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# The Need for the Community of Property in India: A Step Ahead in Improving the Property Rights to Married Couple

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## ABSTRACT

*The recognition of marital/community of property rights to married women in the event of divorce, separation and desertion in India is the need of the hour. The broad concepts of property rights and equality concepts under the Indian Constitution and other legislations dealing with property rights of women needs evaluation for the purpose of implementing the community of property rights to married women. Discovering the traces of legislations or literatures on the community of property rights in different countries becomes essential for the policy makers to understand the community of property concept which could be suited in the Indian Territory. This article deals with the concept of community property rights to married women. Further speaks about the need to implement the law relating to the marital/community of property to married women in the event of divorce, separation and desertion in India irrespective of any personal laws. The community of property rights in India can play a step to improve the property rights of married couple in general as gender neutral law.*

**Keyword:** *Community of Property, Marital property, Spousal property, married couple, property rights, personal laws on property, Indian women, divorced, separated women, nuptial home, hotchpot.*

## I. INTRODUCTION

The important of the women is to be understood from the quote that ‘God cannot be everywhere, therefore, He created Mother’. The patriarchal outlook of the Indian society needs to undergo a change to accept women as equal player in the society on par with men. The underlying merit of the Indian constitution is the concept of equality and there can be no discrimination based on sex<sup>2</sup>. There is no doubt that women have equal rights to property on par with men. However, in reality, the right of women to property is only in legislation not in practice. Nation building cannot be complete without the participation of women and therefore

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<sup>2</sup> Indian Constitution, Art.15.

women must be respected and given equal status in all respect as that of men. The empowering the status of women on par with men depends on how the social, political and economic equality is bestowed impartially on women. Indian women tend to relinquish their property rights voluntarily. This trend is due to various regional and religious practices as a custom or on compulsion. Women become vulnerable when they are deprived of their rights to property. Moreover, women who remain single, divorced/separated or widowed are at the receiving end when they lose the security of their family.

## **II. LEGAL STATUS OF MARRIAGE**

Marriage changes the legal position and status of the women. Her domicile becomes automatically changed to that of her husband by marriage. Marriage<sup>3</sup> is defined as ‘the union of a man and a woman which is recognized by law and by which they become husband and wife’. Marriage is a type of social union of two partners that establish a certain privileges and responsibility between them, their children and their respective in-laws. Marriage is the state of intimate union and with equal partnership of a man and a woman. This union is sacrament and comes to us from the hand of God, who created man and woman in his image, so that they might become one body and might be fertile and multiply<sup>4</sup>. Hence, very essentially, the marriage creates certain rights and obligation between husband and wife. The common law doctrine that the domicile of the wife is that of her husband is founded on the duty of the wife to live with her husband. Therefore, it is enacted under S. 15 of the Indian succession Act, 1925<sup>5</sup>, that by marriage, a woman acquires the domicile of her husband and S.16 of the Act provides that during marriage the wife’s domicile follows that of her husband. Therefore, the obligation to live with the husband inter alia creates certain marital rights to a married woman.

### **(A) A legal outlook of Marital Right**

According to the Free Dictionary.Com<sup>6</sup> the word marital rights meant ‘an old-fashioned expression for the rights of a husband (not rights of a wife) to sexual relations with his wife and to control her operation of the household’. Hence, the married women were considered legally inferior. The household activities of married women are controlled by her husband and she had no free will to do anything of her own. Married woman is always under the mercy and patronage of her husband and in-laws. If a woman is married, her every activity, be it social, political and

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<sup>3</sup>Legal rights of a wife, <https://www.nrilegalservices.com/legal-rights-of-wife/>, Accessed on Mar.31<sup>st</sup>,2020.

<sup>4</sup>See Genesis: Holy Bible, Chapters 1 and 2.

<sup>5</sup> Act No. 39 of 1925.

<sup>6</sup>Maritalrights.(n.d.)*TheFreeDictionary.com*,2020,<https://legaldictionary.thefreedictionary.com/marital+rights>, Accessed on Jun 27<sup>th</sup> 2020.

economic, is controlled by her husband or in-laws. Section 4 of the Married Women's Property Act, 1874<sup>7</sup> says that the earnings of any married woman acquired by her, in any employment, occupation or trade and also any money or other property so acquired by her through the exercise of any literary, artistic or scientific skill, and all savings from and investments of such wages, earnings and property, shall be deemed to be her separate property. This provision only deals with the property that a woman has earned out of her occupation, employment and trade etc. Again when the husband controls the activities of his wife and has a dominant position in determining her free will, this piece of legislation would be no use to women.

Marriage unites a husband and a wife as partners in life. Both of them have an equal duties and rights in the institution of marriage. Married couples have equal duty to perform and equal rights to be claimed in their partnership life. However, married women are often sidelined to have power and control in the household unit. The power and control of the husband in the marital family, deprives his wife to own, hold and enjoy her own separate property, if not in law. The economic contribution by a married woman to her marital family is not acknowledged or valued properly.

### **(B) Position of Women in Marital Home**

A married woman is compelled to contribute to the wellbeing of marital family in her entire matrimonial life. Mostly, in India, all the landed properties are held and purchased in the name of the husband or male's name. No legislation in India that actually recognizes the financial contribution made by a married woman to the property held by her husband. Hence, a married woman cannot get any rights to the property stands in the husband's name in spite of her financial contribution. Normally, the earnings of the married woman in the family are used for managing the household activities and for the allied purpose. The husband's income and earnings are mostly used to buy property in husband's name. Such practices make a married woman vulnerable and helpless in the event of death of her husband. Woman is deprived of her right to claim any portion to the property held by her husband on divorce or separation even if she had made financial contribution. The lack of marital property rights regime to a married woman makes the married woman more vulnerable to oppression and marginalization. Absence of marital property rights to a married woman leave her to surrender to the abusive marriage life and lose her freedom of independence.

## **III. CONTRIBUTION OF MARRIED WOMEN: HOTCHPOT THEORY**

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<sup>7</sup>Act No. 3 of 1874.

Indian married women are emerging as the major contributor to the financial progress of the nuptial family and property. By taking up a job as an employee, a woman contributes to the financial wellbeing of the nuptial family at large. She contributes her physical work and knowledge in the family business apart from being a home maker. The common phenomenon of the contribution of a married woman is rearing of children and other family members in the marital family. The economic contribution of married women for the family wellbeing and property of nuptial family is seldom recognized. The common mindset of the Indian society do not give due importance to the contribution made by married women in the nuptial family. We do not understand that unless married woman takes care of the work at home the other spouse cannot take up a job. Hence, the contribution of women as home maker in enriching the marital family property needs to be given importance. The contribution of married women should be acknowledged as partner in contributing the family economy.

A married woman contributes to the economic enrichment of property held by her husband at marital home in various ways. A married woman enriches the marital home by blending her property through her *stredhan* property and the income through her employment. Hence, a married woman is no doubt, is also considered as a major contributor to the economic growth of the marital family. In such circumstances, economic contribution of a married woman is mixed or blended with the property of her husband or shared in a 'hotchpot'<sup>8</sup> of the family property or marital property.

The meaning and intent of 'hotchpot' theory is the act of blending or mixing the properties of different person with intent to divide them equally. Under civil law<sup>9</sup> it means 'the blending together of property so as to achieve equal division, especially in the case of divorce or intestacy. In the case of a married woman, her properties such as her salary, gift, other source of money from her intellectual activities, are blended with that of her husband's property or nuptial home property. In India, there is no such legal intent to be divided equally either on divorce or intestacy even if the income of a married woman is blended with that of her nuptial home property. This has become the legal hindrance for recognizing the marital share for a married woman in India. Hence, married woman has no legal rights to claim any share from such property in case of divorce or separation even if her income is blended with the marital property. The right of married women to 'marital/community of property' upon

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<sup>8</sup> *Hotchpot*: the mixing together of property belonging to different persons with a view to dividing it equal. Hotchpot,(n.d.)*West's Encyclopedia of American Law, edition 2, (2008)*, <https://legal-dictionary.thefreedictionary.com/hotchpot>, Accessed on Jun 27<sup>th</sup> 2020.

<sup>9</sup>Hotchpot,PayrollHeaven.com.Payroll&AccountingHeavenLtd.,Jun,30<sup>th</sup>2020,<https://payrollheaven.com/define/hotchpot/>.

divorce/separation is a new legal regime that needs a close study in the present development in the Indian context.

### **(A) Concept of Community of Property**

Marital or Matrimonial Property refers to all property acquired by any of the spouses in the course of the marriage. Marital property is a U.S state-level legal term that refers to ‘property acquired during the course of a marriage’<sup>10</sup>. Marital properties include land and house property and other property a couple buys during their marriage. Also, bank accounts, pensions, securities, and retirement accounts of a married person are included as marital property.<sup>11</sup>

In Norwegian family law, community property bears reference to property that is acquired with monies that are earned from the work of each of the spouses in the course of the marriage and whose value is open to division upon divorce<sup>12</sup>. Accordingly, community property does not include property that a spouse had owned before the marriage or property acquired during the marriage by way of inheritance or by gift from a third party. Community property is a family law term and used to refer to all of the personal and real property that a couple acquires during their marriage, which legally belongs to both spouses<sup>13</sup>. Everything purchased or acquired by a couple during the course of their marriage or domestic partnership, but it does not include a gift from third party or inheritance<sup>14</sup>.

### **(B) Significance of Community of Property to Married Women in India**

Married women’s right to claim share in the marital property or community of property is essential in the present era of matrimonial life system. Men cannot make home without women. It is said ‘Men bring rice, women produce meal’. Nuptial home becomes potentially strong when husband and wife treat each other equal. The contribution of each other in making a family socially and financially successful must be recognized. The marital home becomes financially potential if the financial contribution of a married woman in the matrimonial home is recognized. Recognizing the contribution of a married woman in the marital home would really boost her morale and make her as an active participant in enhancing the financial enrichment of marital property. A married woman in India could be emancipated and empowered when the financial contribution of her to the marital home is legally recognized. And as such, must be

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<sup>10</sup>JULIAKAGAN, Marital Property, <https://www.investopedia.com/terms/m/maritalproperty>, 1<sup>st</sup> Nov, 2020.

<sup>11</sup> Ibid.

<sup>12</sup> Lødrup, Matrimonial Property Rights of Women upon Divorce in Ghana, Under The Prism of Legal Empowerment(2004)p.112,file:///E:/New%20Folder%20(2)/phd%20MATRIMONIAL%20PROPERTY%20RIG HTS%20OF%20WOMEN.pdf, Accessed on Nov, 2<sup>nd</sup> 2020.

<sup>13</sup> <https://legaldictionary.net/community-property>, Accessed on Apr. 1<sup>st</sup> 2020.

<sup>14</sup> Ibid.

empowered to claim to rights to the contribution she made.

Few nations in the world have awakened to this call and have given statutory recognition of community/ marital property rights to spouse. Most of the democratic nations recognize the equal or equitable distribution of marital property by the spouse in case of separation or divorce. The statutory recognition to right to claim equal or equitable distribution of share to the marital property upon divorce, separation or desertion is essential need for India. A legal recognition of financial contribution of married women and equal share to the marital property of nuptial family upon divorce will prevent husband from taking undue advantage of financial contribution made by his wife to the marital property.

Landed property is absolutely owned by the person in whose name it is registered under the present property jurisprudence in India. Property purchased is usually registered in husband's name or male member in the family irrespective financial contribution of a wife to that property. This is the present scenario of the male dominated Indian society with respect to property rights. Many women are equally placed in the employment and earn more in the present era. Hence women contribute financially to the purchase of the property along with the husband. However, mostly, property purchased on joint contribution of partners is registered in single name and that too in husband's name or male members of the family.

The property jurisprudence gives absolute power to the person in whose name it is registered to transfer or deal with that property as that person like without any hindrance or consent from the other spouse. Therefore, a married woman has no right to get any portion over the marital property to which she had also contributed upon divorce or separation. Such conditions left with very little financial support upon divorce or separation. She is entitled only for 'maintenance' depending upon her personal laws of her religion in India. Non recognition to marital property rights to a married woman becomes a hurdle to leave or end the abusive and an unpleasant marriage. Absence of such rights takes away the liberty of a woman to choose her personal life and is made to bear the heat of the marriage.

The UN secretary general's 2009 report on 'Legal Empowerment of the Poor and Eradication of Poverty' defines the 'legal empowerment' as "*the process of systematic change through which the poor are protected and enabled to use the law to advance their rights and their interests as citizens and economic actors*"<sup>15</sup>. In the light of the definition, legal empowerment

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<sup>15</sup> UN Secretary General Report, A/64/133, (2009) para 3, also see, **Ahenkorah, Olympia Twenewaa**, Matrimonial Property Rights of Women Upon Divorce in Ghana, Under the Prism of Legal Empowerment, To which extent does the lack of substantive legislation on property settlement upon divorce constitute a breach of the CEDAW?, <http://urn.nb.no/URN:NBN:no-44511>.

of women, especially married women, is to be understood in granting them legal rights with respect to their share in the marital property. In the process of empowering the married women, they should be legally empowered to use the law to protect their interest in the marital property ‘to advance their rights and their interests as citizens and economic actors’<sup>16</sup>. Article 17<sup>17</sup> of UNDHR also acknowledges property rights ‘as a basic human right that is to be enjoyed on equal footing by both men and women’. The main point to be understood from the declaration is that, basic rights, property rights and livelihood of an individual should be effectively upheld and must be protected by the legislation.

#### **IV. INDIAN LEGAL REGIME ON PROPERTY RIGHTS TO WOMEN**

The Indian legal regime and the various statutes that protect married women on her divorce or separation is very complex. There is no uniform law that protect the divorced or separated women in India as it has diverse religion and culture. A married woman has no legal rights to get any share from the marital property on divorce except to seek maintenance from her former husband. On divorce or separation, a married woman has only a limited right to claim maintenance from her former husband. A divorced woman can claim maintenance only if the husband has means and divorced wife should not be in a position to maintain her. Mostly, a divorced wife in India, irrespective of any religion, faces discrimination and deprivations of her legitimate rights to get her due in the marital property. In the event of divorce a married woman has no legal right to reside in the matrimonial house, even if she had contributed.

A divorced wife has to knock at the doors of the judiciary in order to claim her rights to maintenance through various laws. There are various laws on maintenance for various religions in India. The Criminal Procedure Code, 1973, the Hindu Marriage Act 1955, the Hindu Adoption and Maintenance Act, 1956, Protection of Women from Domestic Violence Act 2005, and the Maintenance and Welfare of Parents and Senior citizens Act, 2007 are some of the legislations that contain provisions regarding maintenance of wife, children and parents of a man. The Divorce Act, 1869 and the Muslim Women (Protection of Rights on Divorce) Act, 1986 are applicable to Indian Christians and Muslim in India respectively.

A married woman on divorce, separation or desertion has no right to claim share in the marital property. The economic protection of a married woman on divorce is paramount. The right to maintenance is not an adequate measure to prevent financial hardship of a married woman after divorce. If the marital property rights regime in India is recognized, a married woman on divorce

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<sup>16</sup> Ibid.

<sup>17</sup> Universal Declaration of Human Rights, (UNDHR), 1948.



or separation can claim an equal or equitable share in the marital property and other assets of the marital family. Hence, the need for Marital Property right regime in India becomes imperative. Moreover, the married women have lot more to fight for their legal rights from the matrimonial home in case of the death of her husband. There is no specific law in the matter of Marital Property rights in India even in the case of death of one spouse. Hence, most of the rights of a woman on divorce or separation have to be legally fought and need to depend upon the interpretation and discretionary powers of the Courts in India.

The violence against women in India is dealt under the Protection of Women from DV Act, 2005<sup>18</sup>. This Act provides for protection of the rights of women who are victims of violence of any kind occurring within the family. However, the right of a married woman to Marital Property is significantly important tool that will protect the interest of women in case of divorce.

#### **(A) Community of Property in India: A Need**

There must be suitable legislations to legally acknowledge the right of a married woman to claim rights over the marital/ community property in the marital family. Since, the rights to claim share in the marital property is not legally recognized in India, a married woman become vulnerable to financial hardships in the event of divorce or separation. The assets in the marital family are not equally distributed to a married woman in the event of any dispute in the marital family. Therefore, the need for the legal right of a married woman to claim equal share in the marital property is investigated in this research study. This research problem is chosen because, if married women are denied right to share in the community of property on divorce, separation and /or desertion, they become financially helpless and would find it difficult to get any access to immediate resources. The deprivation of such rights would make many married women vulnerable to poverty.

Therefore, the need for community of property rights to married women in India becomes vital and would serve as a step to enhance the spousal right to community of property. In nuptial home, a married woman contributes to the economic growth of marital property through an employment. She also contributes money or other property so acquired by her. Her gifts or stridhan, such as jewels, and other properties are pledged or sold to use it for the advancement of property of marital home. Her contribution is used even if the properties stand in the name of her husband or in-laws. In such reality, it is time that the married women are given legal rights to claim share in the marital property of the marital family in which she had also contributed. The right of married women to claim share in the marital property needs to be

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<sup>18</sup> Act No.43 of 2005.

recognized in India to empower women in case of divorce, separation or widowhood.

The marital property rights of spouses upon divorce in India is not regarded as an important issue in the absence of formal legal framework. There is no substantive legislation or guidelines on the right of Marital Property in India. The time is ripe now to explore to implement the community of property/marital property rights of married women in the event of divorce and separation in particular in India.

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