CHAPTER III

LAW OF MAINTENANCE

RIGHT OF MAINTENANCE AND SUBORDINATION OF WOMEN

It is one of the basic principles of matrimonial jurisprudence of the patriarchal social order that the husband is bound to provide maintenance to his wife during coverture. The obligation of the husband to maintain and support his wife is a matter of status and is recognised universally. However, there is no such obligation on the wife to provide maintenance to her husband. Therefore, one can very well argue that if the attainment of equality of status of women is one of the specific objectives implicit in our Constitution, why should such unequal provision favouring wives (women) and allowing them to depend on their husbands for support continue? In the days of gender equality, women can not demand the advantages of liberation and independence without accepting the disadvantages of self sufficiency. In such a situation the right of the wife to be maintained by the husband should have no place in the matrimonial jurisprudence of a gender egalitarian social order.

We have already discussed the position of woman in India and have pointed out how she was the victim of the patriarchal system. The social position of Hindu woman deteriorated since the Smriti period. The efforts were made
from the 7th century onwards to improve her position, particularly by giving her proprietary rights. The Muslim women got the rights to hold and inherit the property since post-Islamic period. The Christian and Parsi women's right to property were also recognised to an extent from the 19th century onwards. In post-independence era, efforts were made to remove the inequality based on sex, in the area of family law, for majority of women. However, these legal changes, welcome as they might be, have not touched upon the fundamental structure of the marriage and the family which is premised upon women's economic dependency on men.

Societal and cultural barriers oblige women to look to men for economic security through marriage. This economically inferior position occupied by women frequently remains invisible for the duration of a marriage, it becomes visible only on marriage break-down. It is this structural economic inequality in the marriage, the law has failed to address. It is a fact that the equal opportunities are not provided to women to earn for their own livings. Since money symbolizes power, not having it signifies the subservience and inferior status of woman. Besides, there are number of other factors for subordination of women. Various social, cultural, psychological, physical factors control the mind of woman which do not permit her to be equal to man. There is a traditional image of the male as the protector and of the female to be protected. From generations a message is passed that they are subordinate to men. Because of all these external pressures, woman feels herself to be subordinate.
The result is that woman is treated as dependent on man. Her worth is measured in terms of her ability to produce male children through whom again the patrilineality is perpetuated. Woman never belongs to her father's family, while membership in the husband's family is conditional upon her proper behaviour. Her role is geared to the household. Her domestic labour is seen as non-productive, not real work. Thus the sex role is sex rank\(^2\). This is reflected in women having mere household responsibilities without any power.

It is absolutely essential therefore, in the present context, to continue with the presumption of the matrimonial jurisprudence that women are dependent on men and hence husbands are bound to provide maintenance to their wives. The sex based division of labour, which makes husband the wage earner and wife the housekeeper/mother, is bound to perpetuate the inequalities\(^3\). The wife's right to claim maintenance from her husband will have to remain a legal right, so long her subordination continues.

So far we have tried to justify the husband's duty to provide maintenance to his wife. His duty to provide maintenance to his ex-wife is also recognised by all the laws. Such duty is also cast upon the wife under the Hindu Marriage Act and the Parsi Marriage and Divorce Act on the principle of equality. However in reality, the provision is meant for providing support to the ex-wives only as will be seen through further discussion\(^4\).
Protection And Patriarchy:

A measure provided by the law in favour of the wife to claim maintenance from her husband/ex-husband is a protective measure. The notion of protection implies inequality and weakness, a power imbalance which the law is to rectify by its intervention on behalf of the weaker party. Therefore, protection is a concept which must be carefully analysed. Protection for whom, why, from what, from whom?

The law of maintenance provides protection to the wife/ex-wife. Such protection is needed because during subsistence of marriage, it is necessary to provide her security. On arising of a matrimonial problem, when she is discarded or is abandoned or divorced, she needs economic support for her sustenance. Being dependent on the husband, the responsibility has to be put on the husband to provide maintenance to her, for avoiding her destitution.

However, there is a counter argument that the right of the wife to claim maintenance from her husband as a protective measure, reinforces inequality and perpetuates subordination. It enables continuation of the conditions, that necessitated it initially. Submission by, and control of the protected is the outcome. Protection merely cushions and legitimates discrimination. Therefore, the provision for maintenance merely helps reinforce subordination of women. Here one can apply the analogy of reservation policy. Reservation Policy is, and should be, a temporary measure, for ameliorating the conditions of the weaker sections and
socially disadvantageous sections of the society. To improve their lot, however mere reservation policy is not going to help. But along with it, efforts will have to be made to change the social and cultural values. This could be achieved through drafting and implementing of proper educational policy. The same is the case with the law of maintenance. Provision for maintenance after break-down of a marriage should be a time-bound measure. But she should be allowed to have a right to the matrimonial property, a concept which needs to be evolved very carefully. She should be paid compensation for the services offered by her to the matrimony and sacrifices made by her for making the home. Apart from these rights, right to maintenance, mentioned earlier, should be time bound till opportunities are made available to women to become economically self sufficient. However, mere economic independence of women may not help us removing their subordination. To bring in equality we will have to educate the masses so as to bring change in their social and cultural values. Therefore, we have to remember that the right to maintenance is a remedial and not curative measure. It is expected that a day will come, when this provision will whither away from the law books, on establishment of an egalitarians society. But till then the provision of maintenance will have to continue and efforts will have to be made for its effective enforcement.

Hereinafter, we will discuss the meaning, nature and scope of maintenance and its evolution and development. We will discuss the law of maintenance as an ancillary remedy
and as an independent remedy available to the spouses.

Meaning:

The dictionary meaning of the term maintenance is support or sustenance. The matrimonial laws of all the religious communities, viz. the Hindu Marriage Act (HMA) 1955, the Parsi Marriage and Divorce Act (PMDA) 1936, The Indian Divorce Act (IDA), 1869, the Muslim Personal law and the secular Special Marriages Act (SPMA) 1954 do not define the term maintenance. But the entitlement of claiming maintenance is certainly based on the principle that the claimant doesn't have the sufficient means to support herself. The maintenance generally covers the expenses for necessaries or essentials for the sustenance of the life. However, it is not merely a right for survival of the claimant. This is clear from the provisions under the Acts mentioned above, which give guidelines to the court by stating the factors to be taken into consideration for fixing the amount of maintenance. The court is to look into the possession of the property of both, the husband and the wife, ability of the husband to earn, conduct of the parties and other circumstances to decide the amount of maintenance. These factors would certainly require the status of the parties and the standard of their life during the subsistence of marriage enjoyed by the parties, to be taken into consideration before fixing the amount of maintenance.

The Hindu Adoption and Maintenance Act, 1956 (HAMA) which recognises the Hindu wife's absolute right of
maintenance gives definition of the term maintenance. It says, maintenance includes provision for food, clothing residence, education and medical attendance and treatment. Sec. 23 of the same Act clearly lays down that for fixing the amount of maintenance under the Act the court shall have due regard to:

(a) the position and status of the parties
(b) the reasonable wants of the claimant
(c) the value of the claimant's property and income derived from such property or from the claimant's own earnings or from any other source.

Therefore, these are the exhaustive guidelines. These factors and particularly position and status of the parties are wide enough to include the financial position of both the parties as a vital consideration. The provision also indicates that the maintenance allowance has to be substantial and not merely a token.

However, in reality, as will be discussed in the next chapter, the amount of maintenance is always meager. The law expects to provide residential accommodation for her, which is rarely taken care of. On breakdown of the marriage, the wife's plight becomes precarious. The immediate problem that arises for her is of shelter. She has under the law, no right over the matrimonial home. Usually on marriage, she is not treated as a member of the parent's house. A wife, who is thrown out of the matrimonial home, even without any fault on her part, is not respected by the society and by the members
of her parent's family. But there is no choice for her except to take shelter at parent's home when she is thrown out. Naturally, that lowers her position. It becomes difficult for her to stay at parent's home with dignity.

Scope:

The obligation of a husband to maintain and support his wife arises out of matrimonial status. The matrimonial relation of the parties are governed by the religion based personal laws in India. Therefore, the law of maintenance is bound to be the subject matter of the personal laws. Thus the provisions for maintenance for Hindus, Parsis, Christians and Muslims are laid down in their respective personal laws. However, apart from these religion based provisions for maintenance, there also exists a secular provision for maintenance under the criminal law. Till 1986, any wife, irrespective of her religion, was entitled to claim maintenance under the provisions of the Criminal Procedure Code. Strictly speaking, this is not the provision within the purview of the Family Law. However, this being very important provision recognising the right of destitute, needy woman, though under the criminal law, will have to be taken cognizance of, when one discusses the law of maintenance. Therefore, the first broad classification of the law of maintenance can be made as non-personal, secular law of maintenance and personal, non-secular law of maintenance.

The Sub-classification of the non-personal secular and personal non-secular law of maintenance can be done on the
basis of, maintenance as an independent remedy and as an ancillary remedy. The remedy of maintenance is called as ancillary where filling of a marriage petition, for one of the matrimonial remedies provided by the personal law, is a condition precedent. The relief in the marriage petition is the main relief and the maintenance is an ancillary relief to it. The ancillary personal non-secular relief is provided under all the matrimonial laws viz. the Hindu Marriage Act 1955, the Parsi Marriage and Divorce Act, 1936, and the Indian Divorce Act. The Muslim Personal law, however, recognises the right of divorced wife to claim maintenance from her ex-husband only for the period of iddat (approximately 3 months) after divorce. On arising of any matrimonial dispute, there is no provision for her maintenance. The Dissolution of the Muslim Marriage Act, 1939, did not give her right of maintenance or an ancillary relief to be asked after passing of the decree of divorce by the court. The Special Marriage Act, 1954 which is the secular law of marriage provides for such ancillary remedy of maintenance.

Apart from this ancillary remedy, maintenance is also available as an independent remedy under the personal as well as non-personal secular law. The Hindu Adoption and Maintenance Act, 1956 provides for such independent remedy to a Hindu wife. She is entitled to be maintained by her husband during her lifetime according to Sec. 18(1) of the Act. She is further entitled to live separately from him, without forfeiting her claim to maintenance on the grounds
mentioned in sec. 18(2)(a) to (g). This is called as an independent remedy because like matrimonial laws, it doesn't require filing of the marriage petition or any other petition as a condition precedent. Thus, this is the non-sectarian, independent remedy available to a Hindu wife. Similar remedy is also available to a Muslim wife. The husband is bound to provide maintenance to his wife during coverture and if he refuses to do so, she is entitled to live separately from him and can file a suit for maintenance against him\(^{11}\). However, under Sec.18 of the Act only 'wife' is entitled to get maintenance. If she is divorced or if decree of nullity is passed under the Hindu Marriage Act, she will loose her right to claim maintenance under this provision because she no longer remains the wife. However, this remains merely a provision in the normative law. Because the Muslim husband has a weapon of unilateral, oral talaq in his hands. The moment she goes to the court for claiming maintenance, the husband is likely to give her divorce so as to deprive her of her right to maintenance.

The secular, non personal law under the Criminal Procedure Code provides independent remedy of maintenance. As the religion of the parties is immaterial it becomes secular and it is independent because on establishing the reasons mentioned in the section a wife is entitled to claim maintenance from her husband\(^{12}\) and there is no need of any pending marriage petition in the court. However, the Muslim divorced wife is disentitled from claiming maintenance under the secular independent law after passing of the Muslim
Women's (Protection of Rights on Divorce) Act, in 1986. Prior to the 1986 Act, a Muslim divorcee was allowed to claim maintenance under the secular law viz. under sec.125 of the Cr.P.C. But after 1986, a Muslim divorcee is not allowed to do so. She is allowed to claim maintenance now under the new Act of 1986. Thus we can classify the remedy under this Act as a non-secular ancillary remedy.

Thus in tabular form we can put the law of maintenance as follows:

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<th>Maintenance Law</th>
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<td>Non-personal, Secular law</td>
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<td>Ancillary</td>
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The maintenance under all the above mentioned laws is of two types viz. interim maintenance and permanent alimony. The details about which will be discussed in the next chapter.

The maintenance term itself indicates that it is the right to be provided for the lifetime of the claimant and not beyond. This is also made clear under all these laws.

**Nature Of Right:**

The claim of maintenance does not by itself amount to a charge on the property of the one who is liable to pay
maintenance. Under the HMA, the HAMA and the SPMA, the court has a discretion to create a charge on the properties of the husband for securing the maintenance claim. Under the PMDA and the IDA the court may require execution of a proper instrument to secure the wife's claim. Under sec.125 of the Cr.P.C. there is no provision for creating a charge on the property of the husband at the time of passing of the maintenance order. Thus, the claim of maintenance by itself is not a charge on the property. But it can be created under the personal laws through the court order. And once the charge is created, upon the property, every transfer is subjected to such charge.

The husband's obligation to provide maintenance to his wife is a legal obligation and can be enforced in the court of law under the marriage laws and the HAMA. However, the obligation to provide maintenance is a personal obligation and the right of maintenance is not against the property. Therefore, as mentioned above, the charge has to be created against the property for securing the right of maintenance. In the absence of such charge, the husband is free to dispose of his property as per his wish.

The right of maintenance is available only for the lifetime of the claimant. It is her need to get the support during her lifetime. Consequently the right to maintenance is non-transferable, non-inheritable.

For the execution of the right to future maintenance,
the property or the salary of the husband can not be attached. But such property or salary can be attached for recovering arrears of maintenance.

The right of maintenance is a recurring right and accrues from time to time, according to the wants and exigencies of the claimant. Thus all the laws provide for alteration in the amount of maintenance ordered by the court. The order of maintenance can be modified or rescinded depending upon the facts of the case.

So far we have seen the meaning, scope and nature of the right of maintenance. Hereinafter, we will discuss, in detail, the provisions of maintenance; as an ancillary remedy under various matrimonial laws, as an independent remedy under the HAMA and under the Criminal procedure Code. The Muslim law is so distinct from other laws that it is better to discuss it separately.

However, before we look into all these provisions under various laws, it is necessary to have an overview of the evolution and development of the concept of alimony and maintenance under the English law because the English law is at the base of provision of maintenance as an ancillary remedy.

Evolution And Development Of The Concept Of Alimony And Maintenance Under The English Law:

The concept of alimony and maintenance in England evolved as a part of the cannon law in the ecclesiastical
court, while regulating the matrimonial relation between the parties. The husband's neglect or refusal to make a provision for support and maintenance was considered as an injury to the wife, and the court redressed it by compelling the husband to pay maintenance to her by ecclesiastical censures.

The ecclesiastical court initially treated marriage as a sacrament, hence a indissoluble tie. But it recognised divorce a mensa et thoro, now called judicial separation, and as it did not sever the marriage tie, the alimony was granted to the wife. Further, the wife alone was allowed to claim alimony from the husband. The reason for which was, she carried all her property with her on marriage and passed it to the husband and hence became the subject of his authority and control. However, the only sanction available in the ecclesiastical courts for the enforcement of alimony decrees, on non-payment by the husband, was the process of excommunication, the remedial measure which was ineffective to all intents and purposes.

The common law, as was in existence, treated the husband and the wife as one in the eye of law, which did not permit her to claim maintenance from him. However, it was evolved later on that if a man wrongfully deserted his wife and left her destitute, she became the agent of necessity and could pledge his credit for procuring necessities.

In the process of development, the married women were allowed to hold separate property by marriage settlement. And
thereafter whenever the husband came to recover his wife’s property, the court asked him to do equity to her by paying alimony. Thus based on the principle of equity her right to alimony got protected.

In 1857, by the Matrimonial Causes Act, the jurisdiction of the ecclesiastical court was transferred to the court for divorce and matrimonial causes. The Act provided for divorce. It gave the court certain restricted powers to make financial orders on divorce. This power was extended early in the 20th century to decrees of nullity. However, the Act of 1857 retained the scope of the alimony as ancillary relief which continues even today.

The relevance of the doctrine of agency of necessity evolved in the early 18th century was gradually diminished and became anomalous in the year 1870 and onwards when series of Married Women’s Property Act came into force. It has now been finally abolished in toto by the Matrimonial Proceeding and Property Act, 1970. The Act rationalised and greatly extended the court’s power to make financial orders not only in the divorce cases but also in the cases of nullity, given originally in 1907. In 1984, the Matrimonial and Family Proceedings Act kept the power intact, but gave greater priority to the maintenance of children, reduced husband’s liabilities towards ex-wife and gave more emphasis to the conduct of the parties.

Therefore, right to maintenance and alimony as an ancillary remedy under the matrimonial law, thus, first was
recognised by the English law through ecclesiastical courts and later on by the common law courts. Her right to claim maintenance even after divorce, got recognised by the Matrimonial Causes Act of 1857. The Indian Divorce Act was passed in the year 1869 which reflected the then existing principles of English law. Thus it recognised the wife's right to claim maintenance only on divorce or judicial separation and not on declaring the marriage as null and void. Such a change was brought in the Matrimonial Causes Act in 1907. But the Indian Divorce Act of 1869 is not amended since its enactment. Therefore it still holds the old principles of English law\textsuperscript{17}.

The PMDA of 1925 enacted the provision for maintenance on the line of the English law. The HMA passed in the year 1955 provided the ancillary relief of alimony and maintenance at the time of passing any decree under the Act, which is again based on the above discussed English law.
Notes


3. Michael Freeman, "Legal Ideologies and Patriarchal Precedents", see Supra, Note 1 p. 51 at 53.

4. Infra, Chapter IV.

5. Katherine O'Donovan, "Protection and Paternalism", see Supra, Note 1 p. 79 at 80.


7. On the contrary, Justice Daud of The Bombay High Court held that a wife's re-entry into the husband's house amounted to "forcibly capturing the premises" - see S.P.Jain v. Naina Jain Appeal from order No.1003 of 1986 decided on 12/12/84 unreported. See Sharma Chaterjee, "In Quest for Shelter", Lex Et Juris, June, 1989 p. 36.


10. See generally, Virendra Kumar, Alimony and Maintenance in the light of the changing concept of Marriage & Divorce Punjab University (1978).

12. Sec. 125 of the Cr.P.C.

13. Sec. 40 of the PMDA.  
Sec. 37 of the IDA.


17. Sec. 37 of the IDA.