

# **COMMUNITY OF PROPERTY REGIME: NEED FOR RECOGNITION OF WOMEN'S ROLE IN FAMILY**

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## **Abstract**

Women are an integral part of a family which constitutes a society and thus a nation. Daughter, wife, mother, sister and various roles are played by a woman in her life time. Once married she becomes a backbone of her family who performs multiskilled responsibilities and without whom the concept of a matrimonial home seems to be nugatory. Despite her omnipresent character she is often treated as a mere chattel of her husband without the identity of her own. Particularly the homemakers never receive any financial recognition as their contribution in the family is not considered to be productive work. Shifting of concept of marriage from sacrament to contract and progress of divorce laws from contest to consent and most likely to be breakdown of marriage it becomes extremely important to give due recognition to the various roles played by women. Marriage needs to be treated as an equal economic partnership between the spouses irrespective of their financial contribution. Concept of community of property regime needs to be incorporated in the Indian family jurisprudence. This paper attempts to focus upon the current matrimonial property rights of women and future possibilities that can be incorporated in our legal system. The author tends to limit the scope to Hindu Marriage Act. In order to achieve the aforesaid, emphasis has been made upon various legal systems across the globe and best suited model for Indian family jurisprudence.

Keywords: Marriage, Divorce, Maintenance, Matrimonial property rights, Breakdown of marriage, Post-divorce status of women, contribution of home maker.

## **Introduction**

Pandit Jawaharlal Nehru said, "you can tell the condition of a nation by looking at the status of its women".

The international human rights instruments, including the Universal Declaration of Human Rights and the Convention on the Elimination of all forms of Discrimination Against Women, prohibit any gender discrimination against women and India is a party to these instruments.

Article 1 of CEDAW<sup>1</sup> defines discrimination against women as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field". Article 2(f) requires that State parties condemn discrimination against women and agree to undertake "all appropriate measure, including legislation, to modify or abolish existing laws, regulations, customs and practices, which constitute discrimination against women". Article 16 specifically lays down that "State Parties shall take appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:..... (h) the same rights for both spouses in respect of ownership, acquisition, management, administration, enjoyment and disposition of property whether free of charge or for a value consideration".<sup>2</sup>

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<sup>1</sup> Convention on the Elimination of All Forms of Discrimination Against Women, available at <https://www.un.org/womenwatch/daw/cedaw/text/econvention.htm> visited on 4th march 2020.

<sup>2</sup> *Ibid.*

To implement the Convention (CEDAW) a Committee on the Elimination of Discrimination against Women of 23 experts have been constituted. The Committee formulates general recommendations and suggestions. General recommendations are directed to States and concerns Articles in the convention. General Recommendation No. 21<sup>3</sup> deals with Equality and Marriage and family relations. Commenting on Article 16 (1) (h) the Committee states “ In most countries, a significant proportion of the women are single or divorced and may have the sole responsibility to support a family. Any discrimination in the division of property that rests on the premise that the man alone is responsible for the support of the women and children of his and that he can and will honourably discharge this responsibility is clearly unrealistic. Consequently, any law or custom that grants men a right to a greater share of property at the end of a marriage or de facto relationship, or on the death of a relative, is discriminatory and will have a serious impact on woman’s practical ability to divorce her husband, to support herself or her family and to live in dignity as an independent person”.<sup>4</sup> The committee further emphasis that “ In some countries, on division of marital property, greater emphasis is placed on financial contributions to property acquired during a marriage, and other contributions, such as raising children, caring for elderly relatives and discharging household duties are diminished. Often, such contributions of a non-financial nature by the wife enable the husband to earn an income and increase the assets. Financial and non-financial contributions should be accorded the same weight”.<sup>5</sup>

Article 51 (c) of the Constitution provides that “ The state shall endeavor to foster respect for international law and treaty obligation in the dealings of organized people with one another.”<sup>6</sup>

Indian Courts are also under an obligation to give due regard to international convention and norms while interpreting domestic laws and particularly when there is no inconsistency between them and there is a void in domestic law.<sup>7</sup>

The author of this paper intends to carve out the concept of matrimonial property rights of women mostly in the cases of divorce. There has been a long conversation on the introduction of Irretrievable Breakdown of Marriage as ground of Divorce and attempts have been made by Law Commission twice (1978 and 2009). Marriage laws amendment Bill too was introduced twice (2010 and 2013) to incorporate the concept of irretrievable breakdown of marriage in the present divorce laws of Hindu Marriage Act, 1955 and Special Marriage Act, 1954. Both the times it was heavily opposed by the women’s organization across the country as it would add to the misery of women on the basis of liberalized divorce because as such women have extremely limited rights on divorce. The only claim that a woman can make on divorce is that of maintenance. The maintenance dole is kept at the minimum so that divorce does not become a more attractive proposition, so that the institution of the marriage can be preserved and strengthened.<sup>8</sup> Most of the women keep living in the economic subordination in the name of glorified institution of marriage. Irrespective of the fact that she spends the lifetime in looking after the family and bringing up the children if the marriage breaks down the rights of the husband is only recognised on the house and property acquired during the subsistence of marriage.

The contribution of a women in the matrimonial home is not treated as a productive work. In *Arun Kumar Agrawal v. National Insurance Company*<sup>9</sup> the Hon’ble Supreme Court criticized the 2001 census in which 367 million homemakers were categorized as “non-workers” along with the beggars, prisoners and prostitutes. Such approach towards women’s role in the household is alarming in the times where the law is becoming divorce friendly yet position of women is still the same – Archaic.

In the western countries whenever the Irretrievable Breakdown of Marriage has been introduced as a ground for divorce, the concept of community of property regime (equitable division of all marital assets) have been recognised alongside. When the Marriage Laws (Amendment ) Bill, 2010, was introduced in parliament to incorporate the inclusion of Irretrievable breakdown of marriage in the family jurisprudence of Hindu Law and

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<sup>3</sup> Committee on Elimination of Discrimination Against Women. General Recommendation No. 21. 13<sup>th</sup> Session, 1994.

<sup>4</sup> Idat para 28, available at <https://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom21> visited on 4<sup>th</sup> March 2020.

<sup>5</sup> Idat para 32.

<sup>6</sup> Constitution of India, 1950.

<sup>7</sup> Law Commission of India, Consultation Paper on Reform of Family Law, p 15, para 1.38, 31<sup>st</sup> August 2018.

<sup>8</sup> Flavia Agnes, “Maintenance for Women: Rhetoric of Equality”, Economic and Political Weekly, 1992, 27(41), p 2233.

<sup>9</sup> *Arun Kumar Agrawal vs National Insurance Company* (AIR 2010 SC 3426).

Special marriage Act based on 71<sup>st</sup> Report of the Law Commission of India recommended in 1978, it was withdrawn due to the protests by the women's group. The Rajya Sabha Standing Committee released its 45th Report in 2011<sup>10</sup> and recognised the concept of division of property and economic contribution of women to the marriage was too recognised by the committee in its report.

*The committee's attention has been drawn to very vital aspect of the matrimonial Law which relates to the rights of the wife to matrimonial property in case of divorce. Quite a few of the women's organization have emphasized on this aspect before the committee and demanded that while granting divorce, it needs to be ensured that the women get their share atleast in the assets/properties which the parties to the marriage have acquired during the subsistence of the marriage. The Committee finds logic in this demand of the various women's organisations. It is generally seen that in majority of cases women are left with very little to fall back upon after the divorce and quite often they also have to bear the burden of the children born out of the wedlock. In such situations, it seems quite natural for the women to feel cheated when they are left their fate without any roof or financial support although during the subsistence of marriage they might have contributed in varied forms in the matrimonial family in the prime of their age. This is more true in the case of working women. Accordingly, the Committee feels that there should be some effective legal mechanism so that the women atleast get their share in the matrimonial property which has been acquired during the subsistence of marriage. **The committee, accordingly, recommends the Government to make adequate provisions in the matrimonial law to ensure that the courts, while adjudicating on divorce petitions, also decide upon women's share in the matrimonial property while granting divorce so that they are not deprived of the assets/properties in which they have contributed during the continuance of marriage. The Committee is strongly of the view that liberalization of the laws of divorce should essentially be accompanied with appropriate provisions recognizing the legitimate rights of the women on the matrimonial property/assets atleast, in which they have their share of contribution.***<sup>11</sup>

The Marriage Laws Amendment Bill, 2013 too was opposed by women organization for the non-inclusion of women's matrimonial property rights as the liberalized divorce would give the men an easy way to sneak out of the marriages leaving the women destitute. Even though in the proposed section 13D (1) of Hindu Marriage Act and section 28B (1) of Special marriage Act it did provide the right to the respondent wife to oppose the divorce on the ground of "Grave financial hardship", proposed section 13F (1) and section 28D (1) talks about the compensation towards the settlement of her claim. Nowhere do the law or proposed law does recognise the economic investment of the wife into the marriage. In short it is high time that we incorporate the concept of community of property regime in our family jurisprudence to finally give the women her due recognition so that she no longer compromises in the name of security in marriage or suffer due to the mere maintenance provided as a compensation.

To understand the property rights of women we need to look at the historical aspect attached to it. Under the Hindu Law *Vijnaneswara*, recognised full proprietary rights to females. In fact, section 14 of the Hindu Succession Act, 1956 is the literal reproduction of *Vijnaneswara's* rule that all property, howsoever acquired, shall become the absolute property of a Hindu female. During the British Indian legal history, the Privy Council preferred the Dayabhaga rule limiting the proprietary independence of Hindu females and, thus, *Vijnaneswara's* view could not develop into rule of law.<sup>12</sup>

The concept of women's 'limited estate' was statutorily recognised in the Hindu Women's Right to Property Act, 1937. However, this concept of restricted right was undone by the Hindu succession Act, 1956. With the enactment of Hindu Succession Amendment Act, 2005 a new era of property rights of women emerged in India where a daughter was made a coparcener in her own right along with the son. This amendment is a very empowering provision with regard to the status of daughters but this provision provides the equal proprietary rights in the family of birth only. Now, if the argument suggests that why doesn't women claim their right in their parental home then the obvious answer is that every right comes with a corresponding duty. In India if a woman asks to set up a separate matrimonial home the husband gets a divorce decreed on the grounds of mental cruelty<sup>13</sup> based on the fact that taking care of the elderly is the responsibility of the son as well as the daughter-in-law. If the women claim the

<sup>10</sup> Rajya Sabha Department-related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, *Forty Fifth Report on The Marriage Laws (Amendment) Bill, 2010*, 2011.

<sup>11</sup> *Id.*, chapter IV, para 7.

<sup>12</sup> Vijender Kumar, *Matrimonial Property Law in India: Need of the Hour*, Journal of Indian Law Institute, 57(4) Oct- Dec 2015, p. 501.

<sup>13</sup> *Narendra v K. Meena*, 2016 (9) SCC 455.

proprietary rights in the property of her parents would not that puts her into the shoes of a son in the sense that she too needs to look after her parents. So, will a woman too, get the divorce on the grounds of mental cruelty if the man refuses to stay with her parents.

In the prevalent circumstances there is a strong need to recognise marriage as an 'economic partnership' where the wife contributes to the family and often compromises her own career prospects to raise their children. In matrimonial property legal recognition should be given to the economic value of the contribution made by the wife through household work for the purpose of determining ownership of matrimonial property, instead of continuing the archaic test of actual financial contribution.<sup>14</sup>

### **Matrimonial Property Rights of Women Stridhan**

The word Stridhan has been derived from the words 'stri' meaning a woman and the word 'dhana' means property. Therefore, on combining the word means 'property of woman' over which she exercises absolute control. The Hon'ble Supreme Court in *Pratibha Rani v. Suraj Kumar* held that Stridhan is the wife's absolute property and therefore the husband or his relatives will have no rights over the stridhan and they would be deemed to be trustees if the stridhan was ever placed in their hands.<sup>15</sup> In the case of *Rashmi Kumar v Mahesh Kumar Bhada*<sup>16</sup> the Supreme Court has said that any kind of property be it movable or immovable, if it is gifted to the woman before marriage or at the time of marriage then it is exclusively her property and it is to be termed as *Stridhan*.

### **Maintenance**

Prevention of vagrancy and destitution has been the reason behind the concept of maintenance. Maintenance is granted to the women during the continuation of marriage, during the court proceedings or after the divorce has been granted.

Since the husband accumulates property during the subsistence of the marriage through the active contribution of the homemaker wife, and exercises exclusive rights over it. Hence, when a marriage breaks down, most women are rendered destitute. A woman's right is confined to a monthly maintenance dole. If the woman happens to have an independent source of income. She is denied even this meagre amount.<sup>17</sup>

In India we have the separate property regime, in which each spouse gets the property to which he or she holds title to upon divorce. At the most woman's property right is confined to the monthly maintenance or a permanent alimony which hampers her right to property. Matrimonial property also includes the matrimonial home where the spouses resides during the marriage. In the light of evolving role played by women juggling between the house and her career it becomes imperative to recognise her right in the properties acquired during the subsistence of marriage. That does not mean the homemakers do not contribute in the earnings of her spouse. Their role is also crucial as her contribution to the family by looking after kids and managing the home cannot be ignored. The marriage should be recognised as an 'economic partnership' and women regardless of their career status should be given equal rights in the property acquired during the subsistence of marriage. This should not be looked as a charity offered to her but she needs to be recognised as a rightful owner, hence, the matrimonial home should be recognised as belonging to both spouses holding as joint tenants. The problem arises where the matrimonial home is a joint family house of the husband where he himself does not have any rights in it. In India the problem lies in the very root of the mentality of the society where women though given rights as a coparcener in her parental home but due to socio-religious influence she hesitates in claiming those rights. As such she does not have any proprietary rights in the property where she is married into.

An attempt was made by the legislation to infuse the concept of matrimonial property within the family jurisprudence via section 27 of Hindu Marriage Act, 1955. Section 27 deals with the disposal of property and provides that in any proceeding under this Act, the court may make such provisions in the decree as it deems just and proper with respect to any property presented, at or about the time of marriage, which may belong jointly to both husband and the wife.<sup>18</sup> The scope of this section is very narrow in scope because Firstly, it limits the property

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<sup>14</sup> Indira Jaising, "Women's Inheritance Rights in Contemporary Jurisprudence" in Nitya Rao and Luise Rurup (eds.), *A Just Right: Women's Ownership of Natural Resources and Livelihood Security* 110-21 (1993).

<sup>15</sup> *Pratibha Rani v. Suraj Kumar* A.I.R. 1985 SC 628.

<sup>16</sup> (1997) 2 SCC 397.

<sup>17</sup> Flavia Agnes, "*His and Hers*", *Economic and Political Weekly*, 2012, 47(17), p.11.

<sup>18</sup> Section 27, Hindu Marriage Act, 1955.

presented at or around the time of marriage only hence, keeping the property acquired during the subsistence of marriage out of the scope. Secondly, such property should be given jointly to husband and wife. Hence, the present section does not serve any purpose to introduce the concept of matrimonial property for such properties which have been acquired during the marriage mostly the matrimonial home.

There is a complete absence of recognition of the contribution of wife in making of the household and indirectly contributing towards the acquisition of properties. A wife's non – economic contribution should be recognised and property acquired during marriage must be made jointly owned by both the spouses. If the spouses want to part ways in future such property should be divided equally between them.

### **Contribution of the homemaker**

The four basic concepts which are invoked while prescribing the rules for division of property at divorce are title, fault, need, and contribution.<sup>19</sup> The theory of contribution recognizes the non-monetary household work by the woman in the context of partnership of equality. Indian family jurisdiction fails to recognise the contribution of the homemaker.

General Recommendation number 17 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) dealt with measurement and quantification of the unremunerated domestic activities of women and their recognition in the Gross National Product.<sup>20</sup> The Committee affirmed that the measurement and quantification of the unremunerated domestic activities of women, which contribute to development in each country, will help to reveal the de facto economic role of women. The Committee further recommended that state parties should encourage and support research and experimental studies to measure and value the unremunerated domestic activities of women by conducting time use survey as part of their national household survey programmes and by collecting statistics disaggregated by gender on time spent on activities both in the household and on the labour market.<sup>21</sup>

A Time use survey is a statistical survey which aims to report data on how, on average, people spend their time. After developing a suitable conceptual framework and methodology, the pilot time use survey was conducted in six states of India during July 1998 to June 1999. The burden of unpaid non-SNA work is shared highly unequally between men and women. Women, on an average, spend 28.96 hours per week on household management, that is, taking care of the household. The maximum time is spent on cooking (14.59 hours), followed by cleaning and washing (7.89 hours), care of textiles (2.31 hours), and household maintenance, shopping, etc. (2.14 hours). Men, on an average, spend less than one hour per week on each of these activities. As regards childcare and care of the old, sick, or disabled in the household, women spend 4.47 hours per week against 0.88 hours per week by men. Women spend maximum time on physical care of children (3.09 hours), followed by non-physical care of children (that is, teaching and training children, accompanying them to places, etc.). Women also spend more time on other care activities than men. On an average, men spend 2.17 per cent of their total time on non-SNA work as against 20.61 per cent by women. Clearly, this is a major constraint for women who want to participate in the labour market.<sup>22</sup>

The unequal distribution of unpaid domestic work between men and women coupled with archaic socio-cultural norms results in restricting women's participation in their choice of career. In India majority of household consider that house work is the domain of women only, men are exempt from domestic work. In the absence of distribution of house hold responsibilities it becomes really tough for women to concentrate on her career. That does not mean if a woman spends majority of her life in looking after family and taking the responsibility of the household, her existence is worthless since she does not contribute economically.

The House of Lords in *White v White*<sup>23</sup> held that Judicial approaches that would give the wife enough to meet her needs but would allocate the surplus over needs to husband mean that discrimination would be creeping in by the back door. Needs are only one factor and courts need to give equal importance to other factors such as

<sup>19</sup> Flavia Agnes, *Marriage, Divorce, and Matrimonial Litigation*, 2011, Oxford University Press, p.225.

<sup>20</sup> Committee on Elimination of Discrimination Against Women. General Recommendation No. 17. 10<sup>th</sup> Session, 1991.

<sup>21</sup> *Ibid.*

<sup>22</sup> Indira Hirway, "India's time use data show women spend 69.03 hours on total work, men spend 62.71 hours", Counterview.Org, April 12, 2017, Available at <https://counterview.org/2017/04/12/indias-time-use-data-show-women-spend-69-03-hours-on-total-work-men-spend-62-71-hours/> visited on 15<sup>th</sup> March, 2020.

<sup>23</sup> *White v. White* (2001) 1 A.C. 596.

available resources and parties' contribution. It is further settled that domestic and financial contribution should be treated equally.

*"Today there is a greater awareness of the value of non-financial contributions to the welfare of the family. There is a greater awareness of the extent to which one spouse's business success, achieved by much sustained hard work over many years, may have been made possible or enhanced by the family contribution of the other spouse, a contribution which also required much sustained hard work over many years. There is increased recognition that, by being at home and having and looking after children, a wife may lose for ever the opportunity to acquire and develop her own money-earning qualifications and skills."*<sup>24</sup>

It is evident in various judgments and legislation<sup>25</sup> on matrimonial property rights of most countries that attempts have been made to quantify the contribution of the homemaker, Indian Courts and legislation, however, have refrained from discussing this issue. We do not have any legislation that recognises the contribution of a homemaker. But there has been a number of judgments where such contribution has been accepted for the purpose of insurance claim.

In *Lata Wadhwa v State of Bihar*<sup>26</sup> the Supreme Court, while awarding compensation to the family of deceased and injured in fire, fixed the compensation on the basis of multifarious services rendered by the housewives for managing the entire family at Rs. 3000/- per month and Rs. 36000/- per annum for all homemakers between the age group of 34 to 59. For the age group of 62 to 72, the value of services rendered was modified to be Rs. 20,000/- per annum.

The 2009 Madras High Court judgment<sup>27</sup> is an illuminating judgment on this subject in which Justice Prabha Sridevan referred to CEDAW principles and UNICEF's report of 2000 for the assessment of work done by the home maker. The relevant portion of the said judgment is as follows: -

*"9. The UNICEF in 2000, noted that "unpaid care work is the foundation of human experience". The care work is that which is done by a woman as a mother and definitely in India, the woman herself will be the last person to give this role an economic value, given the social concept of the role of a mother.....*

*10. .... that there have been efforts to understand the value of a homemaker's unpaid labour by different methods. One is, the opportunity lost which evaluates her wages by assessing what she would have earned had she not remained at home, viz., the opportunity lost. The second is, the partnership method which assumes that a marriage is an equal economic partnership and in this method, the homemaker's salary is valued at half her husband's salary. Yet another method is to evaluate homemaking by determining how much it would cost to replace the homemaker with paid workers. This is called the Replacement Method.....*

*12. .... One cannot ignore or forget that the homemaker, by applying herself to the tasks at home, liberates her spouse to devote his energy and time and attention to tasks that augment his income and generate property for the family. In fact, the National Organisation for Women, USA has adopted the proposal for recommendation of economic rights for homemakers, which includes giving of a value to the goods and services produced and provided by the homemaker in the Gross National Product."*

The Court further held that the time has come to scientifically assess the value of the unpaid homemaker both in accident claims and in division of matrimonial property. This is an important judgment as it recognised the unpaid work contributed by the women. The very next year in 2010 Honorable Supreme Court cited the reasoning in the Deepika case with approval in *Arun Kumar Agrawal v. National Insurance Co. Ltd.*<sup>28</sup> The Hon'ble Supreme Court observed and discussed the contribution of women as house wife and her role in bringing up children, cooking, cleaning, working as an agricultural hand etc., all of which are considered as unremunerative. If the women were instead of working in the home were working outside, they would have got the remuneration for that work. Despite being a signatory to an international instrument like CEDAW, no positive step has been taken for according monetary value to the household work done by the home makers. The Court pointed out the existence of gender bias against women in various social welfare legislations, executive policies, etc. In the words of Justice Ganguly:

<sup>24</sup>Id at 605.

<sup>25</sup> Discussed under next heading.

<sup>26</sup> A.I.R. 2001 SC 321.

<sup>27</sup> *National Insurance Company v. Deepika & Ors.*, 2009 Mad LJ 1005.

<sup>28</sup> *Arun Kumar Agrawal v. National Insurance Co. Ltd.*, AIR 2010 SC 3427; 2010 (9) SCC 218.

4. *This bias is shockingly prevalent in the work of Census. In the Census of 2001 it appears that those who are doing household duties like cooking, cleaning of utensils, looking after children, fetching water, collecting firewood have been categorized as non-workers and equated with beggars, prostitutes and prisoners who, according to Census, are not engaged in economically productive work. As a result of such categorization about 36 crores (367 million) women in India have been classified in the Census of India, 2001 as non-workers and placed in the category of beggars, prostitutes and prisoners. This entire exercise of Census operation is done under an Act of Parliament.*

The Court further observed the services rendered by women helps in sustaining in supply of labour to the economy. It further helps to keep human societies going by weaving the social fabric. If the services are taken for granted and are not given due importance then it may deteriorate the human capabilities and social fabric. It was further observed that:

*“26. Household work performed by women throughout India is more than US \$ 612.8 billion per year (Evangelical Social Action Forum and Health Bridge, page 17). We often forget that the time spent by women in doing household work as homemakers is the time which they can devote to paid work or to their education. This lack of sensitiveness and recognition of their work mainly contributes to women's high rate of poverty and their consequential oppression in society, as well as various physical, social and psychological problems.*

*27. In this context the Australian Family Property Law has adopted a very gender sensitive approach. It provides that while distributing properties in matrimonial matters, for instance, one has to factor in "the contribution made by a party to the marriage to the welfare of the family constituted by the parties to the marriage and any children of the marriage, including any contribution made in the capacity of a homemaker or parent".*”

Justice Ganguly in his concluding remarks added that amendments in matrimonial laws may also be made to give effect to the mandate of article 15(1) in the Constitution. Hence it is clear that there has been attempts by various judges for recognizing the role of women as an equal partner in the marriage and suggested for the necessary changes in our matrimonial laws.

### **Concept of Matrimonial property: Matrimonial Property Regime**

The concept of matrimonial property may not fit in a straight formula. It depends upon the kind of matrimonial property regime followed in a country. For a general understanding matrimonial property is the property owned or obtained by the spouses before or during the subsistence of marriage. Matrimonial property also includes the matrimonial home where the spouses resides during the marriage. In the light of evolving role played by women juggling between the house and her career it becomes imperative to recognise her right in the properties acquired during the subsistence of marriage. That does not mean the homemakers do not contribute in the earnings of her spouse. Their role is also crucial as her contribution to the family by looking after kids and managing the home cannot be ignored. The marriage should be recognised as an ‘economic partnership’ and women regardless of their career status should be given equal rights in the property acquired during the subsistence of marriage. This should not be looked as a charity offered to her but she needs to be recognised as a rightful owner, hence, the matrimonial home should be recognised as belonging to both spouses holding as joint tenants. The problem arises where the matrimonial home is a joint family house of the husband where he himself does not have any rights in it. In India the problem lies in the very root of the mentality of the society where women though given rights as a coparcener in her parental home but due to socio-religious influence she hesitates in claiming those rights. As such she does not have any proprietary rights in the property where she is married into. As of now there is no clear answer to the question of right of women in the joint family house post divorce.

The rights of matrimonial property are dependent upon the type of marital property regime. Marital property regime refers to the management and rights over the property during the subsistence of marriage and division of property when the marriage gets dissolved. The various kinds of marital property regime are as follows:

**Separate Property Regime** – In this kind of property regime the property acquired before and during the marriage is considered to be separate property of the spouse who acquired it. At the time of dissolution of



marriage each spouse is entitled to his/her own share. The other spouse does not have any right in the share of the other spouse. Under the separate property regime marriage does not have any impact on the title of the property. India follows the pattern of this marital property regime.

**Community of Property Regime** - Under this doctrine, marriage alters the rules of property ownership and entitles both the spouses rights and interests in each other's property. All the property which is brought into and acquired during the marital relationship by the spouses is pooled into a community of property over which both the spouses acquire equal interest and right of control. When the divorce takes place, the property is divided equally between the spouses. Most of the western countries follow the community of property regime.

**Deferred Community of Property Regime** – Under the legal premise of deferred community of property the property remains separate property of spouses during the subsistence of marriage and during the dissolution of marriage it operates as community of property regime i.e., the property is divided equally between the spouses.

### **Matrimonial Property Laws in various countries**

Principally, matrimonial property laws did not exist in English law. The marriage did not play any role in the matter of property. Under the English common law tradition, the property of spouse remained separate. There were long campaigns for the right of women to own property, for a share in the matrimonial property. Until mid-nineteenth century, married women in England had no right to divorce and no right to own the property. There was a long battle for the English women to fight the Blackstonian principle prevailing in those times which considered the married women property of their husband and could not own property.

Since the battle against coverture had resulted in a separation of property regime in championing women's economic rights, the UK adopted a division of assets policy, reliant on the discretion of the courts in abidance with certain statutory guidelines contained in Section 25 of the matrimonial causes Act.<sup>29</sup>

In *White v White*<sup>30</sup> the courts relied on the principle of equality of division to both parties, ensuring they receive their rightful share of the matrimonial property on division or dissolution of partnership. Lord Nicholls had stated "there should be no bias in favour of the money-earner and against the home-maker and child-carer."<sup>31</sup>

The **German** system of separation during marriage with equalization of accrued gains upon divorce, provides for the statutory regime called the community of gains. Upon the termination of the regime by divorce each spouse is under a duty to account for the increase of his or her property between the beginning and the end of the regime. The difference between the resulting amounts will be split, and the spouse whose increase was less than the other's will have the right in personam to claim up to one half of the difference from the other.<sup>32</sup>

Under **Austrian** law, if the marriage is terminated, the spouses are entitled to share each other's wealth. If spouses reach no agreement, the court has to decide upon the application of the division of their property according to the principle of equity. Assets are to be divided, taking into account the contributions of each spouse to the acquisition of the assets, children's welfare and the debts connected to the expenses of conjugal life, including maintenance, housekeeping, the upbringing of children and assistance in general. The judge can order the transfer of property or expectant rights, of movables and even of real estate, if an equitable partition cannot be achieved otherwise.<sup>33</sup>

Under the **Italian** legal matrimonial system both spouses own property (immovable and movable) jointly during marriage, regardless of whether or not the property was purchased jointly or separately. Property belonging personally to a spouse (e.g., by gift or inheritance), or of a strictly personal use, or property used in a particular profession (such as a business established and managed by either spouse) are not included. Profits from property

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<sup>29</sup> Radhika Chitkara, "*Between Choice and Security: Irretrievable Breakdown of Marriage in India*, Jurisprudence, 2014, 21(3), p. 847-865, Available at <https://pdfs.semanticscholar.org/7fff/c7dee3dcbfe8ff0a3aef8d0d35dcdf222c52.pdf> visited on 07 April 2020.

<sup>30</sup> (2000) UKHL 54.

<sup>31</sup> *Ibid.*

<sup>32</sup> Branka Rešetar, *Matrimonial Property in Europe: A Link between Sociology and Family Law* (December 2008) Volume 12.3, Electronic Journal of Comparative Law, Available at <https://www.ejcl.org/123/art123-4.pdf> visited on 07 April 2020.

<sup>33</sup> *Ibid.*



during marriage and income from the separate profession of each spouse are owned separately by each spouse during marriage, but on dissolution of the community, they become part of the community of property.<sup>34</sup>

In **France**, community of Property regime is followed in case the parties do not have a contract for the division of property in case of dissolution of their marriage. Title V<sup>35</sup> of French Civil Code deals with Ante-nuptial Agreements and Matrimonial Regimes. An Ante Nuptial Agreement is mandatory before the celebration of marriage.<sup>36</sup>

In **China** Marital property is jointly owned by the spouses. A couple may opt out of the matrimonial property regime with pre-nuptial or post-nuptial agreement. The family laws are governed by Marriage Law of the People's Republic of China.<sup>37</sup> As per Article 13 Husband and Wife shall have equal status in the family.

**Conclusion: Suggestion for best suited model for India**

In **India** though the property regime which is followed is Separate Property Regime but **Goa** follows a unique civil code which incorporates community of property regime. The civil laws in Goa pertaining to marriage, divorce, succession is non-discriminatory in nature. According to this code, registration of marriage is compulsory. Marriage is considered to be a contract rather than a sacrament.<sup>38</sup> Section V deals with Contract between the spouses in respect of assets. Parties are free to decide of how their properties would be divided at the time of dissolution of their marriage.<sup>39</sup> In the absence of ante nuptial contract regarding the distribution of property, the custom prevails, which presumes that the spouses are married under the communion of property.<sup>40</sup>

A positive step towards recognizing the property rights of women was taken by the Maharashtra Legislative Assembly to provide equal share to women at the time of dissolution of marriage by introducing 'Matrimonial Property (Rights of Women upon Marriage) Bill, 2012. The bill defines 'matrimonial property' to include self-acquired properties – movable and immovable, husband's property, agricultural land along with pensions, provident fund.<sup>41</sup>

The registration of marriage is made compulsory as per the judgment of Hon'ble Supreme Court in *Seema v Ashwani Kumar*<sup>42</sup> In this case directions were given to the States and Union Territories for framing necessary statutes regarding compulsory registration of marriage. Compulsory registration would be a proof of marriage and would help women in seeking matrimonial remedy.

The present system of personal laws regarding property division is biased against women as it does not recognise the contribution made during the subsistence of marriage and in the case of dissolution of marriage leaves her with a meagre amount of maintenance which is again subject to realization. India should follow the community ownership of 'matrimonial property' rather than separate ownership of property. The following suggestions are made for conceptualizing more equitable legal schemes for the protection of property rights of women:

- It is high time that marriage needs to be recognised as an equal economic partnership between husband and wife. Concept of Community of property regime needs to be incorporated in the Indian family jurisprudence.

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<sup>34</sup> *Ibid.*

<sup>35</sup> French Civil Code, Articles 1387 to 1581.

<sup>36</sup> *Id.*, Article 1395.

<sup>37</sup> Marriage Law of People's Republic of China, Adopted at the Third Session of the Fifth National People's Congress on September 10, 1980 and promulgated by Order No.9 of the Chairman of the Standing Committee of the National People's Congress on September 10, 1980; and amended in accordance with the Decision on Amending the Marriage Law of the People's Republic of China, adopted at the 21st Meeting of the Standing Committee of the Ninth National People's Congress on April 28, 2001. Available at <http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/37821/108011/F-1849345468/CHN37821%20Eng.pdf> visited on 05 April 2020.

<sup>38</sup> Portuguese Civil Code, 1867, Article 1056 - Concept of marriage as a civil contract and its purpose - Marriage is a perpetual contract made between two persons of different sex with the purpose of legitimately constituting a family.

<sup>39</sup> *Id.*, Article 1096 – Ante-nuptial conventions principle of freedom - It is lawful for the spouses to stipulate, before the solemnisation of the marriage and within the bounds of law, whatever they think fit in respect of their assets.

<sup>40</sup> *Id.*, Article 1108 – Concept of communion of matrimonial estate - The marriage as per the custom of the country consists in the communion between the spouses of all their assets, present and future, not excluded by law.

<sup>41</sup> *Supra* note 12 at p. 505.

<sup>42</sup> AIR 2006 SC 1158: (2006) 2 SCC 578.

- Concrete statutory provisions need to be incorporated for the introduction of matrimonial property in the existing laws. There is a need of a more clear and inclusive definition of matrimonial property as already given under section 27 of Hindu Marriage Act, 1955.
- Pre-nuptial or Ante-nuptial agreement should be entered into by the spouses for a clarification on their property rights.
- Property acquired during the course of marriage should be treated as joint property despite the financial contribution of the spouses. Equal share in matrimonial property will ensure financial security to women.
- There is a need to bring in Uniform Civil Code as envisaged under Article 44 of Constitution of India for the unification of various personal laws.