



Spousal /Community of Property Settlement Through Nuptial Agreement: - A way Forward for Indian Family System

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Marriage is a social event in India and a legal contract. Marriage is an option for future settlement and security for women. Mostly, single women who are divorced/separated/ widowed are subject to deprivation of their economic rights. Many fear to get away from the abusive marriage as they also fear of economic deprivation. A property right to spouses is an economic boost and makes them independent and become essential upon divorce /separation in marital relation. Spouses especially married woman contributes to the wellbeing of nuptial family in many ways by taking care of the household activities. However, contributions of women through their household activities are not recognized and are often deprived of their rights to spousal property. The marital community is very peculiar association of husband and wife. Community property refers to assets of married individual. In the spousal property system, husband and wife own and owe everything equally. Spouses have equal ownership to the property held in common after marriage.

The United States of America has nine Community property states which give right to spousal property division upon divorce. This system of spousal property based on economic equalization between husbands and wives had led to the promulgation of the Uniform Marital Property Act, 1983 (UMPA) in U.S.A. This Act allows the spouses to divide the property in the event of divorce or death through nuptial agreement. Prenuptial agreement is entered into by the two individual in contemplation of marriage. By this agreement they determine their rights and interests in the property upon dissolution or death. This agreement to divide their assets upon divorce is legally binding. American states recognize prenuptial agreements in one form or another. There is a Uniform Premarital Agreement Act (UPAA) in place. There is one right that is yet to be realized and evolved in India is rights to spousal property. There are many differences and ambiguity in the personal laws of different religion in India. The law commission of India, time and again proposed certain amendments in the family laws to suit everyone uniformly. They include spousal/community of property upon marriage and divorce. The Civil Code of Goa which was based on the Portuguese Civil code is a living example in India that also provides for pre-nuptial contracts. However, this is not implemented in the other

states of India. The Supreme Court in India has recommended the Civil Code of Goa to be implemented for the rest of the Indian states uniformly. This would pave ways to achieve the spousal property division upon divorce and to have option to enter pre-nuptial or post-nuptial agreement on spousal property among spouses.

Key Words: - Spousal rights/ marital/community of property/ Nuptial agreement/ civil code/ property settlement/ marriage/ divorce/ separation/ matrimonial property

1. Introduction

Marriage is considered as an important social event in India and transmits traditional values across generations. Usually women in India are discouraged to choose any job of their choice. Hence, marriage becomes the only option for future settlement and security of women. Institution of marriage is common in every form of society around the world. The marriage is understood as a legal contract. Marriage is essential for every woman and therefore, single women who are divorced/separated/ widowed are subject to disrespect in the Indian society. Marriage becomes an option for future settlement for women as it takes care of their security and livelihood. Divorce is considered as social evil. Many fear to get away from the abusive and troublesome marriage because of the social stigmas. Women are always dependent upon men in marital life. Many legal initiatives have been taking up to achieve economic and social development of women. Property rights to women are an economic boost and make them independent in the society. A right to property for a woman is an ongoing battle fought by all nations. India is not an exception to this battle. Women in India always had to fight for their rights to property. There is one right that is yet to be realized and evolved in India is a right to 'Marital/Community of property. This right is essential for women who are divorced or separated from the marital relation after contributing to the wellbeing of nuptial family in many ways. Property rights to women promote gender equality and development. The denial of property rights to women causes economic deprivation and poverty. Property rights are considered as human rights. The international human rights law calls for equal protection of property rights of both men and women, especially in marriage partnership.

1.1 Spousal Relation through the Institution of Marriage

The marriage is viewed as a partnership between husband and wife. The financial element of marriages are one of profit-sharing between the spouses under the theory of economic partnership. The dignities, respect, empowerment of women are driven by their marital status. Marriage is considered as an option for security and livelihood for women in India. In such situation, if women decide to remain single or unmarried and if married women want to be separated or divorced, they have to face lot of societal problems. Such women have to face lot of social and economic insecurity. The marriage system in India leaves women always dependent upon men in marital life and often discouraged from holding any secular job. Such mentality deprives the married women of their adequate income.

1.2 Spousal Relation in India

Mostly, the entire life of Indian women is structured by their marital status. Women who remain single, divorced/ separated are subject to disrespect and lower status. They also face economic, physical and mental abuse. Such situation lead to suppression, lack confidence and keep them away from mainstream development process in the society. Presently, there have been many initiatives to achieve economic growth as well as social development of women in India. There is a specific initiative to bring gender equality and treat women on par with men. The measures taken by the government of India is to uplift the status of women and give them better opportunity in social and economic life. Empowerment of women is one of the weapons to fight inequality. Government of India and Indian states had adopted many welfare measures in favour of women in order to give effect to the ideals of the Indian Constitution. National Women Commission was set up to take care of women related issues. All the policies and legislations formulated for the welfare of the women is centred on to remove gender inequality and empower women. Right to ownership of property is essential element in law of property rights. Women's right to property is important because the economic development of a nation depends on their development. Property rights to women promote gender equality and development. The denial of property rights to women causes economic deprivation and poverty.

1.3. Property Rights in Marital Relation

As per the UN data, 1/4th of the countries in the world have laws that obstruct women from owning property¹. Some countries have unequal inheritance laws and unequal property rights regimes. It is therefore important for women to have right to property. The property rights to women are fundamental to women's economic security. This right enhances social and legal status of women. It helps for their survival. Income and economic security is achieved through the ownership of property. Property rights to women make them stronger and have say in household decision-making. The property rights to women become an asset and give them economic boost in case of divorce or death of a husband or on separation. If the property right is not guaranteed to spouses they become vulnerable and prey to domestic violence. International laws and convention ensures equal property rights to women. However, property rights to women are limited by local norms, religious customs. Social and political thought and gender biased legislation are some of the causes that affect property rights to women in India. Property rights of women are connected with human right issues. Domestic violence or violence against women and other economic related issues also connected with the property rights. Equal property rights to women decreases danger of discrimination, domestic violence and other violations of human rights. It helps them to have positive impact on political participation and also helps them to empower them.

Property rights are considered as human rights. The international human rights law calls for equal protection of property rights of both men and women. Universal Declaration of Human Rights² declares that *'everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily*

¹ <https://paycheck.in/labour-law-india/fair-treatment/property-rights>, 22nd Mar, 2025.

² Article 17, Universal Declaration of Human Rights.

deprived of his property'. Convention on the Elimination of All Forms of Discrimination against Women requires all the state concern to take positive steps to eliminate discrimination against women in the matters of property rights. Article 13-16 of the convention³ speaks about the measures to be taken to ensure men and women are treated equally in their right to family benefits and other property rights. The other conventions like the International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights also wants to remove any kinds of discrimination on the property rights of a person. Hence there can be no discrimination based on the gender in the matter of property rights of a person. Women's property rights are also implicit in Millennium Development Goal⁴, specifically Goal on eradicating extreme poverty and Goal on gender equality. Hence, the goals to eradicate poverty and achieving gender equality will not be possible unless women are given property rights.

1.4 Spousal / Community of Property

The marital community is very peculiar association which consist of husband and wife. Community of property is the property belonging to this association of husband and wife. In order to understand the property rights of a married couple in the event of divorce and to evolve community of property regime in place, we need to understand, the meaning of 'community of property' and its consequences.

The term Community of property is explained as '*property acquired by husband and wife, or either, during marriage, when not acquired as the separate property of either*'⁵. Black's Law Dictionary describes the term community property as "*Property owned in common by husband and wife as a result of its having been acquired during the marriage by means other than gift or inheritance, each spouse holding a one-half interest in the property*". The property owned in common by a husband and wife as a kind of marital partnership is community property⁶. Community property is the property held jointly by a married couple⁷. The property acquired or earned during the subsistence of marriage by the husband and wife and holding equal rights in that property is termed as Community Property. The property that is accumulated by the spouses during the marriage, also referred to as marital property. The property acquired either of the husband and wife during marriage also considered as community property. Community property is an incident of legal possessions of married people as belonging to both of them. In general, whatever property acquired or possessed through the efforts of either spouse during the subsistence of marriage is considered as community property. The law treats this property like the assets of a business partnership⁸.

³Convention on the Elimination of All Forms of Discrimination against Women.

⁴ The United Nations Millennium Development Goals (MDGs) are the eight goals set by the 189 UN member states in September 2000 and agreed to be achieved by the year 2015. This was signed at summit held at the UN headquarters in New York. The goal is to combating disease, hunger, poverty, illiteracy, discrimination against women and environmental degradation. <https://www.mdgmonitor.org/millennium-development-goals/>

⁵ In re Lux's Estate, 114 Cal. 73, 45 Pac. 1023; Mitchell v. Mitchell, 80 Tex. 101, 15 S. W. 705; Ames v. Hubby, 49 Tex. 705; Holyoke v. Jackson, 3 Wash. T. 235, 3 Pac. 841; Civ. Code Cal.

⁶ Coleman v. Coleman, Tex.Civ. App., 293 S.W. 695, 699.

⁷<https://www.merriam-webster.com/dictionary/community%20property>, Jan,21st 2023.

⁸ Law, <https://www.britannica.com/topic/community-property>.

1.5. Effect of Community Property upon Divorc

Community property regime plays a vital role when it comes to divorce. When the divorce is filed the division of property becomes very essential factors among the couples. Therefore, it becomes very vital to understand the working of community property and why it has such a big impact during a divorce. Hence, the first thing to know about community property is that marital property is owned by both the husband and wife. Generally, it does not matter in whose name the property stands. Even if only one spouse earns an income, that income is taken as community property and owned by the husband and wife. The second important thing about Community property is that the marital property is divided equally between both spouses. The third thing about community property is that that everything owned by the husband and wife will not be combined together as community property. There are certain properties termed as separate property. The separate property includes gifts and inheritances, property held by either spouse prior to the marriage, and property acquired after the date of separation. The separate property is not subject to division during a divorce. However, if the separate property is used to upgrade the marital property then the upgraded value of the property will be included as community property.

In the community property system, husband and wife own and owe everything equally. The community property system which is also known as spousal Property considers all assets equal to the husband and wife regardless of who earns or spends the income. The bottom line of Community property regime holds a standard that the income and assets of a married couple after marriage are jointly owned and enjoyed. Though, one of them earns more or contributes more net income to the family, assets are normally owned and enjoyed equally.

The community property system regards of the marriage as ‘a community of which each spouse is a member, equally contributing by his or her industry to its prosperity, and possessing an equal right to succeed to the property after its dissolution’⁹. One of the leading scholars on community property William Quinby de Funiak, explained in his treatise that the wife "is placed on a basis of equality with the husband as to her ownership and rights in the community property"¹⁰. A community property system regards of two types of property namely separate property which is not subject to community ownership and joint or ‘community’ property which is subject to division among husband and wife in the event of divorce.

2. The Uniform Marital Property Act: The Legislation in USA

Community property system has been rekindled by a growing conviction in favor of economic equalization between husbands and wives in U.S. The spark of idea that each marital partner should share equally all the assets from the economic activity of the other had led to the promulgation of the Uniform Marital Property Act¹¹ (UMPA) in 1983.

⁹ JENIFER E. STURIALE, *The Passage of Community Property Laws, 1939-1947: Was "More Than Money" Involved*, 11 MICH. J. GENDER & L. 213 (2005), <https://repository.law.umich.edu/mjgl/vol11/iss2/3>.

¹⁰ Id.

¹¹ Uniform Marital Property Act (UMPA), U.S. law enacted in 1983. The Uniform Marital Property Act was approved and recommended for enactment in all the states in July 1983 at the annual conference of the National Conference of Commissioners on Uniform State Laws.

This Act defined the ownership of property by married persons to marital property and the means to divide the property in the event of divorce or death. The UMPA created a class of property that belonged to the marriage rather than the individuals¹². The terminology used in the UMPA for community property is called ‘marital property’ and separate property is called as ‘individual property’. According to this Act, the income earned on individual property also considered as marital property.

Likewise, marital property included all property belonging to all spouses in marriage, with several exceptions. When there is any doubt on the nature of individual property of any spouse or which one is marital property in nature, UMPA considered it to be marital property in all case. If any spouse wants to claim the property as individual property, they should support the claim of individual property with evidence. All other property of a spouse that was not marital property was considered individual property. According to this Act, whatever property acquired by spouse before marriage or prior to 1983, in the year in which the UMPA came into effect as individual property. Other types of property which could be obtained during marriage through inheritance and through gift from third party during the marriage continued to remain as individual property.

2.1 Spousal Property Regulation: Protection of the Weaker Spouse

The concept of spousal property regime is to protect the weaker spouse on the Modern Model of Partnership theory. The present understanding of marriage is considered as partnership marriage. Accordingly, each spouse has equal share of family assets regardless of their contribution in acquisition of property. The spouse may contribute in acquisition of property through child bearing and household work or through business and employment.¹³ In modern partnership marriages, the paid employment of a husband is equated with household activities carried out at home by the wife. Spouses adjust their careers according to their economic needs and work as partner in taking care of the children and earning. Hence, the present partnership marriages make them as two breadwinners in the family. Matrimonial law is based on the principles of partnership which is against the patriarchal principles where the husband was considered to be the head of the family. According to the modern model of partnership principle both spouses have equal and same rights and duties¹⁴ towards their matrimonial property. However, some authors who propagate the need for spousal property legislation say that this is a legal protection given to the weaker or homemaking spouse.¹⁵ The present family practices reveal that women are at continuing economic disadvantage and vulnerable within both families and the labour market.¹⁶

¹² JAFFER, JENNIFER, Uniform Marital Property Act, Encyclopedia Britannica, 8 Mar. 2022, <https://www.britannica.com/event/Uniform-Marital-Property-Act-United-States>, Feb,23rd 2025.

¹³ ANTOKOLSKAIA, M. Harmonisation of Family Law in Europe: A Historical Perspective, Intersentia, Antwerp/Oxford, 2006, at 478.

¹⁴ Branka Rešetar, Matrimonial Property in Europe: A Link between Sociology and Family Law, vol. 12.3 Electronic Journal of Comparative Law, December 2008, at 11.

¹⁵ Bainham, A. (ed.), The International Survey of Family Law, 2006 Edition, Family Law, Jordan Publishing Limited, Bristol, 2006; at 232.

¹⁶ id.

The important causes of division of housework between partners in the family depend on various factors like; gender ideology, education, earning capacity and time. Gender remains the dominant and most important cause for the division of housework. For example men who were dependent on a woman on financial grounds did less housework.¹⁷ The prevalent EU ideology of the family is that the husband is considered as the main breadwinner and the wife is destined to take care of children and other dependants in the family.¹⁸ The relationship between spouses in sharing the housework increase understanding of the needs and demands of law and policies in dealing with marital property regime. The idea of community of property system which was historically introduced for the protection of women, weaker spouse (as housewives) in Europe seems to be the most appropriate system even today.¹⁹

3. Prenuptial Agreements: A Trend in Europe

Matrimonial/spousal contracts regime is preferred with respect to marital property in Europe and in other countries. Prenuptial agreement is an agreement entered into by two individuals in contemplation of marriage, determining their rights and interests in the property upon dissolution or death.²⁰ Prenuptial agreement is ‘an official document signed by two people before they get married that says what will happen to their possessions and/or children if they divorce’.²¹ This agreement is made between the couples before marriage that establishes rights to property and support in the event of divorce or death.²² This agreement is legally binding and it helps the couple to decide how their money, property, and other assets could be divided in the event of a divorce.

There are various trends happening in the field of matrimonial contracts in Europe. English common law does not recognise and enforce any provision of agreement in matrimonial contracts. The marriage contract in Austria is concerned with the economic relations of the marriage and therefore, in the event of divorce, the goods have to be divided by spouses in consent. In France only about 10% of spouses make pre-nuptial agreements and this agreement usually happens only when large and important assets are involved, especially regarding second marriages.²³ Denmark and Sweden, where the deferred community of property system is in place, often include making premarital contracts which opt for partial or total separation of property. European spouses tend to decide their matrimonial property independently, either by a premarital contract or by a division agreement.

¹⁷ KREMER. M. The Cultural Dimension of Welfare States Ideals of Care and Women’s Work, Paper presented at the ESPA net Conference 2005 September 22-24, University of Fribourg, Switzerland, at. 9-13.

¹⁸ BRANKA RESTAR, Matrimonial Property in Europe: A Link between Sociology and Family Law, vol. 12.3 Electronic Journal of Comparative Law, December 2008, at 12.

¹⁹ BAINHAM, A. (ed.), The International Survey of Family Law, 2006 Edition, Family Law, Jordan Publishing Limited, Bristol, 2006, at 460.

²⁰ In re Marriage of Bonds (2000) 24 Cal.4th 1, 99 Cal.Rptr.2d 252; 5 P.3d 815.

²¹ <https://dictionary.cambridge.org/dictionary/english/prenuptial-agreement>, Jul, 6th 2023.

²² Prenuptial agreement. Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/prenuptial%20agreement>. Jul. 6th 2023.

²³ Id, at 14.

3.1 Prenuptial Agreements: A Trend in the United States

Prenuptial agreements and its enforceability and their accompanying controversy in the United States are very important factors for understanding the working and functions of the system. It is important to understand American family law and estate planning followed with respect to prenuptial agreement. It is also important to understand an overview of American rules regarding prenuptial agreements as to how this is treated in America and how to enforce an American prenuptial agreement in a foreign country or how a foreign prenuptial agreement would be construed in the United States. The law on prenuptial agreements in the United States is complex and changing rapidly as a result of demographic and cultural developments. There are fifty states within the United States, and each has its own laws and practices with regard to the laws of prenuptial agreements. In American legal history, initially Courts in the United States did not enforce prenuptial agreements that addressed what would happen upon divorce. The reason for not accepting agreement was that courts viewed the prenuptial agreement as agreements that contemplated divorce, and hence encouraged divorce.²⁴ In *Crouch v. Crouch*,²⁵ the Court has observed that '*such [a] contract is promotes divorce and void on grounds of public policy. Such contract[s] could induce a greedy husband to inflict on his wife any wrong he might desire with the knowledge that his pecuniary liability would be limited. A husband could through abuse and ill treatment of his wife force her to bring an action for divorce and thereby buy a divorce for a sum far less than he otherwise would have to pay*'. The reason to reject such contract was that the divorce are based on fault theory and therefore the agreements that contemplated divorce were also seen as efforts to generate false evidence of fault grounds.

During 1970, traditional fault theory for divorce begun to lose its ground in America and the prenuptial agreements gained importance and acceptance.²⁶ However, premarital contracts between spouses have not been uniformly accepted and enforced throughout the United States and courts ruling were not coherent and consistent. Under American law, prenuptial agreements are considered not as a simple business transaction. The individualism and individuals rights accorded to the citizens under the American legal history and culture the law of prenuptial agreements gained its importance in America. The contractual freedom of an individual is highly valued in the United States and so much so the concept of the right to contract and to have those rights enforced is enshrined in the United States Constitution.²⁷ Taking into the consideration of the intimate relationship of the parties to these agreements, the underlying caring and nurturing union that is presumably being contemplated, the fact that children may be produced of the union, the United States have accepted the prenuptial agreements. Many other countries prohibit or refuse to enforce prenuptial contracts. However, most courts and legislative bodies in the U.S now take the general position that prenuptial

²⁴ *Brooks v. Brooks*, 733 P.2d 1044, 1049, Alaska 1987.

²⁵ 385 S.W.2d 288, 293 (Tenn. Ct. App. 1964).

²⁶ GARRY.A.DEBELE and SUSAN C RHODE, Prenuptial Agreement in the US, https://www.iafl.com/media/1169/prenuptial_agreements_in_the_us.pdf, 21st, Aug 2023.

²⁷ U.S. CONST. art. I, § 10.

agreements are enforceable if they meet certain formal procedural requirements and are otherwise valid contracts under general contract principles.²⁸

The present scenario reveals that more and more professional women have built businesses or receive executive salaries. Men and women are also amassing assets and income at even young ages. In order to protect their wealth and assets in the event the marriage ends through death or divorce, these persons seek to enter into the prenuptial agreements. Another general rule in the United States is that the prenuptial agreements cannot reduce the duty of parents to support children. The prenuptial agreement should also contain rights by establishing more generous or special benefits or a higher standard of living for children and provisions for private schooling or various extracurricular activities.²⁹ The divorce rate is rapidly increasing in the American States. Therefore, people are focusing on the utility of prenuptial agreements to resolve the complex family situations in and out of marriage.

3.2 Uniform Premarital Agreement Act (UPAA): Application in American States

All fifty states in America recognize prenuptial agreements in one form or another. However, the main aspect is to know in which state the agreement was written and in which state it will likely be enforced. Each of the states in America has its own law on the scope and enforcement of prenuptial agreements. There is a Uniform Premarital Agreement Act (UPAA) in place.³⁰ Approximately 26 states in America have adopted the Act with its own modifications to the Act. The other remaining states have adopted their own statutes or apply common law in this regard. Though, there are varying requirements to be included in the prenuptial agreement from state to state there are certain very essential requirements to be included in the prenuptial agreement throughout the fifty states in America. The following are very essential requirements for prenuptial agreement.

3.2.1 Requirement in Writing and Signed

According to the UPPA the essential requirement of the prenuptial agreement must be in writing and signed.³¹ In some states, like Minnesota, each party signing the prenuptial agreement must be witnessed by two individuals and also be sworn before a notary public.³²

²⁸ See Hrudka v. Hrudka, 919 P.2d 179, 186, Ariz. Ct. App. 1995.

²⁹ Id, at 6.

³⁰ 9C U.L.A. 48, 2001.

³¹ Id. at § 6.

³² See Minnesota Statutes, § 519.11 (2004).

3.2.2 Technical Requirements

The formality requires that the parties to a prenuptial agreement must have an opportunity to consult with legal counsel. In *Lutz v. Schneider*³³ the court has observed that if the individual had an opportunity to consult with an independent legal counsel of his choice the absence of counsel during the agreement does not render a prenuptial agreement unenforceable.

3.2.3 Requirement of Occurrence of Marriage

The prerequisite to enforce the agreement is that there must be a marriage subsequent to execution of the agreement. Such requirement can be challenged if the marriage is annulled on the ground of a void marriage or a delay in the marriage after execution of the agreement. However, if the parties have been married for a long time and one of the parties has relied on the agreement during the marriage the agreement can be enforced according the provisions of UPAA. Most of the states require that the agreement should have been signed at least 24 hours or the day before the wedding. In case the agreement is signed just before the closer to the marriage the agreement may more likely to be challenged.³⁴

3.2.4 Requirement against Public Policy

If there is any attempt to regulate certain areas of marriage which are against public policy, such agreement may render unenforceable. For example, if there is any limit on support of children in the agreement, it may be void as against public policy and affecting the rights of individual who were not parties to the agreement.³⁵ Any provisions regarding child custody are also typically not enforceable on the ground of public policy.³⁶ In some states, prenuptial agreements should not cover any agreement as to the waiver of payment of spousal support.³⁷

3.2.5 Requirement for Fundamental Fairness

For the enforcement of the prenuptial agreements, the agreement should meet certain level of fairness. The test of what constitutes substantive fairness upon execution of often depends on the circumstances surrounding the agreement. These considerations are sometimes referred to as the Button factors after the observation made in the case *Button v. Button*.³⁸ In this case the substantive fairness in executing the prenuptial agreement is discussed. Accordingly the substantive fairness test include; the objectives of the

³³ 563 N.W.2d 90 (N.D. 1997).

³⁴ *Fletcher v. Fletcher*, 628 N.E.2d 1343 (Ohio 1994).

³⁵ *Rogers v. Yourshaw*, 448 S.E.2d 884 (Va. Ct. App. 1994),

³⁶ *Alves v. Alves*, 262 A.2d 111 (D. C. 1970).

³⁷ *In re Marriage of Van Brocklin*, 468 N.W.2d 40 (Iowa Ct. App. 1991).

³⁸ 388 N.W.2d 546 (Wis. 1986).

parties, the economic circumstances of the parties, the property owned by each party prior to the marriage, the existence of other family relationships and obligations, income and earning capacity of the parties, the anticipated contributions of each party to the marriage, the age, physical and emotional health of the parties, the anticipated education and professional goals of each party including expectations that one party will contribute as a homemaker and parent. A prenuptial agreement cannot be made unenforceable merely because it provides for less than the law would provide.³⁹ The intent of the agreement is to provide for a different outcome than the law would provide and therefore such agreement cannot be made void.⁴⁰

4. Marital Property: A study on Civil Code of Goa

The Indian state of Goa followed the Goa Civil Code. The Goa Civil Code is also called as the Goa Family Law. This set of civil laws governs the residents of the Indian state of Goa. The 'Goa civil code' followed in the Indian state of Goa is formulated mostly on model of the 'Portuguese Civil Code' (Código Civil Português) of 1867⁴¹. The Goa and Damaon were once 'Portuguese Colonies' and they got the status of 'overseas possession' in 1869. Thereafter the Portuguese Civil Code model was introduced in Goa in 1870, which was applicable to all the residents of Goa. This Civil Code was common to the entire person in Goa irrespective of their religion with slight changes and exception to certain groups.

The Goa civil code was made to suit the legal system followed in India. Indian laws on marriage and property as a whole is based on personal law concept with religion-specific that governs Muslim and Hindu with their respective personal laws. The present state of Goa and Damaon in India are an exception to the rule of personal law concept. The single civil code governs all the native of Goa and Damaon irrespective of their religion, caste and ethnic

4.1 Provisions of Communion of Assets under Civil Code of Goa

The regime of general communion of assets on marriage was in force in Portugal since the middle ages. The objects of Manueline Ordinances⁴² stated that, '*all marriages carried out in our kingdoms and lands shall be deemed as having been entered into on the basis of equal shares, except when the parties stipulate otherwise*'. The matrimonial regimes is defined under section 2(n) of the 2012 Act⁴³ as '*the system of rules which governs the ownership and management of the property of married persons as between themselves and towards third parties*'. Under Article 1108 of the 1867 Code, a communion of assets of married couples is comprised of '*all their assets brought to the marriage or acquired after it*'. Such assets are administered by the husband under article 1117 of the Code. Under article 1119 of the Act, consent of both spouses is required

³⁹ see *Hrudka v. Hrudka*, 919 P.2d 179, 186, Ariz. Ct. App. 1995, at 10.

⁴⁰ *Id.*

⁴¹ https://books.google.com/books?id=QIMp5ctu_ngC&pg=PA245.

⁴² The Manueline Ordinances were an exhaustive compilation of the entire legal system in Portugal and its colonial possessions. This was issued in 1512 by King Manuel I, as part of his reform of the public administration.

⁴³ *Id.*

for the disposition of immovable property, forming part of communion of assets. Very importantly, in case, if the couple becomes separated or divorced, each of them is entitled to a half of the common assets as per articles 1121 and 1123 of the Code⁴⁴.

Article 1096 of the 1867 Code, provided for ante-nuptial agreements by the spouse. Under the virtue of this agreement, different rules may be agreed by the spouses with regard to their assets. Thereby, each spouse can keep as his or her personal property the assets that are acquired before the marriage and also can stipulate even a complete separation of assets. Accordingly, the article 1096 of the Code states that '*it is lawful for the spouses to stipulate, before the solemnization of the marriage and within the bounds of the law, whatever they think fit in respect of their assets*'. This granted certain degree of freedom to both spouses and gives economic liberalism.

4.2 Marital Property: Uniform Civil Code in Goa

The Civil Code that is practiced in Goa is more gender equal and does not discriminate on the basis of sex, religion and ethnicity. The marital property rights or community property law available in that Code is a beneficial piece of legislation that supports the married women. In India, women are subjected to the second class treatment. They are always made to depend upon the male in all aspects including financial matters. If women get divorced or separated due to marital dispute, they have to undergo numerous hardships and long legal battle to solve their marital dispute. The financial support, maintenance and property rights are some of the other issues that need to be solved. Moreover people living in rest of the Indian states other than the state of Goa, are governed by personal laws of different religions.

In such scenario, the Civil Code of Goa enables the spouse to demand the half of the share in the matrimonial property in the event of any divorce or separation. There is also a right to an equal share in the property of intestate under inheritance law. When such rights are guaranteed, a woman need not dependent on men even if is deserted or divorced. The right to matrimonial property gives financial support to a woman and she can look after her children and parents even if she is subjected to domestic violence in the marital family. It is in these respects the Civil Code of Goa stands in higher position. Though there are some differences in the matters of marriage, generally in the matters of property rights this Code is gender equal and applies to all the communities equally. This set up in the Code help both the genders and ensures peaceful co-existence of all religious, cultural and ethnic groups.

4.3. Provision of Pre-nuptial Agreement and Procedures

The laws on marital property rights under the Civil Code of Goa provides for pre-nuptial contracts. There are certain differences with respect to pre-nuptial contracts with regard to communion of property rights on marriage. According to the Code, there are four types of pre-nuptial contracts. The *first* one is that there is

⁴⁴ Lei do Divórcio: Decreto de 3 de Novembro de 1910.

'no communion of properties'. The *second* one is that the couple can contract for total separation of assets before and after marriage. The *third* is Dotal regime.⁴⁵ Under the dotal regime system the bride's share in her father's property is given to the husband.⁴⁶ And the *fourth* one is communion of all assets of husband and wife that are equally divided on divorce or death. Among these four pre-nuptial contracts the fourth one looks more equitable. In any case, the management of property is vested with the husband and this right of the husband to manage the property cannot be curtailed by way of ante-nuptial contracts under Article 1104 of the Civil Code of Goa.

The important part of this provision is that there is joint ownership in the communion of property. The husband cannot sell assets without the wife's consent on any account. However, through pre-nuptial contracts the couple can agree upon certain condition. Thereby the couple can agree upon the condition that there would be no right to property, if the marriage is not solemnized or even on divorce. Some pre-nuptial agreement allows the condition that if the wife leaves the marital home within a few months of marriage she may be barred from getting any share in the marital property.

5. Conclusion

Indian state of Goa continues to be governed by Portuguese law in the matter of marital property. It is a living legacy left by the Portuguese to the state of Goa. It is high time that India wake up to the call to evolve marital property regime taking civil code of Goa as model to the rest of the nation. Property laws in India lack uniformity. Judiciary has to deal with huge number of litigations due to marital dispute. The vast difference between the personal laws of other states in India and the civil code of Goa is evident. Absolute equality and sense of uniformity is present in the civil code of Goa. The property laws for the rest of India are lacking such uniformity. The Civil Code of Goa, 1867 can be considered as a quasi-uniform code⁴⁷. The Civil code of Goa proposes a system called 'Communion of Assets' in marriage. Under this system, when the marriage is complete, both the spouses get half of the undivided share in the matrimonial assets.

One of the legal method by which the marriage in Goa takes place is community of property. The other three methods of marriages are considered as conventional. The marriage by the method of Community Property Law is aimed for the benefit of women. This system of marriage makes spouses to acquire automatic joint ownership to the common assets owned by spouses. Hence, after marriage, these assets cannot be disposed of in any way by one spouse without the express will or consent of the other. Therefore, in the event of divorce/legal separation, a woman is entitled to half of the share of communion of property.

⁴⁵ In French law, the dot, being the property which the wife brings to the husband as her contribution to the support of the burdens of the marriage, and which may either extend as well to future as to present property, or be expressly confined to the present property of the wife, is subject to certain regulations which are summarized in the phrase 'regime dotal'. The husband does not administer during the marriage, but, as a rule, where the dot consists of immovables, neither the husband nor the wife, nor can both of them together, either sell or mortgage it. The dot is returnable upon the dissolution of the marriage, whether by death or otherwise, <https://legaldictionary.lawin.org/regime-dotal/>, Accessed on 2/07/2022.

⁴⁶ Lei do Divórcio: Decreto de 3 de Novembro de 1910.

⁴⁷ Dr. DARIO MOURA VICENTE, Family Law in Goa After the Act of 2012: Key Concepts in the Portuguese Civil Code of 1867 and The Code of Gentile Hindu Usage and Customs of 1880, Professor of Law, University of Lisbon; <https://www.fd.ulisboa.pt/wp-content/uploads/2020/02/Goa-Family-Law-In-Goa-After-The-Act-of-2012.pdf>.

The real dispute revolves around the subject on marriage, inheritance, succession and maintenance of different religion in India. We cannot repair/amend the current archaic laws overnight. The need for change is important. The change must suit the needs of present situation. The Apex court has recommended for having a Uniform Civil Code. The apprehensions lie in the hearts of all. Such system of marriage and property arrangements are absent in the rest of the Indian states. The Portuguese Civil Code which is extended to Goa dates back to 1867. The code of Goa cannot be considered as complete law in itself. The present Code of Goa also needs certain amendment to suit the present situation. The Portuguese have repealed this code in 1966. There are certain doubts on the uniformity of the Code.

Whatever may be the criticism? The state of Goa is successful in bringing all religions under a single umbrella through civil code on marital property. It is a lesson for India. The Civil Code of Goa should inspire the Indian legislature to bringing in Uniform marital property regime for the whole of India.

Can India remain mute spectator to the call for evolving better legal regime to recognise the contributions of the spouses in the marital family? Is there any lesson that India could learn and take forward to enact law in respect to spousal/community of property regime in India? Civil code of Goa on marital property rights upon divorce is living example that Indian sub- continent is not alien to such regime. India can learn lessons from the Civil Code of Goa and look forward to evolve jurisprudence on Marital/Community of Property regime that can be applied to whole of the nations. therefore there is a need to evolve jurisprudence on spousal property regime which could be applicable to the whole of India irrespective of religions.

Reference List

Journal Article

- JENIFER E. STURIALE, The Passage of Community Property Laws, 1939-1947: Was "More Than Money" Involved, 11 MICH. J. GENDER & L. 213 (2005), <https://repository.law.umich.edu/mjgl/vol11/iss2/3>.
- JAFFER, JENNIFER, Uniform Marital Property Act, Encyclopedia Britannica, 8 Mar. 2022, <https://www.britannica.com/event/Uniform-Marital-Property-Act-United-States>, Feb,23rd 2025.
- ANTOKOLSKAIA, M. Harmonisation of Family Law in Europe: A Historical Perspective, Intersentia, Antwerp/Oxford, 2006, p 478.
- Branka Rešetar, Matrimonial Property in Europe: A Link between Sociology and Family Law, vol. 12.3 Electronic Journal of Comparative Law, Dec, 2008, p 11.
- Bainham, A. (ed.), The International Survey of Family Law, 2006 Edition, Family Law, Jordan Publishing Limited, Bristol, 2006; p 232,
- KREMER. M. The Cultural Dimension of Welfare States Ideals of Care and Women's Work, Paper presented at the ESPA net Conference 2005 September 22-24, University of Fribourg, Switzerland, pp. 9-13.
- GARRY.A.DEBELE and SUSAN C RHODE, Prenuptial Agreement in the US.

8. Dr. DARIO MOURA VICENTE, Family Law in Goa After the Act of 2012: Key Concepts in the Portuguese Civil Code of 1867 and The Code of Gentile Hindu Usage and Customs of 1880, Professor of Law, University of Lisbon; <https://www.fd.ulisboa.pt/wp-content/uploads/2020/02/Goa-Family-Law-In-Goa-After-The-Act-of-2012.pdf>.

9. Lei do Divórcio: Decreto de 3 de Novembro de 1910.

Online Document

- <https://dictionary.cambridge.org/dictionary/english/prenuptial-agreement>, Jul, 6th 2023.
2. Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/prenuptial%20agreement>. Jul. 6th 2023.
3. https://www.iafl.com/media/1169/prenuptial_agreements_in_the_us.pdf, 21st, Aug 2023.
4. https://books.google.com/books?id=QIMp5ctu_ngC&pg=PA245.
5. <https://paycheck.in/labour-law-india/fair-treatment/property-rights>, 22nd Mar, 2025.
6. <https://www.mdgmonitor.org/millennium-development-goals/>
7. <https://www.merriam-webster.com/dictionary/community%20property>, Jan, 21st 2023.
8. Law, <https://www.britannica.com/topic/community-property>

Abbreviation

EU	-	European Union
EC	-	European Communities
S.C.	-	Supreme Court
UMPA		Uniform Marital Property Act
UPAA		Uniform Premarital Agreement Act
USA		United States of America