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# Right to Matrimonial Home as a Property Right: Need for the Law is the Need of the Hour

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## ABSTRACT

*Women constitute half of the Indian population and for the growth and well-being of her family; she performs various responsibilities in her matrimonial home. In spite of all this, after the breakdown of marriage, she receives inadequate support from her matrimonial home in the name of maintenance. Right to Matrimonial property is one of the important issues in the institution of marriage.*

*A marriage is a partnership of both the spouses, where both of them contribute equally in building a home. The author in this paper has tried to analyze the issue rationally. The paper will explain the concept of co-ownership and separate ownership of the matrimonial home and will also suggest some ways as to how the property should be disposed off between the spouses. The author aims at reaching out to the society and telling that right to matrimonial home would be more concrete if it is made a property right instead of personal right. It also explains as to why personal rights are less secure than property rights. After explaining about the existing matrimonial property rights of women, the author also speaks about the ambiguous nature of Section 27 of the Hindu marriage act and how it has failed to provide the rights to a woman.*

*With a help of case studies the author has analyzed the current scenario of whether the existing laws are providing equality to women. The paper also gives recommendations to the legislature for the disposal of properties between the spouses and aims at stressing on gender equality and upliftment of women in the society.*

*The paper also focusses on economic independence of women after the breakdown of a marriage as it has already been recognized that economic independence is a catalyst to the gender equality in the country.*

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## **I. OBJECTIVES AND METHODOLOGY**

The research is carried out with the objective of reaching out to the society and telling that right to matrimonial home would be more concrete if it is made a property right instead of personal right. It also explains as to why personal rights are less securing than property rights. The authors also aim to provide recommendations to the legislature on the disposal of properties between the spouses. Last but not the least, stressing on the need of gender equality and upliftment of women in the society is what author intends for.

The research targets the following research questions:

1. Whether the current laws aim at securing equality and justice to women in her property rights?
2. Whether it is possible in the current scenario to amend the existing personal matrimonial laws and make them as property laws?
3. If amended, whether the new matrimonial property laws will achieve for gender equality?

## **II. REVIEW OF LITERATURE**

### **(A) BINA AGARWAL, THE FIELD OF ONE'S OWN, CAMBRIDGE UNIVERSITY PRESS, 1998:**

The central question in this book is when is right to anything is considered as a property right and what criteria a person should qualify to call a property his or her own property. The book is a comprehensive research based on the field work of the author and concentrates on the whole of south Asia. The book has failed to give the point of view of the author and has not focused on one particular country. The current research mainly focuses on India on the topic of matrimonial property rights.

### **(B) ARUNDHATI KATJU, BECAUSE JACK DID NOT BUILD THE HOUSE ALONE, THE RIGHT TO MATRIMONIAL HOME AS A PROPERTY RIGHT<sup>3</sup>:**

The paper was published in National law school India University. This paper is a complete guide on matrimonial property rights of women. It broadly deals with the social and economic reasons why women need a right to matrimonial home. The paper is limited to matrimonial home and matrimonial property in general, but the research paper at hand deals with the practical aspects of the issue in a narrower format.

### **(C) JHUMA SEN, MATRIMONIAL PROPERTY RIGHTS: IS INDIA READY FOR THE LAW<sup>4</sup>:**

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<sup>3</sup> Vol 15 (2003) Jstor.org

The article discusses the economic rights of Indian wife within the family structure especially after the breakdown of marriage. In doing so, it examines the genesis of the personal law regime in India and traces similar developments in various countries.

The research article given a great theoretical and qualitative knowledge but has failed the author has failed to give her views and analysis of the topic.

### **III. INTRODUCTION**

In India, the institution of marriage is given a lot of importance. Husband and wife are considered as one and it is said that man is incomplete without a women and vice versa. It is also believed, that women belongs to her husband's family after marriage. But in a patriarchal Indian society, are women getting all her rights in the matrimonial home? The efforts that women put in developing her matrimonial home, in bringing up her children, in taking care of the family, are these efforts recognized in her rights? I certainly believe it's not.

Women's rights in her matrimonial home and most importantly the property rights are almost nonexistent. After the breakdown or marriage or even after the judicial separation all her life efforts are put in trash. She is offered minimal help in stabilizing herself mentally, socially and most importantly, economically.

The reason of ignorance or not giving recognition to her work is three folds. Firstly, Laws and Policies in India have declared homemaker women as a house wife i.e. no recognition is given to the work she does at home. Secondly, the nature of responsibilities that they are made to do at home. Many women in India are forced to leave her jobs and career and nurture the home and children, which are also not considered as productive work but her duties. Thirdly, the pay scale gap in the country. Our country serves much higher pay to men when compared with women in many of the fields. The solution of these problems is also three folds. Firstly, the work of women who is a home maker should be recognized by the society. Secondly, work opportunities should be created for women that can be managed from home or managerial work should be open for women who have more house work. And thirdly, marriage should be looked as "economic partnership" also so that the efforts of the wife can be appreciated by some monetary or other mechanism.

The research limits itself to a study of economic rights of women and her matrimonial property rights within her matrimonial family especially after the breakdown of marriage.

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<sup>4</sup> Jhuma Sen, Matrimonial Property Rights: Is India Ready for the Law, *JOURNAL OF INDIAN LAW AND SOCIETY*, Vol 1, 132 (2009).

Post-divorce maintenance and property divisions are given paramount importance<sup>5</sup> because these factors signify the contribution of women in her marriage life.

#### IV. CONCEPT OF MATRIMONIAL HOME IN INDIA

In India, the term matrimonial home is not defined in any act neither it is defined in any case by the judiciary. For the purpose of this article, the author has described matrimonial home in layman's language as:

The home in which the couple resides after their marriage which in most circumstances is the place of residence of the husband.

In a "community of property regime", each spouse is entitled to a part of the property of other spouse regardless of how the property is nominally titled. This regime views the marriage as economic partnership. On the other hand, there is "separate regime partnership" according which spouses do not have share in each other's property. India follows the later one i.e. the concept of separate property regime.

#### V. EXISTING MATRIMONIAL PROPERTY RIGHTS OF WOMEN

##### (A) STRIDHAN

The history of *Stridhan* can be traced back to Vedic literature. The word literally means "women's property". A *Stridhan* is any property, movable or immovable which is gifted to women by her family, friends and relatives during her marriage. A woman has absolute right of ownership on her *Stridhan*. The first writer to explain the concept of *Stridhan* in the history was *Katyayana* who classified *Stridhan* as *Saudayika and Asaudayika*<sup>6</sup>. He explained *Stridhan* as:

"The one which is received by the married women or a maiden, in the house of her husband or her father, from her husband or from her parents, is termed the gift of affectionate kindred. The independence of women, who have received such gifts, is recognized in regards to that property, for it was given by her kindred to soothe them and for their maintenance. The power of women over the gifts of their affectionate kindred is ever celebrated, both in respect of donation and of sale according to their pleasure, even in the case of immoveable"

Though there is no legal obligation on family to provide *Stridhan* to the woman but customary law suggests that women should be provided with some property during her

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<sup>5</sup> Jhuma Sen, Matrimonial Property Rights: Is India Ready for the Law, JOURNAL OF INDIAN LAW AND SOCIETY, Vol 1, 130 (2009)

<sup>6</sup> Jimutavahana & Vijnaneshwara. (2013). Two Treatises on the Hindu Law of Inheritance (Cambridge Library Collection - Perspectives from the Royal Asiatic Society) (H. Colebrooke, Trans).

marriage. The object of providing *Stridhan* is to help her, economically during the hard time she faces in her marital life.

In the case of *Pratibha Rani v. Suraj Kumar*<sup>7</sup>, the Supreme Court 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.

*Stridhan* is regarded as the women's absolute property. This was advocated by *Vijneshvara* which was for the first time upheld by the Privy Council in the case of *Mussammat Thakoor Debee v. Rai Baluk Rai*<sup>8</sup>.

Gift made by husband to wife after the marriage are also treated as *Stridhan* in most case but whether her right over such gifts will be absolute or limited depends on the kind of gifts given. It was held in the case of *Hitendra Singh v. Maharaja Dhiraj Sir Rameswar Singh*<sup>9</sup> that if the property happens to be the husband's family property then the wife may have a limited interest. The property reverts to the donors after her death.

#### **(B) MAINTENANCE AND ALIMONY**

Alimony and Maintenance are given by the husband to the wife after the divorce or when the couple is not divorced and the proceedings for the divorce are still continuing in court respectively. The object of providing the alimony and maintenance is to help the indigent wife to take care of her economic needs to bear the costs of the proceeding until the final order has been passed by the court. The reasoning behind the giving of maintenance is provided by Justice Krishna Iyer in case of *Bai Tahira v. Ali Hussain Fissalli*<sup>10</sup>.

*“Interest from which could not keep the woman's body and soul together for a day. Unless she was ready to sell her body and give up her soul... Ill used wives and desperate divorcees shall not be driven to material and moral dereliction to seek sanctuary in the street.”*

But to the author's observation, the court has not been very kind in giving maintenance to the women. Different courts have pronounced this in several judgments that right to maintenance must cease with the death of the husband. Also in the case of *Pankaj Jain v. Naina Jain*<sup>11</sup>, the court held the wife guilty of trespass when she entered her matrimonial home after she was evicted by the husband as she had no rights in the title of her matrimonial property.

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<sup>7</sup>*Pratibha Rani v. Suraj Kumar*, A.I.R. 1985 SC 628 (India).

<sup>8</sup>*Mussammat Thakoor Debee v. Rai Baluk Rai*, (1866) XI MIA 39 (India).

<sup>9</sup>*Hitendra Singh v. Maharaja Dhiraj Sir Rameswar Singh*, A.I.R. 1925 Pat. 625 (India).

<sup>10</sup>*Bai Tahira v. Ali Hussain Fissalli*, A.I.R. 1979 SC 362 (India).

<sup>11</sup>Appealate Order, 1003, December, 1986, Bombay.

But there are several problems with the system or procedures in which maintenance is granted to a woman after the divorce. Firstly, many women do not even know that they have the right to claim maintenance after their divorce. Thus, the concept of Maintenance remains unreachable and hidden from the uneducated women in the backward or less developed areas. Secondly, husbands while giving the maintenance hide their property and assets and also quit their jobs and show that they are unable to provide maintenance to the wife. As the court considers the financial status of the husband, therefore, wife is not given the share in the property which she has a right upon. Thus, she never gets a fair and adequate amount in the husband's property. At the time of providing the maintenance, the women merely asks for her own share in the property which she has helped to build which in the marriage relation but the court fails to provide that adequately.

Section 36 of the Indian Divorce Act, 1869, Section 39 of the Parsi Marriage and Divorce Act 1946 and Section 24 of the Hindu Marriage Act deal with maintenance *pendente lite* and alimony *pendente lite*.

## **VI. RETHINKING: MATRIMONIAL RIGHTS AS A PROPERTY RIGHT OR PERSONAL RIGHT**

Property rights refer to the ownership of specific property by a person and his ability and rights to determine how such property is to be used. The right to accumulate, hold, rent, mortgage, delegate or sell the property are all the rights concerned with property right. On the other hand, personal rights in layman's words are defining as rights of a person in regard to his personal security, personal liberty and private property. Property rights also include in its scope the right to alienation, exclusion and ownership. These important rights cannot be granted in personal rights. Not only this, property rights also have monetary worth which will secure the woman after the separation or divorce but personal right as such do not have any monetary value. Also it is to be mentioned that property rights are rights in *rem i.e.* it is available against the world at large where as personal rights are rights in *persona i.e.* able against for the personal self. These differences make it clear that matrimonial rights to property should be included in property rights than in any other rights as property rights will assure more security and are more concrete than any other rights.

## **VII. JUDICIAL PRONOUNCEMENTS ON MATRIMONIAL PROPERTY**

Section 27 of the Hindu Marriage Act, 1955 reads,

*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 the husband and wife.*

The words used are, jointly to both husband and wife at or about the time of marriage.

In *Surinder Kaur v. Madan Gopal Singh*<sup>12</sup> the Punjab and Haryana High Court, in the context of section 27 of the Act held thus:

- i. the application for disposal of property must be made at the time when the matrimonial proceedings are pending in the court and before the judgment has been pronounced;
- ii. It is not obligatory on the part of the court to admit such an application. It is discretionary on its part;
- iii. the decree made under the section concerned by the court must be just and proper giving importance to the adjustment of the share of the parties;
- iv. The property which has been presented at or about the time of marriage, includes not only the property which has been given to the spouses at the time of marriage but also at any time before or after the marriage. The most essential condition here is that the property must have been given to the spouses in relation to the marriage and close to the time of marriage. The time duration is of importance here;
- v. the concerned property may be given to either of the two spouses or both of them jointly; and
- vi. When the matter is brought before the court of competent jurisdiction, the property concerned must belong to either of the two spouses or jointly to both of them.

In *Kamta Prasad v. Omwati*<sup>13</sup>, the Allahabad High Court held that the court can pass a decree with respect to any property which is owned by either the husband or the wife in addition to the property owned by both of them jointly. The court further held that the provision gives power to the court to deal with both types of properties, belonging to either of them and both of them jointly, and the power is not restricted to the properties owned by both of them jointly. In contrast, the Delhi High Court in *Shukla v. Brij Bhushan*<sup>14</sup>, held that the court does not have the power under section 27 of the HMA to pass a decree with respect to any property owned by either the husband or the wife exclusively.

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<sup>12</sup>*Surinder Kaur v. Madan Gopal Singh*, AIR 1980 P&H 334 (India)

<sup>13</sup>*Kamta Prasad v. Omwati*, AIR 1972 AH 153 (India).

<sup>14</sup>*Shukla v. Brij Bhushan*, AIR 1982 Del 223 (India).

In *Krishnan v. Padma*<sup>15</sup>, the Karnataka High Court had interpreted the term at as referred in section 27 of the HMA to mean actual time of marriage and the word about to mean near or roundabout the time of marriage and not subsequent to the marriage. In *Kamalakar Ganesh Sambhus v. Tejas Kamalakar Sambhus*<sup>16</sup>, the High Court of Bombay held that the provision does not govern the property which was acquired by the parties by their joint efforts during their marriage and deals with the property which was presented at or about the time of marriage.

It is clear from the above judicial pronouncements that different courts have interpreted section 27 of Hindu Marriage Act, 1955 in different manner which is clearly contrary to each other. This leads to the ambiguous nature of section 27 of the HMA.

### VIII. WHETHER CURRENT LAWS ARE GIVING EQUALITY TO WOMEN?

Personal laws stand as a proof to grave injustice and inequality to women even it today's times. The Constitution of India which came into force on 26 January, 1950 guaranteed its citizens 6 basic fundamental rights which also included the right to equality<sup>17</sup> before the law irrespective of their race, sex, cast, creed or place of birth.<sup>18</sup> Article 44 of the constitution which talks about directive principles to state policy also include within itself 'to Endeavour to secure for the citizens a uniform civil code throughout the territory of India', it has not been achieved till date.

The courts in India are empowered to declare any law void if they infringe any of the fundamental rights of any citizen<sup>19</sup>. In a case of *Kaur v. Choudhary*<sup>20</sup> while discussing the question of whether the statutory remedy of restitution of conjugal rights was violative of Article 21 mandated 'personal liberty', the Delhi High Court held that 'in the privacy of the home and married life neither Article 21 nor Article 14 have any place.' The court further stated that:<sup>21</sup>

*Introduction of constitutional law in the home is most inappropriate. It is like introducing a bull in a china shop. In a sensitive sphere which is at once intimate and delicate the introduction of cold principles of constitutional law will have the effect of weakening the marriage bond*

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<sup>15</sup>Krishnan v. Padma, AIR 1968 Kant 226 (India).

<sup>16</sup>Kamalakar Ganesh Sambhus v. Tejas Kamalakar Sambhus, AIR 2004 Bom 478 (India).

<sup>17</sup>Indian Constitution, Art 14.

<sup>18</sup>Indian Constitution, Art 15 cl. 1.

<sup>19</sup>Indian Constitution, Art 13 cl. 2.

<sup>20</sup>Kaur v. Choudhary, A.I.R. 1984 Del. 66 (India).

<sup>21</sup> Jhuma Sen, Matrimonial Property Rights: Is India Ready for the Law, JOURNAL OF INDIAN LAW AND SOCIETY, Vol 1, 132 (2009).

In *Krishna Singh v. Mathura Ahir*,<sup>22</sup> the Supreme Court indicated that Part III of the Constitution does not affect personal law.

From a lot of time, Women of various religious backgrounds are challenging the personal laws that infringe the fundamental rights in part III of the constitution but Supreme Court have never tried to struck down the personal laws on that ground.

Another issue in Indian laws is treatment of Husband as wife as one in the eyes of the law. This stands as a bar in suing the husband in case of contract or tort.

## IX. MATRIMONIAL PROPERTY RIGHT MODELS

There are mainly two types of Property division regimes which are applied by many countries in relation to their laws of division of matrimonial property partition. The first one being “Community of property regime” in which each spouse is entitled to a part of the property of other spouse regardless of how the property is nominally titled. This regime views the marriage as economic partnership. This regime is followed by California, Washington, Idaho, and NewMexico etc. On the other hand there is “Separate regime partnership” according to which spouses do not have share in each other’s property. In India, the concept of “separate regime partnership” is followed. Countries that have made laws in relation to division of matrimonial property mostly guarantee right to equality and have applied the rule of equal distribution of matrimonial property between the spouses in divorce proceedings. While dividing the property, factors such as looking after their children, their salaries etc. are also given importance and looked into.

In United States both these property regimes work side by side in different states. In major 41 states the separate property regime is followed while in Puerto Rico and Gunan, community property regime prevails.

The House of Lords in *Miller v. Miller*<sup>23</sup> strongly articulated that there has to be some sort of rationale for redistribution of resources, from one party to another. It held that there are at least three rationales—need (generously interpreted), compensation and sharing.

Even in India, in state of Goa, for almost 500 years, a system of Uniform Civil Code prevails under which a marriage is a civil contract registration of which is compulsory. I Goa, there are four different options under law. They are, community property regime, absolute separation of property, separation of assets existing prior to marriage and communion of

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<sup>22</sup>Krishna Singh v. Mathura Ahir, A.I.R. 1980 SC 707 (India)

<sup>23</sup>Miller v. Miller, [2006] UKHL 24

property after marriage. If in a situation where, separate property is not registered at the time of marriage, it is considered to come under community property regime.

## **X. CONCLUSION AND RECOMMENDATIONS**

The present system of laws regarding the financial security of women are biased in nature as they fail to provide the economic independence of women. In the present system women after the divorce is forced to live in destitute. Not only this, it leaves a woman homeless with no home of her own. In a typical Indian society, neither she can call her parental home as her home nor does she get any name in the matrimonial property. This further leads to increase in Gender inequality in the country.

Coming to the model of property regime which is best suited for India. India currently follows a Separate Property Regime model or separate ownership model for the distribution of property. In this type of model, a non-working spouse has no share in the property, may it be husband or wife. But, it was interesting to note that, in India, most of the times it's the women who is a non-working house maker<sup>24</sup>. In the year 2002, the statistics for the contribution of women in the economic activities was as low as 14.0% and 28.1% in the urban and rural areas respectively. In 2012, the situation has not changed much. The workforce participation of women in India is as low as 13.8% in urban areas and 26.1% in rural areas<sup>25</sup>. This is what defines a typical Indian Patriarchal Family. Thus, it clearly shows that most of the women in India as house-makers and their work are not measured in monetary values. They are economically dependent on their husbands after marriage. It is shocking to read that in the census of 2001, they were equated with prostitutes, beggars and prisoners and were qualified as non-workers<sup>26</sup>.

Thus, it is suggested by the author that instead of separate property regime model, community property regime model should be followed in India as this will give financial security to the women. Not only this, this will also lead to gender equality and upliftment of women in the Patriarchal Indian Society. The Gender Biasness and severe male domination has led to degradation of position of women in the Indian Society. The work of the women as home maker is equally important as the work of the working spouse. This work in all its forms

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<sup>24</sup> Barun Kumar Mukhopadhyay and Prasanta Kumar Majumdar, Status of Gender Differentials and Trends in India Population, Health, Education and Employment

<sup>25</sup> S.K. Das, Government of India, 14th Issue Report on Women and Men in India, National Statistical Organisation, Ministry of Statistics and Programme Implementation, 23(2012)

<sup>26</sup> J. Venkatesan, Assess value of Homemaker Services properly: Court, *The Hindu*, July 23 (2010)

should be appreciated. Such calculus approach towards the upliftment of women will also lead to oppression of women<sup>27</sup>.

Thus, community ownership regime will be advantageous to the Indian society as it will in its conclusion lead to empowerment of women. This is the need of the hour for Indian Society.

Apart from this, some important suggestions and recommendations by the author are as followed:

- a.** Property which the couple gets in gift and during the course of marriage should be equally divided between them during the divorce. As there is *Stridhan* provided to women, gifts and property are also provided to husband at the time of marriage. And there are some common monetary and property gifts which are given to both. All of it should be divided equally at the time of maintenance.
- b.** Pre-Nuptial Agreements should be made before the marriage and division of property should be made according to the agreements. Pre-Nuptial agreements are made prior to marriage by both the spouse which contains the rights and liabilities of both the parties entering into the contract of marriage. The objectives behind prenuptial agreement are protection of wealth and assets acquired prior to marriage, protection from debts of other spouse, protection of family business, continuation of professional practice, child custody, divorce procedure etc.
- c.** The factors such as economic stability of wife, salary of the wife, care taking of children should be taken into consideration while having the division of property.
- d.** Maintenance laws should be made strict and should be made reaches to all the sections of the society.
- e.** Awareness programs of maintenance laws are needed for poorer sections of the society.

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<sup>27</sup> Mary Ann Glendon, Matrimonial Property: A Comparative Study of Law and Social Change 49 Tul. L. Rev. 21 (1974-1975)