

MATRIMONIAL PROPERTY RIGHTS: IS INDIA READY FOR A LAW?

JHUMA SEN*

Economic independence of women has been identified as a major catalyst in achieving equality for women. The advent of divorce laws apart from freeing many women from the shackles of unhappy or abusive marriages has also steered the phenomenon of destitution, which results from the inegalitarian nineteenth century English doctrine of separate property regime. This is aggravated by the fact that contribution of the homemaker has hardly ever been quantified in India by the courts or law, unlike many other countries. 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 England. Women's property rights at the time of marriage and upon divorce are then discussed in detail to highlight the pressing need for a uniform matrimonial property law.

I. INTRODUCTION

Equality in a patriarchal society largely rests on the Orwellian concept of all are equal but some are more equal than others. Therefore the definition and institutionalization of equal rights as a concept of law is tremendously important to combat the rising tides of gender inequality in India. In order to even the disparity in the social and economic structure of women, many laws have been passed and reforms made. These include

* *Research & Advocacy Officer, Lawyers Collective-, Women's Rights Initiative, New Delhi. The views in this article are that of the author and do not necessarily represent the views of the Lawyers Collective.*

¹ The Equal Remuneration Act, 1976.

² The Maternity Benefits Act, 1961.

³ Hindu Succession Act, 1956.

⁴ Medical Termination of Pregnancy Act, 1971.

⁵ Hindu Marriage Act, 1955.

the right to receive equal pay¹, maternity benefit², to own or inherit property³, to terminate unwanted pregnancies⁴ and the right to be protected from cruelty⁵ at the hand of husbands.

However, contrary to the popular belief that stemmed from these legal reforms in the field of women's rights, that women enjoy a high status in the Indian society, the reality of Indian women has not changed. Majority of Indian women are illiterate, the bulk of Indian women work in unorganized sectors and are grossly underpaid. Majority of women also hold almost no property in their own name. Barring some exceptions, majority of Indian women continue to present a deplorable picture of dwindling in the lowest rung of the economic, social and political ladder. Ineffective and inadequate implementation of existing laws results in the inferior status of women in the society. In spite of constitutional guarantee of equality, many gender biased legislations continue to view women through a feudal lens thereby threatening to destroy the very foundation of constitutional mandate of equality.

In the patriarchal Indian society, it is customarily accepted that a woman belongs to her husband's family upon marriage. However a woman's right to property in her matrimonial home is almost non-existent. The Indian wife is offered little help to be economically independent. This article confines itself to a study of economic rights of Indian women within the family structure especially after the breakdown of marriage. Post divorce maintenance and property division are of paramount importance because they signify the status of women within marriage and their contribution to the marriage.

Part II provides a brief overview of the roots of the personal law regime in India and traces similar developments in England. Part III explores women's property rights related to marriage. Part IV discusses women's property rights upon divorce followed by different schemes of property division in India. Part V argues about the contribution of the homemaker and the evolving jurisprudence in the world that has sought to quantify her contribution in the family. Part VI analyzes several matrimonial property rights regime in the world. Finally Part VII offers conclusions and recommendations for an equitable legal structure for post divorce property distribution.

II. OVERVIEW OF THE PERSONAL LAW REGIME IN INDIA

Prior independence the personal law regime was fairly ingrained in the subcontinent. The British evolved uniform codes both civil and criminal applicable to all persons. However as a colonizing power, it was politically wise for the British to leave the existing personal law regime intact. The Christians were the only community for which legislations were sought to be made in family and inheritance related matters.⁶ The Indian Succession Act was enacted in 1865 which applied to Jews, Europeans living in India apart from Christians. When it was replaced by the Indian Succession Act of 1925, it also contained provisions applicable for Parsis. Regulation II of 1772 required the courts to apply the Law of Koran to Muslims for family and inheritance matters. A spurt of acts and regulations between 1827 and 1887 however also provided for the application of local customs. This was however resisted by the Muslim community who preferred to be governed by Muslim law rather than local customs. Thereafter the Muslim Personal Law (Shariat) Application Act 1937 was passed which required that laws of Islam apply to Muslims and therefore set the tone of privileging religious law over custom.

The Constitution of India was adopted by the Constituent Assembly in 1949 and came into force in 1950. The Constitution guaranteed fundamental rights to all citizens of India individually and collectively⁷ which included the right to equality before the law⁸, prohibition of discrimination by the State on grounds of religion, race, caste, sex or place of birth⁹ and equality of opportunity in matters concerning public employment¹⁰. The Union and States have concurrent powers over matters in List III of the Seventh Schedule. Personal or customary laws in List III administer matters such as marriage, divorce, intestacy, succession, joint family and partition and adoption. This also means that personal laws applicable to Hindus in one state need not necessarily be applicable to Hindus in some other state.

⁶ Indian Christian Marriages Act, 1872; Indian Divorce Act, 1869

⁷ INDIA CONST. part III.

⁸ INDIA CONST. art. 14.

⁹ INDIA CONST art. 15(1).

¹⁰ INDIA CONST. art. 16.

Article 372 again provided that all laws in force in the territory of India immediately before the commencement of the Constitution including case laws to continue as the law of the land until altered, amended or repealed. This has, to some extent, perpetuated the personal law system. Although, Article 44 of the Constitution talked about the directive policy of the state ‘to endeavour to secure for the citizens a uniform civil code throughout the territory of India’, it has not been achieved till date. India continues to be governed by myriad personal laws.

Although courts have the power to declare that all ‘laws in force’ before the Constitution are void if they conflict with the fundamental rights.¹¹ State legislation that abridges fundamental rights is also void.¹² The courts have also shied away from the fact that gender bias in personal laws is a constitutional violation. In *Kaur v. Chaudhary*¹³, while discussing whether the statutory remedy of restitution of conjugal rights was violative of Article 21 mandated ‘personal liberty’, the Delhi High Court infamously 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

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.

In *Krishna Singh v. Mathura Ahir*¹⁴, the Supreme Court indicated that Part III of the Constitution does not affect personal law. In *State of Bombay v. Narasu Appa Mali*¹⁵, the Court while deciding the validity of Bombay Prevention of Hindu Bigamous Marriage Act of 1946 noted that the Constitution excludes personal laws from the ambit of Article 13. It added that even if the term ‘laws in force’ included personal laws, the practice of polygamy would not be violative of Article 15 (1) because

¹¹ INDIA CONST art. 13(1).

¹² INDIA CONST art. 13 (2).

¹³ A.I.R. 1984 Del. 66

¹⁴ A.I.R. 1980 S.C.707

¹⁵ A.I.R. 1952 Bom.84

the article is based on ‘vital and compelling’ social, economic and religious grounds and not on grounds of gender. Therefore the court observed that personal laws do not need to stand the judicial scrutiny of their constitutionality. They were part of tradition and were outside the purview of law. In *re Amina*, however the court held that the decision in *Narasu Appa Mali* was erroneous and that personal laws may also be subjected to fundamental rights.¹⁶

From time to time, women from various faiths have challenged the discriminatory provisions of personal laws in the Supreme Court on the ground that they violate the right to equality. However, the Court has never attempted to strike down personal laws on that ground. When *Mary Roy*¹⁷ challenged the Travancore Christian Succession Act (“TCSA”) on the ground that it put an upper limit of Rs 5000 on the inheritance of the daughter and vesting the entire estate to the son, the apex court refused to subject the discriminatory provision of the said Act to the test of equality and instead held that with the advent of the Indian Succession Act, the TCSA stood repealed and therefore the issue was not necessary to be decided. The question of equality was carefully avoided. This has also been repeated time and again in *Madhu Kishwar v. State of Bihar*¹⁸, *Shah Bano Begum & Others*¹⁹, *Githa Hariharan v. Reserve Bank of India*²⁰ case etc where the Supreme Court continually lost the opportunity to articulate a clear jurisprudential basis within which the demand for equality could be raised.

The advent of divorce laws again marked a new era in the phenomenon of personal laws. It was not available for Hindus till 1955. Only limited circumstances permitted divorce for Christians. The Parsi Marriage and Divorce Act of 1936 permitted divorce under limited circumstances which was subsequently expanded after the passage of the 1988 amendment. Muslim woman’s statutory right to divorce was granted in 1939 under extremely restrictive circumstances.²¹

¹⁶ A.I.R. 1992 Bom.215

¹⁷ 1986 (1) SCR 371

¹⁸ (1996) 5 SCC 125

¹⁹ A.I.R. 1985 SC 945

²⁰ AIR 1999 SC 1199

²¹ Dissolution of Muslim Marriage Act, 1939.

Although divorce laws brought a certain amount of prospect to the woman to escape from unhappy or abusive relationships, it has also gnarled the level of economic security the married woman previously enjoyed. For example the Hindu woman became a part of her husband's joint family upon marriage and he was duty-bound to provide her with maintenance and if his death preceded hers the joint family was responsible for her support. The Hindu wife did not become co-parcener but was provided with a minimum amount of economic security and shelter and a standard of living to which the husband was accustomed to. With the advent of divorce laws, the same Hindu woman could be forced from the matrimonial home, deprived of her marital assets and isolated from the joint family upon divorce.

The Indian wife's economic rights have traditionally revolved around *stridhan*, maintenance and alimony. While *stridhan* was exclusively the woman's property over which her husband could not have any claim, maintenance and alimony were linked to the concept of sustenance to prevent the wife from falling into 'vagrancy and destitution'²² and were distinct from an award of property. The concept of joint matrimonial property is sorely lacking in Indian personal laws. The supremacy of the separate property regime accounts for this virtual silence of the Indian laws regarding post divorce property division between spouses.

Because India remains primarily devoted to an inegalitarian nineteenth century English doctrine of separate property regime, it is imperative that a careful study of the development of the English matrimonial law is conducted. Divorce in England was virtually impossible to obtain because marriage was considered as a sacrament by the Church. It was possible to obtain a judicial separation which did not dissolve the marriage and was obtainable only in very limited circumstances like adultery, cruelty or unnatural offences. Nullity of marriage resulted from consanguinity or affinity, mental incapacity, impotence or a prior existing marriage. The wife could not on her own seek judicial release from her obligation to live with her husband till the passage of the Matrimonial Causes Act 1878. She was also entitled to an order that he must maintain her. What needed to be proved was an aggravated assault against her by

²² K. Vimla v. K. Veeraswamy JT 1991 (2) SC 182.

her husband. However, for many women, recourse to the court was not an option due to financial and social constraints.

Another prevailing gender bias in English statute books was the treatment of husband and wife as one person in the eyes of the law. Understandably the wife could not sue her husband in contract or tort. Also, the woman's property became her husband's upon marriage. This was in place till 1962 till the enactment of the Law Reform (Husband and Wife) Act, 1962.

The first concerted effort towards codification of married woman's right to property came in 1870 with the passage of the Married Women's Property Act, 1870 which allowed married women to retain certain property such as their wages and earnings as separate property. However, it was not until the enactment of the Married Women's Property Act 1882 that full proprietary rights were given to married women. The legislation also granted women remedies for the protection and security of their separate property. However, this Act also ingrained the concept of separate property into the British divorce law and left it to the courts to decide questions of right and title related to property. In other words, upon dissolution of marriage, each party received what belonged to him or her. This is also the foundation of the Indian legislations related to property rights of women in marriage.

However, the English legislature responded with a string of reforms and made several enactments that sought to ease the burden of divorced women. To begin with, grounds for seeking divorce were expanded and made the same for both sexes, courts were enabled to issue orders for permanent maintenance, alimony, to set aside disposition of property which were made with the objective of defeating the wife's right to secure financial relief.²³ The Maintenance Orders Act 1958 sought to enforce maintenance orders through attachment of wages, salaries and other earnings. The Matrimonial Proceedings and Property Act 1970 allowed courts to award periodical payments, lump sum payments, transfer of property orders, settlement of property orders etc. The Act walked an extra step in instructing the courts that in awarding financial relief, they should consider

²³ The Matrimonial Causes (Property and Maintenance) Act, 1958

‘any contribution made by looking after the home or caring for the family.’ Additionally the Act provided for the consideration of money or money’s worth to be considered as a share or enlarged share in the property in question.

Presently the Matrimonial Causes Act 1973 governs the distribution of marital assets upon divorce. Apart from authorizing courts to order periodical or lump sum maintenance payments and child support, the Act empowers courts to divide the property according to its discretion. This usually results in an equal distribution of marital assets. In determining proprietary rights the court may consider the intent of the parties at the time they had acquired their property and may also examine the indirect and direct contribution of each. The presumption here is of joint ownership.

India however has refused to follow a similar developmental path in the realm of matrimonial property laws. Nineteenth century English law remains deeply rooted in the new divorce laws. The current regime is responsible for a woman, divorced by her husband after many years of maintaining the family home being left with nothing but a portion of the remains of her wedding presents despite her contribution to the accumulation of property that her former husband enjoys.

III. WOMEN’S PROPERTY RIGHTS UPON MARRIAGE

A. *Stridhan*

Stridhan, comparable to ‘peculium’ in Roman law or bride’s ‘pin money’ in England is the movable property voluntarily presented to the bride from her family and friends. It mostly consists of jewelry, money and clothing. The term literally means ‘woman’s property’ over which she exercises absolute control. A woman does not have a legal right to receive *stridhan*; however customary rules place an obligation on her family to provide her with some property upon marriage. The roots of *stridhan* can be traced to the Vedic literature. However, the first writer amongst the smritikaras to elaborate²⁴ the subject was Katyayana who classified *stridhan* as ‘*saudayika*’ and ‘*asaudayika*’ to indicate the extent of the woman’s control

²⁴ Katyayana, *Daya-Bhaga*, in MITAKSHARA AND DAYA –BHAGA, TWO TREATISES ON THE HINDU LAW OF INHERITENCE 66(Henry T. Colebrooke trans., Hindoostani Press) (1810). So Katyayana declares: *That which is received by a married woman or a*

over her assets. While a married woman could exercise an absolute and unrestricted control in the disposal of 'saudayika' she could not do the same with 'asaudayika' wherein she had to obtain the consent of her husband. In *Pratibha Rani v. Suraj Kumar*²⁵, 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.

The entire gamut of *stridhan* rotated around the economic independence of women during hard times. The idea was to protect the married woman from social insecurity in difficult times. *Stridhan* also traditionally provided the woman with socially acceptable access to a share of her family's property upon marriage when she moved into her matrimonial home.

Gifts made by the husband to the wife are normally treated as *stridhan* of which she is the absolute owner. The question often asked is whether the wife took the gift as absolute owner under all the circumstances or whether she had a limited interest in the property. Courts have held that the answer rests on the nature of the property. 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.²⁶ She is the absolute owner when the words are sufficient to convey an absolute estate.²⁷

B. Maintenance and Alimony

Broadly speaking, money paid as support by one spouse to another can be in the form of maintenance and alimony. While 'alimony' is usually granted to one of the spouses after divorce, maintenance can be granted during the continuation of marriage, during the divorce proceedings or after the divorce has been granted. The object of these provisions is not to determine rights of the parties but to enable an indigent wife to maintain herself until final

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 immoveables.

²⁵ A.I.R. 1985 SC 628.

²⁶ *Hitendra Singh v. Maharajadhiraj Sir Rameswar Singh* A.I.R. 1925 Pat. 625.

²⁷ *Hitendra Singh v. Rameswar Singh* A.I.R. 1928 P.C. 112.

orders are passed. It enables the wife to live, and to defend and prosecute the case until the rights of the parties are finally decided by the court. The reasoning behind the concept of maintenance was brilliantly illustrated by Justice Krishna Iyer in *Bai Tahira v. Ali Hussain Fissalli*²⁸:

“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.”

Prevention of vagrancy and destitution has been traditionally the reason behind providing for maintenance. Maintenance is less of a right and more of a charity or support. 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*.

However the sad reality of Indian wives is that many women are not even aware of their right to seek maintenance. A woman faces many impediments to obtain maintenance. Courts have not been very kind in this regard. The Punjab and Haryana High Court held that because it is a personal obligation, the payment of maintenance must cease with the death of the husband.²⁹ The widow would then have to file an application for maintenance against her husband’s estate in accordance with Section 22 of the Hindu Adoption and Maintenance Act. Also the courts have traditionally not been generous regarding amount of maintenance order granted to wife. The quantum of maintenance depends upon consideration of several factors like status of the family, earnings and the commitments of the husband and what is required by the wife to maintain herself. In *Maganbhai v. Mani Bein*³⁰, the Court said that the wife can be awarded maintenance to the extent of one-half of the income of the husband, if the husband earns reasonably well and if he had no obligation to maintain

²⁸ A.I.R. 1979 SC 362.

²⁹ A.I.R. 1986 (P&H) 251.

³⁰ A.I.R. 1985 Guj. 187.

others. Again in *Rambu Sharma v. State*³¹ the Court held that pendent lite maintenance is one-fifth of the husband's average net income for the past three years minus the wife's income. In *Hema v. Lakshmana Bhat*³² however the court rejected that view and considered the parties' affluent background and length of marriage to arrive at the amount of maintenance.

Therefore normally the courts consider income and property and ability of the claimant and income and property of the non-claimant, conduct of the parties and any other circumstance relevant for the purpose to determine the quantum of maintenance to be awarded.

The most difficult hurdle faced by the wife is the collection of money after the maintenance order has been granted. Many husbands may dispose of property, quit jobs and hide assets so that they appear less able to maintain their wives. These intrigue the judge in ordering maintenance payments that provide the woman with a fair and adequate share of the husband's income. This is compounded by the fact that the law mostly refuses to recognize that the concept of maintenance must undergo a change. A woman seeking maintenance merely asks for the return of her own property which she had helped her husband accumulate during the period of matrimonial life. As discussed before, the right to maintenance is not the same as right to property. Maintenance stops when the woman remarries or she dies and does not pass on to her children or others. Maintenance, therefore fails to make the woman truly financially independent.

IV. WOMEN'S PROPERTY RIGHTS UPON DIVORCE AND THE NOTION OF SEPARATE PROPERTY REGIME

Under the separate property regime, each spouse leaves the marriage with the property to which he or she holds a title. The Court is not empowered to distribute assets acquired during marriage or in any other manner. The law therefore disregards financial and non-financial contribution to the acquisition of the property by the spouse who does

³¹ A.I.R. 1989 M.P. 261.

³² A.I.R. 1986 Ker. 130.

not hold title. This often discriminates against the woman who lacks title to the matrimonial home and other properties by failing to appreciate marriage as a partnership. To cope with the impending problem of determining proprietary rights, the Hindu Marriage Act provided that the property jointly presented to the spouses at or about the time of marriage may be disposed of by the court as it may think just and proper. Under Section 27³³ of the Hindu Marriage Act, settlement of the jointly held property must be made at the time that the decree is issued and property presented to the husband and the wife before or after the marriage is not within the purview of the section. The expression ‘jointly’ in the Act is significant because it demarcates the limits of the matrimonial courts’ jurisdiction over the disposal of such property in two respects, first, by limiting it to property which has been given to the spouses either at or about the time of marriage and secondly, such property must have been given to them directly. This significantly left out various other kinds of property acquired by the spouses before or after the marriage or property jointly acquired by the spouses during their period of matrimony for meeting the needs of the family etc.

The English courts as early as 1950 evolved a rationale to tackle this problem of adjudicating respective rights over property by the spouses. Referring to such difficulties, Denning L.J. remarked in *Newgrosh v. Newgrosh*:

“In the ordinary running of a home, where the parties agree to buy clothes or furniture, they may also agree to whom it is to belong; but if, as so often happens they have left that unsaid, the title to it depends as a rule on the nature of property bought or the investment made. It does not necessarily depend on who provided the money. If clothes are brought for the wife they are of course hers; if money is invested in the wife’s name it is presumably hers. Conversely, where money is invested

³³ **27. Disposal of property.** In any proceeding under this Act, the court may make such provisions in the decree as the 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.

*in the husband's name, it is presumably his. But if they invest money in their joint names, or if they buy furniture with it, which it is obviously intended as a continuing provision for the benefit of them together, it may properly be presumed to belong to them jointly...Full effect is, therefore, given to their intention by holding them to be joint owners".*³⁴

However, it is a matter of common knowledge that as unstable it may seem, the spouses never foresee the eventuality of a divorce at the start of a marriage. Therefore formal legal relationships are not sought to be created at the very outset of a matrimonial life. These are the considerations that prevent the courts from deciding the claims of the spouses in respect to their property on more equitable grounds than mere formal principles of law. In the absence of any fixed set of rules or clear practice in this are the courts are completely handicapped. A civil code would avoid such mischief and greatly aid in the process of equitable distribution of matrimonial property.

Although the court has discretion to order any settlement of the property to the benefit of either spouse, it is only empowered to distribute property that is jointly held by the husband and wife.³⁵ Courts have traditionally held that under the Hindu Marriage Act, jurisdiction is lacking to deal with the property exclusively by one party or the other, regardless of the time or manner in which it was acquired during the marriage. The Rajasthan High Court stated in *Anil Kumar v. Jyoti*³⁶ that section 27 addresses only that property which is jointly owned by the couple and which has been given to them at or about the time of their marriage. Therefore, it was the court's understanding that this provision did not concern any property belonging solely to one of the parties. The only procedure to regain possession of his or her individual property, the husband or the wife must institute a separate suit.

The Special Marriage Act, 1954 includes no provision addressing the settlement of any type of property upon divorce. Codified Muslim

³⁴ (1950) 100 L.J. 525 (C.A.)

³⁵ *Akasan Chin v. Paravati* AIR 1967 Ori. 163.

³⁶ A.I.R 1987 Raj. 157.

law provides only that upon divorce the wife shall receive the property given to her directly and an amount equal to the sum of *mahr* or dower previously agreed to be paid to her.

The existing codified personal law dealing with post divorce property distribution is grossly inadequate to address the concept of joint matrimonial property which treats marriage as an equal partnership in which assets are accumulated as a result of work, support and fortune of both parties for the benefit of the whole family unit.

According to a study, although a wife's earnings from agricultural wage work were typically about half or two thirds of the husband's, her contribution to household maintenance was greater than his in six of the twenty sample villages, equal or close to equal in five others and substantial in the rest.³⁷ The study also showed that the proportion contributed by the wife from her income was greater than that by the husband. Typically she contributed over 90% of her earnings, while the husband rarely gave over 60 to 75% of his and sometimes even less. Another study found that majority of working women gave most or all of their earnings to a senior member of the household such as the husband.³⁸

A study conducted and published by *Majlis* found that shelter was the most pressing need of divorcing women and provided evidence of the disastrous effects of the separate property regime for women.³⁹ Of 60 women who participated in the study only six resided in the matrimonial home, three of whom did so because the husband left to live with another woman. Divorces had not been finalized for fifty-eight of the women, which meant that women were also unprotected during divorce proceedings. Thus for 90% of the women in the study, divorce or merely divorce proceedings meant loss of the matrimonial home.

³⁷ Bina Agarwal, *Rural Women, Poverty and Natural Resources- Sustenance Sustainability and Struggle for Change*, 24(43) ECONOMIC & POLITICAL WEEKLY WS 46(1989).

³⁸ Lusía Accati Levi, *Wife-Husband Relations- Differences between Peasant Households and Modern Professional Class Families in North Eastern Italy*, 20(17) ECONOMIC AND POLITICAL WEEKLY WS 15, WS 37 (1985).

³⁹ FLAVIA AGNES, *GIVE US THIS DAY OUR DAILY BREAD: PROCEDURES* (1992)

There are some methods to circumvent the inequality in the separate property regime. The husband and the wife, during the marriage can agree to hold titles jointly and in an equitable manner. During the marriage or upon divorce one spouse can agree to transfer the title of certain assets to the other one. But both these methods of minimizing the inequality of separate property require the consent of at least one person. Joint title requires some amount of forethought that may be absent at the time the couple acquire the property.

Using the mechanism of constructive trust, the Court may also be able to ameliorate the suffering of the non-title holding party. However constructive trusts do not create legal rights for the beneficiary.

The court may also compel a spouse to sell his or her property in order to make court mandated maintenance payments. Despite these ways in which the separate property regime can be dodged, it remains an inequitable system which fails to recognize marriage as a partnership and discriminates against women who lack title to the marital home and other property.

Courts elsewhere have responded to these economic realities by evolving a jurisprudence of joint matrimonial property regime where all assets acquired from the time of marriage are viewed as joint marital assets to be divided equitably or evenly between the divorcing parties. In India, however the woman, while enjoying the formal status of equality at law, in essence remains economically dependent on her husband. The separate property regime has resulted in the perpetuation of subordination of women's economic interests.

V. CONTRIBUTION OF THE HOMEMAKER: EVOLVING JURISPRUDENCE

The Indian Judiciary and the personal laws have also consistently failed to quantify the contribution of the homemaker. General Recommendation No. 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. It 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 and it recommended that State-Parties should *inter alia* encourage and support research to evaluate the unremunerated domestic activities of women to quantify and to include this in the Gross National Product. It recognized that most of the unpaid work around the world is performed by women.

The House of Lords in *Miller v. Miller*⁴⁰ 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. for redistribution, which individually or collectively look at factors which were linked to the parties' relationship, either causally or temporally.

The most common rationale is that the relationship has generated needs which the other party should meet. The court in such cases try to ensure that each party and their children have enough to supply their needs which is set at a level as close as possible to the standard of living previously enjoyed. A child is the major source of need. Another source of need is having had to look after children or other family members in the past which compromise the ability of many homemakers to attain self sufficiency as a result of family responsibilities. Yet another source of need may be the fact how the parties chose to run their life together. The House said that even dual career families are difficult to manage with complete equal opportunity for both as compromises often are made by one so that the other can get ahead. 'The needs generated by such choices are a perfectly sound rationale for adjusting the parties' respective resources in compensation.' The second rationale closely related to need is compensation for relationship generated disadvantages. The economic disadvantage generated by the relationship may go beyond the need. The third rationale is the sharing of fruits of matrimonial partnership.

Earlier, in *White v. White*⁴¹ it was already settled that domestic and financial contribution should be treated equally. It clarified that Section 25 (2) (f) of the 1973 Act⁴² does not refer to contribution which each has

⁴⁰ [2006] UKHL 24.

⁴¹ [2001] 1 A.C. 596.

⁴² Matrimonial Causes Act, 1973.

made to the parties' accumulated wealth but the contributions they have made and will continue to make to the welfare of the family.

While a string of legislations on matrimonial property rights have been made in most countries which have taken into account the hitherto unexplored subject of quantifying the contribution of the homemaker and courts have from time and again dealt at length with this issue, Indian courts, very strangely and unfortunately have refrained from discussing this issue. No attempt has been made in passing any suitable legislation to address critical issues in division of matrimonial property.

However, scattered efforts have been made to appraise the value of the homemaker in insurance suits. In an extremely slow pace a skeleton of jurisprudence pertaining to contribution of homemaker is shaping in cases related to insurance claims and the like. In *Lata Wadhwa v. State of Bihar*⁴³, the Supreme Court, while awarding compensation to the family of the deceased (including housewives) and injured in fire, attempted to estimate the value of services rendered by them to the house and held that a notional income of Rs. 3,000/- should be awarded for housewives and fixed Rs. 3,500/- as monthly income. In *Malay Kumar Ganguly v. Dr Sukumar Mukherjee and Ors*⁴⁴, the Apex Court following *Lata Wadhwa* stated that:

“For compensating a husband for loss of wife, therefore courts consider the loss of income to the family. It may not be difficult when she had been earning. Even otherwise a wife’s contribution to the family in terms of money can always be worked out. Every housewife makes contribution to his family. It is capable of being measured on monetary terms although emotional aspect of it cannot be. It depends upon her educational qualification, her own upbringing, status, husband’s income.”

Justice Prabha Sridevan in a recent case in the Madras High Court relied heavily on the decision of the Apex Court in *Lata Wadhwa* and

⁴³ A.I.R. 2001 SC 3218

⁴⁴ 2009 (10) SCALE 675

noted that

“11. The role of a housewife includes managing budgets, coordinating activities, balancing accounts, helping children with education, managing help at home, nursing care etc. One formula that has been arrived at determines the value of the housewife as, Value of housewife = husband’s income + wife’s income + value of husband’s household services, which means the wife’s value will increase inversely proportionate to the extent of participation by the husband in the household duties. The Australian Family Property Law 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.’

12. If we look at some of the rulings of the CEDAW with regard to complaints made to it, we find the high prevalence of the stereotypical attitudes with regard to the role of women that constitutes a serious impediment to the full implementation of the said Convention. 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.”⁴⁵

⁴⁵ National Insurance Company v. Minor Deepika MANU/TN/1304/2009

Concluding, the Court 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.

VI. MATRIMONIAL PROPERTY RIGHTS MODELS

Countries that have made laws relating to matrimonial property apply the rule of equal distribution of the matrimonial property between the spouses, in divorce proceedings. When the division is being worked out, these laws also account for the needs and responsibilities of looking after any children from the relationship. Thus property is not taken by spouses in traditional manner, i.e. property in a particular spouse's name would remain with him. Instead, a common pool of resources is identified which is equally divided. Some countries have identified the right of matrimonial property to live-in relationships and same sex marriages, recognizing that the essence and dynamics in these relationships are no different from the ones that adopt an initial religious or formal process and the greater need of protection in such cases.

The equality spoken of in post divorce cases is to a greater extent the equality of result. The idea is that each spouse should exit the marriage at the same economic level as the other. Caroline Forder⁴⁶ in this regard has articulated that if 'true' economic equality is to result, it is necessary to have regard to all resources and liabilities of each of them, and this may sometimes be achieved through unequal division of assets.

Michael Davie⁴⁷ while comparing the English and American conflict of laws in matrimonial property argue that in general the approach taken by common law jurisdictions is to regard the property rights of spouses as unaffected by marriage. Therefore each spouse retains the assets with which he or she entered the marriage as separate property. In recognition of the fact that the wealth accumulated by each spouse during

⁴⁶ Caroline J. Forder, *Might and Right in Matrimonial Property Law: A Comparative Study of England and the German Democratic Republic*, 1 INT'L Law Pol'y & Fam. 47(1987).

⁴⁷ Michael Davie, *Matrimonial Property in English and American Conflict of Laws*, INT'L & COMP. L. Q. 855 (1993).

the course of the marriage is likely to be the product of joint efforts and with a view to placing the financial needs of one spouse on the shoulder of another when the marriage ends, separate property states treat marriage as bringing with it rights of financial support on the dissolution of marriage and rights of succession on the death of a spouse.

In the civil law countries, under the system of community property, the marriage is deemed to create a common fund which embraces wealth and property of each spouse. From the moment of marriage each spouse has a joint interest in the fund. The nature of the fund differs—in some countries it covers only the property acquired during the course of marriage, in others entire property of each spouse acquired before and after the marriage is covered.

In the United States, both these matrimonial property regimes operate side by side. In 41 States, the District of Columbia and the Virgin Islands, a system of separate property regime continues whereas in nine States (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington and Wisconsin), the Commonwealth of Puerto Rico and the Territory of Guam, a system of community property prevails.

The Uniform Marital Property Act (UMPA) combines of United States combines elements of equitable distribution and community property systems. UMPA creates a class of property that is the property of marriage and not the property of individual. That class of property is made up of all property of the spouses, except certain specific exceptions that remain individual property. If there is a question about specific property, whether it is marital or individual property, the Act raises the presumption that it is marital property. The presumption forces any party claiming property as individual property to bring sufficient evidence to overcome the presumption. Thus, UMPA explicitly favors the family and a finding of marital property.

Each spouse has an undivided present one-half interest in the marital property. Each spouse owns his or her own individual property. Further, marital property interests exist notwithstanding title as evidenced by title documents or otherwise. A spouse has his or her interest in marital property, even if that spouse's name appears nowhere on any title

documents.

Closer home in the context of matrimonial property, the Portuguese Civil Code, the living legacy left in Goa by the Portuguese is of paramount significance. For almost 500 years, a working model of uniform civil code has existed in Goa.

- The civil laws currently in force in Goa that pertain to marriage, divorce, protection of children and succession are non-discriminatory in terms of caste, ethnicity or gender.
- Marriage is a contract and the civil registration of marriage is compulsory.
- Most interestingly, there are four different marital options under the law—community property, absolute separation of property, separation of assets existing prior to marriage and communion of property after marriage and total regime. In the absence of antenuptial contract regarding the distribution of property, the custom prevails, which presumes that the spouses are married under the simple communion of acquired properties.
- Under this system the spouses register their separate properties at the time of marriage. Separate properties include property that each spouse holds at the time of marriage, or that which is acquired by succession, gift or under a previous exclusive right.
- If separate property is not registered at the time of marriage, it is considered to be community property.
- All property acquired during the marriage is considered to be owned jointly by both spouses and is to be divided equally if parties divorce.

Practitioners in Goa agree that this regime provides the baseline for fairness and security in marriage. The argument on the side of communion of property by default seeks to protect the woman who gave up her career to be a housewife and is being divorced after many years of marriage. Giving her a share in the marital property recognizes her contribution to the union, even if the contribution is not

financial. A systematic study of the Goan family laws is required. In the light of the current issue the Goan laws could serve as a model for the entire nation.

VI. CONCLUSION AND RECOMMENDATIONS

The present system of personal laws regarding property division is extremely biased against women because it fails to ensure that the woman will leave the marriage with the assets and economic security to which she is entitled. This legal regime is perpetuating gender inequalities that render the woman homeless and a destitute by divorce. Looking into the foregoing discussion, the following suggestions may emerge to construct a more equitable and egalitarian legal scheme that will protect the rights of women who are divorced from their husbands.

1. *Separate Property*: Individual property prior marriage should remain separate property to which only the owner will be entitled after divorce. It may include inheritance and gifts and there should be a mandatory provision of registration of the same. Presumption unless disproved should be that unregistered assets are joint property.
2. *Joint Marital Property*: Property acquired in the course of the marriage that will be divided equally if the parties decide to divorce. The court must have the power to order the transfer of property from one party to another and to order settlement of spousal property for the benefit of the other spouse and children.
3. *Ante-Nuptial Agreements*: The court may enforce ante-nuptial contracts where both parties to the marriage agree to an alternative settlement of property.

These recommended provisions treat marriage as a partnership of equals and recognize both financial and non-financial contributions of both spouses to the marriage, the household and the acquisition of assets. Removal of legal constraints and legitimization of reform of property rights is an important and catalytic first step for women. Without economic rights, the emergence of women as equal players in the mainstream of Indian life

will remain as it has for the last six decades—slow and sometimes regressive.⁴⁸

⁴⁸ Gita Gopal, *Gender and Economic Inequality in India: The Legal Connection*, 13 B.C THIRD WORLD L.J 63 (1993).