MAINTENANCE TO CHILDREN AND PARENTS AN ENFORCEMENT OF SOCIAL, MORAL AND PERSONAL OBLIGATION BY STATUTORY PROVISIONS
CHAPTER I

MAINTENANCE TO CHILDREN: AN INDEPTH STUDY OF THE PROVISIONS UNDER THE CODE OF CRIMINAL PROCEDURE, 1973 AND OTHER STATUTES

The three important limbs of a family are the husband, the wife and the children. It is the moral duty of both, husband and wife, to maintain their children. It is the Constitutional mandate that 'the State shall direct its policy towards securing that children are given opportunities, and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.'

1. THE SECULAR JURISPRUDENCE MAINTENANCE TO CHILDREN UNDER THE PROVISIONS OF THE CODE OF CRIMINAL PROCEDURE, 1973 A CRITICAL STUDY OF PROVISIONS AND JUDICIAL APPROACH:

Chapter IX of the Code enacts provisions for the maintenance of children irrespective of their caste, creed, community and religion. Clause (b) to Sub. Section (1) of Section 125 pertains to maintenance of minor children while clause (c) of this Sub.Sec.relates to maintenance of major children.

According to Section 125(1) clause (b) and (c), if any person having sufficient means neglects or refuses to maintain.

1. Article 39(f) of the constitution of India subs by the Constitution (forty second amendment) Act, 1973 S.7 (w.e.f.31.3.1977).

Clause (b)- minor child
- legitimate or illegitimate
- whether married or not
- unable to maintain itself, or

Clause (c) - major child (not being a married daughter)
- legitimate or illegitimate
- unable to maintain itself by reason of
  - any physical or mental abnormality or
  - injury

In Explanation (a) to Sub-Section (1) of Section 125 the word 'minor' is defined to mean a person who, under the provisions of the Indian Majority Act, 1875 is deemed not to have attained his majority i.e. a person who has not attained the age of eighteen years.

A combined reading of these provisions reveals that even a minor child viz., a son or daughter aged less than 18 years can claim maintenance under Section 125 (1) of the Code, only if the father or mother having sufficient means neglects or refuses to maintain him or her and he or she is unable to maintain. But, invariably, a minor child has to be presumed to be unable to maintain himself. A major child (not being a married daughter) can claim maintenance only if

1. The Explanation (a) has set at rest the divergence of opinion taken by the High Court of Madras, Calcutta and Kerala, Krishnawami Vs. Chandra vandan, AIR 1914, Mad 594. Amrithammal Vs. K. Marimuthu, AIR 1967 Mad 77; Hemantakumr Vs. Manorama AIR 1935 Cal. 488; Saraswati Vs. Madhava, AIR Ker. 297, respectively wherein it was held that only minor child could claim maintenance or one hand and by the Bombay High Court in Ahmed Mohmood Vs. Bai Fatima, AIR 1943 Bom. 38, Allahabad High Court in Abdul Vs. Azra Sikandar, AIR 1965 All.125, wherein contrary view was taken.

2. Maideen kutty Vs. Pathumma, 1985(1) HLR 37; In Norbat Vs. Smt. Tersa.1971 Cri.L.J.1496, it was held that child of 2 years is obviously unable to maintain itself;Qaiser Jahan Begum Vs. Rizwan Ullah Khan, 1979 All. C.C.3.
unable to maintain itself by reason of any physical or
mental abnormality or injury in addition to neglect or refusal to maintain on the part of his or her father or mother. The factor of neglect or refusal would be a question of fact deducible from the circumstances and the evidence of record.

It is pertinent to note that under the old Code of Criminal Procedure, 1898 a child of any age was eligible to claim maintenance viz., Nanak Chand Vs. Sri Chandra Kishore Agarwala. The Supreme Court held;

"In Section 488 of the Criminal P.C. the word 'child' is used in the reference to the father. There is no qualification of age; the only qualification is that the child must be unable to maintain itself there is not justification for saying that this Section is confined to children who are under the age of majority".

Now, clause (b) and (c) of the Code of Criminal Procedure, 1973 clearly envisages all the situation. A person is bound to maintain his legitimate or illegitimate minor son or daughter who is unable to maintain himself or herself. Such a child may be married or not. Similarly, a person is also bound to maintain his legitimate or illegitimate major son or major unmarried daughter who is unable to maintain himself or herself by reason of physical or mental abnormality or injury. One can note from these provisions as well as from the Supreme Court decision in

1. Moldeen Kutty Vs. Pathumma, 1985(1) HLR 37
2. Manoo Mal Saxena Vs. State, 1979 Cr.i.L.J.266
3. AIR 1970 S.C. 446
Nanak Chand case that the emphasis is always on the inability to maintain himself or herself. When a child is capable of maintaining himself no maintenance can be allowed to him.

(a) PATERNITY OF CHILD: Another point to be noted is that basis of an application for the maintenance of a child is the paternity of the child irrespective of his or her legitimate or illegitimacy. Thus, it is paternity not legitimacy which matters. A Division Bench of the Supreme Court comprising A.P. Sen and S. Natarajan, JJ., in Subanu alias Saira Banu vs. A.M. Abdul Gafoor while discussing the provisions of Section 125 of the Code has very lucidly observed:

"The Legislature being anxious that for the sake of maintenance, the dependents should not resort to begging, stealing or cheating etc., the liability to provide maintenance for children has been fixed on the basis of the paternity of the father and the minority of the child and in the case of major children on the basis of their physical handicap or mental abnormality without reference to factors of legitimacy or illegitimacy of the children and their being married or not".

The Apex Court in Sumitra Devi vs. Bhikan Choudhary

1. Ibid.
4. Ibid.
also laid down that:

"Under Section 125 of the Code of Criminal Procedure even an illegitimate minor child is entitled to maintenance. Even if the fact of marriage is discarded, the minor child being found to be an illegitimate daughter of the respondent would be entitled to maintenance."

Therefore, once it is proved that the man against whom maintenance proceedings are instituted, is the father of the child, irrespective of the fact that the mother of the child is of bad character, or unchaste, or kept concubine of the father, that father will be bound to provide maintenance to such child provided other conditions of Section 125 are fulfilled. But, where the paternity of the child is in doubt, the father cannot be burdened with the maintenance order. In Hari Krishan Vs. Shanti Devi, M.C. Jain, J., of the Rajasthan High Court rightly observed that for the claim of maintenance to a child under Section 125 Criminal Procedure Code paternity is the jurisdictional fact which should be established. In the absence of which the application for maintenance under Section 125 would not be


The Supreme Court has also observed in *Nand Lal Vs. Kanoya Lal* that:

"The basis of an application for maintenance of a child is the paternity of the child irrespective of its legitimacy or illegitimacy. The Section by conferring jurisdiction or the Magistrate to make an allowance for the maintenance of the child, by necessary complication, confers power on him to decide the jurisdictional fact whether the child is the illegitimate child of the respondent. It is the duty of the Court, before making the order, to find definitely, though in summary manner the paternity, of the child."

Thus, paternity of the child being the basis of maintenance order, it is the bounden duty of the Court to record a finding on that issue before passing the order of maintenance. Consequently, if the paternity of the child is a determined fact, the child becomes legally entitled to claim maintenance from such father, irrespective of the fact, whether the marriage between such father and mother is a nullity or even if the fact of marriage is discarded. In

2. Emphasis added.
5. *Sumitra Devi Vs. Bhikam Choudhar*, 1985 Cri. L.J. 528,
State of M.P. Vs. Somati, it was held that a child can claim maintenance against its mother’s paramour even when its mother’s legal marriage with her husband is not dissolved. The child to succeed is to show non access of its mother’s husband to its mother. The Supreme Court in Pathumma Vs. Mohammad, speaking through Dutt, J., held that the question as to whether applicant was married wife or whether child was illegitimate child were pre-eminently a question of fact and High Court was not justified in substituting its own view. A father is also bound to provide maintenance to his child even though the child may be living with its mother who refuses to return to her husband under a decree for restitution of conjugal rights. It was also held in Nanoo Mal Saxena Vs. State by P.N. Bakshi, J., of the Allahabad High Court that the ‘right of the wife and the child to be maintained by the husband are each independent rights. One is not correlated to the other. Mr. Justice Bakshi has also observed in Smt. Kaiser Jahan Begum Vs. Rajvan Ullaah Khan that right of child to claim maintenance allowance from their father is independent of the mother’s right to maintenance.

1. 1971 MPLJ 235.
It is almost undisputed that the application for maintenance under Section 125 of the Code can be filed by the child itself or by its mother on its behalf. If the mother claims maintenance for the child, the burden of proof as to the paternity of the illegitimate child lies on the mother. If the child itself files application the burden of proof lies on him or her. In A.S. Thangiah Vs. T. Alex it was held that 'admission of paternity of an illegitimate child by alleged putative father is not relevant to infer paternity. Burden is on the mother to prove the child was born only to alleged father through an exclusive relation with him'. The mere statement on oath of the mother who asserts that a certain man to whom she is not married is the father of the child. Justice J.L. Bhat of the Kerala High Court has very correctly summed up the law position in this regard in Mohammed Vs. Saulekha. His lordship held:

2. Moti Ram Vs. 1st Addl. District Judge, ubid; Ahalaya Vs. Chhelia 1992(2) HLR 82; LokramVs. Sundara, 1976 Cr.LJ 1962; Agunna Rao Vs. Tara Bena Rani, 1971m Cr.LJ 1044; Mahadeva Rao Vs. Yesoda Bai AIR 1962 Mad.141; In Rama Krishnas Vs. Kali, 1988(1) HLR 689; the Kerala High Court held that even a person having sufficient interest in child can file application on its behalf. Durairaju Vs. Neela, 1976 Cr.LJ 1507 Devki Vs. Kitto, 1967, Cr.LJ 1640;
2A. N.A. Laxman Vs Surindra Supra
3. 1990 Mat. LR 162
4. Agunna Rao Vs Tara Beha Rani supra
5. And Mohammed Vs Pathumma, 1984 HLR 655; Appeal by special leave were filed against the decisions in both the revision petitions. The Supreme Court while uphold the dismissal of maintenance claim of wife by the High Court, allowed maintenance to daughter Sulekha, which
was denied by the High Court.

"If the question is whether a particular person is the father of an illegitimate child, it is a prima-facie not proper to accept without corroboration the mere statement on oath of the mother, who assert its. It is obviously for her benefit to secure a father for her child, who will relieve her of the burden of providing for the up keep of the child. Her evidence can only be regarded as interested. Atleast as a matter of prudence, courts must seek corroboration of the oral testimony of the mother."

His lordship further took a very realistic view:

"There is no presumption that whenever a woman asserts that such and such person is the father of her illegitimate child, her case must be true on the other hand Court's always seek corroboration of her testimony. Equally, the Courts cannot in all cases insist on the person, who is alleged to be the father of the child to allege and prove any motive for the women to put forward such a case."

So, a mother can claim maintenance for her child from her paramour if she could prove that she was exclusively under his control and that her husband had no access to her even if her marriage was subsisting. Thus, as rightly held by the Kerala High Court in C.Vijayan Vs. C.Kanthiayank, that the paternity could be found outside marriage, when there non-access on the part of the husband and access on the part of another is proved. The question of access of non-access must be considered with reference to the time when the child could have been begotten.

2. I(1989) DMC 236 at 238.
Mr. Justice D.Naronha of the Karnataka High Court in *Lokamms Vs. Sundaraa* maintenance case under the Code directed the parties to undergo blood grouping test to determine the disputed paternity under Section 401 read with Section 397 and also with Section 482 of the Criminal Procedure Code, 1898. In this case the parties had consented to undergo the test. Recently, when on the Deoxyribonucleic Acid Test, the paternity was established and trial Court granted maintenance to the child, the Kerala High Court affirmed the decision of the trial court in *Kunhiraman Vs. Manoj*.

From the above discussion, it is obvious that before a person may be ordered to pay maintenance to a child, it must be proved and established that the child is his child. Though a father is bound to maintain his legitimate as well as illegitimate child, yet he is not liable to maintain the child of another man.

(b) CUSTODY OF CHILD NO EFFECT ON HIS RIGHT TO MAINTENANCE:
Now, let us critically examine another very significant aspect of children's right to maintenance. Where a child or on its behalf its mother files an application, can the father insist that the child should be given in his custody

1. 1976 Cr. LJ 1962
2. 1992 (1) HLR 48
as a condition precedent for maintaining the child. Would the child’s conduct in refusing to live with the father disentitle him or her to claim maintenance under Section 125 of the Code? The High Courts have taken the view that the child is always entitled to maintenance under the Code irrespective of the fact that he or she resides with mother. The question whether the mother or the father is entitled to the custody of the children cannot be decided in a summary manner under Section 125 of the Code. The proper forum to decide the question of custody is Civil Courts.

The right of child to claim maintenance under Section 125 being independent, therefore, even if the wife’s claim to maintenance is rejected on the ground of her living separately without sufficient reasons, the fact will not effect the child’s claim to maintenance.


Therefore, the scheme of Section 125 obviously reveals
that the actual custody of the children is irrelevant for the purpose of deciding the question of their maintenance under that Section. Wherever children of a person would be, they are entitled to claim maintenance under Section 125 of the Code. The rational behind this proposition is that minor children are generally not capable of taking a decision or exercising their own will or volition, whether offer of their father to maintain them, provided they stay with him, should be accepted or refused.

Recently, in *Naresh Chandra Vs. Mrs Reshma Bai*, P.O.N.S. Chouhan, J., of the Madhya Pradesh High Court upheld the award of interim maintenance in favour of minor child even where the status of marriage of its father and mother was under cloud.

(C) EFFECT OF DAUGHTER’S MARRIAGE ON HER RIGHT TO MAINTENANCE

A major married daughter is now specifically and statutorily debarred from claiming maintenance under Section 125 (1) (c) of the Code. After the marriage of a major daughter, it is not her father, but her husband who is liable to maintain her. Even in the case of major infirm married daughter it is the husband’s liability to maintain her. The position of

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1. Koli Odla Vs Bai Balu, 1973 Cr. LJ 1103;
2. 1992 (2) HLR 85
3. S.C.Deo VS Kumari Rajmani Deo, 1985(2) HLR 675 (Ori.)

Per Mahapatra, J.

minor married daughter’s right to maintenance is clear from
clause (b) of Section 126(1) of the Code. A minor daughter can claim maintenance from her father till she attains the age of majority, whether she is married or not. Therefore, even a married minor daughter can claim maintenance from her father.

(D) A SALUTARY PROVISION OF MAINTENANCE UNDER THE CODE TO MAJOR INFIRM CHILDREN: A timely, helpful and healthy provision has been enacted in clause (c) of Section 125(1) of the new Code of 1973. Now, even a major child, not being a married daughter, can claim maintenance under the said Section if the child by reason of any physical or mental abnormality or injury is unable to maintain itself. In case of major infirm married daughter liability to maintain them is imposed on their husbands. No such provision for major infirm children existed in the old Code of 1898. This new provision of the Code of 1973 is certainly a practical and beneficial provision for the physically handicapped children.

The word 'injury' used in clause (c) of Section 125(1) was explained by the Madras High Court in T.P.S.H. Selva Saroja Vs. Sasinathan. The facts of the case reveals that an unmarried daughter aged about 31 years living away from her widowed mother claimed maintenance under Section 125 of

1. Harish Chander Vs Santosh Kumari, I(1985) DMC 335(Del.)
3. 1989 Cr. LJ 2032
the Code on the ground that the movement of her mother with another man had caused a grave damage to the reputation of her family and also caused 'injury which could be related to her inability to maintain herself, is not entitled to maintenance under Section 125 (1) of the Code. The daughter on the other hand intended to take benefit of Section 44 of the Indian Penal Code, 1869 wherein the term injury is defined as follow:

"The word 'injury' denotes' any harm whatever illegally caused to any person in body, mind, reputation or property".

As the word injury is not defined in the Code of Criminal Procedure, 1973, therefore, in terms of Section 2(y) of the Code, the words and expression used and not defined but defined in Indian Penal Code have the meaning respectively assigned to them in that Code, so it was argued by the daughter that the injury in her mind comes within provisions of clause (c) of Section 125(1) of the Code. The High Court rejected the argument and held:

"The net result of the analysis leads to the conclusion that the word 'injury' used in Section 125(1) (c) Cr.P.C. will have to be read in the context of inability to maintain, which does not require recourse to the definition of injury in the Indian Penal Code. Paragraph 6 of the maintenance petition where the word 'injury' in the mind of the petitioner has been used does not really come within the scope of the injury contemplated under Section 125 (1)(c) Cr. P.C."

Thus, to entitle a major child to maintenance under clause (c) of Section 125 (1), the nature of 'injury' must be such as leads to the inability to maintain itself.

(E) CAN MOTHER BE LIABLE TO PAY MAINTENANCE TO HER CHILDREN
(E) CAN MOTHER BE LIABLE TO PAY MAINTENANCE TO HER CHILDREN UNDER SECTION 125 OF THE CODE: The question has not been examined by the Courts. May be that the lawyers never thought of advising the children to seek maintenance from mothers, as generally the notion was and still it is so, that only father of a child is liable to pay maintenance to the children. It seems that this notion has originated from the use of the word 'his' in clause (b) and (c) of sub. Section (1) of Section 125 of the Code. Now, the most significant question is, whether mother can be directed to pay maintenance to her children?. The Supreme Court while holding the married daughter’s liability to pay maintenance to her father in *Smt. Vijaya Manohar Arbal Vs. Kashrao* observed that the word 'his' used in clause (d) of Section 125(1), includes both male and female. Taking assistance from the provisions of Section 2(y) of the Criminal Procedure Court read with section 8 of the Indian Penal Code, 1869 and Section 13(1) of the General clause Act., their Lordships of the Apex Court held that the pronoun 'his' as used in clause (d) of Section 125 (1) Criminal Procedure Code includes both male and female. With the same analogy, the word 'his' as used in clause (b) and (c) of Section 125(1) of the Code will includes both male and female viz., son and daughter. The use of the word 'person' in the opening sentence of the sub Section (1) of Section 125 is also significant. Therefore, in view of both these

provisions, a mother is obviously liable to pay maintenance to the children. It will also be a beneficial construction in favour or destitute children, particularly in the case of those children whose father is dead or whose father is not having good resources whereas his or her mother is a financially sound widow. Take the instance of T.P.S.H. Selva Sarojia Vs. Sasinathana, where after the death of the father, the mother took over as Managing Director of a Private Limited Company. In this case the daughter filed application for maintenance against her widowed mother, but it was rejected as she was major aged 31 years without any physical mental abnormality or injury. Interestingly, in this case an argument was advanced on behalf of the mother that she cannot be directed to pay maintenance to her daughter since such course does not appear to be contemplated under Section 125 of Criminal Procedure Code. But this question was not gone into. The case specifically decided on the basis on the majority age of the daughter. It is pertinent to note that the daughter’s application was considered and decided on merit, by the High Court, therefore, it can be averred that daughter’s right to claim maintenance from her mother under the Code is impliedly recognised. Moreover, Arunachlam, J., himself observed in this case:

"However, one cannot overlook that in context of the social purpose and the moral obligation cast on the mother she could be easily excluded from her liability once it is shown that she was

1. 1989 Cr.LJ 2032.
sufficient means of her own independent of the father and child would come within the provision of Section 125 (1) (b) or (c).

Consequently, it may be asserted that mother's liability to maintain the child is equal to that of father in this era of equality, she cannot escape her liability to maintain the child if other requirement of Section 125 are fulfilled.

2. MAINTENANCE TO CHILDREN UNDER THE HINDU ADOPTION AND MAINTENANCE ACT, 1956: The personal obligation envisaged under old Hindu Law of the parents to maintain their children is recognised in Section 20 of the Hindu Adoption and Maintenance Act, 1956. A Hindu child has been given the right to claim maintenance under Section 20 of the Hindu Adoption and Maintenance Act, 1956, which runs as follow:

1) Subject to the provisions of this section a Hindu is bound, during his or her lifetime, to maintain his or her legitimate or illegitimate children and his or her aged or infirm parents.

2) A legitimate or illegitimate child may claim maintenance from his or her father or mother so long as the child is a minor.

3) The obligation of a person to maintain his or her aged or infirm parent or daughter who is unmarried extends insofar as the parent or the unmarried daughter, as the case may be, is unable to maintain himself or herself out of his or her own earning or other property.

Explanation: In this Section 'parent' includes a childless stepmother.

So, this Section 20 enacts provision of maintenance in favour of Hindu children as well as parents. Under this Section, the statutory right of maintenance is given to:

1. Thupasi Kumar VS Raghvan Nair, IR 1985 Ker.20; Smt.Krtishna Vs KJunior Land Reform Officer, AIR 1982 Cal.83
- minor sons, legitimate or illegitimate
- minor daughters, legitimate or illegitimate
- to claim maintenance from his or her
- father or
- mother.

- An unmarried major daughter can claim maintenance from her father or mother.
- if she is unable to maintain herself out of her own earning or other property.
- In Section 3(c) of the Act the word minor is defined to mean a child who has not completed his or her age of eighteen years.

The judiciary has rightly taken the view that an adopted child comes within the ambit of the legitimate child. It is pertinent to note that under Section 20 of this Act, the child has been specifically given the right to claim maintenance from his or her mother also. Secondly, an unmarried daughter can claim maintenance even if she is major provided she is unable to maintain herself out of her own earning or other property. It is important to note that an obligation to maintain daughter includes an obligation to provide for her marriage expenses, as Section 3(b) (ii) clearly defines the term maintenance that ‘in case of an unmarried daughter, also a reasonable expenses of and incidents to her marriage, but, if unmarried daughter gets share in the property, she will not be entitle to a provsision being made for her marriage expenses. In Laxami

1. Nandi Kishore Vs Bhupindra AIR 966 Cal.181
Vs. Krishna. The Mysore High Court held that the question of unmarried major daughter as to her own earning or property is question of fact and therefore, no presumption can be made that a college going girl is capable to maintain herself.

Under old Hindu Law, though there was an obligation on the father to maintain his legitimate daughter until her marriage, yet an illegitimate daughter was not entitled to maintenance against her putative father. Moreover, a female Hindu was under no obligation to maintain her children. Thus, Section 20 of the Act departs on these notions of old Hindu Law and makes provisions of maintenance to illegitimate daughter and also imposes obligation on the mother to maintain her children. The distinction drawn by the old law in regard to the extent of an illegitimate child's right has now been obliterated.

The Mysore High Court has rightly held in Laxmi Vs. Krishna, that children, having good reasons for living separately from her father, are entitled to maintenance under Section 20 of the Act. Therefore, the daughter living

1. AIR 1968 Myr. 268
2. Mayone's Hindu Law, Ed. 13th, p. 1079
3. Sonam Vs Kun Zang AIR 1982 Sik 26
5. AIR 1968 Myr. 26
6. Annamalai Vs Perumaya AIR 1965 Mad. 139; Dodiypa K.P. Rao Vs K. Jaya, AIR 1986 AP. 126
separately from her father on the ground that in the presence of her natural mother, the father has taken another wife, such circumstances are sufficient to justify her living separately and she was held entitled in Laxmi case to maintenance under Section 20 of the Act.

In Adam Vs. Gopale Krishna, the Madras High Court allowed maintenance under Section 20 of the Act to an illegitimate son of a Muslim through a Hindu concubine. Though, sub Section (1) of Section clearly imposes the obligation of maintenance of the children, on a Hindu, yet the Court taking assistance of sub. Section (2) of Section 20 allowed maintenance to such illegitimate child from a Muslim putative father. But, if we read the sub. Section (1), (2) and (3) together it is clear that while sub. Section (1) imposes obligation on a 'Hindu' to maintain his children as parents, sub. Section (2) and (3) deals with period and circumstances, when the children or parents are entitled to maintenance. Therefore, the decision of Adam case is not true construction of the provision of Section 20 of the Act.

1. Supra
2. AIR 1974 Mad. 232; See also Balasatya Vs. Varalakshmi, AIR 1976 A.P. 365
3. Ibid
4. In Mayne’s Hindu Law also, the decision is termed as incorrect decision, p.1080, Ed.13th.
3. MAINTENANCE TO CHILDREN UNDER THE INDIAN DIVORCE ACT, 1969
AND THE PARSI MARRIAGE AND DIVORCE ACT, 1936 (AS AMENDED BY
1988 AMENDMENT ACT): Under Chapter XI of the Indian Divorce
Act, 1869, the provisions are enacted for the custody,
maintenance and education of minor children in case of the
suit of judicial separation between the parents, the Court

1. Sec.41 Power to make orders as to custody of children in
suit for separation-In any suit for obtaining a
judicial separation the court may from time to time
before making its decree, make such interim orders, and
may make such provision in the decree, as it deem
proper with respect to the custody, maintenance and
education of the minor children, the marriage of whose
parents is subject to such suit, and may, if it thinks
fit direct proceedings to be taken for placing such
children under the protection of the said court.

Sec.42 Power to make such orders after decree" The
court, after a decree of judicial separation, may upon
application (by petition) for this purpose, make
from time to time, all such orders, and provision, with
respect to the custody, maintenance and education of the
minor children, the marriage of whose parents is the
subject of the decree or for placing such children
under the protection of the said court, as might have
been made by such decree or by interim orders in case
the proceedings for obtaining such decree were still
pending.

43. Power to make orders as to custody of children in
suits for dissolution or nullity-In any suit for
obtaining a dissolution of marriage or a decree of
nullity of marriage instituted in, or removed to, a
High Court, the Court may from time to time, before
making its decree absolute or its decree (as the case
may be) make such interim orders, and may make such
provision in the decree absolute or decree, and in any
such suit in a District Court, the Court may from time
to time, before its decree is confirmed, make such
interim orders, and may make such provision on such
confirmation, as the High Court or District Court (as
the case may be) deems proper with respect to the
custody, maintenance and education of the minor
children, the marriage of whose parents is the subject
of the suit, and may, if it thinks fit, direct
proceedings to be taken for placing such children under
the protection of the Court.

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is empowered under Section 41 of the Act to make such interim orders and may make such provisions in the decree, as it deems proper with respect to the custody, maintenance and education of minor children. The Court, may, if it think fit, direct proceedings, to be taken for placing such children under protection of the said court. After the passing of judicial separation decree, the Court can make such orders and provisions under Section 42 of the Act. Similar, provision is envisaged in case of a decree of restitution of conjugal rights under the Act.

PARSI CHILDREN: Chapter V of the Parsi Marriage and Divorce Act, 1936 deals with 'children' of the parties. Under Section 49 of this chapter, the Court is empowered 'in any

44. Power to make such orders after decree or confirmation: The High Court after a decree absolute for dissolution of marriage or a decree of nullity of marriage, and the District Court after a decree of dissolution of marriage or of nullity of marriage has been confirmed, may, upon application by petition for the purpose, make from time to time all such orders and provision, with respect to the custody, maintenance and education of the minor children, the marriage of whose parents was the subject of the decree, or for placing such children under the protection of the said Court, as might have been made by such decree absolute or decree (as the case may be), or by such interim orders as aforesaid.

1. Suit by minors-Where the petitioner is a minor, he or she shall sue by his or her next friend to be approved by the Court; and no petition presented by a minor under this Act shall be filed until the next friend has undertaken in writing to be answerable for costs. Such undertaking shall be filed in Court, and the next friend shall thereupon be liable in the same manner and to the same extent as if he were a plaintiff in an ordinary suit.
suit under the Act,’ to pass from time to time such interim orders and make provisions in the final decree, as it may deem just and proper with respect to the custody, maintenance and education of children under the age of 18 years. Thus, while under Indian Divorce Act, the order of maintenance can be passed in case of decree of judicial separation, dissolution of marriage or nullity of marriage, the Court is empowered to make such orders under the Parsi Act in any suit under the Act’. Moreover under the Parsi Act, the Court may, after the final decree upon application by petition for the purpose may revoke, suspend or vary such order or provision. So the jurisdiction conferred on Court regarding custody, maintenance and education under Parsi Act is more wider than the one conferred under Indian Divorce Act.

(4) MUSLIM CHILDREN’S RIGHT TO MAINTENANCE : It is significant to point out that High Court have taken very healthy view that even a Muslim illegitimate child is entitled to claim maintenance under clause (b) or (c) of Section 125(1) of the Code of Criminal Procedure, 1973. Justice B.P. Beri of the Rajasthan High Court in Sukha Vs. Ninno noted that ‘according to Mohammedan Law, it is not duty of a man who has begotten an illegitimate child to

2. AIR 1966 Raj. 163
maintain it. Though, in the case Beri J., uphold the right of Muslim minor child on account of and agreement to that effect, yet he has very rightly observed:

"As a matter of fact, maintenance of an illegitimate children has been statutory recognised under Section 488 of the Code of Criminal Procedure, (Section 125 of the Cr.P.C.,1973) in our country and it is in consonance with this wholesome public policy that the offsprings born under such circumstances are to be provided for and should not be left to the misfortunes of vegrancy and its attendant social consequence". (2)

Another important point to be noted is that the Muslim children's right to maintenance under the code is independent of their mother's right, therefore, exclusion of Muslim divorced wife from the purview of Section 125 of the Criminal Procedure Code by the Muslim Women (Protection of Right on Divorce) Act, 1986, will have no effect on Muslim children right to claim maintenance under the Code. It is interesting to note that in Section 3(1) (b) of the Muslim Woman Act, it is provided that

"Notwithstanding anything contained in any other law for the time being in force, a divorced wife shall be entitled to:

b) Where she herself maintain the children born to her before and after her divorce, a reasonable and fair proviso and maintenance to be made and paid by to her former husband for a period of two year from the respective dates of birth of such children".

The question which arises for consideration is, whether

1. ibid, to conclude this, the Bombay High Court decision in Roshanbai, VS Suleman AIR 1944 Bom.213 was followed.

2. Bracket added.

there is a conflict between Section 125 of the Code and the provisions of Muslim Women Act. Justice Baskar Rao of the Andhra Pradesh High Court has very held in Shaik Mahbood Rasha Vs. Shaik K.Bequm that there is absolutely no provision in the Muslim Women Act governing the question of maintenance of children aged above 2 years and therefore the question of conflict does not arise. Thus, there is absolutely no repugency between the two provision. It therefore follows that it cannot even hold that there is implied repeal of Section 125 as regards the children above 2 years. Lateron Justice Baskar Rao again reiterated in M.A.Hameed Vs. Arif Jan that right of child to claim maintenance under Section 125 of the Code is not taken away by Section 3 of the Muslim Women Act, but it has given additional safeguard to child. Justice T.D.Singla of the Bombay High Court is Siraj Sahebji Muyawar Vs. Smt. Roshan has taken the view that right of children is not effected by the provision of Section 3(1) (b) of Muslim Women Act.

1. 1989 Cr.LJ 2295 D/-30.3.1989
2. 1990 Cr.LJ 96 D/- 5-9-1988
3. AIR 1990 344, this case is decided in Civil Suit filed under Mohammadan Law.