CHAPTER SIX

RIGHT TO MAINTENANCE UNDER PERSONAL LAWS
– HINDU AND PARSÍ 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. 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. 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.


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. The pre-code law for Hindus is 'Dharma Shastra'. 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.

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. 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".

3. *Id.* at p.75.
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 'filius nullius'. 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 infirm 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. 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 whitted 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 parition 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. 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 descendents, 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 proprietorial rights under the ancient Hindu law. They were considered incompetent to perform sacrifices and to read Vedas. According to Smritis, 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.

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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 he *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-parcenery, 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 lifetime.  

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. 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

is not exhaustive of the law of maintenance, yet in respect of all matters pertaining to maintenance, the code supersedes the rules then prevailed among the Hindu community. 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. The Act gives a statutory recognition of this obligation. A reformative 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.
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. 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 women's 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.\textsuperscript{22} The liability extends only until the age of minority.\textsuperscript{23}

Unmarried daughters however, are entitled to avail maintenance until the time they are unable to maintain themselves.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\begin{itemize}
  \item \textsuperscript{22} \textit{Id.} Section 20(1).
  \item \textsuperscript{23} \textit{Id.} Section 20(2).
  \item \textsuperscript{24} \textit{Id.} Section 20(3).
  \item \textsuperscript{25} \textit{Laxmi v. Krishna, AIR} 1968 Mys. 288.
  \item \textsuperscript{26} \textit{Chandra v. Nanag, AIR} 1975 Del. 175.
\end{itemize}
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'. 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. The facts that are relevant to determine the amount of maintenance in case of a wife, children or aged or infirm parents are:

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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 laminate'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. An order of maintenance passed could be a charge on the estate of the deceased under special circumstances. The right of maintenance cannot be absolved by transfer of the property. By due notice, the same may be enforced as against the transferee.

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

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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 reformative. 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. 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. 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.

(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. It is the duty of the court to provide the wife with maintenance and expenses at the first instance. The court can exercise its inherent power to stay further proceedings until the time the husband complies with the order.

(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.

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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 Patna\(^{37}\) and Jammu & Kashmir\(^{38}\) 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.

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 Court\(^39\) 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.\(^41\)


\(^40\) (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. The right under Section 24 should be made available to a wife who is unable to support herself without any reference to her conduct.

(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.


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. 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 Doso 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 unchastness 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 Zoraster 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:

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 female.\(^{51}\)

The Act also provides for registration of marriage. The law enumerates a large number of grounds for divorce.\(^{52}\) 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.

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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 alimony. Any payment made during the pendency of a proceeding between the parties is called as alimony pendente 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 maintenance. 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.

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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. 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.

58. Ibid.

59. Ibid. Section 40(A).