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TRANSFORMATION OF MAINTENANCE JURISPRUDENCE OF WIFE IN INDIA - STATUTORY LIMITS AND JUDICIAL EXPANSIONS

By Prof. Dr. P.B. Pankaja

From Faculty of Law, Dr. MGR Educational and
Research Institute, Chennai

By Prof. Dr. A. Aswini

From Dr. Ambedkar Global Law Institute, Tirupati

ABSTRACT

The legal framework governing maintenance rights of women in India, in general and of wife in particular, reflects a complex intersection of statutory mandates, religious personal laws, and judicial interpretation. While personal laws under Hindu, Muslim, Christian, and Parsi traditions prescribe distinct parameters for maintenance, the statutory limitations embedded within these frameworks often restrict equitable relief. Emergence of new forms of relationships also require statutory updating. However, Indian judiciary—particularly through progressive constitutional interpretation—has expanded the scope of maintenance beyond rigid personal law boundaries to ensure gender justice and socio-economic security.

The scope of the paper is limited to personal laws of Hindus and Muslims and critically examines how judicial pronouncements have transformed maintenance jurisprudence by invoking Articles 14, 15, and 21 of the Constitution. The analysis underscores the role of courts in harmonizing personal law obligations with universal human rights principles, effectively bridging the gap between formal legal entitlements and substantive justice.

By mapping statutory texts against evolving judicial trends, the paper argues that maintenance claims have transitioned from a purely personal law entitlement to a fundamental socio-economic right of women. It concludes by proposing a unified, gender-neutral legislative framework that reconciles personal law

pluralism with constitutional morality and the right to dignified livelihood for women.

Keywords: Maintenance jurisprudence, Personal Laws and Maintenance, Maintenance in new forms of relationship, Judicial Dynamism on maintenance, Statutory Interpretations on maintenance of women.

INTRODUCTION

Religious pluralism is one of the benchmarks of Indian democracy, which permits communities to follow and practice, to regulate and reinforce personal law matters according to their religious texts. They have been historically shaped by traditions deriving their authenticity from religious norms. However, religious pluralism has resulted in legal pluralism in matters of marriage, matrimonial remedies, adoption, guardianship and maintenance.

Maintenance to wife is one area where both personal law as well as secular law play complementary roles, but in this process, the cardinal principle of certainty is faded away and differential treatment is crept in. All religious personal laws do not speak with one voice with regard to wife's entitlement, husband's obligation, the quantum, the duration and the mode of payment. This diversity, though reflects constitutional accommodation of religious freedom in Articles 25 and 26, it also raises concerns of gender justice and equality enshrined in Articles 14 and 15. The seeming tension between these two sets of constitutional guarantees invited judicial interventions in many cases resulting in judicial balancing by harmonising personal laws with constitutional morality.

In this process, the Indian judiciary has transformed the law of maintenance of wife from a personal obligation into a constitutional entitlement, rooted in dignity, equality and gender justice. Through purposive interpretations, landmark rulings and harmonisation of statutes, courts have elevated maintenance claim as a tool of empowerment from a mere means of survival. It has also expanded the scope of law so as to be more inclusive with regard to second



wife and live-in-partner, according to the current changing social realities.

It is a doctrinal research paper with case analysis. Accordingly, this paper seeks to analyse the discussion into three main segments – Part I - The Maintenance rights of wife under Hindu law and Muslim law, the statutory and non-statutory provisions and their uniqueness and limitations. It starts with analysing the existing statutory provisions of Ss.24 and 25 of Hindu marriage Act 1955, S.18 of Hindu Adoptions and Maintenance Act 1956, Muslim Women (Protection of Rights on Divorce) Act 1986, S.125 of CrPC, and S. 20 of Protection of women from Domestic Violence Act 2005 and explores the statutory limitations. It is incidentally a comparative study of Hindu and Muslim personal laws.

Part II - The judicial contribution in transforming the maintenance jurisprudence from a narrow and rigid confinement to a wider and liberal construction so as to achieve the constitutional goals of social and gender justice. The contribution of High courts and Supreme court in the field of maintenance are traced through cases and how judiciary has transformed the maintenance jurisprudence through various interpretative tools. In all these analysis and case studies, the scope of the study is limited to Hindu law and Muslim law.

Part III – Suggestions and way forward.

PART I

Law, as a tool of social engineering, has made inroads into personal laws of Hindus and of Muslims and resulted in the piecemeal codifications. Legislative activism in the field of Hindu Law through codification has resulted in a unified law for all Hindus irrespective of their affiliations to different schools, castes and communities. Through enactments and amendments, repeals and deletions legislature has

¹ Hindu Marriage Act, 1955, ss 24–25 provide gender neutral entitlement, which is not found in any other personal law. Granting maintenance to a husband is

brought forth significant changes in the institution of Marriage and Maintenance. Comparatively, the legislative inroads are less in number under Muslim law and a very few legislations made by the Parliament are reactive to a particular situation or a judicial decision. This part of the discussion focusses on these legislative developments in the area of maintenance, both under Hindu law as well as Muslim law.

A. THE STATUTORY PROVISIONS GRANTING MAINTENANCE TO A HINDU WIFE

Maintenance, in Hindu jurisprudence, is a legal right of a wife, flowing from the marital relationship, intended to prevent destitution and to ensure dignified living of a wife. With codification of Hindu personal law, the right to maintenance¹ is governed mainly by the provisions of two personal law statutes and two secular law legislations.

- (i) Ss.24 and 25 of the Hindu Marriage Act, 1955 (HMA) and
 - (ii) Ss.18(1) and (2) of the Hindu Adoptions and Maintenance Act 1956 (HAMA).
 - (iii) Maintenance under S.125 Criminal Procedure Code, 1973 (CrPC)
 - (iv) Maintenance under Protection of Women from Domestic Violence Act 2005 (PWDVA)
- (i) **Maintenance under Hindu Marriage Act, 1955 (HMA):**

Maintenance under HMA is provided under two important sections namely Ss.24 and 25. Both are incidental and ancillary remedies, attached to the main matrimonial remedies of Restitution of conjugal rights (S.9), Judicial separation (S.10), Nullity of marriage of void and voidable marriage (Ss.11 and 12) and Divorce (13). While S. 24 provides for an interim relief in the form of maintenance *pendente lite* which includes litigation expenses during pendency of a matrimonial litigation, S.25 provides permanent alimony at the time of decree or subsequent thereto,

entirely a new concept accepted in the Hindu jurisprudence.



either in lumpsum or periodical or monthly. It is payable till the life time of the wife provided she is not remarried and she is remained chaste. These two sections are independent and distinct of each other. The unpaid maintenance is treated as a charge on the property or salary of the husband and can be recovered by attachment of the same² or by arrest and detention of the husband,³ in case of intentional evasion of court order for payment of maintenance to wife.

(ii) Maintenance under Hindu Adoptions and Maintenance Act 1956 (HAMA)

HAMA is one more legislation under which, a Hindu wife alone⁴ has a right to be maintained by her husband for her entire life as long as marriage subsists.⁵ The husband's obligation is absolute and personal. It depends neither on her capacity to maintain herself nor the husband's means to provide for her maintenance. It does not arise from a contract but from the very nature of the conjugal relationship between the husband and wife.⁶ It is a solemn obligation and not a matter of generosity or grace. She shall be entitled to live separately from her husband without forfeiting her claim to maintenance⁷ in case the husband is guilty of – desertion, cruelty, bigamy, keeping a concubine in the same house or elsewhere, conversion or any other reasonable cause.⁸ It covers financial support for food, clothing, shelter, and medical expenses. However, she will forfeit her claim to maintenance if she ceases to be a Hindu by conversion or if she is unchaste.⁹

The major difference between these two enactments, namely HMA and HAMA, is that in the former, maintenance is an ancillary relief attached to main matrimonial remedies like divorce, nullity and judicial separation. No claim for maintenance would lie in the absence of matrimonial litigation, initiated either by the wife or husband. In the latter, maintenance is claimed, as an independent and main relief. It is generally opted by women who do not want to get any matrimonial relief from husband but to simply live away from him due to justified cause and yet claim maintenance only. Secondly, a divorced wife is entitled to permanent alimony under S.25 of HMA, whereas only a wife whose marriage is subsisting can claim under HAMA.

(iii) Maintenance under S.125 Criminal Procedure Code, 1973 (CrPC):

S. 125 CrPC is an inclusive remedy available to destitute wives, minor or disabled children and parents who cannot maintain themselves. Being a secular law, any Indian wife can take benefit of the provision. It is a crucial and expeditious relief, ensuring basic sustenance and preventing vagrancy through a summary procedure. It is also popularly known as a fast-track judicial process. Initially, S.125 was limited to legally wedded wife. Later, in 1973, due to certain judicial decisions in Muslim law,¹¹ the term 'wife' is given an expanded meaning so as to include 'a

² Code of Civil Procedure, 1908, Order XXI Rule 48 provides strong mechanisms allowing courts to secure timely payments.

³ Code of Civil Procedure, 1908, s 51 outlines arrest as one of the modes of executing a decree for maintenance.

⁴ Unlike the gender-neutral case of maintenance under Hindu Marriage Act 1955

⁵ Hindu Adoptions and Maintenance Act, 1956, s 18(1): Subject to the provisions of this section, a Hindu wife shall be entitled to be maintained by her husband during her life time.

⁶ Ramesh Chandra Nagpal, *Modern Hindu Law* (Eastern Book Company 2008) 511

⁷ Hindu Adoptions and Maintenance Act, 1956, s 18(2) provides right to separate residence as well as maintenance.

⁸ Hindu Adoptions and Maintenance Act, 1956, s 18(2)(a)–(g)

⁹ Hindu Adoptions and Maintenance Act, 1956, s 18(3)

¹⁰ Code of Criminal Procedure, 1973, s 125: If any person having sufficient means neglects or refuses to maintain his wife, unable to maintain herself, the Magistrate of First class may, on proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife.

¹¹ It is analysed in the latter part of this discussion.



divorced wife'.¹² She is disqualified to receive maintenance:

- (i) if she is living in adultery, or
- (ii) if living separately from her husband without sufficient reason or
- (iii) if they are living separately by mutual consent.

A petition shall be filed before the Magistrate of First Class, who can pass both interim and final order as monthly allowance. It is independent of personal law remedies. Non-compliance with the order invites penalties and imprisonment.

(iv) Maintenance under Protection of Women from Domestic Violence Act 2005 (PWDV Act)

The PWDV Act is a civil and social welfare legislation enacted to protect women from violence occurring within the domestic sphere. It is a secular legislation, and a Hindu wife can claim maintenance and monetary relief under the Act¹³ from her husband for any act of domestic violence, either physical, mental, psychological, financial or sexual, apart from other reliefs such as right to residence, protection, medical etc. It is an all-comprehensive law to ensure economic security and dignified living for an aggrieved wife. The Magistrate of First Class is empowered to grant monetary relief under this Act. She gets either lump sum or periodical sum. On the failure of the respondent the Magistrate may pass Garnishee Order to the employer of the husband to pay it directly to the wife.

An appraisal:

All these provisions are independent of and separate from each other. Nevertheless, they are complementary and supplementary to one another. A

wife cannot be refused maintenance under S.24 of HMA, merely because she is already getting it under S. 125 CrPC. Similarly, the award of maintenance under S. 18 of HAMA also creates no bar to filing an application for maintenance under S.125 CrPC. The amount ordered under one provision will be considered and adjustable for awarding under another provision. Rejection of an application under S.125 CrPC is no bar in deciding an application under S.24 of HMA. Similarly, there is no contradiction between S.125 CrPC and permanent alimony under S.25 of HMA. A Hindu wife has the option to resort to maintenance either under her personal laws or secular laws. The relief under secular laws is less expensive and expeditious. All remedies are complementary and supplementary to each other. However, all are subject to the amount that may be granted in the earlier proceedings.

While maintenance provisions are welfare measures to prevent vagrancy and destitution of women, due to ambiguity in the words of the legislation, their application and interpretation have at many times resulted in hardship to indigent wives. An analysis of statutory provisions high light the inherent limitations existing in them.

(i) S. 24 of the Hindu Marriage Act 1955 is a dependent relief. It provides maintenance only in case, a simultaneous petition is filed before the court. It is not an independent relief.

(ii) Ambiguity is seen in S.25 of the Hindu Marriage Act 1955 which provides permanent alimony to the spouse. Whether maintenance is permissible, when marriage is void – is not clearly worded. Due to this, the judicial decisions do not speak with one voice. In some cases, some high courts granted maintenance to wife of void marriage, notwithstanding the fact that it is nullity.¹⁴ However, in some other cases, the courts

¹² The Code of Criminal Procedure, 1973, s 125 Explanation (b) 'Wife includes a woman who has been divorced by or has obtained a divorce from her husband and has not remarried'.

¹³ Protection of Women from Domestic Violence Act, 2005, s 20

¹⁴ *Govinda Rao v Anandi Bai* AIR 1976 Bom 433; *Dayal Singh v. Bhajan Kaur* AIR 1973 Punj 44; *Rameshchandra Daga v. Rameshwari Daga* AIR 2005 SC 422



denied the relief as the marriage was legally void on the ground that “any decree” within the meaning of S.25 of Hindu Marriage Act 1955 does not mean ‘every decree’.¹⁵

- (iii) S. 18 (2) of Hindu Adoptions and Maintenance Act 1956 provides maintenance only to a legally wedded wife as against Hindu Marriage Act 1955.
- (iv) A similar conflict is seen with regard to application of S.125 CrPC 1973.

B. LEGAL ENTITLEMENT OF MAINTENANCE TO A MUSLIM WIFE

A Muslim wife’s right to maintenance and the obligation of her husband to maintain her can be discussed under three heads.

- (i) Right under *Sharia*
- (ii) Right under S.125 CrPC
- (iii) Right under Muslim Women (Protection of Rights on Divorce) Act 1986

(i) Entitlement under *Sharia*

Maintenance, known as ‘*Nafaqah*’ under *Sharia*, is based on the ‘mutual rights and obligations theory’. Husband is bound to maintain his wife as long as she is faithful and obedient to his reasonable orders. His obligation is linked to the wife’s obligation. She does not have a right to be maintained, and no obligation rests on her husband, if she is not faithful and does not obey to his reasonable commands.¹⁶

In case of divorce, either by way of talaq at the instance of husband or *fasqah*, a judicial divorce, at the instance of wife, his obligation to maintain her is limited to *iddat* period. Beyond that the obligation

falls on her children, her proposed heirs, her parents, her relatives or lastly on the Wakf Board.

(ii) Entitlement under S.125 CrPC

Application of S.125 Cr PC for Muslim women was a contentious issue from the beginning as it was opposed by the community. Logically speaking, as it is a secular law, any ‘wife’, including Muslim wife and even Muslim second wife,¹⁷ is entitled to maintenance from her husband, when her marriage is subsisting, provided she is unable to maintain herself. On this basis, whenever a claim for maintenance was made by a destitute or deserted wife under this provision, it was vehemently opposed by the husbands on the reason that the maintenance claims of Muslim women were sufficiently taken care of under the personal law, which is divine law and judicial intervention was unwarranted. Prior to 1973, Muslim women claimed u/S.125 because ‘any wife’ is entitled to maintenance. Husbands started divorcing their wives by way of Talaq to avoid maintenance liability. They paid dower and took defense u/127 (3) (b) that a woman who has received upon divorce the sum payable to her under her personal law is not entitled to get anything u/125. So, post 1973, the provision was amended and an explanation was added that ‘Wife’ includes divorced wife.¹⁸ It was a radical departure. “*The fictional relationship of wife even after divorce has been created by Statute in view of the social conditions prevalent in the country to prevent quondam husbands to drive their ex-wives to a state of poverty and destitution until they remarry.*”¹⁹

From *Subaida Beevi* to *Daniel Latifi*,²⁰ the courts reiterated that Muslim women could not be excluded from the operation of S.125 CrPC, since it is a welfare

divorced by or has obtained a divorce from her husband and has not remarried’.

¹⁹ Kusum, *Family Law Lectures: Family Law I* (LexisNexis 2015) 280

²⁰ A detailed discussion is made in the subsequent segment.

¹⁵ *Bhau Saheb v. Leela Bai*, AIR 2004 Bom 283

¹⁶ D F Mulla, *Principles of Mahomedan Law* (19th Edn. LexisNexis Butterworths 1972) 271; Asaf A A Fyze, *Outlines of Muhammadan Law* (4th Edn OUP 1974) 212

¹⁷ Restricted polygamy is permissible under *Sharia*.

¹⁸ Criminal Law Amendment Act 1973, S. 125 CrPC Expln (b) ‘Wife includes a woman who has been



legislation. It is directed to helpless women, who are unable to maintain themselves even after the *Mehr* amount was paid to them according to customary law. In *Mohd Ahmed Khan v Shah Bano Begum*²¹ the court reaffirmed its stand by holding that any nominal payment of *Mehr* would not dissolve the husband's liability under S. 125, to pay maintenance to his wife post *Iddat* too.

(iii) Entitlement under Muslim Women (Protection of Rights on Divorce) Act 1986

The famous *Shah Bano* verdict²² created a lot of controversy and unprecedented debate. Pressurised by the Muslim Personal Law Board to nullify *Shah Bano* decision and to statutorily reaffirm the Sharia rules, the 1986 Act was enacted.²³ Accordingly, S. 3 provides that a divorced wife shall be entitled to (a) a reasonable and fair provision and maintenance to be made and paid to her within the *Iddat* period by her former husband.

These legislative developments have created debates whether personal law will prevail over secular law, whether in the name of religious freedom women's rights can be violated and whether personal law will prevail over constitutional morality. These debates constitute the core theme of the discussion *infra*.

Apart from these legal provisions, a Muslim wife is entitled to maintenance under Protection of women from Domestic Violence Act 2005, on par with other women belonging to other religions, in case of domestic violence. The provisions are equally applicable to a Muslim wife also.

These limitations in the statutes, in a sense, paved the way for exercising judicial discretion by the courts.

PART II

JUDICIAL CONTRIBUTION TO THE MAINTENANCE JURISPRUDENCE OF A WIFE UNDER HINDU LAW AND MUSLIM LAW

The impact of judicial decisions in the law of maintenance has far reaching significance in transforming the maintenance of wife from a personal obligation into a constitutional entitlement rooted in dignity, equality and gender justice, enshrined in Articles 14 and 21 of the Constitution, transforming it from a narrow, personal law-based obligation into a wider social justice obligation. This development can be traced through constitutional interpretation, statutory expansion, and purposive judicial activism. This segment explores how judicial decisions have shaped maintenance into a rights-oriented legal remedy. For better understanding, the narration is made in two parts.

A. TRANSFORMATIVE DECISIONS IN HINDU LAW OF MAINTENANCE

(i) Maintenance right is a right against property and not a right in the property

Starting with *Thulasamma v. Sessa Reddy*,²⁴ the Supreme court, in this case analysed the nature of widow's right to maintenance in her husband's property under S.14 of the Hindu Succession Act 1956, and held that maintenance is a tangible right against property (*jus ad rem*) and not a right in property (*jus in rem*). Even after the death of husband a widow can claim maintenance from the deceased husband's property in the hands of his sapindas.

²¹ AIR 1985 SC 945

²² *Ibid*

²³ Statement of objects of the legislation.

²⁴ (1977) 3 SCC 99.



(ii) Multiple hardships to the husband who defaults in compliance

In case, the husband does not comply with the interim maintenance order passed under S.24 of HMA, the court may take suitable steps to enforce it, in the interest of justice. It can stay proceedings of the main petition filed by the husband,²⁵ may adjourn hearing,²⁶ may strike off his defense²⁷ etc. In *Shashikant Pandey v. Ramesh Pandey*²⁸, a husband obtained a decree for divorce, in which the court ordered maintenance pendente lite to wife. However, in view of his deliberate non-compliance with the order, the Chhattisgarh High court not only struck down his defense against appeal, but also set aside the divorce decree.

(iii) Mere education and capacity to earn not a ground for denial of maintenance

In *Muralidharan v. Vijayalakshmi*,²⁹ the claimant wife was a law graduate and yet she was held to be entitled to maintenance. The court observed: “*The expression ‘able to maintain’ must receive a dynamic and realistic interpretation in the light of the indisputable plight of the Indian woman*”. Maintenance cannot be denied to the wife merely because wife is educated.³⁰ Mere educational qualifications and capacity to earn do not disentitle a woman from seeking maintenance from her husband.³¹

(iv) Maintenance is not for a mere survival but for a dignified standard of living

In *Chaturbhuj v. Sita Bai*³², the apex court held that the phrase ‘unable to maintain herself’ does not mean absolute destitution but the inability to maintain a

standard of living consistent with dignity. It is not for a mere survival.

(v) Husband cannot take advantage of his own wrong

It was an established fact that a wife of void marriage is not entitled to any legal protection under the law. In *Rameshchandra Daga v. Rameshwari Daga*,³³ the wife’s application for maintenance from her husband, in her petition for judicial separation under S.10 of HMA was countered by her husband on the ground that it was a void marriage as she was already married to another person and dissolution under customary law through a compromise deed was not legal. The apex court rightfully granted maintenance to a second wife, despite the marriage being null and void on the ground that, the wife had already communicated the same to him, and he cannot take advantage of his own wrong to escape the liability.

(vi) An innocent second wife is distinct from a non-innocent second wife

Prior to *Badshah v. Urmila Badshah*,³⁴ it was a settled law that second wife, being an illegitimate wife, is not entitled to maintenance under S.125 CrPC.³⁵ Following it, in *Savita Ben v. State of Gujarat*³⁶ the apex court reiterated it and conceded that, “*The law operates harshly against the woman who unwittingly gets into relationship with a married man and S.125 does not give protection to such woman. This may be an inadequacy in law, which only the legislature can undo.*” Here the judiciary has adopted the principle of restraint, shifting the burden on the legislature. However, later in *Badshah v. Urmila Badshah*, such a technical approach has been given a backseat. The court took a logical view and differentiated between

²⁵ *Amrit Lal Nehru v. Usha Nehru*, AIR 1982 J&K 98

²⁶ *Jai Singh v. Khimi Bhiklu*, AIR 1978 HP 45

²⁷ *Usha Rani v. Prem Singh*, (2005) 1 HLR 334 (P&H)

²⁸ (2009) 1 DMC 855 Chhath

²⁹ AIR 2007NOC 61 (ker)

³⁰ *Sunita Kachwaha v. Anil Kachwaha*, (2014) 16 SCC 715

³¹ *Padmavathi v. Lakshmi Narayana*, AIR 2002 Kant 424

³² (2008) 2 SCC 316

³³ AIR 2005 SC 422

³⁴ AIR 2014 SC 869

³⁵ *Yamuna Bai v. Anant Rao* AIR 1988 SC 644; *Bakula Bai v. Ganga Ram* (1988) I SCALE 188

³⁶ AIR 2005 SC 1809



an innocent second wife, who was duped into the marriage by the husband, without being disclosed about his previous subsisting marriage and one who enters into wedlock, fully aware of the fact. The court observed: “*Denying maintenance to innocent woman is like giving premium to the husband for defrauding the wife. Therefore, at least for the purpose of S.125 CrPC, such a woman is to be treated as a legally wedded wife.*”

(vii) CrPC S.125 does not require strict proof of marriage

In *Dwaraka Prasad Satpathy v. Bidyut Prava Dixit*,³⁷ the apex court clarified that S.125 CrPC does not demand strict proof of marriage. On proof of prima facie case, the court can grant interim order for maintenance under S.125. Compliance of all essential ceremonies is not necessary to establish legal marriage.

(viii) Maintenance is a component of dignity and equality and not benevolence

Many social factors are playing averse to the cause of women. Son's preference at home, unpaid domestic labour, unequal access to employment and marital power imbalances drive them as objects of charity and dependency on men for their survival and basic needs. Psychological tuning that wife is in receiving end makes maintenance as a benevolence. This thinking and social mindset was given a backlash by holding that maintenance is a mechanism to address structural inequality.

(ix) Expanded protection and entitlement for women beyond formal marriage

Transformative judicial approach can be witnessed whereby the judiciary has shifted the statutory focus

from fault to need and gave expanded protection to women beyond formal marriage, reflecting changing social realities. In this process, the court read maintenance laws harmoniously with constitutional and human rights values.

Chanmuniya v. Virendra Kumar,³⁸ is a landmark decision in this direction in which the term ‘wife’ was given a new and expansive interpretation for the purpose of maintenance and protection order under the Protection of Women from Domestic Violence Act 2005. The court held that “*Where a man and a woman have been living together for a considerably longer period, without ingredients of a valid marriage, and if the man deserts her, she is entitled to maintenance under S.125 CrPC.*” However, the court requested the Chief Justice to constitute a larger bench to decide it in view of divergence in judicial decisions on the interpretation of the term ‘wife’. In the very next year, in 2011, in *D. Velusamy v. D. Pachiammal*,³⁹ the apex court has clearly laid down guidelines as what constitutes a relationship in the nature of marriage. Such a woman is entitled to maintenance and legal protection under the 2005 Act.

A cursory understanding of the ratio decidendi in these cases throw light on the judicial trend, to give progressive judgments by adopting different interpretative tools towards gender justice, in the light of constitutional guarantees.

B. JUDICIAL DYNAMISM IN THE MAINTENANCE JURISPRUDENCE OF MUSLIM WOMEN

The judiciary elevated S. 125 CrPC from a procedural provision to welfare legislation applicable to all, irrespective of religion. The journey started with *Subaida Beevi*, continued through *Bai Tahira*, *Shah Bano* and *Daniel Latifi* and is still ongoing⁴⁰.

judiciary has uplifted the maintenance rights of Muslim women against narrow interpretations by a few Muslim jurists.

³⁷ (1977) 7 SCC 675

³⁸ (2010) 10 SCALE 602

³⁹ AIR 2011 SC 479

⁴⁰ The cases referred are only a few out of large number of cases- to illustrate the argument that



The monumental judgement in *Shahulameedu v. Subaida Beevi*⁴¹ brings to light the story of a Muslim wife with her four children who was neglected by her husband claimed maintenance under S.488 of then CrPC equivalent to S.125. The contention of the husband that the said provision could not arm a Muslim woman with the right to maintenance due to her refusal to live with him who has married another woman. The court, through J. Krishna Iyer, pointed out that “No civilised state can relax its duty in this regard and this humane law deserves to be enforced sternly, when the paramount law of the land breathes the spirit of social justice. A woman should not be driven to live with her husband who has transferred his affections to another woman. The plea of personal law makes no appeal to me. In case of conflict between personal law and statutory law, the latter should prevail.”⁴² Similar cases were cited as precedent in the judgement.⁴³

In *Zohra Khatoon v. Mohd Ibrahim*,⁴⁴ the question whether a wife who has obtained a decree of divorce under Dissolution of Muslim Marriage Act 1939, would be entitled to receive maintenance under CrPC, was held in affirmative, as it is clearly laid down in the provision. The court took a liberal view in *Mushtaq v. Jyosun Bibi*⁴⁵ holding that “Even a wife who was divorced by her husband prior to 1973 would come under the explanation ‘wife’. The new code of Criminal Procedure 1973 has nowhere restricted the definition of ‘wife’ to that extent.”

On a similar note, the SC through J. Krishna Iyer’s ruling in *Bai Tahira v. Ali Hussain Fissalli Chothia*⁴⁶ affirmed that “a divorced Muslim woman’s right to maintenance under S.125 CrPC is not extinguished by receiving customary payments like Mehr or property, unless those properties are a reasonable substitute for life long support and established secular law’s

precedence over personal law in preventing destitution.” The court continued: “The scheme of the complex of the provisions in Chapter IX has a social purpose. Ill-used wives and desperate divorcees shall not be driven to material and moral dereliction to seek sanctuary in the streets.” Soon after *Bai Tahira* came, the Supreme court judgment in *Fuzhumbi v. K. Khadervali*,⁴⁷ in which the court strongly reaffirmed the *Bai Tahira* decision.

Going on the same line, the watershed judgement of the five judge Bench of the Supreme Court in *Mohd. Ahmed Khan v. Shah Bano Begum*⁴⁸ marked a turning point in maintenance jurisprudence of Muslim wife. The court held that: “If the divorced wife is able to maintain herself, the husband’s liability ceases with Iddat. If it is illusory amount and not sufficient and not able to maintain herself, she can still claim u/125.” The judgement highlights that maintenance laws are grounded in constitutional morality and social justice and not in religious doctrines.

Post *Shah Bano* judgement, unprecedented controversy arose to nullify *Shah Bano* decision. Muslim Personal Law Board and others wanted to nullify the decision and make it statutorily clear about the husband’s limited liability. They persuaded the government to make Protection of Rights of Muslim Women (Protection of Rights on Divorce) Act 1986. In the Act, Ss.3 is very much relevant. S. 3 (a) was enacted as: “On divorce, the husband has to pay the wife –

- (i) Reasonable and fair provision and maintenance to be made and paid to her within the *iddat* period.
- (ii) Dower
- (iii) Maintenance, if she has custody of child till 2 years and
- (iv) Return of her properties given at marriage if any.

⁴¹ 1970 KLT 4

⁴² *Ibid*

⁴³ *Badruddin v. Aisha Begum* 1957 Allahabad Law Journal, 300; *Syed Ahmad v. Naghat Parveen Taj Begum*, 1958 Mysore, 128

⁴⁴ AIR 1981 SC 1243

⁴⁵ (1977) Cr LJ 484

⁴⁶ AIR 1978 SC 362

⁴⁷ AIR 1980 SC 1730

⁴⁸ AIR 1985 SC 945



A superficial reading of the provision gives an impression that the what has been said in *Sharia* has been codified in the form of law. However, this has been interpreted in a different way by the apex judiciary in *Danial Latifi v. UOI*.⁴⁹ Post 1986, a bunch of writ petitions were filed challenging S.3 of the Muslim Women (Protection of Rights on Divorce) Act 1986 as gender unjust and unconstitutional violating Arts 14,15 and 21. It suffocates helpless Muslim women after divorce to go from pillar to post to maintain herself. Supreme court, referring to Holy Quran, interpreted in favour of Muslim women and held that “*the Act is not unconstitutional. Husband has to make provision for future, pay maintenance for Iddat and it is to be settled within and not beyond Iddat period. The interpretation placed by us will honour the wisdom of legislature in upholding the validity of the Act.... It does not offend Articles 14,15 and 21 of the Constitution.*” Thus, the court neutralized legislative dilution through purposive interpretation.

One more decision by the apex court is *Noor Sabha Khatoon v. Mohd Quasim*,⁵⁰ in which the court interpreted S.3 (b) of the 1986 Act that “*it provides for grant of additional maintenance to her for the fosterage period of two years from the date of birth of the child for feeding that child during the fosterage.*”

Thus, Judiciary, by following different principles of interpretation, gave relief to destitute Muslim women, from unscrupulous husbands who want to escape from the liability towards wives before and after divorce. Law of maintenance is streamlined to a great extent by judicial pronouncements. It played an instrumental role in balancing religious freedom and constitutional principles.

PART III

SUGGESTIONS AND WAY FORWARD

The jurisprudence of maintenance to a wife is one area which is governed by statutes and customary practices and which has been defined and re-defined from time to time by the judiciary. The legislations are in force with the avowed purpose to protect women from vagrancy and destitution but the improper adoption of the tenets of personal law dilute the said purpose. The role of judiciary in this conflict assumes great significance in harmonizing the two and infusing the spirit of constitution in maintenance jurisprudence. Judicial pronouncements have been constantly reinforcing that maintenance of women is not a matter of charity or benevolence but is a matter of constitutional and legal obligation, arising out of solemn marital relationship. In this process, the judiciary has addressed legislative gaps and religious fundamentalism and responded to evolving social realities. This is an on-going process.

Despite these brighter aspects, challenges persist in the form of difficult access to justice, costly litigation, inordinate court delays, lack of legal awareness, absence of self-confidence, marital imbalance and above all poverty. In the absence of resources, justice for poor women is a distant dream. How many women like Shah Bano, Bai Tahira and Urmila Badshah can approach the court?

In this backdrop, future of maintenance jurisprudence warrants –

- (i) *A comprehensive and coherent maintenance code to avoid multiplicity of proceedings and conflicting judicial decisions and to bring about uniformity.*
- (ii) *Legislative amendment against use of word ‘chastity’ in the context of disqualification. Under Hindu law, the word chastity of woman is being referred to quite often as disqualification to receive maintenance. It*

⁴⁹ (2001) 7 SCC 740

⁵⁰ AIR 1997 SC 3280



looks absurd to use the word chastity and unchastity about a woman in legal drafting. Secondly, the language used lacks legal yardstick. Does the expression “she has not remained chaste” mean that she has not committed adultery? Does it also include if she had been a victim of forceful or fraudulent rape? Whether it should affect her maintenance allowance? Such questions are open-ended questions resulting in conflicting interpretations. The law could simply say that: If she has committed adultery, she forfeits her right to maintenance. The law needs amendment.

- (iii) *Removal of Practical barriers:* While judicial development of maintenance law has significantly advanced women’s rights in general and wife’s rights in particular, challenges remain. Illiteracy, legal illiteracy, poverty, fear of court, lack of confidence to approach the legal machinery, uncertainty of maintenance amounts, prolonged litigation, lack of awareness, high litigation expenses, non-access to justice and enforcement difficulties continue to impact women’s lives negatively. Even judicial discretion, results in inconsistencies and unpredictability. Not only Justice is provided on paper, access to justice, if not made easier, the goal of justice delivery system is of no use to millions of women who are really suffering these difficulties.

Nevertheless, judicial activism has largely compensated for legislative gaps and patriarchal biases embedded in personal laws, demonstrating its role as guardian of the constitution. The transformative maintenance jurisprudence underscores the increasing role of judiciary with sensitivity, administrative commitment to facilitate easy, educational reformation to bring about transformation in the patriarchal mindset, and above all self-empowerment of women.
