

SCHEME OF MAINTENANCE UNDER VARIOUS PERSONAL LAWS

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ABSTRACT

The right of maintenance, which is a right of subsistence and survival, warrants a wide section women access an elaborate discussion as it across class and social strata¹; the act of maintenance refers to the obligation of a husband to maintain his wife.² This obligation arises out of a right under the personal law. As there are various personal laws which govern the activities of different communities, the idea of maintenance differs under each respective personal law. Since it is a well-established right which is deeply ingrained into the country's matrimonial statutes, a wide range of issues surface during the legal contests; one of such contested issues is that of live in relationships which has risen over time in the Indian social and legal scenario. This paper seeks to analyse the scheme of maintenance and the rights that are available to women under the ambit of different personal laws- namely the Hindu, Muslim, Christian and Parsi personal laws. The major point of contention as far as the right of maintenance is concerned is with regard to live in relations as the position of law has often been vague with regard to the status of women who are in live in relations and do not have the legal status of a wife. This paper will study the way in which the courts have interpreted the idea of 'the right to maintenance' and in what cases a woman who is in a live in relation will be considered a wife. The researcher shall be using a methodology which is strictly doctrinal in nature and reliance shall be placed on both primary and secondary data. The paper aims to analyse the socio legal aspect of live in relationships and how it is affecting the courts' outlook on the issue. The paper will also to ascertain any changes that can be made in the position of law in order to better protect the rights of women with regard to maintenance.

Keywords: Maintenance, Marital Status, Marital Rights, Live in relations

INTRODUCTION

¹ Flavia Agnes, *Marriage, Divorce and Matrimonial Litigation*, Volume II, Oxford University Press, pp. 117-118

² Romit Agarwal, Maintenance: Under Hindu, Muslim, Christian and Parsi Laws, available at <http://www.legalserviceindia.com/articles/hmcp.htm>, last visited on 10th August 2017.

Family is the most basic unit where the traits of a welfare society are primarily and easily seen. Apart from being important for the procreation of human race, a marriage is also important for wholesome and proper development of a man and a woman in a family. It is a marriage only that gives the spouses a status, that of being in a relationship and also prescribes rights and obligations which are mutual in nature. One of the most prominent obligations that arises out of a marriage is that of maintenance. The obligation of taking care of one's spouse took substance out of the need to look after them, which can essentially be called a natural obligation. This natural obligation then became deep rooted into the society and turned into a social obligation that has now been given legal recognition through statutory provisions. Perhaps a question materialises amidst these claims: that why the concept of maintenance arose? The simplest answer is that it was to safeguard the interest of both the parties in a marriage as well as those who were part of that family. Today, maintenance is not just a legal right – Section 125 of the Code of Criminal Procedure³ has chalked it out to reflect a constitutional obligation that provides a citizen an adequate standard of living. It has to uphold the spirit of Article 21⁴ and positively falls within the sweep of Article 15(3)⁵ and Article 39⁶ in order to provide social justice to an individual.⁷ The personal laws of the Indian Community i.e. of that of the Hindus, Muslims, Christians and Parsis provide for maintenance or alimony in respective personal laws. The **research question** deals with the scheme of maintenance under various personal laws of this country.

SCHEME OF MAINTENANCE UNDER VARIOUS PERSONAL LAWS

THE CONCEPT OF MAINTENANCE IN INDIA UNDER SECTION 125 OF THE CODE OF CRIMINAL PROCEDURE

³ Act No. 2 of 1973

⁴ Protection of life and personal liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law.

⁵ Article 15(3): Nothing in this article shall prevent the State from making any special provision for women and children.

⁶ Directive Principles of State Policy

⁷ D. Sankar, *RIGHT TO MAINTENANCE UNDER CRIMINAL LAW - A CRITICAL STUDY*, Available at <https://dyuthi.cusat.ac.in/jspui/bitstream/purl/3586/1/Dyuthi-T1529.pdf> last visited on 10th August, 2017; pp. 2-4.

'Maintenance' in India is provided both under Section 125 of the Code of Criminal Procedure and the personal laws of respective religious communities. From Section 125 to Section 128 of the same, maintenance is dealt with in detail. Section 126 deals with the procedure of obtaining maintenance. Sections 127 and 128 provide for alteration in allowance and enforcement of order of maintenance respectively. The roots of this intellection are found in Article 15(3) of the Indian Constitution which states that the State shall make provisions for the protection and betterment of women and children, which further stems from Article 39 of the Constitution of India which lists the directive principles of state policies which a State shall strive to implement and bring into force. Under Indian law, the term 'maintenance' includes and entitlement to food, clothing and shelter, being typically available to the wife, children and parents.⁸ In *Kaur v. Jaswant Singh*,⁹ it was held that maintenance is a measure of social justice and an outcome of the natural duty of a man to maintain his wife, children and parents, when they are unable to maintain themselves. Maintenance can be vindicated under respective personal laws by people following that particular religion; these proceedings will be civil in nature whereas if an individual claims maintenance under Section 125 of the Code of Criminal Procedure, then the proceeding that ensues will be criminal in nature. Evidently, these proceedings would apply to everyone irrespective of their caste creed or religion. Maintenance can be claimed either at the interim stage or at the final stage of the proceeding i.e. the ruling.¹⁰ It must be noted that the purpose of such proceeding would not be penalise any man but is an enactment to not let the person who can and is able to provide for those who are destitute not provide for them at all.¹¹

Section 125 of the Code of Criminal Procedure provides that it is the duty of the wife to prove that the husband has neglected or refused to maintain her even though he has sufficient means to do so and knows that she will be unable to maintain herself. Contrarily, the burden of proof then shifts on the husband to prove that he does not have those 'sufficient means' at all to provide the maintenance. It has already been discussed who are entitled to obtain maintenance. The remedy under Section 125 is speedy and inexpensive, as compared to personal laws. The provision relating to maintenance under any personal law is however, distinct and separate

⁸ Kamini Ahuja and Vasundhra Ravi, The Concept of 'maintenance' under Indian Law, available at <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=5be1285c-2dfc-4513-88c2-acc7e2a0c04e>, last visited on 15th August 2017.

⁹ AIR 1963 SC 1521

¹⁰ Section 125 of the Code of Criminal Procedure provides for both interim and final maintenance.

¹¹ *Chaturbhuj v Sita Bai*, Appeal (crl.) 1627 of 2007

from Section 125. There is no conflict between both the legal provisions. A person is entitled to maintenance under Section 125 despite having obtained an order under the applicable personal law.¹²

The quantum of maintenance includes but is not limited to just food, shelter and clothing; the quantum of maintenance to be provided may differ from case to case and is wholly subjective as it depends on the financial conditions, status and number of dependents and at the discretion of courts as to how much maintenance shall be provided to the claimant. It often happens that before granting maintenance under Section 125, a court takes note of the amount of maintenance that has been provided under the prescribed personal law as it is believed that the wife deserves to live as the husband does, in status as well as standard.

Earlier, the courts interpreted the term 'wife' in a narrower manner, perceiving the concept of maintenance to only be a means to alleviate the plight of destitute women who had been harassed plenty and allowed maintenance to those women who were legally married. But recent decisions of the courts have portrayed their continuous liberal approach in deciding cases relating to claims of maintenance. Matrimonial Laws in India owe their existence to religious beliefs. Conceptually, Hindus, Muslims, Christians and Parsis have their own laws and in the sphere of maintenance show uniformity to a certain extent. But the objective of making such provisions and the class of people towards whom the right is extended varies vastly from one religious statute to another. Likewise, the concept of marriage and its solemnization is also varied in all religious communities. The provision of maintenance has direct bearing on the validity of marriage as well as only when the marriage is valid will the spouse be entitled for maintenance.¹³

THE SCHEME OF MAINTENANCE UNDER HINDU LAW

Hindu law enshrines the oldest kind of any familial system of jurisprudence; the concept of maintenance is well known and validated under the Hindu Law. The marriage between Hindus is considered to be a religious sacrament; and is an essential part of the life that an individual leads as a Hindu. Because of a marriage, certain rights and duties are imposed on both the husband and the wife of marital nature. These are the rights and duties which have been fixed

¹² Kamini Ahuja and Vasundhra Ravi, The Concept of 'maintenance' under Indian Law, available at <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=5be1285c-2dfc-4513-88c2-acc7e2a0c04e>, (last visited on 15th August 2017).

¹³ D. Sankar, *RIGHT TO MAINTENANCE UNDER CRIMINAL LAW - A CRITICAL STUDY*, Available at <https://dyuthi.cusat.ac.in/jspui/bitstream/purl/3586/1/Dyuthi-T1529.pdf> (last visited on 10th August, 2017); pp. 152.

by the law in an absolute manner. One of the major duties of the husband is to maintain his wife and his relatives. Amongst the Hindus, during ancient times, maintenance was not just a legal duty but a moral duty as well. All of these obligations and duties are enshrined in the Dharma Shastras which literally translates to Science of Righteousness. The vitality of maintenance is well recognized by the Hindu law and stands upon the cornerstone of the principles of natural justice, supported by the theory of co-ownership, personal liability and moral duties in a relationship. Since in the Hindu community the joint family system plays an important role, it is believed that the people who are a part of that joint family are entitled to maintenance irrespective of their gender or age as a joint family also signified a joint ownership of property. Before the codification of laws, there were statutes made that dealt with the granting of maintenance but now hold no weightage in the current Indian legal system. Some of these legislations are listed below:

1. The Native Converts Marriage Dissolution Act, 1886.
2. Hindu Women's Right to Property Act, 1937
3. The Hindu Married Women's Right to Separate Maintenance and Residence Act, 1946.

After the pre-independence period, the Hindu laws were codified and the matters of adoption and maintenance were given statutory validity by constructing the Hindu Maintenance and Adoption Act, 1956. Though the act is not exhaustive of law of maintenance¹⁴, it still reigns supreme in matters regarding maintenance under any other codified law. According to Section 3(b) of this Act, Maintenance is/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 incidents to her marriage;

Section 18(1) enables a woman to claim maintenance from her husband during the course of her life time and Section 18(2) grants her the right to reside separately without giving up her right of maintenance provided that the husband has acted in contradiction of his expected behaviour. Due to this clause, the wife, while preserving her marital status, still gets to exercise her right of maintenance. The right to maintenance is also provided in the Hindu Marriage Act

¹⁴ The Hindu Adoption and Maintenance Act, 1956 Section 2(2).

of 1955, but the difference is that the granting of maintenance is the result of her claim of alimony is based on the supposition that either her marital status has been trained or affected by passing a decree for restitution of conjugal rights or judicial separation in her favour or against her. In *Atul Shashikant Mude v. Niranjana Atul Mude*¹⁵, it was held that the court is empowered to pass interim and ad-interim orders of maintenance and the definition of maintenance would include food, clothing, medical treatment and shelter. The same was reiterated in *Amit Saxena v. Smt Rachna Saxena*.¹⁶ In *Laxmi Sahuni v. Maheshwar Sahu*¹⁷, it was declared that the right granted under Section 18(1) is subject to existence of the circumstances or conditions present under the provisions 18(2) and 18(3) of the Hindu Adoptions and Maintenance Act i.e. the wife would be granted maintenance if her separate living is justified under the conditions mentioned in sub-clause 2 of Section 18 and also that the right of maintenance would not be granted if she has been unchaste or has ceased to be a Hindu even if there is sufficient evidence that the husband has fulfilled more than one conditions mentioned in Section 18(2).

On the other hand, Section 24 of the Hindu Marriage Act provides relief by way of litigation expenses and maintenance to a spouse who is unable to maintain itself during the pendency of the proceedings. And Section 25 of the Hindu Marriage Act of 1955 provides for the grant of permanent alimony and maintenance to any of the party to a marriage at the time of passing any decree under the Act or at any time subsequent thereto. The court shall take into account the status of opposite party in fixing the amount for maintenance. Sub-section (1) of Section 25 requires that an application must be made by the wife or the husband who is party to the main proceeding, if she or he wants the incidental relief of permanent alimony and such an application may be made in the main proceedings either before or at the time of passing the decree granting substantive relief of divorce or at any time subsequent to the passing of such decree. The right to permanent alimony accrues only when a decree has been passed in favour of the petitioner under Sections 9 to 13.

In case no such decree has been passed in favour of the petitioner, the right to claim any maintenance or alimony is ruled out. Thus where a petition of the husband is dismissed under any of the sections i.e., Sections 9 to 14 the application for permanent maintenance filed by the

¹⁵ AIR 1998 Bombay 234

¹⁶ AIR 2007 Delhi 39

¹⁷ AIR 1985 Orissa 11

wife under Section 25 of the Act will be rejected. Section 25 confers a special right on the indigent spouse while the Hindu Adoption and Maintenance Act confer an absolute right. In *Shanta Ram v. Dagoo Devi* the court held that Section 25 of the Act, confers upon a woman whose marriage is void or is declared to be void, a right of maintenance against her husband. The right of maintenance can be enforced by her not only in proceeding under Section 25 but also in any other proceeding where the validity of her marriage is determined. Recently in *Babu Shahab v. Leela Bai*, Bombay High Court has given a very important decision on Section 25 of Hindu Marriage Act, 1955. After considering the fact, the Court upholding right of maintenance to “illegitimate wife” or faithful “mistress” by liberal construction of word “wife” as contained in Section 25 of the Hindu Marriage Act cannot be said to be a good law, arc required to be overruled to that extent. The Court observed that illegitimate wife too can claim maintenance. Under the section the right to permanent maintenance comes to a close in the following circumstances:

- (1) Where the wife or husband has remarried;
- (2) Where the wife ceases to remain chaste and in the case of husband where he develops illicit relations with another woman.¹⁸

SCHEME OF MAINTENANCE UNDER THE PARSİ PERSONAL LAW

The Parsi Marriage and Divorce Act came into existence in the year 1936 and has since been regulating the laws marriages and divorces of the Parsi community. After a long period of lawlessness in the matter of matrimony in this community, the act provided a way of semblance as the Parsi people at that time did what suited them best in matters of personal nature. The Act also provides for the constitution of Matrimonial Courts¹⁹ and for the Appointment of Marriage Registrars²⁰.

There are certain essentials which are required to be present at the time of a valid marriage; they are:

1. The parties must not be related within the prohibited degrees of consanguinity or affinity.

¹⁸ Akshay Kondal, Permanent Alimony and Maintenance under Section 25 of Hindu Marriage Act, 1955 available at <http://www.shareyouressays.com/117827/permanent-alimony-and-maintenance-under-section-25-of-hindu-marriage-act-1955-2>, last visited on 25th August 2017

¹⁹ The Parsi Marriage and Divorce Act, 1936, Section 18

²⁰ The Parsi Marriage and Divorce Act, 1936, Section 7

2. The Marriage must be solemnized in the Parsi Ashirvad Ceremony by a priest in front of two witnesses
3. The parties to a marriage must have attained minimum age for marriage, 21 and 18 for a male and female respectively.²¹

There is unquestionable similarity between the laws governing Hindus and the concept of marriage and divorce as reflected in the Parsi Marriage and Divorce Act, especially the feature of considering the Matrimonial Home as Joint Property.²² The law providing for maintenance among the Parsis is also included in the provisions of the Parsi Marriage and Divorce Act, 1936 and there is extreme correspondence between the provisions of the Hindu Marriage Act, 1955, the Special Marriage Act 1954, and the provisions of the Act mentioned above. During the pendency of any suit, either the wife or the husband who has no means to support himself/herself can claim as against the other for allowances referred by the statute as alimony²³. Any payment done made during the pendency of a proceeding between the parties is called as alimony pendent lite. The amount that is awarded can be paid weekly or monthly. The payment, of course, can also include the expenses for the suit. The right of maintenance is not only for the wife but also towards the husband as the sex of the spouse is of no consequence but the possession of means definitely is.

The Court can, at any time of disposal of any suit can order permanent maintenance²⁴; if it is alimony, then the sum is usually in gross amount and if it is the matter of maintenance, then the sum is paid periodically and can extend up to the life-time of the plaintiff. If need be, the court can order for the defendant's property to be charged as well²⁵. With change of circumstances of either of the parties, the order that was made earlier may be varied, modified or rescinded.²⁶ 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.²⁷

SCHEME OF MAINTENACE UNDER CHRISTIAN PERSONAL 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,

²¹ The Parsi Marriage and Divorce Act, 1936, Section 3

²² The Parsi Marriage and Divorce Act, 1936, Section 32

²³ Id Section 39

²⁴ Id Section 40

²⁵ Id Section 40(2)

²⁶ Ibid

²⁷ Ibid Section 40(A)

justice and good conscience.²⁸ 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 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.²⁹ This was later followed by the Indian Christian Marriage Act, 1872. Marriage among Indian Christians is looked at from two stand points, viz., the law of the land and the Canon Law. 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 is appointed by the State Government under Section 7 of the Act.³⁰ The Law of Maintenance as regards to 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 where the purpose of the amount is to help the plaintiff carry on the litigation process for herself as in the Indian Divorce Act, Section 39 only provides for maintenance for the wife 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.³¹ Under Section 36 of the Indian Divorce Act, 1869, the quantum of alimony pendent lite is determined on a case to case basis. Permanent Alimony is determined under the Section 37 of the Indian Divorce Act and is the oldest statute to provide for permanent maintenance. Court is also empowered to discharge, modify or suspend such an order to such an extent as it is considered fit. An order for permanent alimony having been passed the same may be altered when circumstances warrant.³²

SCHEME OF MAINTENANCE UNDER MUSLIM PERSONAL LAW

²⁸ B. P. Beri, Law of Maintenance and Divorce, Eastern Book Company, Lucknow, 1982 pp.27.

²⁹ Id at pp. 28

³⁰ D. Sankar, RIGHT TO MAINTENANCE UNDER CRIMINAL LAW - A CRITICAL STUDY , Available at <https://dyuthi.cusat.ac.in/jspui/bitstream/purl/3586/1/Dyuthi-T1529.pdf> last visited on 10th August, 2017; pp. 213

³¹ D. Sankar, RIGHT TO MAINTENANCE UNDER CRIMINAL LAW - A CRITICAL STUDY , Available at <https://dyuthi.cusat.ac.in/jspui/bitstream/purl/3586/1/Dyuthi-T1529.pdf> last visited on 25th August, 2017; pp. 219

³² The Indian Divorce Act, 1869, Section 37.

The Islamic Law was introduced in the Indian sub-continent in the early eighth century and has its own value today³³. The personal law is constitutionally recognized³⁴ 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 possessions. 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 marriage. Marriage under the Mohammedan law is essentially a civil contract.³⁵

It is the duty of a man, under Muslim Law, to maintain his wife, children and elders and the duty to maintain his wife is almost absolute contrary to the case of children and elders who he has to support only if they have no means of their own. Like in Hinduism, this duty is more moral than legal in nature. Maintenance is known as Nafqah and is inclusive of food, clothes and lodging. Maintenance is a lawful right that a woman can exercise against her husband provided that she has been married legally and in accordance with the customs and traditions of her religion. Only under two circumstances can maintenance arise: if the marriage is a valid one and secondly if there was a pre-nuptial agreement entered into by the parties of the marriage or somebody on their behalf if they are minors. By extension it can be concluded that if the marriage is void due to any number of causes, like entering into marriage with a person who comes under a prohibited relationship, the obligation of maintaining does not arise at all on the husband's part. In *Khawaja Mohammed Khan v. Nawab Hussain Begum*³⁶ it was held that the right of maintenance 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.

In other personal laws, the extension of providing maintenance is till the wife is disqualified by some reason or remarries, and this has been statutorily provided in respective religious legislations. But in regard of Muslims, this takes a different turn; the popular and respected view is that the obligation of providing maintenance is only for the 'iddat'³⁷ period and after

³³ David Pearl, *A Text book of Muslim Law*, pp. 21.

³⁴ Article 225 of the Constitution of India.

³⁵ D. Sankar, *RIGHT TO MAINTENANCE UNDER CRIMINAL LAW - A CRITICAL STUDY*, Available at <https://dyuthi.cusat.ac.in/jspui/bitstream/purl/3586/1/Dyuthi-T1529.pdf> last visited on 25th August, 2017; pp. 189

³⁶ (1910) 12 BOMLR 638

³⁷ A period of time during which a divorced or widowed woman may not remarry, originally observed in order to ascertain if a child was conceived prior to divorce or widowhood. via <https://en.oxforddictionaries.com/definition/iddat>, last visited on 28th August, 2017.

its completion, nothing is due. To rectify this, though there is no provision in the Muslim Personal Law, the Code of Criminal Procedure under Section 125 provides for relief as to an obligation of providing maintenance to a Muslim woman even after the Iddat period is over. This was met with stiff opposition by orthodox Muslim Community but the Supreme Court held that the secular laws of India are applicable to all the sections of this country, inclusive of the Muslim community as well. The Supreme Court recognized the right of Muslim divorce woman in *Bar Tahira v. Ali Husain Fidalli Chothia*³⁸ and *Fuzlumbi v. Khader Vali*³⁹. 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's*⁴⁰ case, 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. The decision given by the Supreme Court led to a lot of uproar and in retaliation, The Muslim Women (Protection of Rights on Divorce) Act in the year 1986 was passed. This Act was an action just to pacify the agitated community and can be called nothing short of legislation entirely against the principles of Social Justice.

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. 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.⁴¹

³⁸ AIR 1979 SC 362

³⁹ AIR 1980 SC 1730

⁴⁰ *Mohd. Ahmed Khan v. Shah Bano*, AIR 1985 SC 945

⁴¹ D. Sankar, RIGHT TO MAINTENANCE UNDER CRIMINAL LAW - A CRITICAL STUDY , Available at <https://dyuthi.cusat.ac.in/jspui/bitstream/purl/3586/1/Dyuthi-T1529.pdf> last visited on 25th August, 2017; pp. 211