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 it's own value today. The personal law is constitutionally recognized 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.


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 1937 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 marriage. Marriage under the Mohammedan law is essentially a civil contract. 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. In fact, 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 tie, 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.
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

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’it’ 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 Pakistan, 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 children. 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.


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 herself. Under the Muslim law, maintenance is known as 'nafqah'. This includes food, raiment and lodging. Hedaya defines maintenance as all those things which are necessary for the support of life. Maintenance is the right of the wife to be provided at the husband's 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 with.

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 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.
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 maintenance\textsuperscript{19}. 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.

\textsuperscript{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 newakhori. 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 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

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 separate 22.

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 divorced 24.

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

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 cancelled\textsuperscript{25}. 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 \textit{Bai Tahira v. Ali Husain Fidalli Chothia}\textsuperscript{26} and \textit{Fuzlumbi v. Khader Val}\textsuperscript{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 \textit{Shah Bano}\textsuperscript{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.

\textbf{(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

\begin{itemize}
\item \textsuperscript{25} Section 127 (3) (b) of the Code of Criminal Procedure, 1973.
\item \textsuperscript{26} AIR 1979 SC 362.
\item \textsuperscript{27} AIR 1980 SC 1730.
\item \textsuperscript{28} \textit{Mohd. Ahmed Khan v. Shah Bano}, AIR 1985 SC 945.
\end{itemize}
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 community. 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 divorce. The Supreme Court took also the opportunity to review its own judgement decided in Bai Tahira 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 whole.32

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 law.\textsuperscript{33}

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.

\textit{(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 menstruation.

\textsuperscript{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 Quran. 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 precedent.

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 divorcée would be looked after by her relatives. It is nowhere stipulated what the evidence be for the existence of such relatives. If 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.

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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 children. 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 validity. 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.
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. Id., p.12.
The special enactment in spite of all its drawbacks and retrograde 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

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 wife.  

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 freedom.43

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.D.44

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 woman.45 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, 1939. 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, which ever date is later. 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 divorce.

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 delivery 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

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 widowhood. 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 conditions 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 Kazi.  

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 are 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 inheritance.

51. Supra n.9 at p.431.
52. Ibid.

210
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 wife\textsuperscript{53}. Same is the view expressed by Tyabji\textsuperscript{54}.

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.\textsuperscript{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

\textsuperscript{53} Supra n.17, p.408.

211
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.\textsuperscript{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.\textsuperscript{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,

\textsuperscript{56} Id., at p.28.

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.\textsuperscript{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.\textsuperscript{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.

\footnotesize
\textsuperscript{58} Supra n.1 p.28.\textsuperscript{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. 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. 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 Act 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. 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. 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 husband's 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." 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."

"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.\textsuperscript{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 \textit{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 \textit{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 \textit{maintenance pendente lite} i.e. maintenance allowance during the pendency of litigation.\textsuperscript{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

\begin{itemize}
  \item \textsuperscript{71} Ibid.
  \item \textsuperscript{72} The Indian Divorce Act, 1869 Section 36.
\end{itemize}

219
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

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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. Id. Section 37.

221
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. 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.