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The Marriage Law Amendment Bill, 2010: Through a Gendered Lens

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ABSTRACT

India has taken a big step in the year 2005 by amending the Hindu Marriage Act, 1955, giving women the equal right of inheritance as their male siblings. However, there remains a loophole where women are still marginalized when it comes to the division of property; the division of matrimonial property after separation. It is observed that divorce leads to women facing several hurdles starting from the legal system to their natal homes; the conditions are not suitable for women to have a good life after divorce due to loopholes in the legal system in India. Due to these issues faced by women, they are forced to stay loyal to their exploitative marriage for the rest of their lives. The introduction of the Marriage Law Amendment Bill of 2010, which eases the laws on divorce, brings further problems for women as they subjected to a rough legal system that upholds social morality over constitutional morality.

Keywords – Family Law, Matrimonial property, Women, Legal system, Courts, Legislature, Divorce

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Women have a long history of discrimination when it comes to matters of marriage laws in our country. India has borne witness to several amendments, each providing rights to women when it comes to the share of the property of women but not to the desired extent. After 73 years of India's Independence, our Constitution provides equal rights to men and women. However, we have failed to provide equality when it comes to the division of matrimonial property after separation/division of couples. The rationale behind such denial must be explored in order to arrive at a solution.

Since the 1950s, Hindu personal laws have borne numerous amendments, especially in the area of marriage and divorce. The grounds for divorce may have expanded but women continue to face problems while availing maintenance or marital property. The Marriage Amendment bill, 2010 was introduced in the Rajya Sabha, which laid down laws regarding divorce and included the irretrievable breakdown of marriage and divorce by mutual consent as a ground for divorce. Under the irretrievable breakdown of marriage, the husband and wife have to live apart for three years, and any party can come and file for divorce under this right. The parties have to prove to the satisfaction of the court that their marriage is broken irretrievably². Divorce on the ground of mutual consent, a petition can be filed by both the parties, the couple has to stay apart/separate for almost one year³. This law was introduced in 2010 but was passed in 2013. However, this Bill lapsed in the Lok Sabha. This Bill was specially made so that women have financial stability after they are divorced/separated and it was a major step taken up against the patriarchal structure of the country.

So, what is the role of the legislature here? The legislature is the body responsible to make laws for the country, which is not discriminatory and arbitrary. However, they seem to have taken a back seat when it comes to the rights of women in the country. Even after years of having a Constitution, that treats men and women equally, they have not given equal rights to women in marriage. The problem which needs to be addressed is that women have to be considered equal in marriage. How a woman contributes to the household by doing household chores has to be considered of economic value. These are some major issues that the legislature must understand. The Hindu Succession Act, 1956 provides different processes for men and women. Men devolve their property to class one heirs, who may be their wife, children, mother. But when it comes to devolving of the women's property, when there are no heirs or husband, the

² Kirti Singh, 'Towards Achieving Equal Rights in Marriage' (2012) 47 <www.jstor.org/stable/23214890> accessed 29 May 2020.

³ *ibid*

law is discriminatory. In the case of *Omprakash v. Radhacharan*, 2009, after 3 months of marriage the husband dies, and the wife was ill-treated by her in-laws, and she left to her natal home where she was educated and became financially well-off. After her death, the in-laws wanted to claim her property, and the property was given to her in-laws instead of her parents. The reason was just that the court is following the law made by the legislature. But the court has the responsibility to not abide by social morality but to follow constitutional morality. In the Constitution, Article 14 states that every person is considered equal before the law and is entitled to equal protection and Article 15 states that no discrimination on the grounds of race, caste, sex, or place of birth. However, with reference to personal laws relating to the division of matrimonial property, such personal laws do indeed violate the basic rights given by the Constitution. This reflects the patriarchal mindset of the leaders of India, but should it be like this? We see how such patriarchal perspectives gravely affect the lives of millions of women in our country.

Firstly, to have a better insight on this topic, a definition of the matrimonial home must be pinned down. It is defined as a home that belonged to both husband and wife as joint tenants⁴. The legislature tried to define matrimonial property in the Hindu Marriage Act, 1955 as “any property presented, at or about the time of marriage, which may belong jointly to both husband and wife”⁵. Gifts given to the wife or husband at the time of marriage by any relative or friend or family are also termed as matrimonial property. So, the intent of the legislature here is to confine the property which is only acquired at the time of marriage only and to be owned by both husband and wife and not any inherited property.

The breakdown of marriage is more common than one may assume. Laws regarding the breakdown of marriage are laid down but the related social constructs must be considered. Divorce is considered a stereotype in our society, as marriage is considered very sacred in Hindu law. So even if a woman faces domestic violence or any other marital atrocities, they do not come forward⁶. Even if a woman comes forward to fight, the procedural hurdles faced by women while accessing their right becomes a problem. One significant issue is how the cases are protracted to award maintenance. Even after going through the suit, the result is not suitable; women often receive a very small amount of maintenance and end up spending more money

⁴ Vijender Kumar, 'Matrimonial property law in India need of the hour' (2015) 57 <www.jstor.org/stable/44782798> accessed 29 May 2020.

⁵ *ibid*

⁶ Kirti Singh, *Separated And Divorced Women In India* (Sage Publications 2013).

on the suit itself. When it comes to working-class women, we have seen that due to the long period of cases they are losing out on their wages just to attend the proceedings. A primary reason why women do not approach courts is due to the financial instability. As a result, cases are often abandoned, and usually, these matters are advocated through settlement among the parties rather than undergoing the rigorous process of a trial⁷.

Though there are provisions regarding legal aid, how far are they helpful to women in need? Courts have repeatedly reiterated that after divorce/separation both the wife and the child must have a similar standard of living as it was in the marital home. But how far is it successful? Various surveys show that when women file a claim for maintenance, they usually get only 35% to 55% of the husband's income, that too after their custody of the child is confirmed. It has been observed that women who cannot afford to register cases usually claim maintenance or return of *Streedhan*. This shows how financially weak women often become after separation. As we see under the Hindu law, gifts women obtain at the time of marriage like jewellery or any kind of movable or immovable property is called *Streedhan* and is considered personal property. However, in some cases her *Streedhan* is taken away from her; as the case goes on, it becomes difficult to prove that items of concern were *Streedhan*.

Many think that the 2010 Marriage Amendment Law is a women's welfare law, as women are given financial rights if the marriage has broken down irretrievably. However, it can be seen that many are opposed to this amendment bill, many women organizations and groups claim that this law is making divorce a more lenient process and this would affect women. As established, many women are often financially unstable after separation and so do not have enough long-term resources to maintain themselves and their children. Organizations like the All-India Democratic Women's Association (AIDWA) pointed out that when it comes to marital property women are not considered equal to their husbands. Various surveys show that women do not own more than 9.3% of the land and only own 20.8% of the total bank deposits. There are maintenance laws that do not substantively benefiting the condition of divorced/separated women in our country. Separated/divorced women are usually seen as dependent on their natal family⁸. Even the natal families are not welcoming their daughters to their own homes as they think it will bring humiliation to their family. All this shows how drastically women's life change after the divorce. Then why would any women come out and

⁷ ibid

⁸ Kirti Singh, 'Towards Achieving Equal Rights in Marriage' (2012) 47 <www.jstor.org/stable/23214890> accessed 29 May 2020

ask for separation/divorce? Remarriage is still considered taboo in several sectors of society. This does not leave women with many options, either they live with their husbands facing marital difficulties or live at their natal homes with societal humiliation.

So, this amendment bill was introduced, somewhat addressing the hardship faced by women economically after the divorce/separation. It is said that this bill was put forward due to “demand from various quarters” coming from the 71st and 217th reports of the Law Commission and the judgments of the Supreme Court. The report laid down that irretrievable breakdown of marriage should be incorporated as a ground of divorce under the Hindu Marriage Act, 1955 and Special Marriage Act, 1954. It also laid down that when granting divorce under this, the judge should also consider the financial arrangements made for the parties and their children⁹. There are circumstances where the wife would oppose the dissolution of marriage just because it would lead to financial problems for the women. When this bill referred to Rajya Sabha the parliamentary standing committee, many women’s-rights organizations were strictly against this bill. They said that this bill would lead to discrimination against women, because until equal rights are given to both the gender in the marital property, the law will of no effect. The committee recommended that the share of property acquired by women at the time of marriage should be her property¹⁰.

This bill was reintroduced in the Rajya Sabha in 2013, where a new law was then included concerning husband paying the wife after separation, “an financial support such gross sum or share in the movable or immovable property towards the settlement of property rights in the respect of the property acquired during the subsistence of the marriage, as the court may deem just and equitable”¹¹. The problem was that the share in the marital property is left to the judges to decide depending on the facts and circumstances. But judges are not immune from systemic ideologies; have their own biases or patriarchal mindset when they decide upon the cases. Moreover, they blend questions of maintenance with that of marital property. Further, the amendments gave limited right over the marital property, “the court may on petition made by the wife order that the husband shall give for her and the children ... equal share of residential property and pay such gross sum or share of the movable property towards the settlement of

⁹ (*Lawcommissionofindia.nic.in*, 2020) <<http://lawcommissionofindia.nic.in/reports/report217.pdf>> accessed 29 May 2020.

¹⁰ Kirti Singh, 'Towards Achieving Equal Rights in Marriage' (2012) 47 <www.jstor.org/stable/23214890> accessed 29 May 2020

¹¹ *ibid*

her claim”¹². Now the share in the property which the women get is half in the immovable property and her share in the residential property is reduced as it is being divided among children as well¹³. For example, if a woman has two children, then her share in the house would be only one-sixth. The court will have to decide upon share, by looking at how much the women have contributed to the household and took care of their children to get a share¹⁴. We see that family courts mostly have maintenance cases and they go on for years. Finally, women get maintenance as low as Rs 200. Even the men who earn well end up proving that they have no money to give for maintenance to their partner. One example we see is where a husband earning Rs 56,000 per month ended up giving his wife Rs 900 as maintenance after dragging the case for 17 years in court¹⁵. So, this suggests what was have explained in the above passages about how women have become the target due to lack of financial stability and how the judiciary lacks to acknowledge the issue of having equal distribution of marital property for women in this country¹⁶.

In our country, the patriarchal setup that women are supposed to be in private space has not been surpassed. The fact that the Indian laws do not consider women working at the house to be productive and of any economic value, even after such women spend most of their time at the house doing the household chores. When it comes to working women, they have to handle both their work as well as the household work. This non-recognition of woman’s contribution to the household has led to major inequalities in our society. The Supreme Court in *Arun Kumar Agrawal v. National Insurance Co.Ltd* stated that “they [women] participate in the production of goods and services but their consumers are family members, so they do not earn in monetary terms. Due to this, their work is not valued”¹⁷.

Taking the example of Canada, where they have made an irretrievable breakdown of marriage as a ground of marriage, the nation also put a major focus on equitable distribution of the marital property among the both. Women who work at home are also considered important as

¹² ibid

¹³ ibid

¹⁴ ibid

¹⁵ Namita Kohli (2020) <<https://www.thehindu.com/features/metroplus/society/law-with-loopholes/article5186386.ece>> accessed 30 May 2020.

¹⁶ ibid

¹⁷ Vijender Kumar, ‘Matrimonial property law in India need of the hour’ (2015) 57 <www.jstor.org/stable/44782798> accessed 29 May 2020.

their household chores are counted to be economically valuable and work outside the home¹⁸. In their law, The Family Law Act under section 4 (7) “the purpose of this section is to recognize that child care, household management, and financial provision are the joint responsibility of the spouses and that inherent in the marital relationship there is an equal contribution, whether financial or otherwise, by the spouses to the assumption of these responsibilities, entitling each spouse to the equalization of the net family properties”¹⁹. One can also refer to Scotland, where they have separate laws regarding the division of matrimonial property under the Family Law (Scotland) Act, 1985²⁰. As per Section 9, it laid down how the matrimonial property is to be distributed keeping in mind 5 principles. Firstly, the net value of the property shared by the couple, that is the matrimonial property. Secondly, should take into account the economic advantage and disadvantage of both parties. Thirdly, the cost to take care of children under the age of 16 years must be divided equally among the parties. Fourthly, any party who is financially dependent on the other must compensate to adjust the loss. And lastly, if any party is suffering economic hardship, then relevant provisions shall be made regarding the same²¹. Here the important fact to be noted from these laws is the financial hardship problem faced by any party. India does not appear to consider the financial hardship faced by women to be an important aspect leading to an increase in women's financial suffering. The conditions of both the party should be kept in mind while the division of matrimonial property and how the party has contributed to the household at the time of marriage, whether it is household work or salaried job.

So, the bill introduced in 2010 and 2013 somewhat addresses the issue of financial instability among women. We have to first make sure that women are considered equal in marriage and the share in the marital property is equal for both men and women. Women's work in the household must be considered an economical value. Not to go as per the social morality, but go as per constitutional morality to ensure equality for all. The point of financial hardships faced by the parties must be kept in mind while making the laws by the legislature and while implementing the laws by the judiciary. As we have seen the example of other countries, we see equality in marriage and how they have given so much importance to the financial stability

¹⁸ Kirti Singh, 'Towards Achieving Equal Rights in Marriage' (2012) 47 <www.jstor.org/stable/23214890> accessed 29 May 2020

¹⁹ Kirti Singh, *Separated And Divorced Women In India* (Sage Publications 2013).

²⁰ 'Divorce In Scotland | Getting A Divorce In Scotland – Gibson Kerr' (*Gibson Kerr*, 2020) <<https://www.gibsonkerr.co.uk/divorce-separation/divorce/>> accessed 29 May 2020.

²¹ *ibid*

part. So, taking into consideration all the factors affecting parties appropriate and equal share must be given to the women. In this way, the nation can achieve equal rights in the division of marital property that the women in India have been longing for.

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