny of the working system of the courts in India, inclusive that of Family Courts, would reveal that any litigation before the court aggravates rather than reducing the tension between the parties. The chances for re-union are therefore much blink when the parties meet to claim and counter maintenance. The in-camera proceedings and the denial of right of advocate to represent go against the weaker sections.³⁸ The study of the working system in India reveals that though Family Courts have been constituted sparsely spread over the territorial limits of India, the counsellors are not appointed in several courts and in courts where they are appointed the counselling cannot be said to be really effective.³⁹ In very few cases where the court has recorded a positive note on conciliation, no feedback exists to ascertain the success of conciliation.

Section 125 of Cr.P.C. though affords a substantive right, it is merely an enabling provision. Unlike wives and parents, children for whom also the protection is extended, cannot invoke the aid of this provision unless some one represents on their behalf. On matrimonial failure children normally remain with mother, who when forced to file a petition for maintenance, claim for her children also. In the absence of mother, such petitions are filed by the grandparents who naturally take care of them when neglected by their father. For children who are victims of neglect by both the parents or one who is neglected by the father but has no one to represent on their behalf to claim the relief under Section 125, the right though available is beyond their reach.

38. *Ibid.*

39. Chapter 5, p.104, *supra*.

Children afford no ground for their neglect. They suffer mostly as victims of matrimonial disrupt between the parents. Separation of the parents affect the children the most. They are deprived of the parental care, affection and love which are much essential at the younger age. For no fault of theirs, they suffer both economically and psychologically. Section 125 takes care of only their economical aspect which will not suffice and which alone will not prevent their turning delinquents of the society. Neglect by parent or failure on their part to take proper care should not drive them to take a criminal career. Proliferation of child labour, child prostitution and several delinquent behaviours carried with the assistance of younger generation of this society are mostly due to neglect by parents to take proper care of their children. No law at present checks properly the abuse or neglect of children by parents. Hence there is need to define culpable neglect a crime and be provided with sanction.

The sanctity of marriage in the computer age is not the same as it existed a decade before. Parental control over the exercise of marriage of their wards is lost. Marriage could be solemnized at the free will of the parties and even at their first sight. Registration is not compulsory, excepting one when solemnized under the Indian Christian Marriage Act. All these add to the vow that soon after the marriage, incompatibilities arise between them forcing the young girls to lay a battle seeking assistance for their survival, or else take a career detested and aimed at for prevention under Section 125. The unscrupulous male member escapes scot free without any liability. Even on successful litigation he is liable to pay only a paltry amount that may not bring back the woman all that she has lost by the union. This appears cruel injustice to women at large. The male member who failed to respect the

sanctity of marriage and who made the institution of marriage a mockery ought to be punished more severely. Hence neglect should be considered a crime.

The law under Section 125 of the Criminal Procedure Code has been drafted to befit circumstances that prevailed at the end of the 19th century. As an emancipatory social legislation, it has played its due role over the period. Now that, when the country advents the next millennium, the law should be fully equipped to suit the future needs of the society.

The law under Section 125 of the Criminal Procedure Code is no more comprehensive. The words and phrases used in the code do not carry the same meaning with which they were used at the time of drafting. With the passing of other social legislation's the strict application of this provision leads to conflict. The conspectus of life in the computer age is not confined to mere sustenance. Again the law at times gets trappled between morality and legality.⁴⁰ The secular characteristics stand destabilized.⁴¹ More than all, the Family Courts Act, 1984 has seized the criminal court's jurisdiction and keeps Section 125 and its sister clauses now merely as appendices.⁴² As a substantive provision, its presence in the procedural code looks redundant. The empirical study reveals the problems faced by the litigant spouse before the Magistrate and Family Courts while invoking the right under Section 125 of the Cr.P.C.⁴³ The remedy lies in incorporating suitable changes both in the law and procedure.

40. Chapter 5, p.132-143, *supra*.

41. Chapter 4, pp.74-75; Chapter 7, pp.196-208, *supra*.

42. Chapter 5, pp.96-105, *supra*.

43. Chapter 5, pp.145-151, *supra*.

Change is the law of nature. Law, no less than life, must change in order to be vital and obey the principles of change to adopt itself to altered social conditions. A comparative study of the law of maintenance in England⁴⁴ and France⁴⁵ also supports the view for a change in the law and procedure in India. The English law which served as model for us to confer matrimonial jurisdiction on criminal courts has been refined.⁴⁶ The Family Courts now have taken jurisdiction of these matters and the system serves the purpose. The law currently in force in England describes a simple procedure and assures the needy class with timely relief. The enforcement measures are highly effective.⁴⁷ The application of this law is parallel to the reliefs provided under matrimonial laws. In England, the law is uniform and poses no difficulty in its enforcement. Failure to maintain one's relation is viewed a violation and provided with punishment. As a true welfare state, the state too fulfils its obligation by providing social security to needed class of people.⁴⁸ A comparison of the civil law system in France lends again more support for drastic changes in the Indian legal system.⁴⁹ The French legal system confers independent economical status to married woman.⁵⁰ The matrimonial regime gives a married woman an equal right on par with her husband.⁵¹ Unlike in India, where married woman is denied her due rights in

44. Chapter 8, pp.223-260, *supra*.

45. Chapter 9, pp.261-281, *supra*.

46. Chapter 8, pp.243-244, *supra*.

47. Chapter 8, pp.244-259, *supra*.

48. Chapter 8, pp.259-260, *supra*.

49. Chapter 9, pp.261-281, *supra*.

50. Chapter 9, pp.268-270, *supra*.

51. Chapter 9, pp.270-279, *supra*.

the matrimonial properties, in French legal system independent property rights through matrimonial regime is recognised. This averts her destitution by unfortunate marriage breakdowns and the need to look for assistance either from her husband or state. The emancipated status of women have not necessitated the constitution of a similar structure as our magistral system. Even then, the *partie civile* concept affords timely assistance in case of need. Neglect seen as crime under the English and French law see to the due fulfillment of the duty owed by parents as against their children and husband as against his wife. It thus imposes a positive duty which on failure may result with sanction.⁵²

In the light of the above inferences the following suggestions are made:

10.1 THE STATE - TO PROVIDE SOCIAL SECURITY

To assure an adequate standard of living to every one and his family is an obligation on the part of the state. It is an international and as well as a constitutional obligation. Towards fulfilment of this obligation the state has to provide social security to every individual who is in need of such assistance. Of all, children must be given special care and attention. It is not a burden but wise investment on human capital. Welfare of the people is the supreme obligation of the state. Poverty stricken and starving population cannot take a nation forward. Hence, to assure an adequate standard of living as envisaged under the Constitution it is the bounden duty of the state to provide security to people who are in need. Such provision is part and parcel of efforts to protect human rights.

52. Chapter 9, pp.280-281, *supra*.

10.2 NEGLECT - TO BE A CRIME

Willful neglect to maintain one's wife, children and parent should be considered an offence and provided with sufficient sentence. Now that under Section 125 of the Criminal Procedure Code only non-compliance is observed as a breach and dealt strictly with punishment for a limited term. If only neglect is defined as a crime this will impose a positive duty on the dependents and will deter them from going behind fulfillment of their obligation.

Every legal right of the individual is by definition an interest which in greater and lesser degree has the protection of the law. The protection is in the first instance against the violation of his rights by other individuals. Even denial of rights protected by law will amount to violation. Neglect by one to maintain his wife, children or parent is as such a violation for which penal action should be provided. Hence the need to incorporate a provision in the substantive penal law providing necessary punishment on proof of willful neglect. The traditional notion of mental intention be dispensed with or may be presumed under circumstances such as possession of means.

10.3 TOWARDS THE EMANCIPATION OF WOMEN

Section 125 of the Code of Criminal Procedure reflects women subordination and the practice of inequality. Though the provision has been incorporated with an avowed object of extending economical assistance to safeguard women's interest, the provision strengthens and perpetuates inequality and subordination of women. To put it in other way, it does not liberate her by providing an economic independence, but keeps her ever under the mercy of the husband. Hence, economic independence of the

woman alone can afford necessary protection and retrieve from them the clutches of dependence. Social policies must be aimed in the direction of ensuring their economical and social independence which would in due course of time render the provision redundant.

Women need to achieve a greater financial independence. Economic self sufficiency cannot be achieved by Indian woman overnight. Orthodoxial custom and belief are well rooted in their day to day life. The way to liberate them is to provide them access to education, employment and opportunity for political participation. To achieve the above, effective steps ought to be taken by the Central and State Governments. If only, they attain economic independence they can improve their life choices and play much more constructive roll in the family and society.

10.4 UNIFORM CIVIL CODE

The law of maintenance cannot be read in isolation. Its application relates to other personal aspects of family life such as marriage, divorce, adoption, custody and guardianship. The law relating to these personal aspects affect the woman most and need a change. The personal law of all communities are unanimous in discriminating woman. Again they lack unanimity. Uniform application of law is an essential feature of a social community. This alone will result in progress. Hence, all the personal aspects of individuals must be brought under one single code. The Constitution of India mandates the state to endeavour to secure for its citizens a uniform civil code. The Supreme Court had reminded the obligation to the Government on various occasions. But the mandate still remains a mirage. All efforts must be made to bring a common civil code.

10.5 TOWARDS STREAM LINING SECTION 125

The law of maintenance under Section 125 of the Criminal Procedure Code needs drastic changes. Serious thought must be given to the subject and changes are effected to suit the present social conditions. Ambiguous words and phrases must be deleted and the provision should be made precise. The law must be made applicable to all people irrespective of their community. Towards this end, the following suggestions are made in the law and procedure under Section 125 of the Cr.P.C.

1. Uniform application of law is an essential feature of a society. This alone will lead to social progress. The Muslim Women (Protection of Rights on Divorce) Act, 1986 is retrograde and violative of the provisions of the Constitution. The Act must be immediately repealed so as to make the secular law applicable to all regardless of one's religion.

2. As to the procedure, the jurisdiction now stands divided between the Magistrates' Courts and Family Courts. The Family Court system can be effectively enforced only if the objective under Article 44 stands realised.

3. The structure and functioning of the Family Court must be redefined before placing the jurisdiction under Section 125 before such courts. The Court must be properly equipped and be provided with counsellors and experts for assisting the Court in achieving its object.

4. As to the procedure, a model format can be utilised so as to get required particulars from the parties dispensing even the assistance of the advocates. The process must be effective to assure earlier service and a time

limit can be prescribed for the disposal of the entire proceedings. Conciliatory efforts may be resorted to if the parties are not going for a stiff contest of the claim. If contested in deserving circumstances interim maintenance must be provided. The conduct or other factors for denial to pay maintenance need not be entertained and the same may be raised before the competent civil court. The remedy provided under Section 125 must be limited to a period not exceeding 12 months within which time the parties may invoke the permanent remedy before the ordinary civil court. The revision jurisdiction must be entertained sparingly.

5. The maximum ceiling of Rs.500 which has been fixed some 50 years back will be totally inadequate to meet the basic requirements of the present day living. The maximum ceiling may either be deleted or else prescribed as Rs.2000 per month.

6. The words 'living in adultery' remain as a fetter in the claim of maintenance by a wife. This serves an easy ground to drag the claim for maintenance and many a times is misused by the husband to avoid payment of maintenance. The clause must be deleted.

7. The right of maintenance must be made reciprocal at least as between father and son. The obligation having been recognised as against each other, one's failure towards another at times of need must be taken note when he himself is a claimant.

ANNEXURE I

EXCERPTS FROM THE UNITED NATIONS

Article 55

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

- (a) higher standards of living, full employment, and conditions of economic and social progress and development
- (b) solutions of international economic, social, health and related problems; and international cultural and educational co-operation; and
- (c) universal respect for; and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 56

All Members pledge themselves to take joint and separate action in co-operation with the organization for the achievement of the purpose set forth in Article 55.

ANNEXURE II

EXCERPTS FROM THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, 1948

Article 1

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 3

Everyone has the right to life, liberty and security of person.

Article 22

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each state, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Article 25

1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care, and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Article 26

1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
3. Parents have a prior right to choose the kind of education that shall be given to their children.

ANNEXURE III

EXCERPTS FROM THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 1966

Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

Article 23

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.
2. The right of men and women of marriageable age to marry and to found a family shall be recognized.
3. No marriage shall be entered into without the free and full consent of the intending spouses.
4. State Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for necessary protection of any children.

Article 24

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.
2. Every child shall be registered immediately after birth and shall have a name.
3. Every child has the right to acquire a nationality

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

ANNEXURE IV

EXCERPTS FROM THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS, 1966

Article 6

1. The State Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely choose or accepts, and will take appropriate steps to safe guard this right.
2. The steps to be taken by a State Party to the present covenant to achieve the full realization of this right shall include technical and vocational guidance and training programs, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedom to the individual.

Article 9

The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

Article 11

1. The State Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The State Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.
2. The State Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation the measures, including specific programs, which are needed; (a) To improve method of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by development and utilization of natural resource; (b) Taking into account the problems of both food-importing and food-exporting countries, to ensure a equitable distribution of world food supplies in relation to need.

Article 13

1. The State Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

ANNEXURE V

EXCERPTS FROM THE CONVENTION ON THE RIGHTS OF THE CHILD, 1989

THE STATE PARTIES TO THE PRESENT CONVENTION

Preamble

Considering that, in accordance with principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

Bearing in mind that the people of the United Nations have, in the Charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom,

Recognizing that the United Nations has, in the Universal Declaration of Human rights and in the International Covenants on Human Rights, proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or origin, property, birth or other status.

Recalling that, in the Universal Declaration of Human rights, the United Nations has proclaimed that childhood is entitled to special care and assistance.

Article 1

For the purposes of the present convention, a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.

Article 6

1. States Parties recognize that every child has the inherent right to life.
2. States Parties shall ensure to the maximum extent possible the survival and development of the child.,

Article 18

1. State Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. The best interest of the child will be their basic concern.

2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, State Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.
3. State Parties shall take all appropriate measures to ensure that children or working parents have the right to benefit from childcare services and facilities for which they are eligible.

Article 19

1. State Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programs to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and as appropriate, for judicial involvement.

Article 24

1. State Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. State Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

Article 26

1. State Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.
2. The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefit made by or on behalf of the child.

Article 27

1. State Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.
2. The parent(s) or other responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.

3. State Parties, in accordance with national conditions and within their means shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programs, particularly with regard to nutrition, clothing and housing.
4. State Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Part and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, State Parties shall promote the accession to international agreement or the conclusion of such agreements, as well as the making of other appropriate arrangement.

Article 28

1. State Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular; (a). Make primary education compulsory and available free to all; (b). Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need; (c). Make higher education accessible to all on the basis of capacity by every appropriate means; (d). Make educational and vocational information and guidance available and accessible to all children; (e). Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

Article 29

1. State Parties agree that the education of the child shall be directed to; (a). The development of the child's personality, talents and mental and physical abilities to their fullest potential; (b). The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations; (c) The development of respect for the child's parents, his or her own cultural identity, language and value, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own; (d). The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic; national and religious groups and persons of indigenous origin; (e). The development of respect for the natural environment.

Article 31

1. State Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.
2. State Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural artistic, recreational and leisure activity.

Article 32

1. State Parties recognize the right of the child to be protected from economic exploitation and from performing and work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual and moral or social development.

Article 36

State Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.

ANNEXURE - VI

EXCERPTS FROM THE AMERICAN CONVENTION OF HUMAN RIGHTS

Article 1 -- Obligation to Respect Rights

1. The State Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

Article 4 – Right to Life

1. Every person has the right to have his life respected. This right shall be protected by law, and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

Article 17 -- Rights of the Family

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
2. The right of men and women of marriageable age to marry and to raise a family shall be recognized, if they meet the conditions required by domestic laws, insofar as such conditions do not affect the principle of nondiscrimination established in this Convention.
3. No marriage shall be entered into without the free and full consent of the intending spouses.
4. The States Parties shall take appropriate steps to ensure the equality of rights and the adequate balancing of responsibilities of the spouses as to marriage, during marriage, and in the event of its dissolution. In case of dissolution, provision shall be made for the necessary protection of any children solely on the basis of their own best interests.
5. The law shall recognize equal rights for children born out of wedlock and those born in wedlock.

Article 19 – Rights of the Child

Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the State.

Article 24 – Right to Equal Protection

All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

Article 26 – Progressive Development

The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.

ANNEXURE - VII

EXCERPTS FROM THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

Article 4

Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

Article 18

1. The family shall be the natural unit and basis of society. It shall be protected by the State.
2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.
3. The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.
4. The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.

Article 19

All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.

Article 22

1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.

States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

ANNEXURE VIII

EXCERPTS FROM THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Article 1

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of the Convention.

Article 8

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

.....

Article 12

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

Article 13

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violations has been committed by persons acting in an official capacity.

Article 14

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

ANNEXURE-IX

EXCERPTS FROM THE EUROPEAN SOCIAL CHARTER

Article 16

The Right of the Family to Social, Legal and Economic Protection

With a view to ensuring the necessary conditions for the full development of the family, which is a fundamental unit of society, the Contracting Parties undertake to promote the economic, legal and social protection of family life by such means as social and family benefits, fiscal arrangements, provision of family housing, benefits for the newly married, and other appropriate means.

Article 17

The Right of Mothers and Children to Social and Economic Protection

With a view to ensuring the effective exercise of the right of mothers and children to social and economic protection, the Contracting Parties will take all appropriate and necessary measures to that end, including the establishment or maintenance of appropriate institutions or services.

ANNEXURE - X

EXCERPTS FROM THE CODE OF CRIMINAL PROCEDURE 1898

Section 488

- (1) If any person having sufficient means neglects or refuses to maintain his wife or his legitimate or illegitimate child unable to maintain itself, the District Magistrate, a Presidency Magistrate, a Sub-Divisional Magistrate or a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, at such monthly rate, not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate from time to time directs.
- (2) Such allowance shall be payable from the date of the order, or if so ordered from the date of the application for maintenance.
- (3) If any person so ordered fails without sufficient cause of comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in manner herein before provided for levying fines, and may sentence such person, for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made:

Provided that, if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

If a husband has contracted marriage with another wife or keeps a mistress it shall be considered to be just ground for his wife's refusal to live with him:

Provided, further, that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due.

- (4) No wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

- (5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order.
- (6) All evidence under this Chapter shall be taken in the presence of the husband or father, as the case may be, or, when his personal attendance is dispensed with, in the presence of his pleader, and shall be recorded in the manner prescribed in the case of summons-cases;
- Provided that if the Magistrate is satisfied that he is willfully avoiding service, or willfully neglects to attend the Court, the Magistrate may proceed to hear and determine the case ex-parte. Any orders so made may be set aside for good cause shown on application made within three months from the date thereof.
- (7) The Court in dealing with applications under this section shall have power to make such order as to costs as may be just.
- (8) Proceedings under this section may be taken against any person in any district where he resides or is, or where he last resided with his wife, or, as the case may be, the mother of the illegitimate child.

Section 489

- (1) On proof of a change in the circumstances of any person receiving under section 488 a monthly allowance, or ordered under the same section to pay a monthly allowance to his wife or child, the Magistrate may make such alternation in the allowance as he thinks fit: Provided that if he increases the allowance the monthly rate of five hundred rupees in the whole be not exceeded.
- (2) Where it appears to the Magistrate that, in consequence of any decision of a competent Civil Court, any order made under section 488 should be cancelled or varied, he shall cancel the order or, as the case may be, vary the same accordingly.

ANNEXURE - XI

EXCERPTS FROM THE CODE OF CRIMINAL PROCEDURES, 1973

Section 125

- (1) If any person having sufficient means neglects or refuses to maintain -
- (a) his wife, unable to maintain herself, or
 - (b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or
 - (c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or
 - (d) his father or mother, unable to maintain himself or herself, a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:

Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means.

Explanation. - for the purposes of this Chapter, -

- (a) "minor" means a person who, under the provisions of the Indian Majority Act, 1875 is deemed not to have attained his majority;
 - (b) "wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.
- (2) Such allowance shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance.
- (3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made:

Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due:

Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

Explanation.-If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him.

- (4) No wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.
- (5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order.

Section 126

- (1) Proceedings under section 125 may be taken against any person in any direct-
 - (a) where he is, or
 - (b) where he or his wife resides, or
 - (c) where he last resided with his wife, or as the case may be, with the mother of the illegitimate child.
- (2) All evidence in such proceedings shall be taken in the presence of the person against whom an order for payment of maintenance is proposed to be made, or, when his personal attendance is dispensed with, in the presence of his pleader, and shall be recorded in the manner prescribed for summons-cases:

Provided that if the Magistrate is satisfied that the person against whom an order for payment of maintenance is proposed to be made is willfully avoiding service, or willfully neglecting to attend the Court, the Magistrate may proceed to hear and determine the case ex-parte and any order so made may be set aside for good cause shown on an application made within three months from the date thereof subject to such terms including terms as to payment of costs to the opposite party as the Magistrate may think just and proper.

- (3) The Court in dealing with applications under section 125 shall have power to make such order as to costs as may be just.

Section 127

- (1) On proof of a change in the circumstances of any person, receiving under section 125 a monthly allowance, or ordered under the same section to pay a monthly allowance to his wife, child, father or mother, as the case may be, the Magistrate may make such alteration in the allowance as he thinks fit:

Provided that if he increases the allowance, the monthly rate of five hundred rupees in the whole shall not be exceeded.

- (2) Where it appears to the Magistrate that, in consequence of any decision of a competent Civil Court, any order made under section 125 should be cancelled or varied, he shall cancel the order or, as the case may be, vary the same accordingly.
- (3) Where any order has been made under section 125 in favour of a woman who has been divorced by, or has obtained a divorce from, her husband, the Magistrate shall, if he is satisfied that -
- (a) the woman has, after the date of such divorce, remarried cancel such order as from the date of her remarriage;
- (b) the woman has been divorced by her husband and that she has received, whether before or after the date of the said order, the whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce, cancel such order, -
- (i) in the case where such sum was paid before such order, from the date on which such order was made;
- (ii) in any other case, from the date of expiry of the period, if any, for which maintenance has been actually paid by the husband to the woman;
- (c) the woman has obtained a divorce from her husband and that she had voluntarily surrendered her rights to maintenance after her divorce, cancel the order from the date thereof.
- (4) At the time of making any decree for the recovery of any maintenance or dowry by any person, to whom a monthly allowance has been ordered to be paid under section 125, the Civil Court shall take into account the sum which has been paid to, or recovered by, such person as monthly allowance in pursuance of the said order.

Section 128

A copy of the order of maintenance shall be given without payment to the person in whose favour it is made, or to his guardian, if any, or to the person to whom the allowance is to be paid; and such order may be enforced by any Magistrate in any place where the person against whom it is made may be, on such Magistrate being satisfied as to the identity of the parties and the non-payment of the allowance due.

ANNEXURE-XII

EXCERPTS FROM THE FAMILY COURTS ACT, 1984 (NO. 66 OF 1984)

An Act to provide for the establishment of Family Courts with a view to promote conciliation in, and secure speedy settlement of, disputes relating to marriage and family affairs and for matters connected therewith

Be it enacted by Parliament in the Thirty-fifty Year of the Republic of India as follows:

CHAPTER I

Preliminary

1. Short title, extent and commencement :-
 - (1) This Act may be called the Family Courts Act, 1984.
 - (2) It extends to the whole of India except the State of Jammu and Kashmir.
 - (3) It shall come into force on such date as the Central Government may, by notification in the official Gazette, appoint, and different dates may be appointed for different States.
2. Definitions :- In this Act, unless the context otherwise requires :-
 - (a) "Judge" means the Judge or, as the case may be, the Principal Judge, Additional Principal Judge or other Judge of a Family Court;
 - (b) "notification" means a notification published in the official gazette;
 - (c) "prescribed" means prescribed by rules made under this Act;
 - (d) "Family Court" means a Family Court established under Section 3;
 - (e) all other words and expressions used but not defined in this Act and defined in the Code of Civil Procedure, 1908 [5 of 1908] shall have the meaning respectively assigned to them in that Code.

CHAPTER II

Family Courts

3. Establishment of Family Courts :- (1) For the purpose of exercising the jurisdiction and powers conferred on a Family Court by this Act, the State Government after consultation with the High Court, and by notification,-
- (a) shall, as soon as may be after the commencement of this Act, establish for every area in the State comprising a city or town whose population exceeds one million, a Family Court;
 - (b) may establish Family Courts for such other areas in the State as it may deem necessary.
5. Association of Social Welfare Agencies, etc .:- The State Government may, in consultation with the High Court, provide, by rules, for the association, in such manner and for such purposes and subject to such conditions as may be specified in the rules, with a Family Court of--
- a) institutions or organisations engaged in social welfare or the representatives thereof;
 - (b) persons professionally engaged in promoting the welfare of the family;
 - (c) persons working in the field of social welfare; and
 - (d) any other person whose association with a Family Court would enable it to exercise its jurisdiction more effectively in accordance with the purposes of this Act.
6. Counsellors, officers and other employees of Family Courts:-
- (1) The State Government shall, in consultation with the High Court, determine the number and categories of counsellors, officers and other employees required to assist a Family Court in the discharge of its functions and provide the Family Court with such counsellors, officers and other employees as it may think fit.
 - (2) The terms and conditions of association of the counsellors and the terms and conditions of service of the officers and other employees, referred to in sub-section (1), shall be such as may be specified by rules made by the State Government.

CHAPTER III

Jurisdiction

7. 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 sub-section are suits and proceedings of the following nature, namely :

- (a) a suit or proceeding between the parties to a marriage for decree of a 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 circumstances 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.

8. Exclusion of jurisdiction and pending proceedings:-

Where a Family Court has been established for any area :

- (a) no district court or any subordinate civil court referred to in sub-section (1) of Section 7 shall, in relation to such area, have or exercise any jurisdiction in respect of any suit or proceeding of the nature referred to in the Explanation to that sub-section;
- (b) no Magistrate shall, in relation to such area, have or exercise any jurisdiction or powers under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974);
- (c) every suit or proceeding of the nature referred to in the Explanation to sub-section (1) of section 7 and every proceeding under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974)--
 - (i) which is pending immediately before the establishment of such Family Court before any district court or subordinate court referred to in that sub-section or, as the case may be, before any Magistrate under the said Code; and
 - (ii) which would have been required to be instituted or taken before or by such Family Court if, before the date on which such suit or proceeding was instituted or taken, this Act has come into force and such Family Court had been established, shall stand transferred to such Family Court on the date on which it is established.

CHAPTER IV

Procedure

9. Duty of Family Court to make efforts for settlement :-

- (1) In every suit or proceeding, endeavour shall be made by the Family Court in the first instance, where it is possible to do so consistent with the nature and circumstances of the case, to assist and persuade the parties in arriving at a settlement in respect of the subject-matter of the suit or proceeding and for this purpose a Family Court may, subject to any rules made by the High Court, follow such procedure as it may deem fit.
- (2) If, in any suit or proceeding, at any stage, it appears to the Family Court that there is a reasonable possibility of a settlement between the parties, the Family Court may adjourn the proceedings for such period as it thinks fit to enable attempts to be made to effect such a settlement.

- (3) The power conferred by sub-section (2) shall be in addition to, and in derogation of, any other power of the Family Court to adjourn the proceedings.

10. Procedure generally:-

- (1) Subject to the other provisions of this Act and rules, the provisions of the Code of Civil Procedure, 1908 (5 of 1908), and of any other law for the time being in force shall apply to the suit and proceedings other than the proceedings under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974), before a Family Court shall be deemed to be a civil court and shall have all the powers of such Court.
- (2) Subject to the other provisions of this Act and the rules, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974), or the rules made thereunder, shall apply to the proceedings under Chapter IX of the Code before a Family Court.
- (3) Nothing in sub-section (1) or sub-section (2) shall prevent a Family Court from laying down its own procedure with a view to arrive at a settlement in respect of the subject-matter of the suit or proceedings or at the truth of the facts alleged by the one party and denied by the other.

11. Procedure to be held in camera :- In every suit or proceedings to which the Act applies, the proceedings may be held in camera if the Family Courts so desires and shall be so held if either party so desires.

12. Assistance of medical and welfare experts :- In every suit or proceedings, it shall be open to Family Court to secure the services of a medical experts or such person (preferably a woman where available), whether related to the parties or not, including a person professionally engaged in promoting the welfare of the family as the Court may think fit, for the purposes of assisting the Family Court in discharging the functions imposed by this Act.

13. 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*.

14. Application of Indian Evidence Act, 1872 :- A Family Court may receive as evidence any report, statement, documents, information or matter that may, in its opinion, assist it to deal effectually with a dispute, whether or not the same would be otherwise relevant or admissible under the Indian Evidence Act, 1872 (1 of 1872).

15. **Record of oral evidence :-** In suit or proceedings before a Family Court, it shall not be necessary to record the evidence of witnesses at length, but the Judges as the examination of each witness proceeds, shall, record or cause to be recorded, a memorandum of the substance of what the witness deposes, and such memorandum shall be signed by the witness and the Judge and shall form part of the record.
16. **Evidence of formal character on affidavit :-**
- (1) The evidence of any person where such evidence is of a formal character, any be given by affidavit and may subject to all just exceptions, be read in evidence in any suit or proceeding before a Family Court.
 - (2) The Family Court may, if it thinks fit, and shall, on the application of any of the parties to the suit or proceeding summon and examine any such person as to the facts contained in his affidavit.
17. **Judgement :-** Judgement of a Family Court shall contain a concise statement of the case, the point for determination, the decision thereon and the reasons for such decision.
18. **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 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.
 - (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.

CHAPTER V

Appeals and Revisions

19. **Appeal :-**
- (1) Save as provided in sub-section (2) and notwithstanding anything contained in the Code of Civil Procedure, 1908, (5 of 1908), or in the Code of Criminal Procedure, 1973 (2 of 1974), or in any other law, an appeal shall lie from every judgment or order, not being an interlocutory order of a Family Court to the High Court both on facts and on law.

- (2) No appeal shall lie from a decree or order passed by the Family Court with the consent of the parties [or from an order passed under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974): [Provided that nothing this sub-section shall apply to any appeal pending before a High Court or any order passed under Chapter IX of the Code of Criminal Procedure 1973 (2 of 1974) before the commencement of the Family Courts (Amendment) Act, 1991].
- (3) Every appeal under this section shall be preferred within a period of thirty days from the date of the judgment or order of a Family Court.
- [(4) The High Court may, of its own motion or otherwise, call for and examine the record of any proceeding in which the Family Court situate within its jurisdiction passed an order under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974) for the purpose of satisfying itself as to the correctness, legality or propriety of the order not being an interlocutory order and as to the regularity of such proceeding].
- (5) Except as aforesaid, no appeal or revision shall lie to any court from any judgment, order or decree of a Family Court.
- (6) An appeal preferred under sub-section (1) shall be heard by a Bench consisting of two or more Judges.

ANNEXURE - XIII

THE MUSLIM WOMEN (PROTECTION OF RIGHTS ON DIVORCE) ACT, 1986

The following Act of Parliament received the assent of the President on 19th May, 1986 and is hereby published for general information.

An Act to protect the rights of Muslim women who have been divorced by, or have obtained divorce from, their husbands and to provide for matters connected therewith or incidental thereto.

Be it enacted by Parliament in the Thirty-seventh year of the Republic of India as follows:

Section 1

Short title and extend

1. This Act may be called the Muslim Women (Protection of Rights on Divorce) Act, 1986
2. It extends to the whole of India except the State of Jammu and Kashmir

Section 2

Definitions

In this Act, unless the context otherwise requires, --

- (a) "divorced woman" means a Muslim woman who was married according to Muslim law, and has been divorced by, or has obtained divorce from, her husband in accordance with Muslim law ;
- (b) "iddat period" means, in the case of a divorced woman, -
 - (i) three menstrual courses after the date of divorce, if she is subject to menstruation;
 - (ii) three lunar months after her divorce, if she is not subject to menstruation ; and
 - (iii) if she is enicient at the time of her divorce, the period between the divorce and the delivery of her child or the termination of her pregnancy, whichever is earlier ;

- (1) "Magistrate" means a Magistrate of the first class exercising jurisdiction under the Code of Criminal Procedure, 1973 in the area where the divorced woman resides.
- (2) "Prescribed" means prescribed by rules made under this Act.

Section 3

"Mahr" or other properties of Muslim woman to be given to her at the time of divorce:

Notwithstanding anything contained in any other law for the time being in force, a divorced woman shall be entitled to –

1. a reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband ;
 2. where she herself maintains the children born to her before or after her divorce, a reasonable and fair provision and maintenance to be made and paid by her former husband for a period of two years from the respective dates of birth of such children ;
 3. an amount of equal to the sum of mahr or dower agreed to be paid other at the time of her marriage or at any time thereafter according to Muslim law ; and
 4. all the properties given to her before or at the time of marriage or after her marriage by her relatives or friends or the husband or any relatives of the husband or his friends
- (2). Where a reasonable and fair provision and maintenance or the amount of mahr or dower due has not been made or paid or the properties referred to in clause (d) of sub-section (1) have not been delivered to a divorced woman on her divorce, she or any one duly authorised by her may, on her behalf, make an application to a Magistrate for an order for payment of such provision and maintenance, mahr or dower or the delivery of properties, as the case may be.
- (3). Where an application has been made under sub-section (2) by a divorced woman, the Magistrate may, if he is satisfied that—
1. her husband having sufficient means, has failed or neglected to make or pay her within the iddat period a reasonable and fair provision and maintenance for her and the children; or
 2. the amount equal to the sum of mahr or dower has not been paid or that the properties referred to in clause (d) of sub-section (1) have not been delivered to her, make an order, within on month of the date of the filing of the application, directing her former husband to pay such reasonable and fair provision and maintenance to the divorced woman as he may determine as fit and proper having regard to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of her former husband or, as the case may be, or the payment of such mahr or dower or the delivery of such properties referred to in clause (d) of sub-section (1) to the divorced woman:

Provided that if the Magistrate finds it impracticable to dispose of the application within the said period, he may, for reasons to be recorded by him, dispose of the application after the said period.

- (4). If any person against whom an order has been made under sub-section (3) fails without sufficient cause to comply with the order, the Magistrate may issue a warrant for levying the amount of maintenance, mahr or dower due in the manner provided for levying fines under the Code of Criminal Procedure, 1973, and may sentence such person, for the whole or part of any amount remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one year or until payment if sooner made, subject to such person being heard in defence and the said sentence being imposed according to the provisions of the said Code.

4. Order for Payment of Maintenance:

- (1) Notwithstanding anything contained in the foregoing provisions of this Act or in any other law for the time being in force, where a Magistrate is satisfied that a divorced woman has not remarried and is not able to maintain herself after the iddat period, he may make an order directing such of her relatives as would be entitled to inherit her property on her death according to Muslim law to pay such reasonable and fair maintenance to her as he may determine fit and proper, having regard to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of such relatives and such maintenance shall be payable by such relatives in the proportion in which they would inherit her property and at such periods as he may specify in his order:

Provided that where such divorced woman has children, the Magistrate shall order only such children to pay maintenance to her, and in the event of any such children being unable to pay such maintenance, the Magistrate shall order the parents of such divorced woman to pay maintenance to her;

Provided further that if any of the parents is unable to pay his or her share of the maintenance ordered by the Magistrate on the ground of his or her not having the means to pay the same, the Magistrate may, on proof of such inability being furnished to him, order that the share of such relatives in the maintenance ordered by him, order that the share of such relatives in the maintenance ordered by him be paid by such of the other relatives as may appear to the Magistrate to have the means of paying the same in such proportions as the Magistrate may think fit to order.

- (2) Where a divorced woman is unable to maintain herself and she has no relatives as mentioned in sub-section (1) or such relatives or any one of them have not enough means to pay the maintenance ordered by the Magistrate or the other relatives have not the means to pay the shares of those relatives whose shares have been ordered by the Magistrate to be paid by such other relatives under the second proviso to sub-section (1), the Magistrate may be order direct the State Wakf Board established under Section 9 of the Wakf Act, 1954, or under any other law for the time being in force in a State, functioning in the area in which the woman resides, to pay such maintenance as determined by him under sub-section (1) or, as the case may be, to pay the shares of such of the relatives who are unable to pay, at such periods as he may specify in his order.

4. Option to be governed by the provisions of Sections 125 to 128 of Act 2 of 1974:--

If, on the date of the first hearing of the application under sub-section (2) of Section 3, a divorced woman and her former husband declare, by affidavit or any other declaration in writing in such form as may be prescribed, either jointly or separately, that they would prefer to be governed by the provisions of Sections 125 to 128 of the Code of Criminal Procedure, 1973, and file such affidavit or declaration in the court hearing the application, the Magistrate shall dispose of such application accordingly.

Explanation :-- For the purposes of this section, "date of the first hearing of the application" means the date fixed in the summons for the attendance of the respondent to the application.

4. Power to make rules :--

- (1) The Central Government may by notification in the Official Gazette, make rules for carrying out the purposes of this Act.
- (2) In particular and without prejudice to the foregoing power, such rules may provide for—
 - (a) the form of the affidavit or other declaration in writing to be filed under Section 5;
 - (b) the procedure to be followed by the Magistrate in disposing of applications under this Act, including the serving of notices to the parties to such applications, dates of hearing of such applications and other matters;
 - (c) any other matter which is required to be or may be prescribed.
- (3) Every rule made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both House agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

Transitional provisions:--

Every application by a divorced woman under Section 125 or under Section 127 of the Code of Criminal Procedure, 1973 pending before a Magistrate on the commencement of this Act, shall, notwithstanding anything contained in that Code and subject to the provisions of Section 5 of this Act, be disposed of by such Magistrate in accordance with the provisions of this Act.

ANNEXURE-XIV

THE HINDU ADOPTIONS AND MAINTENANCE ACT, 1956

Section 3. Definitions:

In this Act, unless the context otherwise requires :--

- (a)
- (b) "maintenance" includes –
 - (i) in all cases, provision for food, clothing, residence, education and medical attendance and treatment;
 - (ii) in the case of an unmarried daughter, also the reasonable expenses of and incident to her marriage;
- (c) "minor" means a person who has not completed his or her age of eighteen years.

Section 18. Maintenance of wife

- (1) Subject to the provision of this section, a Hindu wife, whether married before or after the commencement of this Act, shall be entitled to be maintained by her husband during her life time.
- (2) A Hindu wife shall be entitled to live separately from her husband without forfeiting her claim to maintenance –
 - (a) if he is guilty of desertion, that is to say, of abandoning her without reasonable cause and without her consent or against her wish, or willfully neglecting her;
 - (b) if he has treated her with such cruelty as to cause a reasonable apprehension in her mind that it will be harmful or injurious to live with her husband;
 - (c) if he is suffering from a virulent form of leprosy;
 - (d) if he has any other wife living;
 - (e) if he keeps a concubine in the same house in which his wife is living or habitually resides with a concubine elsewhere;
 - (f) if he has ceased to be a Hindu by conversion to another religion;
 - (g) if there is any other cause justifying her living separately.
- (3) A Hindu wife shall not be entitled to separate residence and maintenance from her husband if she is unchaste or ceases to be a Hindu by conversion to another religion.

Section 19. Maintenance of widowed daughter-in-law :--

- (1) A Hindu wife, whether married before or after the commencement of this Act, shall be entitled to be maintained after the death of her husband by her father-in-law :
- Provided and to extend that she is unable to maintain herself out of her own earnings or other property or, where she has no property of her own, is unable to obtain maintenance :-
- (a) from estate of her husband or father or mother or
 - (b) from her son or daughter, if any, or his or her estate
- (1) Any obligation under sub-section (1) shall not be enforceable if the father-in-law has not the means to do so from any coparcenary property in his possession out of which the daughter-in-law has not obtained any share, and any such obligation shall cease on the remarriage of the daughter-in-law.

Section 20. Maintenance of children and aged parents

1. Subject to the provisions of this section a Hindu is bound, during his or her lifetime, to maintain his or her legitimate or illegitimate children and his or her aged or infirm parents
2. A legitimate or illegitimate child may claim maintenance from his or her father or mother so long as the child is a minor.
3. The obligation of a person to maintain his or her aged or infirm parent or a daughter, who is unmarried extends in so far as the parent or the unmarried daughter, as the case may be, is unable to maintain himself or herself out of his or her own earnings or other property.

Explanation : In this section "parent" including a childless step mother.

Section 21. Dependants defined

For the purpose of this Chapter "dependents" mean the following relatives of the deceased :

- (i) his or her father;
- (ii) his or her mother
- (iii) his widow, so long as she does not remarry;
- (iv) his or her son or the son of his pre-deceased son or the son or the son of a pre-deceased son of this pre-deceased son, so long as he is a minor; provided and to the extent that he is unable to obtain maintenance, in the case of a grandson from his father's or mother's estate, and in the case of a great grandson, from the estate of his father or mother or father's father or father's mother;
- (v) his or her unmarried daughter, or the unmarried daughter, or the unmarried daughter of his pre-deceased son or the unmarried daughter of a pre-deceased son of his pre-deceased son, so long as she remains unmarried; provided and to the extent that she is unable to obtain maintenance, in the

case of a grant-daughter from her father's or mother's estate and in the case of a great-father's father or father's mother.

- (vi) His widowed daughter; provided and to the extent that she is unable to obtain maintenance –
- (a) from the estate of her husband, or
 - (b) from her son or daughter if any, or his or her estate;
 - (c) from her father-in-law or his father or the estate of either of them;
 - (i) any widow of his son or of a son of his pre-deceased son, so long as she does not re-marry; provided and to the extent that she is unable to obtain maintenance from her husband's estate, or from her son or daughter, if any, or his or her estate; or in the case of a grandson's widow, also from her father-in-law's estate;
 - (ii) his or her minor illegitimate son, so long as he remains a minor;
 - (iii) his or her minor illegitimate daughter, so long as she remains unmarried.

Section 22. Maintenance of dependants

1. Subject to the provisions of sub-section (2), the heirs of a deceased Hindu are bound to maintain the dependants of the deceased out of the estate inherited by them from the deceased.
2. Where a dependant has not obtained, by testamentary or intestate succession, any share in the estate of a Hindu dying after the commencement of this Act, the dependant shall be entitled, subject to the provisions of this Act, to maintenance from those who take the estate.
3. The liability of each of the persons who takes the estates shall be in proportion to the value of the share or part of the estate taken by him or her.
4. Notwithstanding anything contained in sub-section (2) or sub-section (3), no person who is himself or herself a dependant shall be liable to contribute to the maintenance of others; if he or she has obtained a share or part the value of which is, or would, if the liability to contribute were enforced, become less than what would be awarded to him or her by way of maintenance under this Act.

Section 23. Amount of maintenance

- (1) It shall be in the discretion of the court to determine whether any, and if so what, maintenance shall be awarded under the provisions of this act, and in doing so the Court shall have due regard to the considerations set out in sub-section (2), or sub-section (3), as the case may be, so far as they are applicable
- (2) In determining the amount of maintenance, if any, to be awarded to a wife, children or aged or infirm persons under this Act, regard shall be had to –
 - (a) the position and status of the parties ;
 - (b) the reasonable wants of the claimants ;
 - (c) if the claimants is living separately, whether the claimants is justified in doing so ;
 - (d) the value of the claimant's property and any income derived from such property, or from the claimant's own earnings or from any other source;
 - (e) the number of persons entitled to maintenance, under this Act.

1. In determining the amount of maintenance, if any, to be awarded to a dependant under this Act., regard shall be had to –
 - (a) the net value of the estate of the deceased after providing for the payment of his debts ;
 - (b) the provision, if any, made under a will of the deceased in respect of the dependant ;
 - (c) the degree of relationship between the two ;
 - (d) the reasonable wants of the dependant ;
 - (e) the past relations between the dependant and the deceased ;
 - (f) the value of the property of the dependant and any income derived from such property ; or from his or her earnings or from any other source ;
 - (g) the number of dependants entitled to maintenance under this Act.

Section 24. Claimant to maintenance should be a Hindu

No person shall be entitled to claim maintenance under this Chapter if he or she has ceased to be a Hindu by conversion to another religion

Section 25. Amount of maintenance may be altered on change of circumstances

The amount of maintenance, whether fixed by a decree of court or by agreement, either before or after the commencement of this Act., may be altered subsequently if there is a material change in the circumstances justifying such alteration.

Section 26. Debts to have priority

Subject to the provisions contained in Section 27 debts of every description contracted or payable by the deceased shall have priority over the claims of his dependants for maintenance under this Act.

Section 27. Maintenance when to be a charge

A dependant's claim for maintenance under this Act shall not be a charge on the estate of the deceased or any portion thereof, unless one has been created by the will of the deceased, by decree of court, by agreement between the dependant and the owner of the estate or portion, or otherwise.

Section 28. Effect to transfer of property on right to maintenance

Where a dependant has a right to receive maintenance out of an estate, and such estate or any part thereof is transferred, the right to receive maintenance may be enforced against the transferee if the transferee has notice of the right, or if the transfer is gratuitous: but not against the transferee for consideration and without notice of the right.

ANNEXURE-XV

DOMESTIC PROCEEDINGS AND MAGISTRATES' COURTS ACT 1978

PART I

MATRIMONIAL PROCEEDINGS IN MAGISTRATES' COURTS

Powers of court to make orders for financial provision for parties to a marriage and children of the family

1. Grounds of application for financial provision

Either party to a marriage may apply to a magistrates' court for an order under section 2 of this Act on the ground that the other party to the marriage-

- (a) has failed to provide reasonable maintenance for the applicant; or
- (b) has failed to provide, or to make a proper contribution towards, reasonable maintenance for any child of the family; or
- (c) has behaved in such a way that the applicant cannot reasonably be expected to live with the respondent; or
- (d) has deserted the applicant.

2. Powers of court to make orders for financial provision

(1) Where on an applicant for an order under this section the applicant satisfies the court of any ground mentioned in section 1 of this Act, the court may, subject to the provision of the Part of this Act, make any one or more of the following orders, that is to say—

- (a) an order that the respondent shall make to the applicant such periodical payments, and for such term, as may be specified in the order;
- (b) an order that the respondent shall pay to the applicant such lump sum as may be so specified;
- (c) an order that the respondent shall make to the applicant for the benefit of a child of the family to whom the application relates, or to such a child, such lump sum as may be so specified.

(2) Without prejudice to the generality of subsection (1)(b) or (d) above, an order under the section for the payment of a lump sum may be made for the purpose of enabling any liability or expenses reasonably incurred in maintaining the applicant, or any child of the family to whom the application relates, before the making of the orders to be met.

- (3) The amount of any lump sum required to be paid by such an order under this section shall not exceed (£1,000) or such larger amount as the Secretary of State may from time to time by order fix for the purposes of this subsection.

Any order made by the Secretary of State under this subsection shall be made by statutory instrument and shall be subject to annulment in pursuance of a resolution of either House of Parliament.

3. Matters to which court is to have regard in exercising its powers under S.2

- (1) Where an application is made for an order under section 2 of this Act, it shall be the duty of the court, in deciding whether to exercise its powers under that section and, if so, in what manner, to have regard to all the circumstances of the case, first consideration being given to the welfare while a minor of any child of the family who has not attained the age of eighteen.

- (2) As regards the exercise of its powers under subsection (1)(a) or (b) of section 2, the court shall in particular have regard to the following matters—

- (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;
- (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
- (c) the standard of living enjoyed by the parties to the marriage before the occurrence of the conduct which is alleged as the ground of the application;
- (d) the age of each party to the marriage and the duration of the marriage;
- (e) any physical or mental disability of either of the parties to the marriage;
- (f) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family;
- (g) the conduct of each of the parties, if that conduct is such that it would be in the opinion of the court be inequitable to disregard it.

- (1) As regards the exercise of its powers under subsection (1)(c) or (d) of section 2, the court shall in particular have regard to the following matters—

- (a) the financial needs of the child;
 - (b) the income, earning capacity(if any), property and other financial resources of the child;
 - (c) any physical or mental disability of the child;
 - (d) the standard of living enjoyed by the family before the occurrence of the conduct which is alleged as the ground of the application;
 - (e) the manner in which the child was being and in which the parties to the marriage expected him to be educated or trained;
- the matters mentioned in relation to the parties to the marriage in paragraphs (a) and (b) of subsection (2) above.

- (2) As regards the exercise of its powers under section 2 in favour of a child of the family who is not the child of the respondent, the court shall also have regard—
- (a) to whether the respondent has assumed any responsibility for the child's maintenance and, if he did, to the extent to which, and the basis on which, he assumed that responsibility and to the length of time during which he discharged that responsibility;
 - (b) to whether in assuming and discharging that responsibility the respondent did so knowing that the child was not his own child;
 - (c) to the liability of any other person to maintain the child.
4. Duration of orders for financial provision for a party to a marriage
- (1) The terms to be specified in any order made under section 2(1)(a) of this Act shall be such terms as the court thinks fit except that the term shall not begin earlier than the date of the making of the application for the order and shall not extend beyond the death of either of the parties to the marriage.
 - (2) Where an order is made under the said section 2(1)(a) and the marriage of the parties affected by the order is subsequently dissolved or annulled but the order continues in force, the order shall, notwithstanding anything in it, cease to have effect on the remarriage of the party in whose favour it was made, except in relation to any arrears due under the order of the date of the remarriage.
5. Age limit on making orders for financial provision for children and duration of such orders
- (1) Subject to subsection (3) below, no order shall be made under section 2(1)(c) or (d) of this Act in favour of a child who has attained the age of eighteen.
 - (2) The term to be specified in an order made under section 2(1)(c) of this Act in favour of a child may begin with the date of the making of an application for the order in question or any later date but—
 - (a) shall not in the first instance extend beyond the date of the birthday of the child next following his attaining the upper limit of the compulsory school age (that is to say, the age that is for the time being that limit by virtue of section 35 of the Education Act 1944 together with any order in Council made under that section) unless the court considers that in the circumstances of the case of welfare of the child requires that it should extend to a later date; and
 - (b) shall not in any event, subject to subsection (3) below, extend beyond the date of the child's eighteenth birthday.
- (1) The court—
- (a) may make an order under section 2(1)(c) or (d) of this Act in favour of a child who has attained the age of eighteen, and
 - (b) may include in an order made under section 2(1)(c) of this Act in relation

to a child who has not attained that age a provision for extending beyond the date when the child will attain that age the term for which by virtue of the order any payments are to be made to or for the benefit of that child,

if it appears to the court—

- (i) that the child is, or will be, or if such an order or provision were made would be, receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not he is also, or will also be, in gainful employment; or
- (ii) that there are special circumstances which justify the making of the order or provision.
- (4) Any order made under section 2(1)(c) of this Act in favour of a child shall, notwithstanding anything in the order, cease to have effect on the death of the person liable to make payments under the order.

6. Orders for payments which have been agreed by the parties

- (1) Either party to a marriage may apply to a magistrates' court for an order under this section on the ground that either the party making the application or the other party to the marriage has agreed to make such financial provision as may be specified in the application and, subject to subsection (3) below, the court on such an application may, if—
 - (a) it is satisfied that the applicant or the respondent, as the case may be, has agreed to make that provision, and
 - (b) it has no reason to think that it would be contrary to the interests of justice to exercise its powers hereunder, order that the applicant or the respondent, as the case may be, shall make the financial provision specified in the application.
- (2) In this section "financial provision" means the provision mentioned in any one or more of the following paragraphs, that is to say—
 - (a) the making of periodical payments by one party to the other,
 - (b) the payment of a lump sum by one party to the other,
 - (c) the making of periodical payments by one party to a child of the family or to the other party for the benefit of such a child.
 - (d) The payment by one party of a lump sum to a child of the family or to the other party for the benefit of such a child, and any reference in this section to the financial provision specified in an application made under subsection (1) above or specified by the court under subsection (5) below is a reference to the types of provision specified in the application or by the court, as the case may be, to the amount so specified as the amount of any payment to be made thereunder and, in the case of periodical payments, to the term so specified as the term for which the payments are to be made.

- (3) Where the financial provision specified in an application under subsection (1) above includes or consists of provision in respect of a child of the family, the court shall not make an order under that subsection unless it considers that the provision which the applicant or the respondent, as the case may be, has agreed to make in respect of that child provides for, or make a proper contribution towards, the financial needs of the child.
- (4) A party to a marriage who has applied for an order under section 2 of this Act shall not be precluded at any time before the determination of that application from applying for an order under this section; but if an order is made under this section on the application of either party and either of them has also made an application for an order under section 2 of this Act, the application made for the order under section 2 shall be treated as if it had been withdrawn.
- (5) Where of on an application under subsection (1) above the court decides—
- (a) that it would be contrary to the interests of justice to make an order for the making of the financial provision specified in the application, or
 - (b) that any financial provision which the applicant or the respondent, as the case may be, has agreed to make in respect of a child of the family does not provide for, or make a proper contribution towards, the financial needs of that child, but is of the opinion—
 - (i) that it would not contrary to the interests of justice to make an order for the making of some other financial provision specified by the court, and
 - (ii) that, in so far as that other financial provision contains any provision for a child of the family, it provides for, or makes a proper contribution towards, the financial needs of that child, then if both the parties agree, the court may order that the applicant or the respondent, as the case may be, shall make that other financial provision.
- (6) Subject to subsection (8) below, the provisions of section 4 of this Act shall apply in relation to an order under this section which requires periodical payments to be made to a party to a marriage for his own benefit as they apply in relation to an order under section 2(1)(a) of this Act.
- (7) Subject to subsection (8) below, the provisions of section 5 of this Act shall apply in relation to an order under this section for the making of financial provision in respect of a child of the family as they apply in relation to an order under section 2(1)(c) or (d) of this Act.
- (8) Where the court makes an order under this section which contains provision for the making of periodical payments and, by virtue of subsection (4) above, an application for an order under section 2 of this Act is treated as if it had been withdrawn, then the term which may be specified as the term for which the payments are to be made may begin with the date of the making of the application for the order under section 2 or any later date.

- (9) Where the respondent is not present or represented by counsel or solicitor at the hearing of an application for an order under subsection (1) above, the court shall not make an order under this section unless there is produced to the court such evidence as may be prescribed by rules of—
- (a) the consent of the respondent to the making of the order,
 - (b) the financial resources of the respondent, and
 - (c) in a case where the financial provision specified in the application includes or consists of provision in respect of a child of the family to be made by the applicant to the respondent for the benefit of the child or to the child, the financial resources of the child.

7. Powers of court where parties are living apart by agreement

- (1) Where the parties to a marriage have been living apart for a continuous period exceeding three months, neither party having deserted the other, and one of the parties has been making periodical payments for the benefit of the other party or of a child of the family, that other party may apply to a magistrates' court for an order under this section, and any application made under this subsection shall specify the aggregate amount of the payments so made during the period of three months immediately preceding the date of the making of the application.
- (2) Where on an application for an order under this section the court is satisfied that the respondent has made the payments specified in the application, the court may, subject to the provisions of this Part of this Act, make one or both of the following orders, that is to say—
- (a) an order that the respondent shall make to the applicant such periodical payments, and for such term, as may be specified in the order;
 - (b) an order that the respondent shall make to the applicant for the benefit of a child of the family to whom the application relates, or to such a child, such periodical payments, and for such term, as may be so specified.
- (3) The court in the exercise of its powers under this section—
- (a) shall not require the respondent to make payments which exceed in aggregate during any period of three months the aggregate amount paid by him for the benefit of the applicant or a child of the family during the period of three months immediately preceding the date of the making of the application;
 - (b) shall not require the respondent to make payments to or for the benefit of any person which exceed in amount the payments which the court considers that it would have required the respondent to make to or for the benefit of that person on an application under section 1 of this Act;
 - (c) shall not require payments to be made to or for the benefit of a child of the family who is not a child of the respondent unless the court considers that it would have made an order in favour of that child on an application under section 1 of this Act.

- (4) Where on an application under this section the court considers that the orders which it has the power to make under this section—
- (a) would not provide reasonable maintenance for the applicant, or
 - (b) if the application relates to a child of the family, would not provide, or make a proper contribution towards reasonable maintenance for that child, the court shall refuse to make an order under this section, but the court may treat the application as if it were an application for an order under section 2 of this Act.
- (5) The provisions of section 3 of this Act shall apply in relation to an application for an order under this section as they apply in relation to an application for an order under section 2 of this Act subject to the modification that for the reference in subsection 2(c) of the said section 3 to be occurrence of the conduct which is alleged as the ground of the application there shall be substituted a reference to the living apart of the parties to the marriage.
- (6) The provisions of section 4 of this Act shall apply in relation to an order under this section which requires periodical payments to be made to the applicant for his own benefit as they apply in relation to an order made under section 2(1)(a) of this Act.
- (7) The provisions of section 5 of this Act shall apply in relation to an order under this section for the making of periodical payments in respect of a child of the family as they apply in relation to an order under section 2(1)(c) of this Act.

Powers of court as to the custody etc. of children

16. Powers of court to make orders for the protection of a party to a marriage or a child of the family
- (1) Either party to a marriage may, whether or not an application is made by that party for an order under section 2 of this Act, apply to a magistrates' court for an order under this section.
- (2) Where on an application for an order under this section the court is satisfied that the respondent has used, or threatened to use, violence against the person of the applicant or a child of the family and that it is necessary for the protection of the applicant or a child of the family that an order should be made under this subsection, the court may make one or both of the following orders, that is to say—
- (a) an order that the respondent shall not use, or threaten to use, violence against the person of the applicant;
 - (b) an order that the respondent shall not use, or threaten to use, violence against the person of a child of the family.
- (3) Where on an application for an order under this section the court is satisfied—
- (a) that the respondent has used violence against the person of the applicant or a child of the family, or
 - (b) that the respondent has threatened to use violence against the person of the applicant or a child of the family and has used violence against some other person, or

- (c) that the respondent has in contravention of an order made under subsection (2) above threatened to use violence against the person of the applicant or a child of the family, and that the applicant or a child of the family is in danger of being physically injured by the respondent (or would be in such danger if the applicant or child were to enter the matrimonial) the court may make one or both of the following orders, that is to say—
 - (i) an order requiring the respondent to leave the matrimonial home;
 - (ii) an order prohibiting the respondent from entering the matrimonial home.
- (4) Where the court makes an order under subsection (3) above, the court may, if it thinks fit, make a further order requiring the respondent to permit the applicant to enter and remain in the matrimonial home.
- (5) Where on an application for an order under this section the court considers that it is essential that the application should be heard without delay the court may hear the application notwithstanding—
 - (a) that the court does not include both a man and a woman,
 - (b) that any member of the court is not a member of a family panel, or
 - (c) that the proceedings on the application are not separated from the hearing and determination of proceedings which are not family proceedings.
- (6) Where on an application for an order under this section the court is satisfied that there is imminent danger of physical injury to the applicant or a child of the family, the court may make an order under subsection (2) above notwithstanding—
 - (a) that the summons has not been served on the respondent or has not been served on the respondent within a reasonable time before the hearing of the application, or
 - (b) that the summons requires the respondent to appear at some other time or place, and any order made by virtue of this subsection is in this section and in section 17 of this Act referred to as an “expedited order.”
- (7) The power of the court to make, by virtue of subsection (6) above, an expedited order under subsection (2) above may be exercised by a single justice.
- (8) An expedited order shall not take effect until the date on which notice of the making of the order is served on the respondent in such manner as may be prescribed or, if the court specifies a later date as the date on which the order is to take effect, that later date, and an expedited order shall cease to have effect on whichever of the following dates occurs first, that is to say—
 - (a) the date of the expiration of the period of 28 days beginning with the date of the making of the order; or

- (b) the date of commencement of the hearing, in accordance with the provisions of Part II of the Magistrates' Courts Act 1980, of the application for an order under this section.
- (9) An order under this section may be made subject to such exceptions or conditions as may be specified in the order and, subject in the case of an expedited order to subsection (8) above, may be made for such term as may be so specified.
- (10) The court in making an order under subsection (2)(a) or (b) above may include provision that the respondent shall not incite or assist any other person to use, or threaten to use, violence against the person of the applicant, or, as the case may be, the child of the family.

17. Supplementary provisions with respect to orders under s.16

- (1) A magistrates' court shall, on an application made by either party to the marriage in question, have power by order to vary or revoke any order made under section 16 of this Act.
- (2) Rules may be made for the purpose of giving effect to the provision of section 16 of this Act and any such rules may in particular, but without prejudice to the generality of this subsection, make provision for the hearing without delay of any application for an order under subsection (3) of that section.
- (3) The expiry by virtue of subsection (8) of section 16 of this Act of an expedited order shall not prejudice the making of a further expedited order under that section.
- (4) Except so far as the exercise by the respondent of a right to occupy the matrimonial home is suspended or restricted by virtue of an order made under subsection (3) of section 16 of this Act, an order made under that section shall not affect any estate or interest in the matrimonial home of the respondent or any other person.

18. Powers of arrest for breach of s. 16 order

- (1) Where a magistrates' court makes an order under section 16 of this Act which provides that the respondent—
 - (a) shall not use violence against the person of the applicant, or
 - (b) shall not use violence against a child of the family, or
 - (c) shall not enter the matrimonial home,the court may, if it is satisfied that the respondent has physically injured the applicant or a child of the family and considers that he is likely to do so again, attach a power of arrest to the order.
- (2) Where by virtue of subsection (1) above a power of arrest is attached to an order, a constable may arrest without warrant a person whom he has reasonable cause for suspecting of being in breach of any such provision of the order as is mentioned in paragraph (a), (b), or (c) of subsection (1) above by reason of that person's use of violence or, as the case may be, his entry into the matrimonial home.

- (3) Where a power of arrest is attached to an order under subsection (1) above and the respondent is arrested under subsection (2) above—
- (a) he shall be brought before a justice of the peace within a period of 24 hours beginning at the time of his arrest, and
 - (b) the justice of the peace before whom he is brought may remand him. In reckoning for the purposes of this subsection any period of 24 hours, no account shall be taken at Christmas Day, Good Friday, or any Sunday.
- (4) Where a court has made an order under section 16 of this Act but has not attached to the order a power of arrest under subsection (1) above, then, if at any time the applicant for that order considers that the other party to the marriage in question has disobeyed the order, he may apply for the issue of a warrant for the arrest of that other party to a justice of the peace for the commission area in which either party to the marriage ordinarily resides; but a justice of the peace shall not issue a warrant on such an application unless—
- (a) the application is substantiated on oath, and
 - (b) the justice has reasonable grounds for believing that the other party to the marriage has disobeyed that order.
- (5) The magistrates' court before whom any person is brought by virtue of a warrant issued under subsection (4) above may remand him.

Interim Orders

19. Interim orders

- (1) Where an application is made for an order under section 2, 6 or 7 of this Act—
- (a) the magistrates' court at any time before making a final order on, or dismissing, the application or on refusing to make an order on the application by virtue of section 27 of this Act, and
 - (b) the High Court on ordering the application to be reheard by a magistrates' court (either after the refusal of an order under section 27 of this Act or on an appeal under section 29 of this Act), shall, subject to the provisions of this Part of this Act, have the
 - (i) power to make an order (in this Part of this Act referred to as an "interim maintenance order") which requires the respondent to make to the applicant or to any child of the family who is under the age of eighteen, on to the applicant for the benefit of such a child, such periodical payments as the court thinks reasonable.
- (3) An interim maintenance order may provide for payments to be made from such date as the court may specify, not being earlier than the date of the making of the application for an order under section 2, 6 or 7 of this Act; and where such an order made by the High Court on an appeal under section 29 of this Act provides for payments to be made from a date earlier than the date of the making of the order, the interim order may provide that payments made by the

respondent under an order made by a magistrates' court shall, to such extent and in such manner as may be provided by the interim order, be treated as having been paid on account of any payment provided for by the interim order.

- (3A) Where an application is made for an order under section 6 of this Act by the party of the marriage who has agreed to make the financial provision specified in the application—
- (a) subsection (1) shall apply as if the reference in paragraph (i) to the respondent were a reference to the applicant and the references to the applicant were reference to the respondent; and
 - (b) subsection (3) shall apply accordingly.
- (5) Subject to subsection (6) below, an interim order made on an application for an order under section 2,6 or 7 of this Act shall cease to have effect on whichever of the following dates occurs first, that is to say—
- (a) the date, if any, specified for the purpose of the interim order;
 - (b) the date of the expiration of the period of three months beginning with the date of the making of the interim order;
 - (c) the date on which a magistrates' court either makes a final order on or dismisses the application.
- (6) Where an interim order made under subsection (1) above would, but for this subsection, cease to have effect by virtue of subsection (5)(a) or (b) above, the magistrates' court which made the order or, in the case of an interim order made by the High Court, the magistrates' court by which the application for an order under section 2,6 or 7 of this Act is to be reheard, shall have power by order to provide that the interim order shall continue in force for a further period, and any order continued in force under this subsection shall cease to have effect on whichever of the following dates occurs first, that is to say—
- (a) the date, if any, specified for the purpose in the order made under this subsection;
 - (b) the date of the expiration of the period of three months beginning with the date of the making of the order under this subsection or, if more than one order has been made under this subsection with respect to the application, beginning with the date of the making of the first of those orders;
 - (c) the date on which the court either makes a final order on, or dismisses, the application.
- (7) Not more than one interim maintenance order may be made with respect to any application for an order under section 2,6 or 7 of this Act, but without prejudice to the powers of court under this section on any further such application.
- (8) No appeal shall lie from the making of or refusal to make, the variation of or refusal to vary, or the revocation of or refusal to revoke, an interim maintenance order.
- (9) An interim order made by the High Court under this section on ordering that an application be reheard by a magistrates' court shall, for the purpose of its enforcement and for the purposes of section 20 of this Act, be treated as if it were an order of that magistrates' court and not of the High Court.

Variation, revocation and cessation of orders etc.

20. Variation, revival and revocation of orders for periodical payments
- (1) Where a magistrates' court has made an order under section 2(1)(a) or (c) of this Act for the making of periodical payments, the court shall have power, on an application made under this section, to vary or revoke that order and also to make an order under section 2(1)(b) or (d) of this Act.
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- 20A. Revival of orders for periodical payments
- (1) Where an order made by a magistrates' court under this Part of this Act for the making of periodical payments to or in respect of a child (other than an interim maintenance order) ceases to have effect—
- (a) on the date on which the child attains the age of sixteen, or
- (b) at any time after that date but before or on the date on which he attains the age of eighteen, the child may apply to the court which made the order for an order for its revival.
- (2) If on such an application it appears to the court that—
- (a) the child is, will be or (if an order were made under this subsection) would be receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not while in gainful employment, or
- (b) there are special circumstances which justify the making of an order under this subsection, the court shall have power by order to revive the order from such date as the court may specify, not being earlier than the date of the making of the application.
- (3) Any order revived under this section may be varied or revoked under section 20 in the same way as it could have been varied or revoked had it continued in being.
22. Variation of instalments of lump sum
- Where in the exercise of its powers under section 75 of the Magistrates' Courts Act 1980 a magistrates' court orders that a lump sum required to be paid under this Part of this Act shall be paid by instalments, the court, on an application made by either the person liable to pay or the person entitled to receive that sum, shall have power to vary that order by varying the number of instalments payable, the amount of any instalment payable and the date on which any instalment becomes payable.
26. Reconciliation
- (1) Where an application is made for an order under section 2 of this Act the court, before deciding whether to exercise its powers under that section, shall consider whether there is any possibility of reconciliation between the parties to the marriage in question: and if at any stage of the proceedings on that application it appears to the court that there is a reasonable possibility of such a reconciliation, the court may adjourn the proceedings for such period as it thinks fit to enable attempts to be made to effect a reconciliation.

- (2) Where the court adjourns any proceedings under subsection (1) above, it may request a probation officer or any other person to attempt to effect a reconciliation between the parties to the marriage, and where any such request is made, the probation officer or that other person shall report in writing to the court whether the attempt has been successful or not, but shall not include in the report any other information.

Provisions relating to High Court and county court

27. **Refusal of order in case more suitable for High Court**
Where on hearing an application for an order under section 2 of this Act a magistrates' court is of the opinion that any of the matters in question between the parties would be more conveniently dealt with by the High Court, the magistrates' court shall refuse to make any order on the application, and no appeal shall lie from that refusal; but if in any proceedings in the High Court relating to or comprising the same subject matter as that application the High Court so orders, the application shall be reheard and determined by a magistrates' court acting for the same petty sessions area as the first mentioned court.
28. **Powers of High Court and county court in relation to certain orders under Part I**
Where after the making by a magistrates' court of an order under this Part of this Act proceedings between, and relating to the marriage of, the parties to the proceedings in which that order was made have been commenced in the High Court or a county court, then, except in the case of an order for the payment of a lump sum, the court in which the proceedings or any application made therein are or is pending may, if it thinks fit, direct that the order made by a magistrates' court shall cease to have effect on such date as may be specified in the direction.
29. **Appeals**
- (1) Subject to section 27 of this Act, where a magistrates' court makes or refuses to make, varies or refuses to vary, revokes or refuses to revoke an order (other than an interim maintenance order) under this Part of this Act, an appeal shall lie to the High Court.
- (2) On an appeal under this section the High Court shall have power to make such orders as may be necessary to give effect to its determination of the appeal, including such incidental or consequential orders as appear to the court to be just, and, in the case of an appeal from a decision of a magistrates' court made on an application for or in respect of an order for the making of periodical payments, the High Court shall have power to order that its determination of the appeal shall have effect from such date as the court thinks fit, not being earlier than the date of the making of the application to the magistrates' court or, in a case where there was made to the magistrates' court an application for an order under section 2 and an application under section 6 and the term of the periodical payments was or might have been ordered to begin on the date of the making of the application for an order under section 2, the date of the making of that application.

- (3) Without prejudice to the generality of subsection(2) above, where, on an appeal under this section in respect of an order of a magistrates' court requiring any person to make periodical payments, the High Court reduces the amount of those payments or discharges the order, the High Court shall have power to order the person entitled to payments under the order of the magistrates' courts to pay to the person liable to make payments under that order such sum in respect of payments already made in compliance with the order as the court thinks fit and, if any arrears are due under the order of the magistrates' court, the High Court shall have power to remit the payment of those arrears or any part thereof.
- (5) Any order of the High Court made on an appeal under this section(other than an order directing than an application shall be reheard by a magistrates' court) shall for the purpose of the enforcement of the order and for the purposes of section 20 of this Act be treated as if it were an order of the magistrates' court from which the appeal was brought and not of the High Court.

Provisions relating to procedure, jurisdiction and enforcement

- 30. Provisions as to jurisdiction and procedure
 - (1) A magistrates' court shall, subject to section 2 of the Family Law Act 1986 and section 70 of the Magistrates' Court Act 1980 and any determination of the committee of magistrates thereunder, have jurisdiction to hear an application for an order under this Part of this Act if at the date of the making of the application either the applicant or the respondent ordinarily resides within the commission area for which the court is appointed.
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- 31. Enforcement etc of orders for payment of money
 - (1) An order for the payment of money made by a magistrates' court under this Part of this Act shall be enforceable as a magistrate's court maintenance order.
 - (2) Without prejudice to section 59 of the Magistrates' Court Act 1980 (which relates to the power of a magistrates' court to direct periodical payments to be made through the clerk of a magistrates' court) a magistrates' court making an order under this Part of this Act for the making of a periodical payment by one person to another may direct that it shall be made to some third party on that other person's behalf instead of directly to that other person; and, for the purposes of any order made under this Part of this Act, the said section 59 shall have effect as if, in subsection (2) thereof, for the words "the applicant for the order" there were substituted the words "the person to whom the payments under the order fall to be made."
 - (3) Any person for the time being under an obligation to make payments in pursuance of any order for the payment of money made under this Part of this Act shall give notice of any change of address to such person, if any, as may be specified in the order; and any person who without reasonable excuse fails to give such a notice shall be liable on summary conviction to a fine not exceeding £100.
 - (4) A persons shall not entitled to enforce through the High Court or any country court the payment of any arrears due under an order made by virtue of this Part of this Act without the leave of that court if those arrears became due more than twelve months before proceedings to enforce the payment of them are begun.

- (5) The court hearing an application for the grant of leave under subsection (4) above may refuse to leave, or may grant leave subject to such restrictions and conditions (including conditions as to the allowing of time for payment or the making of payment by instalments) as that court thinks proper, or may remit the payment of such arrears or any part thereof.
- (6) An application for the grant of leave under subsection (4) above shall be made in such manner as may be prescribed by rules.
35. Orders for repayment in certain cases of sums paid after cessation of order by reason of remarriage
- (1) Where —
- (a) an order made under section 2(1)(a), 6 or 7 of this Act has, by virtue of section 4(2) of this Act, ceased to have effect by reason of the remarriage of the party in whose favour it was made, and
- (b) the person liable to make payments under the order made payments in accordance with it in respect of a period after the date of that remarriage in the mistaken belief that the order was still subsisting,
- no proceedings in respect of a cause of action arising out of the circumstances mentioned in paragraphs (a) and (b) above shall be maintainable by the person so liable or his personal representatives against the person so entitled or his personal representatives, but on an application made under this section the court may exercise the powers conferred on it by subsection (2) below.
- (2) The court may order the respondent to an application made under this section to pay to the applicant a sum equal to the amount of the payments made in respect of the period mentioned in subsection (1)(b) above or, if it appears to the court that it would be unjust to make that order, it may either order the respondent to pay to the applicant such lesser sum as it thinks fit or dismiss the application.
88. Interpretation
- (89) In this Act—
- “child,” in relation to one or both of the parties to a marriage, includes a child whose father and mother were not married to each other at the time of his birth; “child of the family,” in relation to the parties to a marriage, means—
- (a) a child of both of those parties; and
- (b) any other child, not being a child who is placed with those parties as foster parents by a local authority or voluntary organisation, who has been treated by both of those parties as a child of their family; “commission area” has the same meaning as in the Justices of the Peace Act 1979; “family proceedings” has the meaning assigned to it by section 65 of the Magistrates’ Courts Act 1980; “local authority” means the council of a county (other than a metropolitan county), of a metropolitan district or of a London borough, or the Common Council of the City of London; “Magistrates’ court maintenance order” has the

same meaning as in section 150(1) of the Magistrates' Courts Act 1980; "petty sessions area" means any of the following areas, that is to say, a non-metropolitan county which is not divided into petty sessional divisions, a petty sessional division of a non-metropolitan county, a metropolitan district which is not divided into petty sessional divisions, a petty sessional division of a metropolitan district, a London commission area which is not divided into petty sessional divisions, a petty sessional division of a London commission area and the City of London; "rules" means rules made under section 144 of the Magistrates' Courts Act 1980.

- (2) References in this Act to the parties to a marriage living with each other shall be construed as references to their living with each other in the same household.
- (3) For the avoidance of doubt it is hereby declared that references in this Act to remarriage include references to a marriage which is by law void or voidable.

ANNEXURE-XVI

EXCERPTS FROM THE FRENCH CIVIL CODE (ENGLISH VERSION)

Article 203—The spouses contract together, by the fact alone of marriage, the obligation to nourish, maintain and raise their children.

Article 204—The child has no action against his father and mother for a settlement through marriage or otherwise.

Article 205—Children owe support to their father and mother or other ascendants who are in need.

Article 207—The obligations resulting from these provisions are reciprocal.

Nevertheless, when the creditor himself has failed gravely in his obligations towards the debtor, the judge may discharge the latter from all or part of the debt for support.

Article 207-1—The succession of the predeceased spouse owes support to the surviving spouse who is in need. The period for claiming it is one year from the decease, and is prolonged, in case of partition, until its completion.

The subsistence support is levied upon the inheritance. It is borne by all the heirs, and in case of insufficiency, by all the particular legatees, in proportion to their emolument.

However, if the deceased has expressly declared that a certain legacy will be acquitted in preference to others, application will be made of Article 927.

Article 208—Support is accorded only in the proportion of need of the one who claims it and of the wealth of the one who owes it.

The judge may, even on his own motion and according to the circumstances of the case, arrange the subsistence support through provision for variation permitted by the laws in force.

Article 209—When the one who furnishes or the one who receives support is in altered circumstances such that the one can no longer give it or that the other no longer has need of it in whole or in part, discharge or reduction of it may be requested.

Article 210—If the person who is to furnish support proves that he cannot pay the subsistence support the court may, with full knowledge of the facts, order him to receive in his dwelling, nourish, and maintain the one to whom he owed support.

Article 211—The court will also decide whether the father or the mother who offers to receive, nourish and maintain in his or her dwelling the child to whom he or she owes support, should be dispensed from paying the subsistence support.

Article 212—Spouses mutually owe each other fidelity, assistance presence.

Article 213—The spouses together assure the material and moral guidance of the family. They provide for the education of the children and prepare their future.

Article 214—If the matrimonial agreements do not regulate the contributions of the spouses to the charges of the marriage, they contribute thereto in proportion to their respective capacities.

The wife acquits herself of her contribution by deducting it from the resources of which she has administration and enjoyment, by her own property in dowry or in community, by her activity in the home or her collaboration in the profession of the husband.

A spouse not fulfilling such obligations may be constrained to do so by the other in the forms provided in the Code of Civil Procedure.

Article 215—Spouses mutually oblige themselves to a community of living.

The residence of the family is at the place which they choose of common accord.

The spouses cannot, the one without the other, dispose of the rights whereby the lodging of the family is secured, nor of the furnishings with which it is equipped. The one of the two who has not given consent to the instrument can claim its cancellation: the action in cancellation is open to him or her within the year from the day when he or she had knowledge of the instrument, without ever being able to bring it more than one year after the matrimonial régime has been dissolved.

Article 216—Each spouse has full capacity in law; but his or her rights and powers may be limited by the effect of the matrimonial régime and of provisions of the present chapter.

Article 217—A spouse can be authorized through justice to enter alone into an instrument for which the concurrence or consent of the other spouse would be necessary, if the latter is not in condition to manifest a wish or if a refusal is not justified by the interest of the family.

The instrument entered into in the conditions fixed by the authorization of justice may be asserted against the spouse whose concurrence or consent is lacking, without there resulting therefrom the charge of any personal obligation.

Article 218—One spouse may give agency to the other to represent him or her in the exercise of powers which the matrimonial régime attributes to him or her.

Article 219—If one of the spouses is not in a condition to manifest a wish, the other can be enabled at law to represent him or her, in a general manner or for certain particular acts, in the exercise of powers resulting from the matrimonial regime, the conditions and extent of such representation being fixed by the judge.

In default of legal power, agency or enablement at law, the acts done by one spouse in representation of the other take effect, with regard to the latter, according to the rules of quasi-contract (*gestion d'affaires*).

Article 220—Each one of the spouses has the power to make contracts alone which have as their object the maintenance of the household or the education of the children: any debt thus contracted by the one obligates the other jointly.

The joint obligations does not hold, however, for expenditures manifestly excessive, with regard to the way of life of the household, to the utility or inutility of the transaction, to the good or bad faith of the contracting third party.

It does not hold either for obligations resulting from instalment purchases if they have not been concluded with the consent of the two spouses.

Article 220-1—If one of the spouses fails gravely in duties and thus puts in peril the interests of the family, the president of the court of grand first instance may prescribe any urgent measures which such interests require.

He can particularly forbid such spouse to make, without the consent of the other, instruments disposing of his or her own assets or those of the community, real or personal. He may also forbid the moving of personal property, except to specify those which he attributes to the personal use of the one or the other of the spouses.

The duration of the measures provided by the present article is to be definite. It is not, possible prolongation included, to go beyond three years.

Article 220-2—If the other imports prohibition of making instruments of disposition of assets whose alienation is subject to legal advertisement, it is to be advertised at the behest of the requesting spouse. Such advertisement ceases to be effective at the expiration of the period fixed by the order, except for the party interested in obtaining in the interval a modifying order, which will be advertised in the same manner.

If the order imports prohibition of the disposing of corporal personality, or of moving it, it is served by the petitioner on the other spouse, and has the effect of rendering the latter the responsible custodian of the personal property on the same terms as a garnishee. Served on a third party, it puts him on notice of bad faith.

Article 220-3—All instruments concluded in violation of the order are voidable on demand of the petitioning spouse, if they have been made with a third party in bad faith, or in case of an asset whose alienation is subject to legal advertisement, if they are merely subsequent to the advertisement provided in the preceding article.

The action in cancellation may be brought by the petitioning spouse within two years from the day when he or she had knowledge of the instrument, without ever being able to sue, if the instrument is subject to advertisement, more than two years after its publication.

Article 221—Each one of the spouses may open, without the consent of the other, any deposit account and any securities account in his or her personal name.

The depositing spouses is considered, with regard to the depositary, to have the free disposition of the funds and securities on deposit.

Article 222—If one of the spouses appears alone to do an act of administration, enjoyment or disposition on a personal asset which he or she holds individually, he or she is considered, with regard to third parties of good faith, to have the power to do alone this act.

This provision is not applicable to furnishings contemplated in Article 215, paragraph-3, nor to corporal personality whose nature presumes ownership by the other spouse in conformity with Article 1404.

Article 223—The wife has the right to exercise a profession without the consent of her husband, and she may always, for the needs of such profession, alienate and obligate alone her personal assets of full ownership.

Article 224—Each one of the spouses collects his or her gains and salaries and may dispose of them freely after being acquitted of the charges of marriage.

The assets which the wife acquires by her gains and salaries in the exercise of a profession separate from that of her husband are reserved for her administration, enjoyment and free disposition, except for observance of the limitations imposed by Articles 1425 and 1503 on the respective powers of the spouses.

The origin and consistence of the reserved assets are fixed with regard both to third parties and to the husband, following the rules of Article 1402.

Article 225—Creditors towards whom the wife is obligated may pursue their remedies against the reserved assets, even when the obligation was not contracted by her in the exercise of her profession.

Article 226—The provisions of the present chapter, on all points where they do not reserve the application of matrimonial agreements, are applicable through the effect alone of marriage, whatever be the matrimonial régime of spouses.

ANNEXURE-XVII

EXCERPTS FROM THE FRENCH PENAL CODE (ENGLISH VERSION)

FELONIES AND MISDEMEANORS AGAINST PRIVATE PERSONS

Article 357-I

A punishment of Jailing from three months to one year and a fine of 300,000 to 600,000 francs shall be imposed upon:

- (1) a father or mother who, without serious reason, leaves the family residence for more than two months and completely, or partially withdraws from moral or marital obligations incidental to parental rights or legal custody: the two months period is interrupted only by a return which implies an actual intent to definitely resume the family life;
- (2) a husband who willfully abandons his wife for more than two months, knowing her to be pregnant;
- (3) a father or mother, regardless as to whether the loss of their parental right has been decreed, who endanger the health, safety or morals or one or several of their children by bad treatment, pernicious examples of habitual drunkenness or overt misconduct, lack of care or lack of necessary control.

The prosecution of offenses mentioned by paragraphs 1 and 2 of this Article shall be commenced by summoning the offender through an office of the State Attorney Police, by an authenticated record. An eight day delay shall be granted so that the offender may satisfy his obligations. If the offender is at large or has no known residence, the summons may be replaced by sending a registered letter to his last known address.

In such cases, during the marriage, the prosecution shall be brought only upon the charge of the abandoned spouse.

Article 357-II

Any person who, notwithstanding a decision rendered against him under Article 214, paragraph 4 of the Civil Code, or an order or decision providing for the payment of alimony to his spouse, or ascendants or descendants, willfully fails to make the full payments imposed upon him by the court or to pay the total alimony for more than two months, shall be punished by jailing from three months to one year and by fine of 300,000 to 600,000 francs.

The lack of payment shall be presumed to be willful, unless otherwise proven. The insolvency resulting from habitual misconduct, laziness or drunkenness shall never excuse the offender.

Any person convicted of one of the misdemeanors referred to in this and the preceding Article, may, furthermore, be deprived of his civil right, provided by Article 42 of this code, for no less than five nor more than ten years.

The Court which has jurisdiction over misdemeanors referred to by this Article shall be that of the domicile or residence of the person entitled to the alimony support.

ANNEXURE-XVIII

QUESTIONNAIRE

Details of the petitioner

1. Status of the petitioner : (a) Wife
(b) Son
(c) Daughter
(d) Parent Father/mother

2. Age of the petitioner years

3. Educational status

4. Period of desertion

5. Present means of livelihood :
(a.) Employed
(b.) Depending on relative
(c.) Depending on others

If employed,

- (a) Nature of employment :
(b) Income Drawn :
(c) Whether living alone or with others:

If depending on relatives/others

- (a) Relationship :
(b) Source of Income :
(c) No. of dependents :

6. Total expenses for the month : Rs.

- Food : Rs.
Clothing : Rs.
Shelter : Rs.
Other things : Rs.

7A. When petitioner is the wife :

- (a) year of marriage :
(b) Age at marriage :
(c) Marriage whether Registered : YES/NO
(d) Husband whether related : YES/NO
(e) Year of desertion :
(f) No. of children :

- (g) Total No. of dependents :
- (h) Type of family : Joint/
- (i) Whether willing to co-habit : YES/NO
- (j) Reason or reasons for separation :

- (i) Ill treatment
- (ii) Adultery
- (iii) Bigamy
- (iv) Parental influence
- (v) Drunkedness
- (vi) Other reasons

7B. When petitioner is a child:

- (a) Sex : Male/Female
- (b) Marriage of parents whether valid : Yes/No
- (c) Parents whether related : Yes/No
- (d) Whether school going : Yes/No
- (e) Total No. of children of his parents :
- (f) Presently living with :
 - (a) Mother
 - (b) Father
 - (c) Relatives
 - (d) Orphanage
 - (e) Others
- (g) Whether willing to live with the respondent : Yes/No
- (h) Year of separation :
- (a) Reason or Reasons for separation

- (i) Subsequent marriage of Respondent
- (ii) Ill treatment
- (iii) Drunkedness
- (iv) Other reasons

7C. When petitioner is parent:

- (a) Total no. of children
- (b) No. of males
- (c) No. of females
- (d) Reason for making the claims to the Respondent
 - (i) Eldest son/daughter
 - (ii) Employed
 - (iii) Wealthy of
 - (iv) Only son/daughter
 - (v) Owes duty
 - (vi) Other reasons

8. Particulars of the Respondent : Husband/Father/Mother/Son/Daughter

- (a) Age
- (b) Educational Status
- (c) Nature of Employment

- (d) Income drawn
- (e) Income from other sources
- (f) Total no. of dependents
- (g) Reasons as alleged by the Respondent for neglect

9. Details of the petition

- (a) Year of petition
- (b) No. of hearings
- (c) Stage of the proceeding
- (d) Amount demanded
- (e) Amount expected
- (f) Reason as alleged by Respondent for refusing maintenance
- (g) Whether willing to go for Conciliation : Yes/No
- (h) Whether willing to drop the proceeding if taken care of : Yes/No
- (i) Whether willing to drop the proceeding if given a suitable job : Yes/No
- (j) Whether any other case pending as between the parties : Yes/No
- (k) Nature of the case
 - (i) Matrimonial
 - (ii) Property
 - (iii) Succession
 - (iv) Others
- (l) Reason for making the claim before the criminal court
 - (i) Advise of the Counsel
 - (ii) Advise of relatives
 - (iii) To coerce the Respondent
 - (iv) Inexpensive
 - (v) Speedy relief
 - (vi) No. specific reason
 - (vii) Need for survival

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The Muslim Women (Protection of Rights on Divorce) Act, 1986.
The Parsi Marriage and Divorce Act, 1936.
The Special Marriage Act, 1954.

ABBREVIATIONS

| | | |
|-----------|---|---|
| A.I.R. | - | All India Reporter |
| All.E.R. | - | All England Reporter |
| Cr.L.J. | - | Criminal Law Journal |
| Cr.P.C. | - | Criminal Procedure Code |
| D.P.M.C.A | - | Domestic Proceedings and Matrimonial Causes Act |
| DHSS | - | Department of Health and Social Security |
| M.C.A. | - | Matrimonial Causes Act |

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