CHAPTER ONE

INTRODUCTION

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

1.1 MAINTENANCE - AN OBLIGATION ARISING OUT OF MARRIAGE

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


2. Id., at p.2.
unregulated and much animal like. It was perhaps, a scarcity of women or admiration of one particular woman that first roused in him the desire to keep her for permanent possession. When one took possession of a woman, other men followed his example. He obliged the woman to receive only his caresses and taking in return the obligation upon himself to regard her as his wife and to protect and bring up her children as his own. Thus arose marriage and the obligation to care for each other. This was a natural obligation. It got rooted as moral obligation in a social community. The modern welfare society imposes them as statutory obligation.

1.2 MAINTENANCE - A SOCIAL CONCERN

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

3. *Id.*, at p.6.
its origin from England and withstood onslaughts of social and legal changes over the period.

1.3 MAINTENANCE - THE LEGAL CONCERN

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

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

The personal laws of the Indian community viz., Hindus, Parsis, Christians and Muslims provide for maintenance or alimony. But these are mostly made available only to the married partners when they seek for matrimonial relief under their respective marriage laws. The law in this area is
cumbersome, expensive and lacks uniformity. The conflictive personal laws though have their own independent existence, has its influence to play on Section 125 Cr. P.C.

1.4 MAINTENANCE - A RIGHT UNDER CRIMINAL LAW

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

The provision remained as the first unifying law on the personal aspect of the non-homogenous religious communities in India. The Supreme Court of India in Bai Tahira v. Ali Hussain⁴, Fuzlumbi v. K. Khader Vali⁵, Mst. Zohra Khatoon v. Mohd. Ibrahim⁶ and Mohd. Ahmed Khan v. Shah Bano Begum⁷ upheld the secular characteristics of the provision. Of the

4. AIR 1979 SC 362.
5. AIR 1980 SC 1730.
7. AIR 1985 SC 945.
class for whom the benefit is intended, some are now governed by their own personal law. The Muslim Women (Protection of Rights on Divorce) Act, 1986 specifically excludes the application of this provision to Muslim divorced women. To assert the status of 'wife', the language of the provision has to be read in conjunction with the personal law of the parties. This raises serious doubts as to the secular characteristics of the law and the comprehensiveness of the relief provided in favour of a wife, child or parent.

Women though equal in population to their male counterparts, they do not enjoy the status on par with them. Women are honoured and even worshipped as goddesses but in real life they are relegated to a position much worse than a slave and kept always under sub-ordination. The subservient status is mainly rooted in the unique sexual function women performed as child bearers. During periods of pregnancy she became inferior and child birth and lactation forced her to look to her husband for assistance, support and protection. The occasional helplessness of woman at a time when physical strength alone was held in respect, was the origin for her subordination and the necessity for assistance. She was confined to bearing and rearing children and managing their homes. Even here, her contribution to the family was least considered. She was educated primarily to perform these tasks which in turn stunted their development and growth. Women's domestic role was held a reason to exclude them from political participation and thus they were reduced to a status of second rate beings. Women were denied property and inheritance rights making them economically dependent on men. Thus socially, politically and economically women were made to accept an inferior and secondary status and this was more justified and defended on grounds of custom and tradition.
Section 125 Cr.P.C. which provides maintenance as a substantive right do not extend the same to all married women. The legality of the marriage when tested in the light of personal laws leads to conflictive stand being taken by the judiciary. A second wife to a muslim husband is entitled to maintenance whereas not one under Hindu law. All divorced women excepting one belonging to Muslim religion are entitled to maintenance. A child whose marriage is void or voidable is also recognised with right of maintenance. But an innocent victim to a marriage practised on her by an unscrupulous male member is denied of maintenance. All these raise doubt as to the secular characteristics and the protective objective claimed by the provision.

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

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

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

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

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

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

The law that we imported from England has changed a vast to suit the present conditions there. In India the law that has been passed some hundred years ago to suit the conditions then at existence has its force still without much reform. The social and economic condition of the Indian community is not the same as it existed prior to hundred years ago. Law must change and see to the progress of the community. The mandate under Article 44 of the Constitution remains a distant dream for long years. The Supreme Court of
India did remind the obligation on the part of the State towards fulfilling its obligation directed under the Constitution. But nothing effective has come off yet. All these necessitate review of the law and the system.

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

1.5 OBJECT OF THE STUDY

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

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

1.7 SCHEME OF THE STUDY

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

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

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

The fourth chapter discusses the right provided under the criminal law in its entirety. The historical background behind the incorporation of Section 488 in the old code of 1898 and the need for such domestic jurisdiction on the Criminal Court is brought to the fore. The role played by the Judiciary in transforming the provision into a comprehensive code under the 1973 code has also been focussed. The decisions such as Bai Tahira,13 Fazlnunbi,14 Zohra Khatoon15 and Shahbano16 that lent support to retain the secularistic characteristics of the provision are highlighted. The political and legal changes that altered the ambit of Section 125 Cr. P.C.

13. Supra. n.4.
14. Supra. n.5.
15. Supra. n.6.
16. Supra. n.7.
have been discussed. The objectives as visualized by the provision and the class of people who benefit out of this has been brought to focus.

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

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

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

Chapter Eight brings home a comparative analysis of the law and position prevailing in England. The origin of the family court jurisdiction of the Magistrate has been traced and the present working system has
been analysed in the light of Indian conditions. This will lend support towards strengthening the working system in India.

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

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