Marriage in England remained a formless and uncertain contract during medieval times.\(^1\) The church exercised exclusive control over matrimonial matters. The marriage law was simply cannon law and marriage as such was regarded as an indissoluble union.\(^2\) The informality permitted by the Common Law had a disastrous consequences over family and economic interests.\(^3\) This led to the passage in 1753 of Lord Hardwick's Act, the avowed aim of which was the suppression of clandestine marriage and adverse proprietal consequences of such unions.\(^4\) The effect of this Act was to require rigid compliance with formality in the regularization of marriage, together with an insistence that all marriages be celebrated in a Church of England or Chapel. Further, parental consent was required for the marriage of persons aged under twenty one, the penalties for breach of these provisions were severe, and included not only the invalidity of the marriage itself but, in certain cases, the criminal penalties of transportation and death.

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4. *Id.*, p.25.
The legislation came under attack for two reasons. First, by insisting on celebration according to the rites of the Church of England, exempted in case of Jews and Quakers, the Act displayed little tolerance of religious dissent; and second, the system of parochial registration of marriages was extremely inefficient. For these reasons, certain provisions of the Act were repealed in 1823\(^5\) and, more importantly, the Marriage Act 1836, together with the Birth and Deaths Registration Act of the same year, introduced a Civil Procedure for the formalizing and recording of marriage. Although the law as to formality has been amended many a times,\(^6\) this dual framework of religious and civil formality remains the basic framework of the modern law.\(^7\)

The effects of marriage:

Marriage as an organizing legal concept ascribes rights and remedies to family members. One such chief objective achieved by marriage is economic and physical protection of weaker family members. The status right attaching to marriage, frequently considered the most significant as the right of spouses to claim maintenance from each other, either during the currency of the marriage or following a divorce. This right is not available to those who are merely cohabiting.

In England there existed the common law fiction that husband and wife were one person, that person being the husband. By marriage, the husband and wife were one person in law, the very being or legal existence

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5. Marriage Act 1823.

6. Much significant changes have been effected by the Marriage Acts of 1886 and 1949.

7. Supra. n.3, at p.25.
of the woman was suspended during the marriage or at least is incorporated and consolidated into that of the husband. The husband had a duty to keep himself and not be a charge on the community, and keeping himself involved keeping his wife because they were one person and the person was indisputably at law, the husband. De Mont morency has put this in his 'doctrine of henosis' and comments in an anatomically graphic way as 'the creator took from Adam a rib and made it Eve; The Common Law of England sought to reverse the process, to replace the rib and to remerge the personalities'.

The law recognized the wife as 'bone of his bone, flesh of his flesh, and no man did ever hate his own flesh so far as not to preserve it'. Under the law of England, so long as the wife was 'helpful to him and lived with him the husband was bound to provide for her.' Thus the common law directly did impose an obligation on the husband to maintain his wife.

The law of maintenance in England has a long cherished history. The common law recognized the duty to maintain and thus provided it as a right. The husband was bound to maintain his wife to an adequate level through the provision of a house and other necessaries, such as food and clothing. This non-reciprocal obligation had been there on the husband in the context of the contractual and property owning disabilities to which married women were subjected to by the common law. A husband was

9. Supra. n.3, at p.6.
entitled to own the wife's properties and in turn he was obliged to maintain her by providing with necessaries. She enjoyed as such no specific right of maintenance but only an indirect assistance. She was entitled to pledge her husband's credit for the supply of necessaries under the "doctrine of necessity". This is because English law instead of laying down the general code of financial rights and obligations, usually prefers to confer rights of access to the court, which can exercise its wider discretion. Maintenance as such was a right rather than a remedy and principle rather than procedure.¹²

*Manby v Scot*¹³ remains to be the earliest reported case eliciting the policy of the common law courts in awarding maintenance relief. The Exchequer Chamber in 1663 held finally that the common law declined any jurisdiction in matrimonial affair but provided a partial remedy by way of the law of agency which permitted a wife to pledge her husband's credit for necessaries. The precedent laid the proposition that a wife's right to maintenance as such was enforceable exclusively before the ecclesiastical courts, limited as the right was. The remedy of spiritual censure was in harmony with the notion of moral rather than practical enforcement of marital obligations.

### 8.1 PARLIAMENTARY JURISDICTION OF MAINTENANCE

The rigorous theory of indissolubility of marriage posed much inconvenience to marriage partners. Hence by the end of the 17th Century a

12. Supra. n.1, at p.323.
13. Supra. n.2.
cumbersome and expensive escape from the inconveniences of indissoluble marriage was provided for a very small number of husbands wealthy enough to proceed by Private Act of Parliament. By express enactment such Acts provided that the wife should not be left destitute. Later the House of Commons came to have a functioning known as the "Ladies Friend", an office usually filled by some member interested in the private business of parliament, who undertook to see to it that any husband petitioning for divorce made suitable provision for the wife. Although claims relating to the maintenance of the wife were not inserted in the Bills, the practice was that it would not pass through the Committee in the Commons unless husbands had entered into bond to secure modest income for their wives. The Private Act divorces were abolished in 1857 and the Jurisdiction was transferred to the secular courts.

8.2 ALIMONY BEFORE ECCLESIASTICAL COURT

The parliamentary jurisdiction permitted only a small number of husbands to avail divorce, whereas, for the rest of the population, the only remedy for matrimonial difficulties was the divorce mensa et thoro (the equivalent of a modern judicial separation). This could be granted only by the ecclesiastical courts on the grounds of the respondent's adultery or cruelty. If the wife was the successful petitioner, the general rule seems to

15. Ibid.
17. Supra. n.2, at p.2.
have been to award her one third of the husbands' income. If the husbands' conduct had been particularly bad or if his income came largely from his wife's property which he had acquired on marriage, the court might award as much as one half. The only sanction available to the ecclesiastical courts had been excommunication. After 1813, imprisonment by a writ de contumace capiendo was substituted but there is no record that it was ever successfully utilized. This Jurisdiction was later transferred to the secular courts in 1857 when Private Act divorces were abolished in England.

8.3 MAINTENANCE BEFORE SECULAR COURTS

8.3.1 Right Under Matrimonial Causes Act 1857

The common law though recognized the right of maintenance, the remedy has not been extended to all class of destitute women. With the passing of Matrimonial Causes Act 1857, the divorce jurisdiction thenceforth enjoined on ecclesiastical or parliament was transferred to the secular courts which had also the power to order maintenance relief. Thus the parliamentary principle transcended as statutory right. The state had its own interest to protect while transferring this obligation to the husband who deprived his wife of her property rights. The series of legislation that succeeded the 1857 Act kept the principle sacrosanct. The divorce law underwent a major reform in 1969 and this necessitated also a change over the proprietial

18. Ibid.
19. Ibid.
20. The state is liable to pay income support if one has no means under the Social Security Act, 1986.
rights of married women. Then came the Matrimonial Causes Act, 1973 whereunder maintenance or alimony can be availed during the currency of marriage or at its dissolution. The remedy can fall under any one of the following heads.

(a) Separation and Maintenance Agreements

A married couple whose relationship has broken down can formalize their financial position with respect to each other by private agreement. Where spouses have separated amicably and wish to avoid legal proceeding as far as possible or where they may simply wish to clarify arrangements quickly and flexibly or where they may have separated without immediate intention of seeking a divorce it may be appropriate for the parties to enter into a separation or maintenance agreement. These are agreements privately negotiated and enforceable as contracts. A separation agreement will usually provide for the release by each party of the duty to cohabit, but may also provide for the income maintenance, property distribution and child custody. A maintenance agreement is similar, but will be concerned only with financial terms. Both types of agreements, being basically contracts, must comply with the rules for the formation of contracts.

Separation and maintenance agreements though supplant the role of courts in deciding issues of finance and property, the role of courts is retained in two ways. Where the agreement in question satisfies the statutory definition of a 'maintenance agreement', first any provision in such

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23. Matrimonial Causes Act 1973, Ss. 34(2) and 35(2)
an agreement purporting to restrict any right to apply to a court for an order containing financial arrangement shall be void; and secondly, there is jurisdiction in the High Court or Magistrate Courts to lay application to alter the agreement itself. For this purpose, a ‘maintenance agreement’ means any agreement in writing made between the parties to a marriage which either (a) contains financial arrangements, made during or after the dissolution of marriage; or (b) is a separation agreement containing no financial arrangements, and where there is no other agreement in writing containing financial arrangements between the parties.25

Private agreement though offer the parties a degree of autonomy in the determination of the consequences of the end of their relationship, possesses some features which make them less attractive. From the point of view of the party obliged to make payments, usually the husband, he is deprived of the additional tax advantage available when such orders were made by the court and from the point of view of the recipient, it necessitates court action for enforcement.

(b) Orders for Maintenance

Where the parties have not entered into any enforceable maintenance agreement and have no immediate intention of petitioning for divorce, other than the remedy open before magistrate courts they can make an application to a divorce court under Matrimonial Causes Act 1973, under Section 27 on the ground that the other party has failed to provide reasonable maintenance for the applicant, or has failed to provide or to

24. Id., s.34(1)
25. Id., S. 34(2).
make a proper contribution towards, reasonable maintenance for any 'child of the family'. 26

On an application under Section 27 of the Matrimonial Causes Act 1973, the court may make one of the following orders:­

i. Unsecured or secured periodical payments to the applicant;

ii. a lump sum to the applicant;

iii. unsecured or secured periodical payments to, or to someone on the behalf of, a child to whom the application relates;

iv. a lump sum to such a child, or to someone on that child's behalf. 27

The powers of the Divorce Court under Section 27 of Matrimonial Causes Act 1973 are wider when compared to the powers of Magistrate Court to pass similar orders. There is no limit on the size of lump sum that may be ordered, but there is no power to order the transfer of property as this is not a 'proceeding ancillary to divorce'. The provision concerning variation, revocation, duration and enforcement of orders for periodical payments are similar to those governing periodical payments ordered by a Divorce Court in proceedings ancillary to divorce. The Court has also power to order payments of interim maintenance under imminent circumstances. 28

26. Id., S. 27(1).

27. Id., S. 27(6).

28. Id., S. 27(5).
(c) **Orders for Alimony**

Under the pre-1970 law, the continuing support obligation after divorce was overtly dominated by moral consideration and was based on the set guidelines derived from parliamentary practice. In making orders for maintenance, the courts were concerned in protecting the public purse and to shield women from 'temptation' and, most of all, deter against irresponsible rejection of marriage vows.\(^{29}\) Further, the liability of husbands to maintain their ex-wives could be diminished if the wife had committed adultery or was otherwise guilty of matrimonial offence. The general reform of divorce law implemented in 1970 altered this legal construction of the economic construction of divorce. The new approach ignored the moral justice concept and emphasized the need for the financial needs of the parties and to place them in a position of minimal loss.\(^{30}\) The legal framework presently governing the distribution of property and income on divorce focus much attention on the needs of the parties and that of the children.\(^{31}\) Besides, it postulates 'clean break theory' and the principle of equality.\(^{32}\) The salient features that existed in the Matrimonial Property and Proceedings Act 1970 are now re-drafted and exist under the Matrimonial Causes Act 1973.

(d) **Reform of the Law**

The Act equalized the liabilities of husband and wife to provide for each other on divorce and gave more extensive re-adjustive powers on the

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29. Supra. n.3, at p.200.


32. Ibid.
courts, primarily based on the need of the parties.\textsuperscript{33} The overriding objective was to place the parties in the position in which they would have been had the marriage not broken down, the principle christianed as the ‘principle of minimal loss’.\textsuperscript{34} The effect of this new statutory regime was to alter ‘the legal axes of regulation of the family’ in such a way as to reveal the marriage contract to be an economic or financial one rather than a contract based on sexual fidelity and moral obligation.\textsuperscript{35}

The statutory guidelines, and in particular the overriding principle of minimal loss, had become a ‘crumbling edifice’ by the end 1970, owing to the fact that in most cases it was impossible to fulfill. Research had also shown the less inconsistency among county court registration who were responsible for deciding the majority of the cases, the justifiability of a continuing support obligation after divorce was widely questioned, most effectively by pressure groups acting on behalf of ex-husbands and second wives.\textsuperscript{36}

The Law Commission of England considered the matter in a discussion paper (1980), in which a range of alternative models for reform was discussed. The final report of the Commission did not suggest recourse of the law but suggested certain ‘changes of emphasis’ within the statutory

\textsuperscript{33} Matrimonial Causes Act 1973, S. 25.

\textsuperscript{34} Wachtel v. Wachtel, (1973), 1 All. E.R. 829, C.A.

\textsuperscript{35} Supra. n.3 at p.200.

\textsuperscript{36} Ibid.
framework laid down in 1970. The changes of emphasis suggested by the Law Commission were, (a) to give greater priority to the needs of children, (b) to place greater emphasis on the need of the parties to make them self sufficient following divorce and (c) to promote the use of the so called ‘clean break concept’ in financial matters, which results in a once-and-for all financial settlement involving no continuing economic links between the parties.

8.3.2 Matrimonial and Family Proceedings Act, 1984

The proposals were embodied in the Matrimonial and Family Proceedings Act 1984 which effected certain amendment to the Matrimonial Causes Act 1973. The Act faced wider criticism. First, the objectives of the Act were urged to be contradictory. For example, according priority to the needs of children may be inconsistent with the priority to be accorded to self sufficiency and the clean break, since it may not be in the best interests of the children for the wife to go out to work or to be dependent on Government’s welfare benefit. Yet another argument is that the 1984 Act was founded on the myth on the existence of a large groups of ex-wives living parasitically on the earnings of their ex-husbands, which gets support from very little evidence. The reduction of ex-wives right to maintenance without increasing the public support available to women through the benefits system, on the lines recommended by the Finer Committee has also been criticized to be highly unfair.

The empirical evidence suggests that the economic position of women following divorce depends partly on their social class, partly on their continuing status as mothers, and partly on their ability to find a new
This de-facto position has effectively been consolidated in law by the Matrimonial and Family Proceedings Act 1984. By emphasizing the needs of children, this has done much to reduce the significance of the distinction between spouse maintenance and child maintenance. The Act further represents a further shift in the legal regulation of marriage and divorce, from a financial and economic relationship to a relationship centered on the presence and needs of children.

**8.3.3 Right Under the Amended Act**

An application for ancillary relief is made either in the divorce petition or in the respondents answer to the petition when the divorce is to be defended. If the divorce is undefended it could be claimed by the service of a notice in prescribed form. The application is made to the court seized of the divorce petition, that is, to the county court where the main petition is undefended and to the High Court where defended. In the former case, there is no time limit on the application which may be made at any time following the decree of divorce, provided the court is prepared to grant leave and provided also that the applicant has not since remarried.

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37. *Id.* at p.204.
40. *Id.* Form 11, r. 68(3).
41. *Id.* r. 68(2).
8.3.3.1 **Procedure**

The application must be accompanied by an affidavit setting out the applicant's financial position. This will include details of the applicant's income, assets and outgoings. The other spouse must then file a similar affidavit in answer. The obligation to supply an affidavit in answer is ultimately enforceable by means of an application to court for directions. The court may direct that failure to supply one will render the spouse liable to committal for contempt of court.

Either party may then request further information from the other by letter, or in the event of non-compliance, by court direction for discovery of documents. The relevant documents will be any item that provides information as to the parties financial position, which may include bank accounts, building society and other savings accounts, wage slips, tax returns, business accounts, credit card accounts, and details of pension entitlement, insurance policies and share holdings. The courts also have the power to prevent or set aside dispositions made or about to be made with the intention of defeating claims to financial relief. The court may order that a child be separately represented in ancillary applications by a solicitor or guardian ad litem. Although, the fact finding powers of the court appear considerable, to overestimate their efficacy would be a mistake.


44. *Id.* r. 73(1).

45. *Id.* r. 77(6).

46. Matrimonial Causes Rules 1977, r. 77(4), (5).

There exist variations in practice as to the use made by them by courts and more often the information furnished by parties in affidavits is found to be not reliable and failure to supply affidavits is much widespread.\textsuperscript{48} Difficulties are greater when the whereabouts of the husband is not known.

\subsection*{8.3.3.2 Orders that may be Passed by the Court}

The orders that may be passed by the court under the provisions of the Matrimonial Causes Act are as follows:-

\textbf{(a) Maintenance pending suit and interim orders}

The court may order such payments for the applicant's maintenance 'as it thinks fit' for the period between the presentation of the petition and the decree absolute of divorce.\textsuperscript{49} The purpose of the order is simply to ensure adequate provision for the applicant until the court is in a position to make a full order,\textsuperscript{50} that is, at any time from the granting of a decree of divorce onward.\textsuperscript{51} Since the order is for a temporary period only, and is not made with the assistance of full information as to the parties' resources nor as part of a wider financial settlement, the level of order is likely to be less than that awarded as a full order. Maintenance pending suit is not available for children, since full orders for maintenance may be made in their favour from the presentation of the petition.\textsuperscript{52}

\textsuperscript{48} Supra. n.3, at p.200.

\textsuperscript{49} Matrimonial Causes Act 1973, S. 22.


\textsuperscript{51} Matrimonial Causes Act 1973, S. 23(1).

\textsuperscript{52} Id., S. 23(2).
(b) Income maintenance

Once a decree has been granted, the court may order payment of income maintenance to be made by either party to the marriage in favour of the other party and this will take effect from the date of the decree absolute.\(^*53\) Orders may be made in favour of any 'child of the family' under the age of eighteen taking effect from the date of the presentation of the petition.\(^*54\) Orders may also be made in favour of children of the family aged over eighteen where the recipient is undergoing full-time education or training, or where there are 'special circumstances'.\(^*55\) An example of the latter might be where the child is handicapped.

Usually, the spouse with custody of the child will apply for maintenance on their behalf, and the court may order payment to be made to that person.\(^*56\) However, the statute does permit payment directly to the child, and the precise form taken by the order may be influenced by tax considerations.

Income maintenance order that may be passed may either be for secured or unsecured periodical payments. An unsecured order passed in favour of a spouse cannot last beyond the death of either party or the remarriage of the recipient spouse. A secured order similarly terminates

\(^{53}\) *Id.*, S. 23(1).

\(^{54}\) *Id.*, S. 23(1), (2), 29(1), (3).

\(^{55}\) *Id.*, S. 29(3).

\(^{56}\) *Id.*, S. 23(1) (d) to (f).
on remarriage, but not on the death of the liable spouse. Secured or unsecured payments in favour of children of the family should initially be made only up to the age at which the child may leave school, and in any case not beyond eighteen years.

(c) Lump sums

The court may order that one party to the marriage transfer a lump sum of money to the other spouse both for that spouse's benefit and for the benefit of any child of the family. Application must be made before the applicant remarries and, where the order is in favour of a child, before the child reaches the age of sixteen. Once a lump sum has been transferred, it does not present the problems of enforcement encountered in relation to orders for periodic maintenance. Lump sum payments are rarely resorted to and depends on wealth of the parties.

8.3.3.3 Enforcement of the Orders

There exists variety of methods of enforcing a divorce court order for maintenance. These are either aimed at the liable spouse's income or at his property. The former category includes; judgment summons, which requires the liable spouse to attend before a judge who may make such orders as he thinks fit and an order under the Attachment of Earnings Act

57. Id., S. 28(1).
58. Id., S. 29(2).
59. Id., S. 23(1),(c),(f).
60. Id., S. 28(3), 29.
1971 ordering the liable spouse's employer to deduct a certain amount from the salary paid to the liable spouse and to forward it to the court. The later category includes; a garnishee order, directing any third debtor of the liable spouse, such as bank to pay this as debt to the applicant to the extent necessary to discharge the arrears; a charging order, creating a charge on the property of the debtor which if necessary can be followed by an application for sale of the charged properties; and a warrant of execution, entitling the creditor to seize the property of the liable spouse and sell it to satisfy the debt. The maintenance orders passed by the divorce court can also be registered with the magistrates' court, in which case the order is enforceable by more coercive measures. The enforcement procedure before the domestic court is highly effective and one largely preferred by married women in England.

8.4 MAINTENANCE BEFORE MAGISTRATES' COURT

The Magistrates' Court occupies the lowest position in the hierarchy of courts, but is the most geographically widespread in England. It usually consist of three lay magistrates, advised and assisted by a qualified clerk. Although it is primarily concerned with criminal law, it also sits as a 'domestic' court to hear matrimonial or domestic matters or as a juvenile court to hear child care matters, such as care proceedings. Magistrates sitting in the domestic or juvenile courts are selected from a panel of experienced and specially trained magistrates.

61. Supra. n.3, at p.8.

62. Ibid.
The origin of the magistrates jurisdiction in domestic matters lies in the Matrimonial Causes Act 1878. The jurisdiction acquired by Magistrates has no counterpart in the procedure of the ecclesiastical courts and has a long history of interest. Physical violence over married women had been a private and common affair in England and went unnoticed until 1870. It became a matter of public and political issue thereafter. The law then at existence were ineffective. The Magistrates were empowered to make only protection orders to prevent deserting husbands laying their hands on their wives hard earned income.63

It was by the untiring works of the social reformers like Serjeant Pulling and Francies Power Cobbe that awareness over the cause and the need for legislation fell in England.64 Women were then subjected to much atrocities and brutal treatment at the hands of their husbands. Wife battering was a common affair. Illusage of women was so systematic and so little hindered by the strong arms of the law that some areas where popularly termed as kicking districts.65 The two reformers raised their voice against such atrocities and voiced their concern through various means. While Pulling's efforts were to repress violence against wives, the idea of Cobbe was to see a way out to the problem. Her writings portrayed the real ill-status married women among working class enjoyed in the English society. She suggested such pathetic woman be given the power of separating herself and children from the miserable condition they were in.

64. Supra. n.2, at p.12.
65. Id. p. 13.
Frances Power Cobbe was more realistic when she writes 'The only thing really effective, I considered, was to give the wife the power of separating herself and her children from her tyrant. Of course, in the upper ranks, where people could afford to pay for a suit in the Divorce Court, the law had for some years opened to the assaulted wife this door of escape. But among the working classes, where the assaults were ten-fold as numerous and twenty times more cruel, no legal means whatever existed of escaping from the husband, returning after punishment to beat and torture his wife again. I thought the thing to be desired was the extension of the privilege of rich women to their poorer sisters, to be effected by an Act of Parliament which should give a wife whose husband had been convicted of an aggravated assault upon her, the power to obtain a separation order under Summary Jurisdiction.66

Miss Power Cobbe wrote articles on the subject for reviews and published a pamphlet, 'the truth on wife torture'. Further she sought help from several members of Parliament to introduce a bill which she had drafted. Lord Penzance, who was about bring a Bill into the House of Lords to remedy defects concerning the costs of intervention by the Queens' practor in matrimonial causes took notice of the writings of Cobbe and read this in the House of Common. He wasted no time to add a clause in his Bill giving assaulted wives the relief that has been proposed by Miss Power Cobbe.67 The response was such that the Bill passed without opposition.

67. Id., p.12..
The Bill provided that a husband convicted of aggravated assault upon his wife should pay to his wife such weekly sum as the Court of Magistrate may consider to be in accordance with his means. The Act also enabled the Court to give legal custody of any children of the marriage under the age of ten to the mother. The working class wives, thus acquired a statutory right to maintenance against their husbands.68

Lord Penzance's Modest Legislative Contribution sparked off more sweeping reforms in 1886 and in 1895. The Married Women (Maintenance in Cases of Desertion) Act 1886 gave a more direct and economically useful remedy to wives, wherein married women could establish that her husband was able to support her and his children but has refused or neglected to do so and had deserted them. The Act enabled the Magistrates Court to award her maintenance up to a limit of $2 a week.69

The Summary Jurisdiction (Married Women) Act 1895 marked the crucial stage in endowing married women with right to maintenance. The Act was significant in conferring a general matrimonial jurisdiction on Magistrates Courts. They were given extensive powers which in certain respects were wider than those of the High Court. Apart from consolidating the provisions of the 1878 and 1886 Acts, the Act gave much wider powers to Magistrates in passing maintenance orders. The 1895 Act contained the nucleus of grounds for complaint that appear compendiously in 1960 Act.70

68. Id., p. 14.

69. Id. p. 15.

70. Ibid
Much changes in the divorce law has been effected by the Divorce Reform Act 1969. The substantive law of divorce administered in the County and High Court has been reformed.\textsuperscript{71} Despite this the Magistrate Court continued to dispense with the more limited relief provided to them. But the dual system of matrimonial relief became more obvious, by its unfairness, wherein, one system catered almost exclusively, the needs of poor. To reduce this disparity in the two jurisdictions, the Domestic Proceedings and Magistrates' Courts Act 1978 was enacted on the suggestions by the Law Commission. The Law Commission played a pivotal role in transforming the role of the Domestic Court into that of a 'Casualty Clearing Stations' offering immediate assistance to those marriages in trouble. Now those who were in retrievable difficulty could be assisted through the various orders available in the Magistrates Court and those who were not would be passed on to the divorce court for termination of their marriages.

\textbf{8.4.1 Domestic Proceedings and Magistrates' Courts Act 1978}

Domestic Proceedings and Magistrates' Courts Act 1978 (in short DPMCA 1978 referred hereinafter) empowers a Magistrate sitting as Domestic Court to resolve family matters between husband and wife. The Magistrate was given the power to award maintenance to either of the spouses and children of the family on certain grounds. For the benefit of children though there remains also such other Acts,\textsuperscript{72} the domestic jurisdiction exercised by the Magistrates under DPMCA 1978 is the often used practice.

\textsuperscript{71} Supra. n.3, at p.171.

8.4.1.1 Procedure

Proceedings are initiated by the laying of a complaint and the service of summons. The application is heard by three Magistrates whose number must comprise one member of each sex. The powers of the Magistrates are more limited than those of the Divorce Court, in that, there is no power to grant a divorce or to order the transfer of items of property. There are only limited powers towards discovery of the parties means, passing interim or substantive orders of maintenance, and variation or revocation of any such orders passed. Legal aid is not available for applications to the Magistrate Court, but the parties may apply for assistance by way of representation. Default in the payment of maintenance may lead to enforcement proceedings by the Magistrate.

8.4.1.2 Grounds for an Order of Maintenance

An applicant seeking a financial order from the Magistrate Court has to establish any one of the grounds set out in section 1 of the DPMCA Act 1978. The grounds enumerated thereunder are:

(a) that the respondent has failed to provide reasonable maintenance for the applicant.

The Act gives no guidance as to what has to be established to make out the above ground. But the Court has to find that there has been failure

75. DPMCA 1978, S.1(a).
even after the applicant being guilty of some matrimonial misconduct or that the parties have separated without having made an agreement about continued financial support. In practice the Court will consider such matters as the means and needs of the parties in determining whether there has been a failure to provide reasonable maintenance. The concept of reasonable maintenance has not been defined in the legislation. The identical grounds contained in the code applicable to the High Court and County Court on identical grounds are also considered to decide whether there has been failure to provide reasonable maintenance on the part of the respondent. All the special circumstances such as income, earning capacity and other financial resources of the parties as well as, their conduct, if it would be inequitable to disregard it, have to be taken into consideration by the Magistrates.

(b) that the respondent has failed to provide, or to make proper contribution towards reasonable maintenance for any child of the family.

The expression 'child of the family' is very widely defined in the Act and has the same meaning, as it has in Matrimonial Causes Act 1973, to mean and include;

77. Id. S. 27(3) and DPMCA 1978, S. 63(2).
78. DPMCA 1978, S.1(b).
a child of both of those parties; and

any other child, not placed with those parties as foster parents by a local authority or voluntary organization, who has been treated by both of those parties as a 'child of the family'.

The definition includes all children of both parties to the marriage whether legitimate, legitimated, adopted\(^{80}\) or illegitimate.\(^{81}\) The Act goes much further, and makes the existence of a biological or formal legal relationship, such as adoption, between the child and the spouses irrelevant. Whether a child is within the definition depends simply on whether or not the child in question, has been 'treated as a child of the family' by both parties.\(^{82}\) The test of treatment is purely objective and is immaterial for the purpose of deciding whether a child falls within the definition.

The Court has not been given specific guidance in determining what is reasonable maintenance for the purpose of deciding whether the ground of complaint has been made out. But when once the ground has been made out the Court is given the guidance whether to exercise its power and if so in what manner.\(^{83}\) Although failure to provide for a spouse and failure to provide for children are separate grounds of complaint, since the needs of the mother and the child are obviously interrelated,\(^{84}\) the Court may on

\(^{80}\) Adoption Act 1976, S. 39(1).


\(^{83}\) DPMCA 1978, S.3(1).

proof of either ground make any order set out in Section 2(1) of the Act. But always the welfare of the child receives first consideration.85

(c) that the respondent has behaved in such a way that the applicant cannot reasonably be expected to live with the respondent.86

The object of including this ground is to enable a spouse to leave the other without endangering his or her claim to maintenance. This ground in substance is identical to the fact evidencing breakdown of marriage for the purpose of divorce.87 Adultery could presumably be brought within this ground though there is no specific mention of it. Whether a single act of adultery could be described as 'behaviour' is not clear.

(d) that the respondent has deserted the applicant.88

Desertion has the same meaning as in the law of divorce,89 but it is not necessary to show that there is a minimum period of desertion.90 The purpose of including desertion as a ground is to enable a spouse to seek an order for maintenance even though he/she is being reasonably maintained.

8.4.1.3 Bars to the Making of an Order

The chances for reconciliation between the parties is given paramount importance and this will limit the exercise of marital jurisdiction by the

85. DPMCA,1978 S.3(1), as amended in M & FPA 1984 S. 9(1).
86. DPMCA 1978, S.1(c).
88. DPMCA 1978, S.1(d).
90. 2 years under Matrimonial Causes Act 1973.

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Domestic Court. The DPMCA 1978 requires a Court hearing an application under its provisions to consider whether there is any possibility of reconciliation between the parties to the marriage in question. If at any stage, the Court considers that there is a reasonable possibility for the same, it can adjourn the proceedings so as to enable reconciliation attempts.\textsuperscript{91}

Again, as the proceedings under the Act are subject to the general rule applicable in Magistrates' Courts\textsuperscript{92} an application except on the ground of desertion must be made within six months from the date of cause of an action.

\textbf{8.4.1.4 Orders that Can be Made}

If the applicant satisfies the Court any one or more of the grounds in section 1 of DPMCA 1978, it is open to the Court to make one of the following orders.\textsuperscript{93}

(a) An order that the other party shall make to the applicant such periodical payments, and for such term, as may be specified in the order.\textsuperscript{94}

Prior to the passing of this Act the Magistrates' Courts were empowered to pass orders for weekly payments.\textsuperscript{95} The practice had been

\textsuperscript{91} DPMCA 1978, S.26(1).
\textsuperscript{92} Magistrates Courts Act 1980, S. 127.
\textsuperscript{93} DPMCA 1978, S. 2.
\textsuperscript{94} DPMCA 1978, S.2(1)(a).
\textsuperscript{95} M.P. (MC) Act 1960, S. 2(1)(b).
done away with the 1978 Code. Now it is possible to make a limited term order by which time the applicant can adjust to new circumstances, find a job and become self-supporting.\textsuperscript{96} The Court has discretion as to the period of the order, but it cannot grant an order that precedes the date of application nor beyond the death of either party.\textsuperscript{97} Any such order which has been passed by the Magistrate may cease to have effect on the direction of the High Court or County Court entertaining proceedings of divorce or nullity,\textsuperscript{98} or on the remarriage of the party.\textsuperscript{99} Cohabitation by parties is neither a bar to the making nor enforcement of an order but it should not exceed six months period.

(b) An order that the other party shall pay to the applicant such lump sum as may be so specified.\textsuperscript{100}

The Act provides for a 'lump sum order' to meet maintenance expenses for the purpose of enabling any liability or expenses reasonably incurred in maintaining the applicant or any child of the family to whom the application relates. But the lump sum awarded must not exceed £1000.\textsuperscript{101} The lump sum orders may be made on several occasions subject to not exceeding the maximum limit.\textsuperscript{102} There is no power to vary the amount of a


\textsuperscript{97} DPMCA 1978, S.4(1).

\textsuperscript{98} Id, S. 28(1).

\textsuperscript{99} Id., S. 4(2).

\textsuperscript{100} Id., S. 2(1)(b).

\textsuperscript{101} Id., S. 2(3).

\textsuperscript{102} Id., S. 20(7).
lump sum order, but the Magistrates Court has the general power to allow time for payment or to order payments by installments.¹⁰³

(c) Orders to make periodical payments in respect of a child of the family.¹⁰⁴

An order of this nature takes effect from the date of application up to the attainment of the age of sixteen, by the child.¹⁰⁵ The tax advantage which existed at one point of time no more is in existence.

(d) Orders for a lump sum payment to or for the benefit of each child of the family.¹⁰⁶

Herein to the lump sum payment should not exceed £1000, although it would be open to a Court to make separate lump sum awards to both a spouse in his or her own right together with a further sum either to the spouse on the child's behalf or directly to the child.

Factors Relevant to the Making of an Order

In exercising the domestic power, the Magistrates' Courts are required to take into account several factors related to the passing of an order for maintenance. The list of factors that need to be considered by the Court are exhaustively narrated under Section 3 of the DPMCA 1978.¹⁰⁷

¹⁰³ Matrimonial Causes Act 1980, S. 75(1).
¹⁰⁴ Id., S. 2(1)(c).
¹⁰⁵ Id., S. 5.
¹⁰⁶ Id., S. 2(1)(d).
¹⁰⁷ DPMCA, 1978. S. 3
8.4.1.5 Consensual Separation and Voluntary Maintenance

Where the parties have agreed to separate, so that there is no desertion, and where one party has been providing the other (or a child of the family) voluntarily with de facto maintenance, it is open to the recipient to apply to Court to formalize the maintenance payments in a court order under the DPMCA 1978.\footnote{ld., S. 7.} The advantage of this is that it enables a spouse to regularize what may be an erratic and unreliable source of income. This provision differs from Section 6 in that the applicant need not prove an agreement to make provision, merely the fact that it has been provided in the past will be sufficient. An applicant must show (a) that the parties have been living apart for a continuous period of more than three months, (b) that neither party has deserted the other and that (c) one party has been providing the applicant or a child of the family with periodical payments. If these conditions are satisfied, the Court may order that the respondent make periodic payments to the applicant or to, or for the benefit of, a child of the family. There is no power to order lump sums. A Court cannot order a respondent to pay more than either (a) the court would have ordered if the application had been made under section 1, or (b) a sum that in aggregate over a three month period exceed the aggregate amount actually paid by the respondent in the three months preceding the application.

Consent Orders

Either party to the marriage may apply to a Court under Section 6 of the DPMCA 1978, for an order formalizing an agreement made between

\footnote{Id., S. 7.}
the spouses that one spouse shall make financial provision to the other. 'Financial Provision' in this context refers to any of the orders that are within the powers of the Domestic Court. Before making the order, the Court must be satisfied (a) that there is agreement by the paying spouse to making the provision, which may be proved either orally in Court or in prescribed documentary form if the paying spouse is not in Court, and (b) that there is no reason to think that it would be contrary to the interests of justice to exercise its powers. Further, if the proposed provision includes provision for a child of the family, the Court must be satisfied (c) that the provision proposed provides for or makes an adequate contribution towards the financial needs of the child. If either of these last two conditions are not satisfied, it is open to the Court to suggest alternative arrangements which do satisfy these conditions. If the parties agree to what the Court proposes, the Court's proposed terms will be incorporated into the court order.

**Interim orders**

On an application under Section 1, 6 and 7 of the Act, the Court may make an order for interim maintenance at any time before making a final order, either granting or dismissing the application. Interim maintenance may also be awarded where a Domestic Court refuses to make an order on the ground that the case would be better heard by the High Court, or by

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109. *Id.*, S. 6(1)(a).
110. *Id.*, S. 6(9).
111. *Id.*, S. 6(1)(b).
112. *Id.*, S. 6(3).
113. *Id.*, S. 5.
the High Court itself on ordering the case to be reheard by magistrates.\textsuperscript{114} The period of maintenance up to three months may be specified by the Court; if not, an order will terminate on the magistrates making a final order, or at the end of three months following the making of the order, whichever is the earliest.\textsuperscript{115} An interim order may be renewed for a subsequent term, subject to the same time limits.\textsuperscript{116} There is also a power to make interim custody orders.\textsuperscript{117}

8.4.1.6 Duration of Orders

The Court normally makes an order for a specified period extending up to 12 months. Even if ordered for a specified period, the order is subject to change of circumstances that are statutorily prescribed as

\begin{itemize}
  \item \textbf{(a) Effect of remarriage:} Periodical payment orders made in favour of a spouse is unenforceable after the remarriage of the spouse.\textsuperscript{118} The effect is the same even in cases where the remarriage is void or voidable.\textsuperscript{119} But the remarriage by a spouse will not alter the orders that are made for a child.
\end{itemize}

\begin{itemize}
  \item 114. \textit{Id.}, S. 19(1).
  \item 115. \textit{Id.}, S. 19(5).
  \item 116. \textit{Id.}, S. 19(6).
  \item 117. \textit{Id.}, S. 19(1)(ii).
  \item 118. \textit{Id.}, S. 4(2).
  \item 119. \textit{Id.}, S. 88(3).
\end{itemize}
(b) **Pendency of Divorce or Matrimonial Proceedings:** Divorce do not automatically determine the orders made by the Magistrates Courts. Indeed they often continue with much force. But if the marriage is declared void, the order becomes ineffective since no order could properly be made unless the parties were lawfully married.

If matrimonial proceedings are started, the Divorce Court has power to cease the order of a Magistrates' Court for periodical payments. This power is normally exercised to enable the Court to pass wholly a new order. But the common practice is that the petitioner will not seek financial relief from the Divorce Court, but will continue to rely on Magistrates' order even after divorce.

(c) **Cohabitation:** An order can be obtained notwithstanding that the parties to the marriage are living with each other at the date of the making of the order. But if they continue to live so, or subsequent to an order having been made if they resume co-habitation, for a continuous period of six months the order will cease to have effect.

8.4.1.7 **Variation and Revocation**

Orders for periodical payments made under Sections 1, 6, 7, 11 and 19 of the Act may be varied, revoked, suspended or revived on the

120. Supra, n.1, at p.364.
122. Supra, n.1, at p.364.
123. DPMCA 1978, S.88(2).
124. Id., S. 25(1) and (2).
application of either party to the marriage, or, in the case of an order made to or for the benefit of a child of the family, by the child himself or herself if he or she is over sixteen. In exercising the powers of variation, the Court shall have regard to all the circumstances of the case, including any change in any of the matters to which the Court was required to have regard when making the order to which the application relates.

8.4.1.8 Registration of Divorce Orders

Where the husband is in paid employment and when he has failed to make at least one payment he is required to pay through an order of divorce, the spouse in whose favour such an order has been made can register the same with the Magistrates' Courts, where after, the earnings of the liable spouse will be attached. The effect of registration is to give the Court of Registration the same power over the order for the purpose of enforcement and variation as if it were an order of that Court. The court can then direct the liable spouse's employer to deduct a certain amount from the spouse's earnings and to remit the amount to the Court. An empirical study of the divorce Court orders registered for enforcement in the Magistrates' Court has shown that they are least effective and at times the husband with a view to avoid the liability has given up the employment.

125. Id., S. 20(1)-(6), (10) and (12).
128. Supra. n.3, at p.103.
8.4.1.9 **Maintenance for Children**

Children were also entitled to obtain maintenance from their parents vide two procedures, (i) proceedings under Section 9 of the GMA 1971 for the resolution of disputes over custody, and affiliation proceedings under the Affiliation Proceedings Act 1957. The Family Reform Act modified the procedure and now under section 11(b) of the GMA 1971 parents, married or unmarried, can apply for financial provision orders for their 'children'. The order may be for periodical payments, secured or unsecured, or through lump sum payments. All factors relevant towards passing such an order as provided under GMA 1971 is applicable. The duration of payments will be the same as is provided under DPMCA 1978. The earlier discussed maintenance agreements can also be entered into by an agreement between the parents.129

8.4.1.10 **Enforcement of the Magistrate Order**

The orders passed by the Magistrates' Courts will specify the payment should be made to the Court,130 who then will remit the payment to the recipient or, if the 'diversion procedure' is applicable, to the DHSS.131 Once arrears have accumulated to a certain amount, the clerk notifies the recipient, who may then request the clerk to initiate enforcement proceedings.132 It is then up to the Magistrates to decide how to exercise their discretion to remit the whole or part of the arrears.133 At no

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129. GMA 1971, S. 12.
132. Magistrates Court Rules 1981, r. 40(1).
circumstance the Magistrate should enforce arrears payable more than one year before the date of the application. Towards the realizing the arrears anyone of the following measures are followed.

(i) **Distress**: This is an order of Court enabling the police to seize goods of the liable spouse in order that they may be sold and the proceeds used to discharge the arrears.134 This means of enforcement is rarely used.

(ii) **Comittal to prison**: Any default by a liable spouse to pay the maintenance arrears may lead to his committal to prison.135 Before committing a defaulter to prison, the Court must be satisfied, after an inquiry in the presence of the defaulter, that (a) the default was owing to his willful refusal or culpable neglect and (b) that an attachment of earnings order, if available (see below), is not a more appropriate order to make in the circumstances.136 The period of imprisonment that may be ordered depends on the amount of arrears, subject to a maximum of six weeks.137 Imprisonment does not discharge the arrears, but arrears will not usually be regarded as accumulating during the period of imprisonment138. It is open to a Court to suspend a committal on condition that payments are made regularly and arrears discharged.139

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134. Matrimonial Causes Rules 1981, r. 54.
136. *Ibid*.
137. *Ibid*.
138. *Id*, S. 94.
(iii) Attachment of earnings\textsuperscript{140}. Where a liable spouse is in paid employment, the most effective method of enforcing financial provision will be attachment of the earnings by an order under the Attachment of Earnings Act 1971. This is a Court order directed to the liable spouse's employer to deduct a certain amount from the spouse's earnings and to remit the amount to the Court\textsuperscript{141}. The effectiveness of the order will obviously depend on the husband being in paid employment.

8.5 WELFARE BENEFITS

As a welfare state England provides also a third system of family law, operating alongside those of the Divorce and Magistrates Courts, to assuage the needs of those families who are separate or divorced. There is always a close link between marriage breakdown and single parenthood, in that most single parents, majority of whom are women, are either divorced or separated. There is also a close link between single parenthood and poverty. Earlier the National Assistance Act, 1948 provided contributory benefits. As the scheme is felt ill-adopted, the law in this area has been changed. Presently the Social Security Act, 1986 that came into force in April 1988 provides a 'safety net' guarantee of a minimum level of income to the needy class, as state benefit. Other welfare measures include family credit,\textsuperscript{142} child benefit\textsuperscript{143} and one parent benefit\textsuperscript{144}. Family benefit is available to families with low income.

\textsuperscript{140} Attachment of Earnings Act 1971, S. 1.

\textsuperscript{141} Id., S. 6.

\textsuperscript{142} Family Credit (General) Regulations, 1987.

\textsuperscript{143} Child Benefit Act 1975; Child Benefit (General) Regulations, 1976.

\textsuperscript{144} Ibid.
Child benefit is paid to anyone with responsibility of a child. It is non taxable and is payable by monthly cashable orders. One parent benefit is an additional benefit payable to single parents in respect of the first child of the family.