

MANEUVER FROM THE ANGELIC CONSORTIUM TO AN AUSTERE CONCORDAT

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The paper analyses how with the changing wave of tide, the sanctity of marriage has transgressed into having juridical characteristics. The paper shows how women were ridiculed throughout the changing society, barring them from their rights and how with the change in the institution of marriage, how the proposition of matrimonial property rights to women as an acknowledgement to their contribution to the household have emerged. We have in our best endeavors, aimed to analyze the existing laws relating to the proposition, along with laws which were not enforced and international legislations, concluding the paper by linking the scheme with woman empowerment and proposing a model law in consonance with the Indian society and its ethos.

Introduction:

While one believed that the holiest object in the world is a virtuous woman, a tear of sorrow rolling down from her eyes melts the heart of even a mighty tyrant, the other believed that the best way to reach god was to avoid women. Sage Agastya says, as stated by A.S Altekar, “*Women combine the fickleness of the lightening, the sharpness of weapon and the swiftness of the eagle*”². It was believed that true domestic felicity depended upon the mutual harmony of the husband and wife

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² Dr A.S Altekar, *The Position Of Women In Hindu Civilisation*, 11th Reprint, 2014, Page 320.

and their pious performance of religious duties.³ Nevertheless, the main disability from which the wife suffered in the Vedic age was a proprietary one. She had no legal status i.e. she could neither hold nor inherit property.

Where the position of women and their proprietary rights in the country have not seen any radical changes, the sanctity of marriage has witnessed a major maneuver. Where marriage was considered as an imperishable accord, not only for the present life, but for future lives to come, the idea behind the institution of marriage in Hinduism is to foster, not self-interest, but love for the entire family. Practice of self-restraint is the ideal of marriage in Hinduism. According to the Vedas marriage is a union of "*bones with bones, flesh with flesh and skin with skin*", the husband and wife become as they were one person. In Hindu society marriage was not only a *Samskara*⁴ to be performed but also a religious duty of a Hindu towards his father, family and society to fulfill certain purposes. However by recognition of many rights of women in the relationship, we see how marriage came to be denoted as not merely an **Angelic Consortium but an Austere Concordat** bestowing upon both certain obligations as well.

Constitution incorporated certain sacrosanct ideals in the form of comprehensive rights for women so as to metamorphose the abstract ideals into a concrete form, which would enable the upliftment of the status of women in the male-dominated chauvinistic society in the form of Fundamental Rights that of Equality before law⁵, and Protective Discrimination.⁶ Where such provisions in

³ "O gods, with constant draught of milk husband and wife one accords press out and wash the somajuce"(Rigveda X 34,11)

⁴ a purificatory ceremony or rite marking a major event in one's life

⁵[http://www.academia.edu/4362417/Gender Justice The Constitutional Perspectives And The Judicial Approach](http://www.academia.edu/4362417/Gender_Justice_The_Constitutional_Perspectives_And_The_Judicial_Approach) last visited on 23rd November, 2015

⁶7th Report of Parliamentary Standing Committee on Personal, Public Grievances, Law and Justice Dt. 13th May, 2005 on the Hindu Succession Amendment Bill, 2004.

favour of women exist, a certain level of uproar has been seen in the country with regard to the special status given to women, under various legislations. The entire concept has been rightly justified in the following extract of *C. B. Muthamma v Union of India & Ors*⁷:

“We do not mean to universalise or dogmatise that men and women are equal in all occupations and all situations, and do not exclude the need to pragmatise where the requirements of particular employment, the sensitivities of sex or the peculiarities of societal sectors or the handicaps of either sex may compel selectivity. But save where the differentiation is demonstrable, the rule of equality must govern”

Also a need for laws relating to matrimonial rights and distribution of the property in lieu of the same has been felt by jurists. “India does not have the necessary supportive measures, such as: laws for division of matrimonial property; the right to reside in the matrimonial home; a financial plan for the future security of the caretaker spouse; and foster homes for the children”⁸

The need for such matrimonial property has been also acknowledged in the international scenario.⁹

⁷ 1979 AIR 1868

⁸ In order to emphasize the “Welfare of the Child” as the paramount consideration in adjudicating custody and guardianship matters, the Law Commission of India decided to study the issue of adopting a shared parenting system in India. The Commission, in November 2014, issued a Consultation Paper on the subject. The Consultation Paper analysed shared parentage systems across the world and reviewed the existing law in India. The paper, as on May, 2015 was addressed to Shri Sadanand Gowda, by Mr Ajit Prakash Shah, Former Chief Justice of Delhi High Court.

⁹ CONVENTION ON THE LAW APPLICABLE TO MATRIMONIAL PROPERTY REGIMES (Concluded 14 March 1978)

The States signatory to this Convention, Desiring to establish common provisions concerning the law applicable to matrimonial property regimes, Have resolved to conclude a Convention for this purpose and have agreed.

An International Document as to applicability of Matrimonial Property regimes was also formed under the Hague Convention which elaborated that marriages celebrated prior to 1 September 1992 are subject to ordinary law while

The Conscious Mandate: Existing Laws

Laws, existing have been covered into two heads; “The Conscious Mandate” includes the legislations in the Public Domain, whereas the “Obscure Mandate” includes legislations which are not in public knowledge and are a hidden treasure for the country.

The Indian Divorce Act, 1869

Part VI of the Indian Divorce Act, 1869 provides for protection orders for the wife. A wife who has been deserted¹⁰ by her husband (and who is not governed by section 4 of the Indian Succession Act, 1865) may present a petition to the court, after such desertion, for an order to protect any property which she may have acquired, against the husband.¹¹

The Court on being satisfied that desertion¹² was without any reasonable excuse and that the wife was maintaining herself by her own industry, or property, “may make and give the wife an order protecting her earnings and other property from her husband and all creditors and persons claiming under him.”¹³

If the husband or person claiming under him, seizes or continues to hold any property of the wife after notice of any such order, he shall be liable at the suit of the wife (which she is empowered to

those contracted after this date come under the Hague Convention of 14 March 1978 on the law applicable to matrimonial property regimes

¹⁰ “Desertion means the intentional permanent forsaking and abandonment of one spouse by the other without the other’s consent and without reasonable cause. It is total repudiation of the obligation of marriage. (Halsbury’s Laws of England ,3rd Edn., Vol. 12, p. 241 to 243)

¹¹ Section 27 of the Indian Divorce Act, 1869

¹² Desertion means abandonment, and implies an action of withdrawal from a co-habitation that exists(Kako v Ajit Singh, AIR 1960 Punj 328,330)

¹³ Section 28 of the Indian Divorce Act, 1869.

bring under this part) to return or deliver to her the specific property and also pay her a sum equal to double its value.¹⁴

The legislation also incorporates the notion of “Feme Sole” (Discussed later)¹⁵

The rights provided under the Indian Divorce Act, provide a mere defensive remedy, and are exercisable only after desertion. However, it lacks the bestowment of a specific right on the woman making it a deficient law.

Hindu Marriage Act, 1955

In any proceedings under this Act, the court may make such provisions in the decree as it deems just and proper with respect to any property presented, at or about the time of marriage, which may belong jointly to both the husband and the wife.¹⁶

This section has two requisites:

- The settlement of property can be made only at the time of the passing of the decree, i.e., when the court grants a decree in a matrimonial cause, and not at any time subsequent thereto.
- Orders relate only to the joint property of the spouses has been presented to them at or about the time of marriage. The property of the parties acquired by them before or after the marriage is not within the purview of the section.

The court is free to make any settlement of the joint property, either for the benefit of any spouse or children. It may distribute the property among the spouses. In either case property must jointly

¹⁴ Section 30 of the Indian Divorce Act, 1869.

¹⁵ Section 24 & 25 of The Indian Divorce Act, 1869

¹⁶ Section 27 of the Hindu Marriage Act. 1955

belong to the husband and wife.¹⁷ The property, as contemplated by section 27, is not the property which is given to the time of the marriage only. It includes the property given to the parties before or after marriage also, so long as it is relatable to the marriage. The expression “at or about the time of marriage” has to be properly construed to include such property which is given at the time of marriage as also the property given before or after marriage to the parties become their “joint property”, implying thereby that the property can be traced to have a connection with the marriage. All such property is covered by section 27 of the Act.¹⁸ A similar provision exists in the personal laws of Parsis in the Parsi Marriage and Divorce Act, 1869.¹⁹

In spite of the narrow scope of this section, the Allahabad High Court, in *Kanta Prasad V Omwati*²⁰, took the view that the section does not exclude the inherent power of the court to pass a decree with respect to the separate property of the husband and wife. However, The Delhi High Court, in *Shukla v Brij Bhushan*²¹, took a contrary view. The court exercising the jurisdiction under the act is powerless to deal with properties exclusively belonging to one or the other spouse.²² The Bombay High Court²³, Mysore High Court²⁴ and the Rajasthan High Court²⁵ supported the view presented by the Delhi High Court. The Supreme Court in *Balakrishnan Kadam v Sangeeta B*

¹⁷ *Akasam China Babu v. Aksam Parbati*, AIR 1967 Ori 163 (DB); *Shakuntala v. Mahesh*, AIR 1989 Bom 353; *Subhash v. Khanna* (1991) 44 DLT 142; AIR 1992 Del 14.

¹⁸ *Balakrishna Ramachandra Kadam v. Sangeeta Balakrishna Kadam*, (1997) 7 SCC 500; AIR 1997 SC 3562

¹⁹ Section 42

²⁰ AIR 1972 All 153

²¹ AIR 1982 Del 223

²² *Sushma Kumari v. Ramesh Chand*, (1982) 1 DMC 272; *Surya Kant v. Jashumati*, (1981) 1 HLR 473

²³ *Nandini v Sanjiv* AIR 1988 BOM 239; *Shakuntala V Mahesh* AIR 1989 BOM 353

²⁴ AIR 1968 MYS 226

²⁵ *Anil Kumar v Jyoti* AIR 1987(RAJ 157)

*Kadam*²⁶ held that property covered under Section 27 must be traced to marriage and should be connected with it. Even after diverging opinions of different courts in the country, the position is still stagnating, and urgently requires a concrete legislation.

SECTION 151 CPC IN RELATION TO SECTION 27 OF THE HMA, 1955:

In *Sangeeta Balkrishna Kadam v. Balkrishna Ramchandra Kadam* a Division Bench had set the trend that the court must exercise the powers vested in it under Section 151²⁷, CPC and pass orders relating to the property not covered under section 27 of the Hindu Marriage Act. The Bench gave very cogent arguments: the Hindu Marriage Act imposes no bar on the Courts regarding the disposal of other forms of property, it is hardly fair to the parties to drive them to file another case, nor is it fair to the Courts in view of the volume of litigation pending. Filing one more case²⁸ seems unnecessary and superfluous²⁹. As Justice Raghubar Dayal³⁰ rightly state “The inherent powers has not been conferred upon the court; it is a power inherent in the court by virtue of its duty to do justice between the parties before it.” However the scope of inherent powers is still not clear leading to a paradoxical and ambivalent situation without a definite law.

DWELLING HOUSE AND SECTION 27 OF THE HMA, 1955:

²⁶ AIR 1997 SC 3562

²⁷Section 151 of CPC, 1908 Saving of inherent powers of court.- Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice, or to prevent abuse of the process of the court.

²⁹ AIR 1994 Bom 1 paras 13-14

³⁰ Manohar Lal Chopra v Hira Lal AIR 1962 SC 527; State of West Bengal v Indra Debi(1977) 3 SCC 559

A dwelling house³¹ with respect to matrimony would be a place where the husband and wife coalesce. Even if the house property was exclusively owned by the husband before marriage, wife's right of residence in a portion is now firmly entrenched in our jurisprudence. Such portion would be commensurate with the status and lifestyles of the parties.³² The above decision clearly depicts how important it is to preserve a wife's right to dwelling even if it is the exclusive property of the husband.

Other Acts and Personal laws

The reality of Uniform Civil Code is still a dream in India and perhaps this is the reason that different personal laws have dominated the distribution of matrimonial property and matrimonial settlement. The existing codified personal law dealing with post divorce property distribution is extremely insufficient to address the concept of joint matrimonial property which treats marriage as an equal partnership in which wealth is accumulated as a result of work, support and fortune of both parties for the benefit of the whole family. The personal laws have failed to acknowledge these facts and figures while drafting their personal laws. The Special Marriage Act, 1954 includes no provision addressing the settlement of any type of property upon divorce. Codified Muslim law provides only that upon divorce the wife shall receive the property given to her directly and an amount equal to the sum of *mehr* or dower previously agreed to be paid to her.

The Obscure Mandate:

Stride against Stagnation: Maharashtra's Equality Bill

³¹ P Ramanatha Aiyar's , Concise Law Dictionary , Fourth Edition , Lexis Nexis , Nagpur , 2012 , Pg. 405 , 406

³² Kanchan B.R. v. Akash Alias Usuf Hussain 1 (2001) DMC 574 (Del)

The Maharashtra Government tried to attain egalitarianism in terms of Matrimonial Property by way of Married Women (property co-ownership) Equality bill³³. Though the bill is yet to develop into legislation, nevertheless it is a positive step towards attainment of Gender Justice. The Bill is Secular in Nature and conforms to the ideology as given by the Constituent Assembly under Article 44 of the Constitution. It makes the name of the wife to be mandatorily added to the title deeds at the time of registration of marriage. Further, it also gives an accurate and an unambiguous definition of joint property and separate property. Furthermore, it makes the consent of the wife as a legal necessity at the time of transfer of property and also provides for Suspension of the right of transaction by the civil court in case the husband fails to comply with his obligations as contemplated by the Bill. The bill has also introduced the concept of 'Joint Spousal Property' where the property acquired after marriage is attributed to be a joint property irrespective of the contributions by the spouses. Lastly, The bill elaborates on the transactions, which take place without the wives consent as a co-owner, and provides for the adjustment of the same in joint estate if claimed by the wife.

The Bill has been perceived as a welcome step, the Former State Women's Commission chairperson Nirmala Sawant-Prabhawalkar while appreciating the step taken said "It is a progressive step, one that must be followed up as it would bring relief to millions of women³⁴"

The bill has been called a "Stride against Stagnation" for the reason that the proposers have taken an initiative to develop this embryonic legislation.

³³ xa.yimg.com/kq/groups/14360946/223131981/name/property last visited on 23rd November, 2015

³⁴ <http://timesofindia.indiatimes.com/city/mumbai/Equal-rights-for-wife-in-husbands-assets-a-law-long-overdue-Activists/articleshow/10421974.cms> last visited on 23rd November, 2015

GOA: Pie in the Sky

India is a quasi-federal nation. The concept of 'quasi-federal' form of government was enumerated by the constituent assembly so as to acclimate with the diverse culture of the country and to make the most of the existing diversities. But, we still have failed to relish this flamboyant structure by not taking the best of the laws from one state as an epitome for the entire nation. On this note we elaborate the legacy left by the Portuguese, i.e., Portuguese Civil Code which applies to Goa. The code is a secular code and extends to all religions and castes overriding their personal laws. However, the irony remains in the fact that it is we the people of India who gave ourselves the Constitution and failed to abide by it under Article 44 which contemplates a Uniform Civil Code. Marriage in the code is more of a contractual obligation, is an Austere Concordat and therefore civil registration of marriage is mandatory. To make the law more perspicuous the marital options are further demarcated as, 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 ante-nuptial agreement³⁵ regarding the distribution of property, the custom prevails, which presumes that the spouses are married under the simple communion of acquired properties. The highlight under this system remains in the fact that the spouses register their independent properties at the time of marriage. These properties include property that each spouse holds at the time of austere concordat, or that which is acquired by succession, gift or under a previous exclusive right. So, if the independent property is not registered at the time of marriage, it is deemed to be community property and is liable to equitable distribution on the event of separation.

³⁵ Ante-nuptial - Occuring before marriage ; preceding a marriage as an ante-nuptial agreement . as stated by Ramanatha Aiyar's , Concise Law Dictionary , Fourth Edition , Lexis Nexis , Nagpur , 2012 , Pg. 66

The system appears to be well in consonance with the General Recommendation No. 17 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)³⁶ which dealt with measurement and quantification of the unremunerated domestic activities of women and their recognition in the Gross National Product. It acknowledges the contribution of the women around the globe in all forms of unpaid work. The concept of contribution is not just a premise, but has been well perceived by various judicial pronouncement³⁷ and legislations³⁸ around the globe.

³⁶

http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_GEC_5833_E.pdf last visited on 23rd November, 2015

³⁷ .Miller v. Miller [2006] UKHL 24 , White v. White [2001]1A.C.596 , Lata Wadhwa v. State of Bihar A.I.R. 2001 SC 3218 , Malay Kumar Ganguly v. Dr Sukumar Mukherjee and Ors 2009 (10) SCALE 675 ,National Insurance Company v. Minor Deepika MANU/TN/1304/2009)

³⁸ New-zealand:

. *The Matrimonial Property Act ,1976* of New Zealand gives a fairly comprehensive enumeration on this point.

Contributions of spouses or partners (1) For the purposes of this Act, a contribution to the marriage, civil union, or de facto relationship means all or any of the following:

(a)the care of—

(i)any child of the marriage, civil union, or de facto relationship:(ii) any aged or infirm relative or dependant of either spouse or partner:

(b)the management of the household and the performance of household duties:

(c)the provision of money, including the earning of income, for the purposes of the marriage, civil union, or de facto relationship:

(d) the acquisition or creation of relationship property, including the payment of money for those purposes:

(e)the payment of money to maintain or increase the value of—

(i) the relationship property or any part of that property; or

(ii)the separate property of the other spouse or partner or any part of that property:

(f)the performance of work or services in respect of—

(i)the relationship property or any part of that property; or

(ii)the separate property of the other spouse or partner or any part of that property:

(g)the forgoing of a higher standard of living than would otherwise have been available:

International Legislations:

The purpose of adopting matrimonial property rights for women is to empower them and capacitate them to a luminous future. The objective is, and should be, to enable the parties to make a transition to independence, in a way that takes account of the choices made within the marriage or civil partnership, its length, the parties' ongoing shared responsibilities (for example, for any children), the need for a home and the standard of living during the relationship³⁹. This section of the paper aims to decipher the various international legislations which provide for the a law for matrimonial property.

Alberta:

The Matrimonial Property Act of Alberta (Current as of November 1, 2010) provides for a Matrimonial Order after a judgment of divorce has been granted⁴⁰. Separation or divorce is a precondition to the acquisition of property. The Act starts from a presumption that property and debts acquired by either party during the marriage are to be shared equally. Under section 8 of the statute, the legislators have discussed matters which are to be considered for the matrimonial order. The section is dominated by the “contribution” of the spouses where contribution has been given a wide ambit to include contribution to the welfare of the family and contribution as a homemaker other than Financial Contributions. What is intriguing to note here is that the court also needs to consider the duration of marriage for a matrimonial order, which gives the concept of contribution

(h)the giving of assistance or support to the other spouse or partner (whether or not of a material kind), including the giving of assistance or support that—

(i)enables the other spouse or partner to acquire qualifications; or

(ii)aids the other spouse or partner in the carrying on of his or her occupation or business.

³⁹ The Law Commission’s Report on Matrimonial Property, Needs and Agreements, UK

⁴⁰ Section 5 of The Matrimonial Property Act of Alberta Conditions precedent to application

a new direction.⁴¹ These rights to the property exist in addition to and not in substitution for or derogation of the rights of the spouse under the Dower Act.⁴² The rights under the Act are provided in the absence of an agreement. The court may under the act, order transfer of interest, payment of money, division of proceeds of sale of a property or any other order it may deem fit.⁴³

⁴¹Section 8 of The Matrimonial Property Act of Alberta: Matters to be considered: The matters to be taken into consideration in making a distribution under section 7 are the following: (a) the contribution made by each spouse to the marriage and to the welfare of the family, including any contribution made as a homemaker or parent; (b) the contribution, whether financial or in some other form, made by a spouse directly or indirectly to the acquisition, conservation, improvement, operation or management of a business, farm, enterprise or undertaking owned or operated by one or both spouses or by one or both spouses and any other person; (c) the contribution, whether financial or in some other form, made directly or indirectly by or on behalf of a spouse to the acquisition, conservation or improvement of the property; (d) the income, earning capacity, liabilities, obligations, property and other financial resources (i) that each spouse had at the time of marriage, and (ii) that each spouse has at the time of the trial; (e) the duration of the marriage; (f) whether the property was acquired when the spouses were living separate and apart; (g) the terms of an oral or written agreement between the spouses; (h) that a spouse has made (i) a substantial gift of property to a third party, or (ii) a transfer of property to a third party other than a bona fide purchaser for value; (i) a previous distribution of property between the spouses by gift, agreement or matrimonial property order; (j) a prior order made by a court; (k) a tax liability that may be incurred by a spouse as a result of the transfer or sale of property; (l) that a spouse has dissipated property to the detriment of the other spouse; (m) any fact or circumstance that is relevant

⁴² Section 28 of The Matrimonial Property Act of Alberta: Rights additional to rights under Dower Act 28(1) The rights under this Part are in addition to and not in substitution for or derogation of the rights of a spouse under the Dower Act. (2) If a spouse is in possession of a matrimonial home and a life estate in the matrimonial home vests in that spouse pursuant to the Dower Act, the registration of an order under this Part may be cancelled by the Registrar of Land Titles on application by that spouse.

⁴³ Section 9 of The Matrimonial Property Act of Alberta: Power of the Court 9(1) If part of the property of the spouses is situated in Alberta and part elsewhere, the Court may distribute the property situated in Alberta in such a way as to give effect to the distribution under section 7 of all the property wherever it is situated. (2) The Court, in order to effect a distribution under section 7, may do any one or more of the following: (a) order a spouse to pay money or transfer an interest in property to the other spouse; (b) order that property be sold and that the proceeds be divided between the spouses as the Court directs; (c) by order declare that a spouse has an interest in property notwithstanding that the spouse in whose favour the order is made has no legal or equitable interest in the property. (3) To give effect to an order under this section the Court may do any one or more of the following: (a) order a spouse to pay money over a

Kenya:

Originally, Kenya was governed by the Married Women's Property Act of 1882⁴⁴, which introduced the supposition of *Feme Sole*⁴⁵ where the married woman was considered to be equivalent to an unmarried woman and was capable of holding all property independently⁴⁶. This being a comprehensive legislation was silent on how marital property was to be divided upon

period of time with or without interest; (b) order a spouse to give security for all or part of any payment; (c) charge property with all or part of a payment to be made under the order and provide for the enforcement of that charge; (d) prescribe the terms and conditions of a sale ordered under subsection (2); (e) require a spouse, as a condition of an order, to surrender all claims to property in the name of the other spouse; (f) require a spouse, as a condition of an order, to execute a release of dower rights under the Dower Act with respect to all or any property owned by the other spouse or transferred to the other spouse; (g) impose a trust in favour of a spouse with respect to an interest in property; (h) vary the terms of an order made under subsection (2) in accordance with this subsection; (i) if property is owned by spouses as joint tenants, sever the joint tenancy; (j) make any other order that in the opinion of the Court is necessary.

⁴⁴ Married Women's Property Act of 1882, was A United Kingdom Statute of General Application applied in Kenya by virtue of Section 3(1)(c) of the Judicature Act

⁴⁵ Feme sole, in Anglo-American common law, a woman in the unmarried state or in the legally established equivalent of that state. The concept derived from feudal Norman custom and was prevalent through periods when marriage abridged women's rights. Feme sole (Norman French meaning "single woman") referred to a woman who had never been married or who was divorced or widowed or to a woman whose legal subordination to her husband had been invalidated by a trust, a prenuptial agreement, or a judicial decision. In some instances by custom a woman could execute contracts independent of her husband as a feme sole trader, but generally legal action was required to establish a married woman's legal separateness from her husband(Encyclopedia Britannica)

⁴⁶Section 1 of the Married Women's Property Act of 1882. (1) A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a feme sole, without the intervention of any trustee. (2) A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a feme sole, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise.

dissolution of a marriage and was overturned by the Matrimonial Property Act of 2013. The Matrimonial Property Act of 2013 was enacted to “provide for the rights and responsibilities of spouses in relation to matrimonial property.” The act defines contribution to include monetary and non-monetary contribution including-domestic work and management of the matrimonial home; child care, companionship, management of family business or property;⁴⁷ Section 4 gives equal status to both spouses.⁴⁸ The act does not indiscriminately approve equal division of property but vests in the spouses property, according to the contribution of each spouse.⁴⁹ The act also lays a presumption in favour of the other spouse where matrimonial property is acquired during marriage in the name of one spouse, there is a presumption that the property is held in trust for the other spouse; and in the names of the spouses jointly, there’s a presumption that their beneficial interests in the matrimonial property are equal.⁵⁰

Nova Scotia:

The Matrimonial Property Act, Nova Scotia not being a very comprehensive legislation, limits the ambit to only “Matrimonial Home”, It defines Matrimonial Property as “the dwelling and real property occupied by a person and that persons spouse as their family residence and in which either

⁴⁷ Section 2 of the Matrimonial Property Act of 2013.

⁴⁸ EQUAL STATUS OF SPOUSES (Section 4 of The Matrimonial Property Act of 2013) A married women has the same rights as a married man: to acquire, administer, hold, control, use and dispose of property whether movable or immovable; to enter into a contract; and to sue and be sued in her own name.

⁴⁹ OWNERSHIP OF MATRIMONIAL PROPERTY (Section 7 of The Matrimonial Property Act of 2013) Where there is no prenuptial agreement, matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided (not equally) between the spouses

⁵⁰ Section 14 of The Matrimonial Property Act of 2013.

or both of them have a property interest other than a leasehold interest.”⁵¹ It also provides for a consent clause, whereby neither spouse shall dispose of or encumber any interest in a matrimonial home unless the other spouse consents by signing the instrument of disposition or encumbrance.⁵² Under the act, the court has powers to determine what shall form matrimonial property, and authorize the disposition of the matrimonial home.⁵³

South Africa:

The Matrimonial Property Law in South Africa is primarily regulated by the Matrimonial Property Act No. 88 of 1984. In terms of Section 14 of the Act, a marriage in Community of Property is a marriage in which both spouses have equal authority with regard to the disposal of the assets of the joint estate, the contracting of debts which lie against the joint estate and the management of the joint estate. A marriage in Community of Property is the automatic matrimonial property regime, which can only be excluded by a written ante nuptial contract. Under the Act, alienation of property requires a written consent of the other spouse. The statute provides for an Accrual System. At the dissolution of the marriage subject to the accrual system, by divorce or death of one or both of the spouses, the spouse whose estate shows no accrual or a smaller accrual than the

⁵¹ Section 3 of The Matrimonial Property Act, Nova Scotia

⁵² Disposition of matrimonial home

(1) Neither spouse shall dispose of or encumber any interest in a matrimonial home unless

(a) the other spouse consents by signing the instrument of disposition or encumbrance, which consent shall not be unreasonably withheld; (b) the other spouse has released all rights to the matrimonial home by a separation agreement or marriage contract; (c) the proposed disposition or encumbrance is authorized by court order or an order has been made releasing the property as a matrimonial home; or (d) the property is not designated as a matrimonial home and an instrument designating another property as a matrimonial home of the spouses is registered and not cancelled.

⁵³ Section 10 The Matrimonial Property Act, Nova Scotia

estate of the other spouse, acquires a claim against the other spouse or his estate for an amount equal to half of the difference between the accrual of the respective estates of the spouses.⁵⁴

Proposed Law & Key Features:

- **Universal Applicability:** The Act shall be a Uniform code. A common Civil Code will help the cause of national integration by removing disparate loyalties to law which have conflicting ideologies. Justice to all is a far more satisfactory way of dispensing justice than justice from case to case.⁵⁵

- **Definition of Contribution:** The entire concept of Matrimonial property depends on the contribution by each spouse and thereby the legislation requires a concrete but capacious definition. Various international legislations include both monetary and non-monetary contribution, which shall include:

(a) The contribution made by each spouse to the marriage and to the welfare of the family, including any contribution made as a homemaker or parent;

⁵⁴ A and B intend getting married Out of Community of Property with the inclusion of the Accrual system At the date of signature of the ANC, A's commencement value (assets) are R50 000-00 and B's commencement value R0-00. At the dissolution of the marriage, A's estate has increased in value and his assets are worth R250 000-00 and B's assets are worth R50 000-00. B's assets has grown the less (accrual is the smallest) and has a claim against A for an amount equal to half of the difference in growth in other words: (a) R250 000-00 (dissolution value) less R50 000-00 (commencement value) equals R200 000-00 (accrual) (B) R0-00 (commencement value) less R50 000-00 (dissolution value) equals R50 000-00 (accrual) thus R200 000-00 less R50 000-00 equals R150 000-00 divided by two equals R75 000-00. B has a claim of R75 000-00 against A.

⁵⁵ Mohd. Ahmed Khan vs Shah Bano Begum And Ors on 23 April, 1985

Equivalent citations: 1985 AIR 945, 1985 SCR (3) 844

(b) The contribution, whether financial or in some other form, made by a spouse directly or indirectly to the acquisition, conservation, improvement, operation or management of a business, farm, enterprise or undertaking owned or operated by one or both spouses or by one or both spouses and any other person;

(c) The contribution, whether financial or in some other form, made directly or indirectly by or on behalf of a spouse to the acquisition, conservation or improvement of the property;

By acknowledging the non-monetary contributions of the spouse, the menial chores which every woman does in the household would also come into light. However the decision of quantification of the non monetary contributions would be the discretion of the court, which should not be exercised arbitrarily.

- **Matters to be considered:** Other than contributions of the spouse other matters such as
 - (a) the income, earning capacity, liabilities, obligations, property and other financial resources that each spouse had at the time of marriage, and that each spouse has at the time of the trial;
 - (b) Whether the property was acquired when the spouses were living separate and apart;
 - (c) The terms of an oral or written agreement between the spouses;
 - (d) that a spouse has made (i) a substantial gift of property to a third party, or (ii) a transfer of property to a third party other than a bona fide purchaser for value; (i) a previous distribution of property between the spouses by gift, agreement or matrimonial property order;
 - (e) a prior order made by a court;
 - (f) a tax liability that may be incurred by a spouse as a result of the transfer or sale of property; (g) that a spouse has dissipated property to the detriment of the other spouse;
 - (h) any fact or circumstance that is relevant
 - (i) Duration of Marriage

Maintenance is an important intellection which cannot be overlooked while drafting a policy for the matrimonial rights of a woman. The idea of short-duration marriages has been well adopted in the international scenario too.⁵⁶

However in the authors view the concept of short-duration in India will need some more time looking at the various sociological and cultural factors. In India a short-duration marriage should be the one which subsists for a period of 7 years or less. But this rule should not apply if a child is born out of the marriage. This rule is keeping in mind the welfare of the child as the paramount consideration⁵⁷.

- **Concept of Matrimonial Fault**

The contemporary approach is that break-down of marriage leads to matrimonial fault and not that the matrimonial fault causes breakdown of marriage. In India, also matrimonial fault should not be made a relevant factor. If Matrimonial Faults are also taken into consideration, there is a possibility that there will be a subsistent perusal by both the parties to inflict the matrimonial fault which will lead to 'Perjury, Hypocrisy and Humiliation.' The relationship which has already turned bitter will see a further aggravation in form of obnoxious drama played by parties to win the case. A similar stand has been taken by the Law Reform Commission of Australia⁵⁸

⁵⁶ The Matrimonial Property Act ,1976 of New Zealand in Section 13 excludes short-duration marriages from the principle of equal sharing in matrimonial home and chattels. It defines a short-duration marriage as one 'in which the spouses have lived together as husband and wife for a period less than 3 years' . The Ontario Family Law Act 1986 in Section 5(6) authorizes the court to deviate from the equalizing principle adopted for division of property when the period of cohabitation is less than 5 years(under clause e)

⁵⁷ Noel v Noel 10 PD 179; Tarington v Tarington 11 PD 84.

⁵⁸ Law Reform Commission , Report No. 39 , Matrimonial Property 39 80 (1987) (Australia). If the law gave separating spouses a financial incentives to accuse each other of marital wrong doing unrelated to the financial aspect of the marriage there would be a risk in every case of an exchange of allegations which would aggravate the rupture

- **Nullity Of A Marriage**

To draft a proposed law on the matrimonial property, it is important to note that the law relating to void and voidable marriages has to be taken at a different footing as from a valid marriage. The term “Void” as explained by the Black Law Dictionary 6th is “Null; ineffectual; nugatory; having no legal force or binding effect; unable, in law, to support the purpose for which it was intended”⁵⁹ going by the above definition it is understood that void is something which does not have any legal effect. So, if a marriage has no legal effect then any adjoining right from a void marriage also becomes ineffective. The Supreme Court also took a similar view when it negated the right of maintenance out of a void marriage⁶⁰

The term “Voidable” Marriage as defined by the Concise Law Dictionary is “A marriage which is initially invalid but which remains in effect unless terminated by the order of court”.⁶¹ Voidable Marriage cannot be treated at par with a valid marriage. Further there appears to be a lot of divergences in the existing laws of voidable marriages in different statutes⁶². In view of such discrepancies and the absence of a uniform civil code, it is not advisable to confer matrimonial rights in case of Voidable Marriage, either in stratagem or in implementation.

- **Presumption:** The act shall also lays a presumption in favour of the other spouse where matrimonial property is acquired during marriage in the name of one spouse, there is a presumption

in the relationship , with damage to the spouses' self-esteem and (in many cases) to their continuing relationship as parents with shared responsibilities to their children.

⁵⁹ Hardison v. Gledhill, 72 GaApp. 432, 33 S.E.2d 921, 924.
https://archive.org/stream/BlacksLaw6th/Blacks%20Law%206th_djvu.txt last visited on 23rd November, 2015

⁶⁰ Yamuna Bai V. Anantrao , AIR 1988 S.C. 645 .

⁶¹ P Ramanatha Aiyar's , Concise Law Dictionary , Fourth Edition , Lexis Nexis , Nagpur , 2012 , Pg. 1317

⁶² Section 30 of Parsee Marriage and Divorce Act, Section 24 of Special Marriage Act and Section 12 of Hindu Marriage Act.

that the property is held in trust for the other spouse; and in the names of the spouses jointly, there's a presumption that their beneficial interests in the matrimonial property are equal.

- **Non obstante clause: Rights additional to rights under Maintenance laws** The rights under the law shall be in addition to and not in substitution for or derogation of the rights of a spouse under any personal law or any other law granting maintenance to the woman.
- **Equal Status of Spouses:** A married women has the same rights as a married man: to acquire, administer, hold, control, use and dispose of property whether movable or immovable; to enter into a contract; and to sue and be sued in her own name.
- **Pre Nuptial⁶³ Agreement:** Where a pre-nuptial agreement exists, between the spouses, with regard to the distribution of Property, such agreement shall prevail. However such an agreement shall subsist, only when it is in consonance with the Indian Contract Act, 1872
- **Accrual System:** At the dissolution of the marriage subject to the accrual system, by divorce or death of one or both of the spouses, the spouse whose estate shows no accrual or a smaller accrual than the estate of the other spouse, acquires a claim against the other spouse or his estate for an amount equal to half of the difference between the accrual of the respective estates of the spouses.⁶⁴

⁶³ Made or occurring before Marriage(Ramanatha Aiyar's , Concise Law Dictionary , Fourth Edition , Lexis Nexis , Nagpur , 2012 , Pg. 986

⁶⁴ A and B intend getting married Out of Community of Property with the inclusion of the Accrual system At the date of signature of the ANC, A's commencement value (assets) are R50 000-00 and B's commencement value R0-00.v At the dissolution of the marriage, A's estate has increased in value and his assets are worth R250 000-00 and B's assets arev worth R50 000-00. B's assets has grown the less (accrual is the smallest) and has a claim against A for an amount equal to half of the differencev in growth in other words: (a) R250 000-00 (dissolution value) less R50 000-00 (commencement value) equals R200 000-00 (accrual) (B) R0-00v (commencement value) less R50 000-00

Woman Empowerment:

Man's efforts in his world, to empower the "Power" are a pusillanimous attempt to play the role of the bestower. For aeons past, India has been a fortunate witness of the power called woman. This cosmic creation is itself the various shades and attributes of the metaphor called "Kali" which makes one feel the play of the power more emphatically than its description as a circle of birth, life and death.

Investing in women's economic empowerment sets a direct path towards gender equality, poverty eradication and inclusive economic growth⁶⁵.

The matrimonial property rights not only provide her with this recognition but also are a way to her empowerment and self-dependance. 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.⁶⁶

To quote Justice Sujata V. Manohar of Supreme Court of India "It is not easy to eradicate deep seated cultural values or to alter traditions that perpetuate discrimination. It is fashionable to denigrate the role of law reform in bringing about social change. Obviously law, by itself, may not be enough. Law is only an instrument. It must be effectively used. And this effective use depends

(dissolution value) equals R50 000-00 (accrual) thus R200 000-00 less R50 000-00 equals R150 000-00 divided by two equals R75 000-00. B has a claim of R75 000-00 against A.

⁶⁵ <http://www.unwomen.org/en/what-we-do/economic-empowerment#sthash.CeDIR6df.dpuf> last visited on 23rd November, 2015

⁶⁶ Gita Gopal, Gender and Economic Inequality in *India: The Legal Connection*, 13 B.C THIRD WORLD L.J 63(1993).

as much on a supportive judiciary as on the social will to change. An active social reform movement, if accompanied by legal reform, properly enforced, can transform society."

