

MAINTENANCE AND CUSTODY

THE LEGAL rules relating to the maintenance and custody of children are found in the personal laws (including statutory) of the various religious communities, and in the Criminal Procedure Code. There is, therefore, no uniformity in this matter except to the limited extent to which the provisions of the Criminal Procedure Code apply. We shall first deal with the latter and then proceed to examine the personal laws of the different religious communities.

**I MAINTENANCE OF CHILDREN AND THE
CRIMINAL PROCEDURE CODE**

The old Criminal Procedure Code of 1898 contained a few provisions relating to maintenance of children and other near relatives.¹ The old Code was replaced in 1973 by an entirely new Criminal Procedure Code. In the new Code, the relevant provisions are found in chapter IX (sections 125-128).

Section 125 provides, *inter alia*, that if any person "having sufficient means" neglects or refuses to maintain his child "unable to maintain itself", a magistrate of first class may "upon proof of such neglect or refusal, order such person to make a monthly allowance for" its maintenance. The provision applies equally to legitimate as well as illegitimate children² and also both to male and female children, whether married or unmarried.³ A "child" covered by this provision normally

1. See Criminal Procedure Code, 1898, s. 488.
2. Criminal Procedure Code, 1973, s. 125 (1) (b).
3. *Ibid.*

means a minor within the meaning of the Indian Majority Act, 1875. The Act of 1875 excludes from the purview of its general provisions certain personal law matters, but maintenance is not among them. In other words, maintenance orders can be made under the Code in regard to a child normally up to 18 years of age and, in the case of a child under the authority of the Court of Wards, till it attains the age of 21 years. Also, under the Code, an order can be made for maintenance of a major child—son or unmarried daughter—who is unable to maintain himself or herself by reason of any “physical or mental abnormality or injury”.⁴ Thus, physically or mentally retarded children, even if major (*i.e.*, above 18 years of age) have to be maintained by the parents except in case of a major married daughter. In case of a married daughter who is a minor, she is to be maintained by the father if the husband is not possessed of sufficient means to maintain her.⁵

It is notable that there is no provision in the Code regarding a widowed daughter who is not a minor. If such a daughter cannot maintain herself, neither can her parents nor her in-laws be compelled by the criminal courts to maintain her under the provisions of the Criminal Procedure Code of 1973; and this seems to be a lacuna in the Code.

The allowance payable under any of the above provisions will be as the “Magistrate thinks fit” but cannot exceed Rs. 500 a month.⁶ The mode of payment is also to be decided by the court.⁷

Failure to comply with an order for maintenance made under the Code, entitles the court to issue a warrant for levying the amount due “in the manner provided for levying fines”, and if the amount still remains unpaid, to sentence the defaulter to imprisonment up to one month till the amount due is paid.⁸

The maintenance order for a child once made under the Code may at any time be suitably altered depending on the circumstances of the case.⁹

But for the flaw referred to above, namely, the absence of any provision applicable to a widowed daughter or daughter-in-law, the provisions of the new Criminal Procedure Code including its penal sanctions seem to be quite progressive and favourable to children.

4. *Id.*, s. 125 (i) (c).

5. *Id.*, s. 125 (1) (a).

6. *Id.*, s. 125.

7. *Ibid.*

8. *Id.*, s. 125 (3).

9. *Id.*, s. 127.

II HINDU LAW

The law of children's maintenance applicable to Hindus, Jains, Buddhists and Sikhs, is contained in the Hindu Adoptions and Maintenance Act, 1956. Since the law applicable prior to 1956 has now been repealed, no useful purpose will be served by discussing it in the present work.¹⁰ We, therefore, confine ourselves only to the Act of 1956.

The Hindu Adoptions and Maintenance Act, 1956 includes three distinct provisions relating to maintenance of :

- (a) a person's minor sons and daughters;
- (b) a person's widowed daughter-in law;
- (c) other minor relatives of a person.

Section 20 of the Act provides that every Hindu (father or mother) is bound to maintain his or her minor children—whether legitimate or illegitimate. A minor Hindu child (*i. e.*, a child below the age of 18 years)¹¹ can claim maintenance either from his or her father or mother.¹² No order of preference is laid down in this connection between father and mother. The obligation to maintain the children, it is notable, is personal and does not depend on the parent having any property, ancestral or otherwise.¹³ Maintenance can be claimed by the issues from either parent only during minority, except in the case of an unmarried daughter who can claim it till she gets married.¹⁴ In all cases, however, the issues' right to claim maintenance is subject to the condition that the claimant himself or herself has no means to maintain himself or herself.¹⁵

Section 19 of the Act imposes, on the Hindu father-in-law, an obligation to maintain his widowed daughter-in-law, whether minor or major, if the latter cannot maintain herself out of her own income or out of her late husband's estate or her parents' estate or from her own son or daughter or their estate. The obligation is, however, subject to his having a coparcenary property in his possession.¹⁶ So, if he has considerable self-acquired property or income, but no ancestral property, he need not provide any maintenance to his widowed daughter-in-law, even if minor and destitute. Also, if the father-in-law is dead, the obligation would

10. Reference may be made to S. V. Gupte, *Hindu Law of Adoption, Maintenance, Minority and Guardianship* 134-188 (1970).

11. Hindu Adoptions and Maintenance Act, 1956, s. 3(c).

12. *Id.*, s.20 (2).

13. *Supra* note 10 at 360.

14. *Supra* note 11, s. 20 (3).

15. *Id.*, s. 20 (1).

16. *Id.*, s. 19 (2).

not pass on to the mother-in-law. In view of these flaws in the law, it is desirable to confer on a widowed daughter the same right to claim maintenance from her parents as is enjoyed by an unmarried daughter, if she is not adequately maintained by the family of her deceased husband. This should be more so if the widowed daughter is a minor.

Section 22 of the Act provides that heirs of a deceased Hindu are bound to maintain the "dependants" of the deceased. Such "dependants" include the following relations of the deceased:¹⁷

- (a) son, grandson, great grandsons;
- (b) daughter, son's daughter, son's son's daughter—if unmarried;
- (c) widowed daughter;
- (d) son's or grandson's widow;
- (e) minor illegitimate son;
- (f) illegitimate daughter if unmarried.

The maintenance of dependants is hedged by several restrictions, particularly by the restriction that the heirs are bound to maintain the dependants of the deceased out of the estate inherited by them from the deceased. It is not necessary to go into the details of the restrictions here.

The obligation of heirs to maintain the "dependants" of the praepositus—even if minor—corresponds to their shares in the property of the praepositus; it is in no case personal.¹⁸ This seems to be a flaw. At least in regard to such close relations as a minor sister, the obligation could be made personal.

For all purposes and in regard to all persons entitled to maintenance under the Act of 1956 "maintenance" includes (i) food; (ii) clothing; (iii) residence; (iv) education; and (v) medical aid. In case of unmarried daughters, it includes also reasonable expenses of marriage.¹⁹

The amount of maintenance which a child under any of the three categories above can claim is to be decided in each case by the court.²⁰ For this, the Act gives some guidelines to the court which include:

- (a) reasonable wants of the claimant;
- (b) position and status of the claimant and the obliged person;
- (c) the claimant's own resources.²¹

17. *Id.*, s. 21.

18. *Id.*, s. 22.

19. *Id.*, s. 3 (b).

20. *Id.*, s. 23 (1).

21. *Id.*, s. 23 (2).

A Hindu child who ceases to be a Hindu by conversion to another religion loses all his rights to claim maintenance from anybody under the Act of 1956.²² This communal provision seems to be rather misplaced; and it conflicts with the Caste Disabilities Removal Act, 1850.

Besides, the Hindu Adoptions and Maintenance Act, 1956, the Hindu Marriage Act, 1955 empowers the courts granting various matrimonial remedies provided for under the Act to pass suitable orders relating to the maintenance, education, and custody of the children, any,²³ such orders have to be consistent with the wishes of the children.²⁴ Both final as well as interim orders may be passed for this purpose.²⁵ In making an order of custody of the children by the court the paramount consideration is their welfare.

The criminal and civil laws of maintenance thus exist side by side. The H.A.M.A, 1956 does not repeal provisions of Criminal Procedure Code or *vice versa*.²⁶ The important differences between the provisions of the Criminal Procedure Code and the Hindu Adoptions and Maintenance Act, 1956 may be noted. Firstly, the coverage of the latter is wider in that it covers the widowed daughter-in-law and dependants of the deceased. Secondly, the maximum amount fixed in case of the former is Rs. 500, but no such maximum is fixed in case of the latter. Thirdly, there are strict sanctions in complying with the orders issued under the Criminal Procedure Code as compared with the orders issued by the civil courts under the Hindu law. Fourthly, the provisions of the Criminal Procedure Code apply whether the claimant has ceased to be a Hindu or not. The two provisions are not mutually exclusive. The right to maintenance can be enforced not only under the Criminal Procedure Code, but also under the Hindu law. It has been held that mere existence of a decree of a civil court awarding maintenance will not oust the jurisdiction of a criminal court, though the magistrate in such a case is to make clear in his order that anything paid under the decree of the civil court will be taken into account against anything which he may order to be paid.²⁷ Further, even if a child has obtained an order for maintenance under the Criminal Procedure Code he will be entitled to maintain an action for maintenance under the Hindu law.

It is notable that though a widowed daughter-in-law is entitled to seek maintenance from her father-in-law (if the latter has coparcenary

22. *Id.*, s.24.

23. Hindu Marriage Act, 1955, s. 26.

24. *Ibid.*

25. *Ibid.*

26. *Nanak Chand v. Chandra Kishore*, A. I. R. 1970 S. C. 446.

27. *In re Taralakshmi Manuprasad*, A. I. R. 1938 Bom. 499.

28. See S. V. Gupte, *supra* note 10 at 329.

property), neither the Act of 1956 nor the Criminal Procedure Code provision entitle a daughter-in-law whose husband is alive to seek a maintenance order against her father-in-law, even if the husband is missing or absconding or has been jailed for a long term, or has deserted her. In these cases she can seek divorce, but not a maintenance order against her in-laws.

III LAW OF CIVIL MARRIAGE

Under the Special Marriage Act, 1954, provisions identical with the above provisions of the Hindu Marriage Act, 1955 are found relating to the courts' power to pass interim and final orders regarding the maintenance, custody and education of children while entertaining a petition for any matrimonial remedy.²⁹ Under both the Acts, such orders may be suitably varied, altered, suspended or cancelled.³⁰

IV PARSI LAW

The provisions contained in the Hindu Marriage Act, 1955 and Special Marriage Act, 1954, relating to the custody, maintenance and education of children, were first made under the Parsi Marriage and Divorce Act, 1936. Section 49 of that Act confers the same powers on Parsi matrimonial courts as are conferred in this respect on the courts by the law of civil marriages and by Hindu law. The language of the provisions under the three laws is nearly identical. All of them provide adequate safeguards for the interests of children likely to be affected by matrimonial remedies if granted under the relevant law. There is, however, no specific statute applicable to the Parsis on the lines of the Hindu law. They are governed by the Criminal Procedure Code.

V CHRISTIAN LAW

As regards the Indian Christians, there is, like Parsis, no separate law relating to maintenance of children. However, the Indian Divorce Act, 1869 includes certain provisions relating to custody and maintenance of the children of those couples who seek judicial separation under that Act. These are contained in chapter XI. The court, hearing an application, for judicial separation, may make interim as well as final orders regarding the custody, education and maintenance of minor children.³¹ Similar powers are vested in the courts dealing with suits for dissolution of marriages or for nullity of marriages under the provisions of the Indian Divorce Act, 1869.³² The children may even be put under the protection of the courts.³³

29. Special Marriage Act, 1954, s. 38.

30. *Ibid.*, also *supra* note 23.

31. Indian Divorce Act, 1869, ss. 41-42.

32. *Id.*, ss. 43-44.

33. *Id.*, ss. 41-44.

Like all other communities they are governed by the provisions of the Criminal Procedure Code.

VI MUSLIM LAW

In Muslim law a father is bound to maintain his son till he attains puberty.³⁴ Puberty for this purpose is placed according to Wilson at the completion of 18 years³⁵ and in Mulla's opinion at the completion of 15 years.³⁶ (Wilson's opinion seems to be rather without a basis). Daughters are to be maintained by the father till they get married.³⁷ It has been held by the Bombay High Court that a father is not bound to provide separate maintenance to a child who refuses to live with him *without a reasonable cause*.³⁸ But, if the child is in the custody of the mother who is living separately for a reasonable cause, the father's obligation is not taken away.³⁹ The child is entitled to be maintained by the father even where it is in the custody of the mother or, in her absence, in that of another female relative, under the principle of *hizanat*.

If the father is poor, his above mentioned obligations pass on to the mother of the children.⁴⁰ If she too is destitute the grandfather is in law bound to maintain the grandchildren.⁴¹ A father-in-law is under no legal obligation to maintain his daughter-in-law if widowed; this liability is of the girl's father, mother or grandfather.⁴² Even in their absence, the father-in-law is not bound to maintain her.

A father is not bound in the Muslim law to maintain his illegitimate children; only in the *Hanafi* law a mother is under a legal obligation to support her illegitimate minor children.⁴³

Apart from children, those would-be heirs of a Muslim who are within prohibited degrees of marriage are, during their minority in the case of males and up to marriage, in case of females, to be maintained by him or her.⁴⁴ Thus, a brother must maintain his minor brother and unmarried sister.

The custody (*hizanat*) of an infant in Muslim law belongs to the mother. In the *Hanafi* law it extends up to the age of 7 years in case of male

34. Fyzee, *Outlines of Muhammedan Law* 214 (1974).

35. R. K. Wilson, *Anglo-Muhammedan Law* 200 (1908).

36. Mulla, *Mahomedan Law* 346 (1972).

37. *Supra* note 34.

38. *Dinsab Kasimsab v. Mohmad Hussien*, (1944) 47 B. L. R. 345.

39. *Supra* note 34.

40. *Ibid.*

41. *Ibid.*

42. *Ibid.*

43. *Id.* at 215.

44. *Ibid.*

children and up to puberty in case of female children.⁴⁵ In *Shia* law her right is confined to a male child up to the age of 2 years and in case of daughters up to 7 years.⁴⁶ Even in case of separation from or divorce by her husband, these rules apply. These rules are to be discarded only if the mother is an "apostate, wicked or unworthy of trust".⁴⁷ During the mother's custody of the child under these rules, guardianship and maintenance of the child belong to the father.⁴⁸ Thus, where a child is living with both parents, neither of them can take it away. When the child is in the custody of the mother, or where she is disqualified, in the custody of the father, the other parent cannot be prevented from visiting the child.⁴⁹

In India, the rules relating to the mother's right to custody mentioned above have not been followed strictly by the courts; and the courts have in each case kept the interests of the child concerned as the paramount consideration.⁵⁰ This is quite in keeping with the reforms in this branch of family law introduced in recent years in some of the Muslim countries.⁵¹

VII CONCLUSION

The Muslim law and the modern Hindu law (applicable also to Sikhs, Jains and Buddhists) both are quite detailed in regard to maintenance of children. The statutory laws applicable to Christians and Parsis deal only with maintenance of children of those parents who seek any of the matrimonial remedies. However, the provisions of the Criminal Procedure Code, 1973, are applicable to all Indians alike. The religious as well as non-religious laws in this field suffer from some flaws as detailed in these pages above. It is desirable to have a uniform children's maintenance statute free from these flaws and applicable to all Indians irrespective of religion.

45. *Id.* at 198.

46. *Ibid.*

47. *Ibid.*

48. *Imabandi v. Mutsaddi*, (1918) 45 I. A. 73.

49. *Supra* note 34 at 199.

50. T. Mahmood, *Family Law Reform in the Muslim World* 273 (I.L.I., 1972).

51. *Id.* at 33-34, 53, 67-68, 71, 78, 84, 103, 111-12, 132, 134, 150, 163.