MATRIMONIAL PROPERTY LAW IN INDIA: NEED OF THE HOUR

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Abstract

Matrimonial property is one of the most important issues pertaining to the institution of marriage. In spite of immense contributions made by women to the household economy, they receive unsatisfactory financial support. Their contribution to the growth of the family is not seen as productive work and therefore they are not given any economic co-ownership with equal rights. This paper argues that there is a need to deliberate rationally on this issue. Marriage ought to be recognised as an equal economic partnership between the husband and the wife. Indian laws need to make clear provisions regarding matrimonial property and its share among spouses. This paper also tries to study the strains and stresses in the introduction of the concept of matrimonial property in the existing family system. In order to emphasise on the issue, an attempt is made to closely analyse the inheritance rights of women in different legal systems. It is followed by a study of different functional models of matrimonial property across the world and a discussion on the best suited model for the Indian scenario.

I Introduction

WOMEN CONSTITUTE half the world's population, perform multi-skilled responsibilities in the matrimonial home, but receive unsatisfactory and insufficient financial support as their contribution to the growth of family is not considered productive work and they are not given any economic co-ownership with equal rights. In the regime of matrimonial property in India, spouses continue to treat the property they bring into the marriage as their separate property. The valuation of the matrimonial property that may take place at the time of death of the husband or the dissolution of marriage follows what, B. Sivaramayya referred to as the separation of property model. Under such a system there is no corpus of matrimonial property over which both the spouses can exercise a claim. There is no conception of an economic partnership between the spouses that would come into existence upon marriage.[1] As a result, for many women, the initial corpus of wealth that they have at the time of marriage, together with accretions to their property that are made by their own effort or through gifts or inheritance, constitute

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1 B. Sivaramayya, *Matrimonial Property Law in India* 112 (Oxford University Press, 1999).

the only property over which they exercise ownership at the time of the dissolution of marriage.

In the matrimonial home the disproportionate holding of assets occurs primarily for three reasons; *firstly*, laws and policies in India do not recognise domestic work as productive work ; *secondly*, nature and nurture responsibilities of women, where they are frequently forced to give up their careers to look after their homes, are not considered as productive work ; and *thirdly*, even when women take up jobs, they are confined to relatively low-paid ones. The solution of these problems is also three fold: *firstly*, recognise domestic work as productive work ; *secondly*, draw women into the managerial and remunerative work; and *thirdly*, recognise marriage as an equal economic partnership between husband and wife, and acknowledge wife s contribution to the acquisition of assets by way of suitable legal mechanism.

Legislative approach and judicial pronouncements have resulted in amelioration of the proprietary status of a Hindu female. But much remains to be done. An analysis of the various statutory provisions and judicial opinions reveals that the Hindu female s personal and proprietary status more or less remains the same as it was before the emergence of the statutory era in Hindu law. Juristic efforts have been eclipsed by the socio-religious influence on Hindu society. Eventually, property and personality are interdependent terms; while property as a concept is inconceivable without person, likewise personality is inconceivable without property. The study of the legal systems of the world, ancient and modern, reveals that females have been denied the proprietary status under all the male dominated legal systems, deteriorating their social status and reducing them to the other class, definitely of inferior human beings.

Under Hindu law, ancient and modern, no author, except *Vijnaneswara*, ever advocated and 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 a rule of law.

The Hindu female s absolute right to property advocated by *Vijnaneswara* was judicially curtailed by the Privy Council for the first time in 1866 in

Mussumat Thakoor Deyhee v. *Rai Baluk Rai*.[2] This case was decided by the judicial committee of the Privy Council in order to reconcile the then existing conflicting interpretations given to *Dharmasastras* on *stridhan*. The Bengal school accepted the restricted interpretation of the text of *Yajnavalkya* which was finally accorded approval by the judicial committee of the Privy Council. Thus, was born the concept of woman's limited estate which in 1937 was statutorily recognised in the Hindu Women's Rights to Property Act, 1937. The concept of Hindu woman's limited estate gave rise to two types of property owned by Hindu woman, *viz.*, (i) woman's limited estate; and (ii) *stridhan*. It was only in 1956 that woman's limited estate, a judicial creation, was undone by the Hindu Succession Act, 1956. Further amendments have been made to the Hindu Succession Act, 1956 by the Hindu Succession (Amendment) Act, 2005, wherein the daughter of a coparcener shall by birth become a coparcener in her own right in the same manner as the son and have the same rights in the coparcenary property as she would have had, if she been a son in the joint Hindu family (HJF) governed by Mitakshara law.[3] The amendment is a welcome step towards socio-legal and economic empowerment of Hindu daughters, but it provides equal proprietary rights only in the family of birth. This amendment has nothing to do with proprietary rights of a woman who is in marriage with a male coparcener of another family and contributes her share in bearing and rearing of children and household works in the matrimonial home but gets no proprietary rights as a legally wedded wife, (though as a widow of her deceased husband, she becomes her deceased husband's class-I heir as specified in the schedule of section 8 of the Hindu Succession Act, 1956 and being the widow of pre-deceased son of her father-in-law, and gets inheritance rights).

Efforts and attempts to bring about a viable change in the social status of Hindu females did not succeed because the problem of female's life-long tutelage has not been attended to in the right perspective. Efforts can be made to analyse the English and the Hindu legal system to introduce a matrimonial property law where both spouses should have equal share in the property either earned before or on marriage, or after marriage. On the death of her husband, the wife steps into the shoes of her deceased husband as a widow of a coparcener and gets the same share which her deceased husband would have taken had he been alive but during her husband's life

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2 (1866) XI MIA 39.

3 The Hindu Succession (Amendment) Act 2005, s. 6.

time she has no proprietary right in the matrimonial home. The only right she has, while her marriage is persisting, is the right to get maintenance from her husband which is not even enough to survive with dignity. If she divorces her husband because of any reason she gets nothing from her husband s property except permanent maintenance alimony. In the absence of clear law of maintenance, it is left to the discretion of the court to decide what would be the amount of permanent maintenance alimony, and for obvious reasons, it depends upon the facts and circumstances of each case. Thus, in these circumstances it is desirable to have matrimonial property law in the country. 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.[4] This paper analyses the strains and stresses in the introduction of the concept of matrimonial property in the existing family system where property is an integral part of the marriage institution and it devolves on a person as per the status he/she holds in the family.

II Concept of matrimonial property

Until the recent past matrimonial home was to be provided by the husband only. However, with the passage of time women are equally contributing in the making of a matrimonial home, therefore, a matrimonial home should be recognised as belonging to both the spouses holding it as joint tenants. The connotation of matrimonial home in the Indian context gives rise to a special problem within Hindu law, namely, to what extent a joint family house (dwelling house) can be treated as a matrimonial home. If the spouse s share, capable of separate possession and enjoyment, is regarded as a matrimonial home, the problem may assume an awkward, if not a serious turn, if a divorced wife decides to exercise her right to live in the joint family house of the husband.[5] At present, no clear answer is possible and it is hoped that the existing legal system will meet the challenges of the occupants of the joint family house. The prevailing approach of English law giving power to a court to adjust the assets is unsuited to India. It involves time-consuming determination by the courts and fails to recognise marriage as an economic partnership with equal rights . Hence, Indian law should make it clear who

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4 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).

5 *Supra* note 1 at 83.

provides the matrimonial home on marriage and within its ambit which property should be recognised as matrimonial property subject to equal distribution on the dissolution of marriage by divorce or death.

An attempt to define matrimonial property was made by the legislators while amending and codifying the law of marriage among Hindus in the form of the Hindu Marriage Act, 1955 (hereinafter, HMA) and to regulate the property acquired at or about the time of marriage of a spouse. While doing so, section 27 of HMA 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 wife. However, if any matrimonial matter comes before the court, it is difficult for the court to make a decision with respect to the property under this section as the source of property is very narrowly designed by the legislators.

The property presented by relatives, friends, family members, in the form of gifts to the bride or the bridegroom at the time of marriage and the gifts given by parents and relatives after marriage are included in the purview of matrimonial property , even though the acquisition of this property, did not involve any labour or skill of the spouses. The intention of the donor is given importance with respect to such properties and hence, the property belongs to both the spouses, as part of the matrimonial property which may be divided equally between them at the time of dissolution of marriage. In case the donor intended to gift the property to either of the two spouses, then it is considered as the separate property of such spouse and is not subjected to division between them. Therefore, the use of may rather than shall has been taken into consideration by the legislators in section 27 of HMA. Hence, the present section 27 of the Act does not serve the purpose to introduce matrimonial property in the matrimonial home where both husband and wife share it on the dissolution of their marriage, if such situation emerges among them; and it shall provide equal economic support to the parties on divorce.

In addition to an attempt to define matrimonial property under section 27 of HMA, the matrimonial property shall consist of property acquired by the spouse(s) at or about the time of marriage. It indicates clear intention of the legislators that the property in its any form presented at or about the time of marriage must be considered the property jointly owned by both the husband and the wife. Hence, the legislators did not include the property which is inherited at or about the time of marriage or inheritable by both the

spouses within the purview of this section nor the property acquired by either both the spouses or one of them after their marriage. The legislators did not give due thought to the contribution of the wife in making of household and indirectly contributes towards the acquisition of a lot of properties. Her contribution forms the base of the family and provides the opportunity to the other earning members in the family to acquire properties. However, the level of contribution differs from household to household. Therefore, a wife's non-economic contribution must be recognised in law and the property acquired by the husband during marriage must be made jointly owned property of both the husband and the wife. If, for any reason, they decide to divorce in future, the property so acquired, must be divided on divorce equitably.

An initiative was taken by the Maharashtra Legislative Assembly to provide equal share to women in the matrimonial property at the time of dissolution of marriage by the introduction of Matrimonial Property (Rights of Women upon Marriage) Bill, 2012 . The bill defines matrimonial property to include self-acquired properties-moveable and immovable, husband's property, agricultural land along with pensions, provident fund. This is a welcome step taken by the Government of Maharashtra but we need to wait until this bill is passed.

II Judicial approach on matrimonial property law

The phrases used in the section 27 of the HMA may belong jointly to both the husband and the wife and at or about the time of marriage have created scope for contradictory interpretations by the courts in adjudication of justice. The courts have interpreted these phrases differently while executing matters on section 27 of HMA.

In *Surinder Kaur* v. *Madan Gapal Singh*[6] the Punjab and Haryana High Court, in the context of section 27 of the Act held thus:[7]

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;

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6 AIR 1980 P&H 334.

7. *Id.,* para 7.

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.

The court further observed that irrespective of the source of the property, the nature of the property, intention of the donor or by the agreement of the spouses is given importance to decide whether section 27 governs the property. To exemplify, if a property is meant for joint use by the spouses, then the property belongs to them jointly, irrespective of the fact that it is owned by one of them exclusively. The court further observed that a property belonging to the spouses jointly is different from the property which was received by the spouses jointly.[8] In *Sunita Shankar Salvi* v. *Shankar Laxman*,[9] the parties of divorce petition were living in a flat which was registered in the joint names of the wife and the husband. The family court held that the flat be divided equally between the husband and the wife. When the matter was brought before the High Court of Bombay in appeal, the high court upheld the decree of the family court and observed that the wife has 50% right, title and interest in the said flat jointly owned by them.

In *Kamta Prasad* v. *Om Wati*,[10] 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

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8. *Id.*, para 11.
9 AIR 2003 Bom 431.
10. AIR 1972 All 153.

them jointly.[11] 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.[12] Similarly, in *Hemant Kumar* v. *Laxmi Devi*,[13] the Allahabad High Court held that property owned by either the husband or the wife would be covered under this section provided that it was presented at or around the time of marriage . The court stressed on the use of the term may and not must , the latter being obligatory in nature. The use of the term may suggests that the property exclusively owned by one of the spouses is not excluded.[14] For any property to be governed by this section, it is necessary that the same was presented to the parties in relation to marriage and not otherwise.[15] In contrast, the Delhi High Court in *Shukla* v. *Brij Bhushan*,[16] 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.[17]

In *Krishnan* v. *Padma*,[18] 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. The court had cautioned not to confuse the property given to spouse at the time of marriage with property given after marriage.[19] However, in *Balkrishna Ramchandra Kadam* v. *Sangeeta Balkrishna Kadam*,[20] the Supreme Court held that property under this section would not be restricted to property given to a spouse at the time of marriage only but would also include property given before as well as after marriage. The Supreme Court specified that the property must be given in relation to the marriage.[21]

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11. *Id.*, para 3.
12. *Id.*, para 6.
13. AIR 2004 All 126.
14. *Id.*, para 21.
15. Vijender Kumar (rev.), John D. Mayne, *Treatise on Hindu Law and Usage* 536 (Bharat Law House, New Delhi 17th edn., 2014).
16. AIR 1982 Del 223. See also *Amarendranath Sanyal* v. *Krishna Sanyal* 1993 (1) HLR 578.
17. Shukla, *id.*, para 2.
18. AIR 1968 Kant 226.
19. *Id.*, para 18.
20. AIR 1997 SC 3562: (1997) 7 SCC 500.
21. *Id.*, para 13.

On the contrary, in *Surinder Kaur*,[22] the court case interpreted the term to include the property which was given to the parties prior to or after the marriage. The property as contemplated by section 27 of the Act is not the property which is given to the wife at the time of marriage only. It includes the property given to the parties before or after marriage also, so long as it relates to marriage. In *Kamalakar Ganesh Sambhus* v. *Tejas Kamalakar Sambhus*,[23] 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.[24] Thus, it can be seen from different judicial pronouncements that the courts have interpreted the terms in a contradictory manner leading to ambiguity.

In a case where wife claimed return of gold and silver ornaments given to her by her parents, the application for recovery of said *stridhana* was filed under section 27 of HMA and sections 4 and 151, order 7, rule 7 of the Civil Procedure Code, 1908 (hereinafter, CPC). The claim was allowed as all provisions of CPC are applicable to matrimonial proceedings under the Act.[25] Similarly in *Sangeeta B. Kadam* v. *Balkrishna Ramchandra Kadam*,[26] the claim of wife was for disposal of property on divorce which included gold and silver ornaments presented to her at the time of marriage. It was held that the family court has jurisdiction in the matter and the wife was returned the ornaments so claimed. However, efforts were made by the wife to prove that her *stridhana* was lying with the husband and a list of articles was enclosed with the petition (which was not signed by the husband or his parents), but cognisance could not be taken as the same had not been proved with reliable evidence. Hence, an application of the wife was rejected.[27]

In *Pratibha Rani* v. *Suraj Kumar*,[28] the Supreme Court observed that neither section 27 of HMA nor section 14 of the Hindu Succession Act, 1956 go to the extent of providing that the claim of a woman on the basis of *stridhana* is completely abolished. The section 27 of the HMA does not in any way take

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22. *Supra* note 6.
23. AIR 2004 Bom 478.
24. *Id.* para 3.
25 *Manish Nema* v. *Sandhya Nema*, AIR 2009 MP 108.
26 AIR 2005 Bom 262.
27 *Renu* v. *Rakesh Kannojia*, AIR 2013 Utr 1.
28 AIR 1985 SC 628: (1985) 2 SCC 370: (1985) 3 SCR 191.

away the right of the wife to file a criminal complaint if the property belonging to her is criminally misappropriated by her husband.

III Women and inheritance rights

In India, property rights including inheritance rights are attached with the institution of marriage wherein different laws are applicable to marriage of persons belonging to different religions, faiths and spiritual traits. The Hindu law of intestate succession is governed by the Hindu Succession Act, 1956. Section 30 of the Act provides substantive law of testamentary succession and procedural law of will is laid down in the Indian Succession Act, 1925. The Muslim intestate succession is governed by *quaranic* law and testamentary succession is governed by the Indian Succession Act, 1925, whereas intestate and testamentary successions of Christian and Parsis are governed by the Indian Succession Act, 1925. Therefore, inheritance and succession laws are well settled wherein a woman is provided with property rights in the matrimonial home but these rights are subject to some or the other incidence to happen. Only then these rights are put into execution, otherwise they remain suspended rights. However, there is no property right in the matrimonial home where wife gets property right by virtue being married to a male member of the family. A woman in marriage gives birth to a male or a female child, the child so born becomes coparcener under Mitakshara Hindu law and gets an interest by birth in the coparcenary property of his or her father, but the woman who has given birth gets no property right by virtue of marriage or being the mother of a coparcener. However, on being widowed, she gets inheritance rights from her deceased husband and / or if her husband predeceased his father, she becomes an heir to her father-in-law and acquires inheritance rights.

Property rights of muslim women

Under Muslim law, both Sunni and Shia, a daughter though a *quranic* sharer can be excluded by customs and statues.[29] Though at variance with the *quranic* principles, these customs are valid and treat a daughter as non-existent at the time of opening of the intestate succession. In some communities in Jammu and Kashmir, a daughter can succeed only in the absence of all male agnates of the deceased, while in other states she can inherit only if she

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29 A childless widow, in the absence of all other relations of the deceased, only can inherit his total property following the doctrine of *radd* (return). See *Abdul Hamid Khan* v. *Peare Mirza,* AIR 1935 Oudh 78.

is a *Khananashin*.[30] A daughter is also not entitled to inherit the *watan* land under the Watan Act, 1886 (Bombay). The Oudh Estates Act, 1869 that follows the rules of primogeniture for devolution of the *taluqdari* properties also excludes the daughter and her heirs.[31] In *Sheikh Madar* v. *Kursheeda Begum*,[32] the trial court and the Andhra Pradesh High Court, both affirmed the principle of Muslim law of inheritance under Hanafi law *i.e.* the residuary can get a share on partition if the property is left after distributing it to the sharer which constitutes the first category of property inheritors. If after giving the share to the daughter any share is left, then the residuary would definitely be entitled for the same. Since the daughter and the residuaries were demanding for the share on partition simultaneously, it did not give a ground to the wife of the deceased, *i.e.*, the widow to refuse the share of the residuary. It was also stated that if the share which is to be divided is equal to unity then the residuaries would not be entitled to a share but if the share to be divided is less than a unity then the sharers would inherit the property first and then later the residuaries would share the rest of the left over property.

In *Kulusumbi* v. *Aziza Begum*[33] it was held that the property inherited by the widow on the death of her husband cannot be divested on her remarriage. In this case, the death of Osman Pasha (husband of Aziza begum), Aziza Begum got a right to her 1/8thshare as his sharer along with the mother, brother and sister of Osman Pasha and her first husband. These heirs had their shares specifically carved out in accordance with the provisions of Hanafi law. The relatives of the deceased claimed that since the widow has now remarried, she had an evil intention in the first place and there was a collusion between her and the killer of her husband. The same was thrashed by both the trial and the High Court of Karnataka and it was held that the position of the property already inherited by the wife would not be affected as per the Hanafi school of law. Hence, the court held that a vested inheritance is the share which vests in an heir at the moment of the ancestors death. If the heir dies before distribution, the share of the inheritance which has vested in him will pass to such persons as are his heirs at the time of his death. The shares

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30 Iqbal Ali Khan (rev.), D. F. Mulla, *Principles of Mahomedan Law* 63 (Lexis Nexis Butterworths Wadhwa, Nagpur, 2013).

31 *Ghulam Hassan* v. *Mst. Saja*, AIR 1984 J&K 26, *Mohammad Zia-Ullah* v. *Rafiq Mohammad*, AIR 1939 Oudh 213; *Abdul Latif Khan* v. *Mt. Abadi Begum*, AIR 1934 PC 188.

32 2005 (5) ALD 818: 2005 (5) ALT 591.

33 ILR 1986 Kant 4027: 1986 (2) KarLJ 388.

therefore are to be determined at each death .[34] In *Taufeeq Hassan* v. *Dr.Khurshid Ara Begum* [35] and *Syed Fateyab Ali Meerza* v. *Union of India* [36] similar principles relating to both Hanafi and Shia law of inheritance were affirmed where daughters, whether married or unmarried were in consideration.

Property rights of Christian women

The property rights of Christian women are laid down in the Indian Succession Act, 1925. The authoritative case which deals with property rights of Christian women is the case of *Mary Roy* v. *State of Kerala*[37] where it was laid down that daughter is entitled to equal share in property of the father as that of the son. It may be noted that the practice of Christian daughters executing release deeds at the time of marriage which get them excluded from succession are not valid. It is so because a Christian daughter has no pre-existing right in the family property and her rights arise only when her parents die intestate. Therefore, only a release deed executed after the date of intestacy would be valid. An adopted child cannot claim the right to succession unless a custom of adoption can be proved. If it is proved then adopted daughter is akin to a real daughter and can claim equal share as that of the son. As for Christian widow, sections 33 and 33-A of the Indian Succession Act, 1925 are applicable. If the heirs of the deceased are the widow and lineal descendants, then, the widow receives 1/3rdshare, while the balance 2/3rd goes to the lineal descendants. If the intestate has no lineal descendants, but has left persons who are of kindred to him, of his property shall belong to the widow and the other shall go to those who are of kindred to him. If the intestate has left none who are of kindred to him, the whole of the property shall belong to the widow. A widow may be excluded from inheritance by a valid contract made before her marriage.

Property rights of Parsi women

The property rights of Parsi women are governed by the succession laws initially laid down in the Parsi Interstate Succession Act, 1925 which was later incorporated in chapter-III, part-V, (sections 50-56) of the Indian Succession

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34 M. Hidayatullah (rev.), D. F. Mulla, *Principles of Mohomedan Law* 53 (17th edn. 1972).

35 2006 (3) ALD 494.

36 2006 (3) CHN 407.

37 AIR 1986 SC 1011: (1986) 2 SCC 209: (1986) 1 SCR 371.

Act, 1925. Women under the Parsi law are entitled to receive property by interstate succession.[38] However, the underlying criterion for receiving property under Parsi law is that the person should be a part of the Parsi community. Children of Parsi fathers by non-Parsi women are admitted into the Zoroastrian religion and are governed by the Parsi succession laws. However, children of Parsi women married to non-Parsi males are not considered Parsis and have no right under Parsi law.[39]

There are no restrictions imposed on a Parsi man, if he wants to give away his property and women have no right to object to such an action. Women, who are entitled to receive property by interstate succession under Parsi law: a daughter gets half the share of a son in the property of the father. If a Parsi woman dies interstate, her property is divided equally among her husband and children. Therefore, a daughter is entitled to equal share in the property of her mother. Parsi adoption *per se* is not recognised by custom or law for the purposes of inheritance and succession. However, a Parsi widow without any children can adopt a son on the fourth day of her husband s death. This is for the temporary purpose of performing certain religious rites for the dead man. This adoption is for a limited purpose and does not grant any property rights on the adopted child. A Parsi widow has, in the property of her deceased husband, an equal property right to that of a son and twice the share of a daughter. If a person dies interstate leaving only a widow and no lineal descendants, the widow can take half of the property. If there is any widow of lineal descendants, the widow and the widow of the lineal descendant each must be given 1/3rd of the property. In such cases the remaining property shall be distributed among the remaining relatives of the deceased. However, if she remarries during the lifetime of her husband, she is not entitled to any share in his property.

Property rights of Hindu women

The Hindu Succession Act, 1956 provides provisions for two entirely different schemes of intestate succession based on grounds of sex which are distinct from each other.[40] There is further divergence in case of female intestates linked with the source of the property which is the subject matter

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38 Shailendra Jain and Peeyushi Diwan (rev.), Paras Diwan, *Hindu Law* 228-229 (2nd edn., 2005).

39 *Ibid.*

40 Ss. 8-13 of the Hindu Succession Act, 1956 provide provisions for male intestate succession, whereas ss. 15-16provide provisions for female intestate succession.

of inheritance. Thus, where a woman inherits property from her parents and dies issueless, this property on her death does not go to her own heirs but goes to the heirs of her father. Similarly, where she inherits the property from her husband or her father-in-law, on her death this property goes to her husband s heirs from whom or from whose father she had inherited the property. The sub-division of the schemes of succession in case of female intestate is outdated and irrational. The heirs are not described as brother, sister, her brother-in-law *etc.*, but as heirs of her parents, and heirs of her husband. She is perceived to have no identity of her own. The legislature while framing this scheme was influenced by the Mitakshara law, its concepts of *stridhana* and inheritance by female in double capacity. This reversion of the once inherited property back to her father s or her husband s heirs shows a desperateness on the part of the legislature to treat her only as a temporary occupier.

The Hindu Succession (Amendment) Act, 2005 and Hindu daughters

Under *shastric* Hindu law the male heirs were put on a higher footing by providing that they shall inherit an additional independent share in the coparcenary property over and above what they inherit equally with female heirs on intestacy. The concept of coparcenary was that of an exclusive right of male members in the family . Now this concept has changed while introducing daughter of a coparcener as coparcener by statutory amendment, if the family is governed by the Mitakshara law. However, even today, after the new law came into force on September 5, 2005 coparcenary remains a primary entitlement of male members; no doubt law provides for equal division of share between all heirs, male and female on the death of a male coparcener, but in practice the scene is totally different. Legally, on intestacy self-acquired property devolves equally between male and female heirs but female heirs are asked to relinquish their share by making relinquishment deeds. Before the amendment of 2005, if the intestate property included a dwelling house, the female heirs had no right to partition until the male heirs chose to divide their respective shares but now the situation is different. The daughters are made coparcener, so they can ask their share on partition from the dwelling house property which is if they wish to do so. Further, if a Hindu female dies intestate but issueless, then her property which is inherited by her on the intestacy of her parents, devolves first on the heirs of her father, then on her mother s heirs; if the property is inherited by her on the intestacy of her husband or father-in-law, the property devolves first to husband s heirs, then

to husband's father's heirs respectively. Thus the intestate succession of Hindu female property is kept within the father's or husband's domain.

By retention of Hindu joint family system and introducing daughters as coparceners, the legislative efforts to usher in gender parity have resulted in abundant confusion. Under the classical law, a female could not be a coparcener, but a daughter born in the family was a member of her father's joint family. Upon her marriage, she ceased to be a member of the joint family of her father and she joined the joint family of her husband. The Supreme Court in *Kamesh Panjiyar* v. *State of Bihar* [41] held that a bride leaves the parental home for the matrimonial home, leaving behind sweet memories therewith a hope that she will see a new world full of love in her groom's house. She leaves behind not only her memories but also her surname, *gotra* and maidenhood. Presently, under the amending Act of 2005 a daughter is made a coparcener in the same manner as that of a son, *i.e.*, irrespective of her marital status, now she is a member of her father's coparcenary and member of the husband's joint family. The anomaly is on two counts: *first*, a daughter who has married on the day the amendment came into force would not be a member of her father's joint family (as upon marriage a daughter ceases to be a member of her father's joint family), but due to the amendment she would become a member of a narrow institution within the undivided family, *i.e.*, coparcenary. *Second*, the retention of the Hindu joint family system with a superimposition by way of introduction of daughters as coparceners, without fundamentally altering the basic structure, is perplexing. A daughter who is born in the family will be a coparcener and a member of the joint family of her father. She will retain her rights to be coparcener even after her marriage, and consequently, upon her marriage, she would be a member of the joint family of her husband. The amendment has created dual membership jurisprudence whereas this incongruous situation could have been avoided by a simple abolition of the Hindu joint family system.

A female under Hindu law inherits in a double capacity. She inherits as a daughter from her parents and also inherits as a daughter-in-law from her husband's family. As far as the rights of the daughter-in-law are concerned, she has to be a widowed daughter-in-law.[42] If she remarries before the day

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41 AIR 2005 SC 785: (2005) 2 SCC 388.

42 Hindu Succession Act, 1956, s.24. Although this section has been deleted by the amending act of 2005, yet the effect remains the same.

of opening of the succession she forfeits her rights of succession. If her husband is alive she is his wife, and the primary right of inheritance is with him and not with her.

IV Different models of matrimonial property followed across the world

In the western countries, if the spouses were married without any provision concerning matrimonial property law, the default statutory system of a limited community property is applied.[43] In this system, only the property acquired during the marriage is held in common, although gifts and inheritances acquired during the marriage are the separate property of each spouse.[44] Community property belongs to both spouses jointly, although each spouse is able to make ordinary acts of administration of community property. However, important transactions relating to this kind of property need the consent of both spouses.[45] Importantly, when the record of marriage mentions that a marital agreement has not been made, third parties may assume that spouses have been married under the default statutory regime of limited community property.[46] However, this rule is not applied if the spouses have declared, in the transaction entered into with a third party, that they had made a marital agreement.[47]

The freedom of contract in the field of marital agreements is very well-developed in French law, especially when compared to the other European countries.[48] In their marital agreements, spouses in France may choose one of the property regimes mentioned by the civil code, but may also modify the rules of these regimes; spouses may mix different regimes and are even able to establish new regimes that are not recognised by the law. Finally, in their marital agreements, spouses may make provisions for a spouse s death. Specifically, they may decide that the surviving spouse be authorised to receive from the common property either a specified sum, or a specified

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43 Carolyn Hamilton & Alison Perry, *Family Law in Europe* 260 (Butterworths, London, 2002).

44 C. Civ. 1402 (France).

45 C. Civ. 1421 (France).

46 The record of marriage is a certificate given to the spouses and serves as proof that they are married.

47 C. Civ. 1394 (France).

48 Walter Cairns & Robert McKeon, *Introduction to French Law* 52. 69 (Cavendish Publishing, London, 1995).

property in kind, or a specified quantity of a determined kind of property .[49] Such a provision does not affect the rights of the surviving spouse under inheritance law.[50] Expenses arising during the marriage may also be allotted to each spouse by a marital agreement.[51]

While European matrimonial property law is codified in each country s civil code, the American tradition of freedom of contract provides spouses with the power to contract around state statutory law on the subject. Americans are therefore not restricted to the property regimes laid out in statutes, whether community property or equitable distribution, and may contract around them subject to few limitations by the court. In fact, spouses may even import into their agreements any of the European property systems, such as a system of accruals. Meanwhile, Europeans are often limited to selecting one of the property regimes statutorily permitted in their countries. Although this permits them to avoid the statutory default, they must nonetheless select one of the regimes recognized by law. Only occasionally may spouses alter the rules of those European systems. Americans therefore enjoy more autonomy in premarital contracting relative to Europeans. These differing levels of contractual autonomy have differing consequences.

Further, there are various models of ownership of matrimonial property have been adopted and implemented in accordance with their societal needs. However, each model has its own merits and demerits.

Separate ownership of property

In this model, there is separate ownership and administration of property, irrespective of whether the property was bought before or after the marriage. The property owned by a spouse is retained by him/her as its sole owner even after dissolution of the marriage and the other spouse has no right in that property after dissolution of the marriage.

This system was adopted in England[52] to protect the wives whose husbands got half of her property in accordance with the communal ownership of property which was followed earlier. Following passing of the Marriage Women s Property Act, 1882, an individualist approach with respect to

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49 C. Civ. 1515 (France).

50 C. Civ. 1516 (France).

51 French Civil Code, 2005, art. 214, when spouses do not regulate this matter, they shall contribute to the marriage expenses in proportion to their respective means.

52 The Married Women s Property Act, 1882.

ownership of property was taken in order to benefit the women who, in the 19th century were at a disadvantage, losing half of their estate to their husbands.[53] Further, the husband got right to enjoyment, possession, income and management of his wife s property.[54] Presently, the courts have been given wide discretion with respect to the division of matrimonial property.[55] The wide ambit of discretion, with respect to the division of matrimonial property at the time of dissolution of marriage, given to the English courts produces tailored results for each case. This model assumes that both the spouses are financially independent and are having equal capability to accumulate wealth.[56]

The spouses share the company of each other but with respect to property, neither of them can claim a share in the property of the other. This model promotes individualism which goes against the basic principles of the Hindu family system. The dependent spouse would have no source of income after the termination of marriage and this model is to the detriment of such spouse. This model is thus not suitable to the Indian social scenario, especially, the Hindu family system.

Community ownership of property

In this model, the property is assumed to be common between the spouses and both have equal share in the same. This model is based on the assumption that marriage is a partnership of spouses and both contribute equally to the common fund through which properties are bought. This assumption holds even when one of the spouses takes care of the house, which in most cases is the female. Both spouses are joint and equal owners of the properties irrespective of the fact that title of the property belongs to one of them.[57] Here the contribution of the female partner is given its due importance and is not neglected as being of no significance. Further, this provides financial security to the non-working spouse. This model promotes equality between

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53 Lucky Ann Buckley, Matrimonial Property and Irish Law: A Case for Community 53 *Northern Ireland Legal Quarterly* 40 (2002).

54 Mary Ann Glendon, Matrimonial Property: A Comparative Study of Law and Social Change 49 *Tulane Law Review* 21, 26 (1974-1975).

55 *Charman* v. *Charman* (no. 4) [2007] 1 FLR 1246, para 124.

56 *Id.* at 143.

57 Carolyn J. Frantz, Hanoch Dagan, *Properties of Marriage* 104 *Columbia Law Review* 125, 75-133 (2004).

the spouses and thus several countries like Sweden[58] have implemented this system to provide financial security and promote equality between the spouses.

In France, community ownership of matrimonial property is followed in case the parties do not enter into a contract specifying the division of property in case of termination of their marriage. Three kinds of funds exist in the French marriages: (a) husband s fund (husband s separate property); (b) wife s fund (wife s separate property); (c) community fund (collective property).[59] The husband s fund and wife s fund refer to the property owned by them before the marriage, whereas the community funds include the property owned by either of them after their marriage.[60] The marriage is considered to be a contract in which the spouses are given the freedom to decide the fate of their respective properties and their collective property. They can mutually decide the financial agreement or the arrangement which would govern the division of properties at the time of dissolution of the marriage or death. In case they do not mutually come to a conclusion, then the legal regime according to article 1400 of the civil code is applicable. The joint property of the spouses is subjected to the debts and liabilities of the parties, save in case of fraud by any of the spouses.[61] The joint property comprises of the properties bought due to their joint or individual efforts during the subsistence of their marriage.[62] The right to manage this property is held by both of them. Each spouse has full control over his/her separate property and this property cannot be subjected to the debts of the other spouse.[63]

Thus, this model gives autonomy to both the spouses with respect to their individual properties, while at the same time they have equal rights over the joint property. This provides financial security to the dependent spouse, whose work, though not recognised in economic terms, is indispensable for the efficient and successful working of the other spouse.

V Model best suited for Indian scenario

India follows the separate ownership model of matrimonial property distribution. This model does not recognise the contribution of the non-

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58 Bradley, Marriage, Family, Property and Inheritance in Swedish Law 39 *ICLQ* 370, 371-374 (1990).

59 *Supra* note 53.

60 *Supra* note 54.

61 Fr d rique Ferrand and Bente Braat, National Report: France, Netherlands, Sep. 2008.

62 French Civil Code, art. 1401.

63 *Id.*, art. 1428.

working spouse, who in most of the cases is the woman.[64] In 2002, the statistics were dismal as the participation of women in economic activity 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.[65] This reflects the persisting patriarchal system in the society. Thus, most of the women in India are homemakers. Since their contribution cannot be measured in monetary terms, their work is not given the due importance. They are economically dependent on the male spouses. In the census of 2001, they were equated with prostitutes, beggars and prisoners and were qualified as non-workers.[66] This drew criticism from Supreme Court in *Arun Kumar Agrawal* v. *National Insurance Co. Ltd.*[67] where A.K. Ganguly J opined that they participate in the production of goods and services but their consumers are family members, so they do not earn in monetary terms. Due to this, their work is not valued. The court held that it is unfair and undermines a homemaker s work. The court further questioned the rationale behind equating the homemaker s work with one third of the earning spouses salary. While G.S. Singhvi J opined: [68]

> it is highly unfair, unjust and inappropriate to compute the compensation payable to the dependents of a deceased wife/ mother, who does not have regular income, by comparing her services with that of a housekeeper or a servant or an employee who works for a fixed period. The gratuitous services rendered by wife/mother to the husband and children cannot be equated with the services of an employee, and no evidence or data can possibly be produced for estimating the value of such services.

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64 Barun Kumar Mukhopadhyay and Prasanta Kumar Majumdar, Status of Gender-Differentials and Trends in India Population, Health, Education and Employment , *available at*: www.isical.ac.in/~wemp/Papers/PaperBarunKM&PKM.doc. (last visited on Oct. 17, 2015).

65 Government of India, 14th Issue Report on Women and Men in India 2012 (National Statistical Organisation, Ministry of Statistics and Programme Implementation) xxiii, *available at*: http://mospi.nic.in/mospi_new/upload/women_men_2012_31oct12.pdf (last visited on Oct. 17, 2015).

66 J. Venkatesan, Assess value of Homemaker Services properly: Court , *The Hindu*, July 23, 2010, *available at*: http://www.thehindu.com/news/national/assess-value-of-homemaker-services-properly-court/article530178.ece (last visited on Oct. 17, 2015).

67 (2010) 9 SCC 218.

68 *Id.* at 240.

Community ownership of matrimonial property provides women with financial security. Further, equal division of matrimonial property promotes a sense of equality in their relationship and it decreases the tendency of a spouse to look at the property through the lens of ownership.[69] Such practice leads to domination, which is the reason behind persisting patriarchal society in India. Women are subjected to physical and mental torture in many parts of the country. The work of a homemaker is as important as income of the working members of the family. The gender biasness in society has led to degradation of position of women in the society as a whole. Such callous approach towards their work contributes to oppression of women in the society.[70] Due to their complete financial dependency on the other spouse, they do not file suit for termination of their marriage as they would be left homeless without any source of income.

Thus, India should follow the community ownership of matrimonial property replacing the existing separate ownership of property. This would help overcome the oppression of women and would empower them. This is the need of the hour for the Indian society which needs to disentangle itself from the clutches of the male dominated society.

Disposal of matrimonial property between the spouses

M.B. Shah J of Bombay High Court bench at Goa, commented that the incidents of atrocities committed on women in Goa are very less as compared to other states in the country.[71] In Goa, personal matrimonial laws, as applied throughout the country, are not applicable. It follows the Portuguese Civil Code, 1867 which provides uniform civil code for everyone. According to this code, registration of marriages is compulsory. Marriage is considered to be a contract as opposed to a sacrament in Hindu law. The parties are at liberty to decide mutually how their properties would be divided at the time of dissolution of their marriage. In case they do not decide, the law of community property is applicable. According to this code, both the spouses are joint owners of their properties as a whole. Further, their properties are

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69 Carolyn J. Frantz and Hanoch Dagan, Properties of Marriage 104 *Columbia Law Review*, 104, 75-133 (2004).

70 *Supra* note 66.

71 Sandesh Prabhudesai, Judiciary Advocates Uniform Civil Code for India *Goa News*, May 23, 1997, *available at*: http://www.goanews.com/news_disp.php?newsid=581. (last visited on Oct. 17, 2015).

divided equally between them at the time of dissolution of their marriage.[72] Thus, it provides women with financial resources at the time of termination of her marriage, as opposed to currently applicable separation of assets law, according to which wife does not have any right to her husband s properties.

Taking inspiration from the law applicable in Goa and France, the matrimonial property in India should be equally divided between the spouses to promote equality among the spouses and empower the women to stand on their own feet. Equal share in the matrimonial property provides financial security to women who devote their life towards taking care of the family and contributing indirectly towards the development and progress of the family.

Prenuptial agreement of marriage

The registration of marriage as provided under section 8 of the HMA. The Supreme Court in *Seema* v. *Ashwani Kumar* [73] made registration compulsory as it would serve as an evidence of marriage and would help the women in seeking matrimonial remedy. Except some states that have made laws in this regard, the requirement of registration of marriage is not realised. To achieve desired result of registration of marriage which has not been fulfilled yet, the alternative would be prenuptial agreement of marriage. Prenuptial agreements are agreements entered by prospective spouses before marriage. These agreements state the rights and liabilities of a spouse (like all the properties of both the parties are listed, procedure of divorce in provided, conditions relating to adoption of child or maintenance are laid down) with the consent of both the parties. 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.* These type of agreements are very progressive approach where parties before marriage decide all foreseeable disputes . Prenuptial agreements are not only for rich people, a normal person can also enter into it, it is a precautionary step by spouse for financial security against future uncertain events. As society is changing day by day and spouses are worried about their career and individuality after marriage, prenuptial

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72 Tina M. Thomas, A Uniform Civil Code in India: The Flaws of the Personal Law System and Goa as a Model for a Common Law 5 *International Affairs Journal* 12, 7-13 (2009).

73 AIR 2006 SC 1158: (2006) 2 SCC 578.

agreement is best option available because; *firstly*, it is the most economical solution, considering the divorce cost or any sort of suit relating to maintenance or adoption *etc.* through court; *secondly*, parties are free to include conditions which are suitable to them with mutual consent; *thirdly*, it is a more relaxed procedure than going through the court; and *lastly*, it keeps a check on misrepresentation made by either spouse and reduces possibilities of fraud and hence parties can be protected from such bitter experiences. A properly drafted prenuptial agreement has binding effect over both parties and is legally enforceable.

VI Conclusion

At present, there is no law among Hindus which deals with matrimonial property among the married couples and provides them with an equal share at the time of dissolution of marriage. Though a legally wedded Hindu wife is considered to be a class-I heir to her deceased husband, where she gets a share on her husband s death from his self-acquired property and his share from the coparcenary property but during the marriage, she has no share in the property of her husband whether the property is self-acquired or it is an interest in the coparcenary property. The Hindu Succession (Amendment) Act, 2005 has provided daughters coparcenary rights by birth in the family of their birth but this Act too has not provided them any rights by marriage in the matrimonial family. It is surprising to understand that woman as daughter is given equal property rights in the family of her birth where her parents always give their best for her upbringing and educate her with the best of their efforts but once she is married, she is not given any property rights along with her husband in the matrimonial family. If this anomaly is taken care by the introduction of matrimonial property and if the law is also made for its equitable distribution among the married spouses, the real object of women empowerment will be achieved.

The term matrimonial property must be defined in clear and unambiguous terms so as to remove ambiguity which is currently prevailing in the Indian legal system. The present provision which vaguely refers to matrimonial property under section 27 of the HMA must be amended to include the property received, bought, inherited or any other mode of acquisition during the marriage irrespective of the fact that either of the two spouses has joint title and co-ownership to the same.

The prevailing separation of assets principle in the matrimonial home must be replaced by community ownership of the property as women are highly affected by financial hardships on termination of marriage. Giving

women right to equal share in the matrimonial property would provide recognition to the work done by them at home as productive work. Besides, it would provide them financial, social and legal security. The introduction of on Matrimonial Property (Rights of Women upon Marriage) Bill, 2012 in Maharashtra and deliberations on the introduction of the Marriage Laws (Amendment) Bill, 2012 in Parliament are welcome steps towards creation of a new jurisprudence on matrimonial property in India. In addition, there is a need to amend section 27 of the HMA to widen the scope of the word property presented at or about the time of marriage with an attempt to include the earnings of both the spouses during their marriage and their inherited properties as well. This property ought to be divided equally between the parties at the time of divorce, by the court of competent jurisdiction, on an equitable principle.

At a broader level, developing a suitable law and policy on matrimonial property in India would clearly require a close examination of the objects and functions of marriage along with the acknowldgement of the role played by women in establishing, nurturing and caring for the members of the family and the socio-economic and legal protection presently accorded to women in the matrimonial home.