



# Maintenance and custody of children international laws perspective

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## **ABSTRACT**

Maintenance and custody of child based on Indian laws, conventions and international laws and conventions. The constitutional provisions and legislative provisions under family laws, criminal procedure code, civil procedure code, Indian penal code, juvenile justice. Under International conventions the human rights and convention on the rights of the child. Care and protection of children, national child rights commission based on both the legal binding force. Comparative study and charts / graphs of international conventional statics with a summary and conclusion. This paper will give the information that shows the understanding the knowledge structure and will enable the academic development within disciplinary context to more ably to gain the knowledge and emphasis on research professional organization advocacy.

## **INTRODUCTION**

Family has been understood as an essential element in human life. It is of great legal interest because of the decisive role it has historically played in the raising and socialization of children and in mutual economic support of its members. In this sense, family is considered as the natural and fundamental unit of a society. Marriage, one of the essential ways to form a family, is usually considered the most fundamental building block of human societies. Thus, the institution of marriage, found practically in all human societies, strives mainly to establish a stable framework in which children are cared for and supported, both emotionally and financially. It should be noted that the continuation of a marital relationship is an indispensable foundation to achieve such function of the institution of marriage. The dictionary meaning of the term maintenance is support or sustenance. The term maintenance is not defined in the marriage laws of any of the religious communities. But the entitlement of claiming maintenance is certainly based on the assumption that the claimant doesn't have the sufficient means to support herself. The maintenance generally covers the expenses for necessities or essentials for the substance of life. However, it is not merely a right for survival of the claimant. This is clear from the provisions under acts mentioned above which give guidelines to the court by stating the factors to be taken into consideration for fixing the amount of maintenance. The court is to look into the possession of the property of both, the husband and wife, ability of the husband to earn conduct of the parties and others circumstances to decide the amount of maintenance the status of the parties and the standard of their life enjoyed by them during the subsistence of marriage will have to be taken into consideration. When parents end their relationship, determining who gets the children is one of the most important decisions they will have to make. Legal custody of a child means having the right and obligation to make decisions regarding the child's upbringing. These may include schooling, religion, medical care and lifestyle choices. When the parents cannot make this decision without a dispute, allegations against their spouse or partner are widespread in the effort to win custody. False accusations of child abuse (emotional, physical and sexual), financial and or educational

incompetency and substance abuse are common claims made by one parent against the other. Dealing with child custody and visitation is one of the most difficult aspects when getting divorced or separated. The court of jurisdiction for the divorce proceedings will also determine child custody arrangements. If the parents have children together while married, they have joint guardianship over that child and their rights are equal. They both have an equal right to custody when they separate. If the parents are unable to reach a custody agreement, the court must help to determine what is best for the child. In some cases, the court may order a psychological examination of one or both of the parents. This is often referred to as a parenting evaluation which is a formal investigation to assess the level of each parent's parenting skills and which parent may be best suited to care for the child. Marriages are considered to be made in heaven with nuptials believed to be pre-determined by destiny. However, man has ensured that with the course of time, this match is fettered with a string of legislation. These legislations govern all the areas revolving around the concept of marriage, from the initiation to the breakdown of marriage. The entire concept of maintenance was introduced so that if there is a spouse who is not economically independent then the other spouse would provide help so that they can make a living.

Disputes resulting from such global families, especially involving inter-parental custody battles have yet to be addressed comprehensively by the Indian legal regime. The present paper explores the current Indian position on this issue and the future potential in the background of the Hague Convention of 1980 on the Civil Aspects of International Child Abduction.

“Statistics show that divorce and custody cases are on the rise. The practice of international child abduction has its roots in these inter-parental custody battles. Here, it is pivotal to understand what exactly constitutes international child abduction. In a situation such as this one in which violations and grave breaches of international law are being relentlessly committed and the perpetrators are not being held accountable and continue to defy the law with impunity the unfortunate result is the weakening of international law, giving rise to accusations of double standards in the implementation of the law, and the undermining of the credibility of those institutions entrusted with implementing the law. The perpetuation of such situations is clearly harmful not only to those civilian populations subjected to such violations, but also to the international system itself. In the case of Palestine, the fostering of this culture of impunity by appeasement of the occupying Power or by ignoring its incessant violations against the civilian population under its occupation has not only aggravated the situation by failing to bring about an end to the violations, including an end to Israel’s belligerent military occupation it In a situation such as this one in which violations and grave breaches of international law are being relentlessly committed and the perpetrators are not being held accountable and continue to defy the law with impunity the unfortunate result is the weakening of international law, giving rise to accusations of double standards in the implementation of the law, and the undermining of the credibility of those institutions entrusted with implementing the law. The perpetuation of such situations is clearly harmful not only to those civilian populations subjected to such violations, but also to the international system itself. In the case of Palestine, the fostering of this culture of impunity by appeasement of the occupying Power or by ignoring its incessant violations against the civilian population under its occupation has not only aggravated the situation by failing to bring about an end to the violations, including an end to Israel’s belligerent military occupation itself, but has also prolonged a conflict that has caused so much suffering, loss and hardship for the Palestinian people, as well as for the entire region, whose stability and security is under constant threat as a result of the ongoing occupation.

Appropriate measures in accordance with the purposes and principles of the Charter should be taken to remedy the situation in the interest of upholding and strengthening the rule of international law and promoting peace and security in the world. In that regard, it is clearly in the interest of the international community to exert all efforts necessary for securing a peaceful settlement of the Israeli-Palestinian conflict as well as of the Arab-Israeli conflict as a whole, on the basis of international law and the resolutions of the United Nations.

### **Maintenance under Hindu Laws**

Can a wife claim maintenance from her husband? Maintenance under the Hindu Adoption and Maintenance Act, 1956 is provided as a right to a wife to claim maintenance from her husband.

A wife can file a maintenance case under the Act in India against her husband when she is unable to maintain herself financially.

The court will consider the financial position of the husband and reason for which the wife is separated from her husband, before awarding maintenance to her.

However, a wife who claims maintenance under personal laws cannot claim maintenance under criminal procedural laws.

The Hindu law or family law in India recognises the right of a wife, children, aged parents and widowed daughter or daughter in law to receive maintenance.

Under matrimonial laws, if the husband is ready to cohabit with the wife, the wife's claim to maintenance is rejected.

However, a Hindu wife is entitled to reside separately from her husband without forfeiting her maintenance claim under the Hindu Adoptions and Maintenance Act, 1956.

The Act envisages certain situations in which it may become impossible for a wife to continue to reside and cohabit with the husband but she may not want to break the matrimonial tie for various reasons ranging from growing children to social stigma.

There is a misconception that a working woman is not entitled to claim maintenance as she is earning and is thus able to maintain herself.

The Indian courts have recognised the right of maintenance of a working woman and held that an estranged woman can claim maintenance from her husband even if she earns a monthly income, which is not enough for her to maintain herself.

Thus, under the family law in India, an earning wife is entitled to maintenance under maintenance laws in India. Top Family Lawyers will help assist and guide you throughout the procedure of Indian maintenance system and case laws. Child maintenance in India is recognised under Section 125 CrPC. It has been provided that the child can claim maintenance from the father in India. Section 26 of the Hindu Marriage Act also provides for maintenance of child under Hindu law.

The section of the Act states that a minor child is entitled to get maintenance from the father if during the divorce proceeding the custody of a child has been awarded to the mother or otherwise also.

Recently, Indian courts have also said that a minor child whether daughter or son, under the family law in India, is also entitled to get maintenance from his/her father if they are dependent on their parents.

Dependency on parents means that they are not in a position to earn themselves either because they are studying or due to any disease.

The family courts when handing over the custodial rights to one of the parents, the decision is based on the attempt to assure the best possible future of the child in question. The question of welfare is decided on four distinct parameters; they are:

### Factors which contribute to welfare of a child

- Proper ethical upbringing of the child in question.
- Assurance of safety of the child.
- Imparting quality education.
- The guardian in whom the custodian rights is vested must be financially well to do.

Rights of parents over minor child after divorce

In the case of a minor child, both the parents have equal rights over the child after divorce. Here, equal right refers to the right to the custody of the child. However, the family court gets the last say in this regard. The central piece of legislation having provisions to address the issue is the Guardian and Ward Act,

enacted in 1890 which is primarily secular in nature. However, the provisions of this Act are often in stark contrast to the provisions of the statutes dealing with personal laws. The oversight of the family court is important in this regard because while pronouncing its verdict, the court aims to strike a balance between the two. The custody of the child is given to any one parent at a time based on the previous factors mentioned above. The other parent is given the right to access to stay in touch. The right to access is a potent right in the hand of the other parent because it makes sure that the parent with the custodial right actually takes care of the child. The conditions of the visiting rights are however set by the court. The provision of the access rights ensures that the child gets the love and affection of both the parents.

**\*\*Custodial rights under Hindu law\*\***

The marriage and the subsequent separation laws are dealt with by the personal Hindu Laws. The Hindu Minority and Guardianship Act, 1956, the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954 stipulates the rules and regulations for the transfer of custodial rights of a minor after separation:

**1. Section 26 of the Hindu Marriage Act, 1955**

The provisions stipulated under Section 26 of the Hindu Marriage Act addresses the education and the maintenance of the child only when both the parents are followers of the Hindu religion. Under this law, the orders can be passed at any juncture of time, overriding the pending decree within a period of 60 days from the date of service of notice.

**2. Section 38 of the Special Marriage Act, 1954**

The provision deals with the custodial rights in case of the parents belonging to different religions. Under this law, the orders can be passed at any juncture of time, overriding the pending decree within a period of 60 days from the date of service of notice.

**3. Hindu minority and Guardianship Act, 1956**

The provisions do not take into consideration the third party custodial rights. The provisions of this Act talks about the custodial rights between the biological parents only and subject to the fact that they are Hindu. Maintenance under this law is only limited to the claims of the wife and not by the husband. In the case of *Savitaben Somabhai Bhatiya v. State of Gujarat*, the Supreme Court held that the term “wife” appearing in Section 125(1) only means legally wedded wife. However, in the case of *D. Velusamy v. D. Patchaiammal and Chanmuniya v. Virendra Kumar Singh*, the Supreme Court ruled that “Wife” includes a woman who has been divorced or has obtained a divorce from her husband and has not remarried again. In such cases the wife can claim for maintenance from the husband. In a landmark case of *Badshah v. Urmila Badshah Godse*, (2014) 1 SCC 188, the court held that there are certain provisions under which the second wife is entitled to maintenance under Section 125 of CrPC. If a man and a woman are living together for a long period of time without marriage then she is entitled to maintenance. Also, in the case of misrepresentation made by man stating that he is competent

**Conclusion**

The custody of a child remains one of the most sensitive and convoluted issues caused due to the separation proceedings of the parents. The custody, as seen, is guided mainly by the middle ground established by the judges on this regard. There has been a marked controversy between the various religious laws and the uniform legislation enacted by the State. However, the controversy regarding the various viewpoints of law should not compromise the future of the child. While resolving various pieces of legislation, it should be remembered that the welfare of the child along with assured social security is the prime motive behind the custody of a child. Hence, any hindrance caused by law in this front should be addressed to and then rectified. marriage, the woman being unaware at the time of marriage, will be entitled to maintenance. By virtue of judicial pronouncements and other steps, rights of women has been restored but it will become fruitful only when under lying thinking are changed, the women should emancipate themselves educationally, economically and socially for their well being only and then they can understand their rights and worth and thereafter the social upliftment of the whole community is possible. We should always

remember that mother is the first teacher and mentor of his child. It is a historical fact that no society ever lived in peace until their women folk are at peace. Although Maintenance should be gender neutral and should be applicable both for husband and wife respectively for the greater perspective of the society but still many women are being denied to claim their rights of maintenance. Proper implementation is necessary to abide by the Law of the Land and ultimately to make it a grand success. It is very evident now, from the recent judicial decisions that the courts in India have become progressively liberal while deciding the cases pertaining to maintenance. The main question arises is whether an illicit partner of a married partner should be entitled to receive any maintenance or not. Even though it appears that the same may be possible based on the decisions passed under the personal laws, judicial decisions under Section 125 clearly states that only a legally wedded wife can seek for maintenance.

