Changing Scenarios of Economic Interest of the Spouses During the Subsistence and on the Dissolution of Marriage:A Comparative Analysis of Indian, UK and USA Laws.

Dissertation submitted to the Lovely Professional University
in partial fulfillment of the academic requirement
for the award of the degree of
Master of Law (LL.M)

Submitted by

Ritika Malhotra
(Reg No:11512480)

Under the Supervision and Guidance of

Mr. Rupendra Singh
Assistant Professor
School of Law

LOVELY PROFESSIONAL UNIVERSITY

PHAGWARA – 144411, INDIA

April 2017

CERTIFICATE

I hereby certify that this dissertation entitled **"Changing Scenarios ofEconomic Interest of the Spouses During the Subsistence and on the Dissolution of Marriage:** A Comparative Analysis of Indian, UK and USA Laws" submitted for the award of Degree of Master of Law (LL.M) is a record of research work done by the candidate "Ritika Malhotra " during the period of her study under my guidance at School of Law, Lovely Professional University, Phagwara, Punjab, India, and that the dissertation has not formed the basis for the award of any Degree, Diploma, Associateship, Fellowship or other similar titles to the candidate. I further certify that this dissertation represents the independent work of the candidate.

_____

Mrs. Meenu Chopra
Assistant Professor
Supervisor & Guide

Plcae:
Date:

Dr. Shailesh N. Hadli
Dean and Professor
School of Law
Lovely Professional University

Place:
Date:

D E C L A R A T I O N

I hereby declare that the dissertation entitled **"Changing Scenarios of Economic Interest of the Spouses During the Subsistence and on the Dissolution of Marriage: A Comparative Analysis of Indian, UK and USA Laws" submitted to the School of Law, Lovely Professional University for the award of degree of Masters of Law (LL.M)** is a record of original and independent research work done by me under the supervision and guidance of Mr. Rupendra Singh, Assistant Professor, School of law, Lovely Professional University and that the dissertation has not formed the basis for the award of any Degree, Diploma, Associateship or other similar titles.

Ritika Malhotra

11512480

Place:

Date:

PLAGIARISM REPORT

It is herewith certified that the dissertation titled **"Changing Scenario of Economic Interest of the Spouses During the Subsistence and on the Dissolution of Marriage:** A Comparative Analysis of Indian, UK and USA Laws" submitted by Ritika Malhotra Registeration no. 11512480, has been checked for Plagiarism by the Turnitin Software and as a result of which plagarised content found in this work amounts to eighteen percentage.

As per the norms of the School of Law, Lovely Professional University, the above work is deemed to be an original work as per the Turnitin plagiarism checker software.

Dr. Jane Eyre Mathew
Assistant Professor
Research Coordinator
School of Law

Place:
Date:

ACKNOWLEDGMENT

I would never have been able to finish my dissertation without the guidance of my Mentor, Head of School and Head of Department, help from my friends and support from my family.

I would like to express my deepest gratitude to my mentor Mr. Rupendra Singh for his excellent guidance, care, patience and providing me with excellent atmosphere for doing research.

I would like to express my gratitude towards my Head of School Mr. Shailesh N Hadli who guided me and helped me frame my topic "Changing Scenario of Determination of Economic Interest of the Spouses during the Subsistence and on the Dissolution of Marriage: A Comparative Analysis of Indian, UK and USA Laws" correctly and approving my work. I am really thankful to him.

I also express my sincere gratitude to my Coordinator of the Department Mrs. Meenu Chopra for approving my topic of research. I would also like to thank Lovely Professional University for giving me an opportunity to be a part of this great institute.

I would also like to thank my parents and my brother. They were always supporting me and encouraging me with their best wishes.

- RITIKA MALHOTRA

Table of Contents

Chapter-1 INTRODUCTION……**1**

1.1 Introduction……..1

1.2 Research Objective and Research Questions……...6

1.3 Hypothesis…….....8

1.4 Research Methodology…….……8

1.5 Scope of Study……..9

Chapter-2 MARRIAGE……**11**

2.1 Marriages in India……....11

2.1.1 Introduction……...11

2.1.2 Forms of Marriages…….....12

2.1.2.1 Among Hindus……..…….....12

2.1.2.1.1 *Brahma* Marriage……..……...12

2.1.2.1.2 *Gandharwa* Marriage……...12

2.1.2.1.3 *Asura* Marriage…….…13

2.1.2.2 Among Muslims…….....13

2.1.2.2.1 Classification of Marriages……...14

2.1.2.3 Among Christians…….....14

2.1.2.4 Among Parsis……14

2.1.2.5 Civil Marriage……...…14

2.1.3 Capacity to Marry……...…14

2.1.4 Ceremonies of Marriage……18

2.2 Marriage Laws of USA…….……18

2.2.1 Formalities of Marriage……..19

2.2.2 Marriage license and Marriage Certificate…….20

2.2.3 License to Marry…….……...…21

2.2.4 License, Effective Date……..22

2.2.5 Judicial Approval……22

2.2.6 Solemnization and Registration……...…24

2.2.7 Common Law Marriages……...…25

2.3 Marriage Laws of UK……...…25

2.3.1 Forms of Marriages……26
2.3.1.1 Civil Marriages……..……26
2.3.1.2 Religious Marriages…….....26
2.3.2 Conditions of Valid Marriage…….……..……26
2.3.3 Legal Requirements……...……..…….……27
2.3.3.1 Documents Required…….……..…27
2.3.3.2 Change in name……...27
Chapter-3 Divorce……..**29**
3.1Introduction…….29
3.2 Theories of Divorce…….…..29
3.2.1 Offence or Guilt theory …….....29
3.2.2 Consent Theory…….....39
3.2.3 Irretrievable Breakdown of Marriage Theory …….....43
Chapter-4 Economic Interest of the Spouses During the Subsistence and on the Dissolution of Marriage 46
4.1 Introduction…….46
4.2 Separation of Property System ……46
4.2.1 Movement from Separate Property to Spousal Property…….....51
4.2.1.1 Development under English Law……..……...…51
4.2.1.2 Development Under Indian Law.……...……54
4.2.1.2.1 Indian Divorce Act, 1869……54
4.2.1.2.1 Parsi Marriage and Divorce Act, 1936……54
4.2.1.2.3 Hindu Marriage Act, 1955……..…55
4.2.1.3 Some Important Steps Taken…….....57
4.3 Community of Property System……..58
4.3.1 Separation Agreement……..….59
4.3.2 Disposition of property…….60
Chapter-5 Conclusion and Suggestions 62
5.1 Conclusion and Suggestions ……..…62
Bibliography…….....**71**
Books……..……...……...71
Journals……...…….....72

Web Sources……………………………………………………………………………………76

Annexure………………………………………………………………………………………**77**

List of Abbreviations

1. AIR- All India Reporter
2. All L R- Allahbad Law Reporter
3. AP- Andhra Pardesh
4. Bom- Bombay
5. Cal- Calcutta
6. D.C.N.D.N.Y.-
7. Del- Delhi
8. e.d.- Edition
9. ERPL- European Review of Private Law
10. Fed- Fedral
11. Ga- Georgia
12. Haw- Hawaii
13. HLR- Himachal Law Reporter
14. HP- Himachal Pradesh
15. Info- Information
16. JILI- Journal of the Indian Law Institute
17. Jour- Journal
18. Lah- Lahore
19. Mys- Mysore
20. No.- Number
21. Ore- Oregon
22. P2d- Pacific Second Reporter
23. Pat- Patna
24. Raj- Rajasthan
25. S.- Section
26. SC- Supreme Court
27. SCC- Supreme Court Cases
28. UK- United Kingdom
29. UKHL- United Kingdom House of Lords
30. U.S.A.- United States of America
31. WLR- Weekly Law Reporter

Table of Cases

1. Adams v. Palmer, (1863) 51 Maine 480. ……..14
2. Appleton v. Appleton, 1 WLR 25 (1965, House of Lords) …….....63
3. Badri Prasad v. Sanjiv, AIR 1988 Bom. 239……..78
4. Banoo Jal Daruwala v. Jal C. Daruwala AIR 1964 Bom 126. …….. 65 & 77
5. Bhagat v. Mrs. D. Bhagat, AIR 1994 SC 710. ……....4
6. Bhagwan Lal v. Bai Divali AIR.1925 Bom.445. ……...…….....61
7. Bijoy Krishna Ghosal v. Namita Ghosal nee Ganguly, AIR 1991 Cal 34. …...……..…66
8. Blackburn v. State, 22 Ohio St. 102 (1971)..……...…24
9. Blackwell v. Blackwell, (1943) 2 All E.R.579 (C.A.)..……...58
10. Booni v. Maharaj Singh, (1881)3 ALL 738. ……...16
11. Button v. Button, 1 ALL ER 357, 1128 (1968, House of Lords). ……....63
12. Christensen v. Christensen, 144 Neb. 763, 14 N.W.2d 613 (1944)…….24
13. Cobb v. Cobb, 2 All ER 696 (1955)..……...62
14. Cochran v. State, 91 Ga. 763, 185 S.E. 16 (1893)..…….….24
15. Compare State v. Anderson, 239 Ore. 200, 396 P.2d 558 (1964)…...…….....30
16. Davis v. Davis (1967), P. 185, at p. 192 per Willmer, L. J. …….....60
17. Falconer v. Falconer, 3 Ml ER 449, 452 (1970). ……..…….....62
18. Fribance v. Fribance, 1 ALL ER 357, 370 (1957, House of Lords). ……63
19. Gissing v. Gissing 2 ALL ER 780 (1970, Court of Appeal). ……...63
20. Gollins v. Gollins, [1963] UKHL 5 ……..4
21. Hargrave v. Newton, 3 ALL ER 866 (1971, Court of Appeal). …….....64
22. Hartman v. Valier & Spies Milling Co., 356 Mo. 424, 202 S.W.2d 1 (1947); …….....24
23. Hazell v. Hazell, 1 ALL SR 923 (1972, Court of Appeal), …….....64
24. Hine v. Hine, 1 WLR 1124 (1962, House of Lords).……..……..62
25. Hoddinott v. Hoddinott, (1949) 2 K.B.406; ……..……58
26. Johnson v. Clark (1908)1. ……56
27. Johnson v. Johnson, 214 Minn. 462, 8 N.W.2d 620 (1943)..……24
28. Kamini Devi v. Kameshivar Singh, AIR 1946 Pat 316……16
29. Kamta Prasad v. Om Wati, AIR 1972 All 153……..67
30. Kanta Prasad v. Omwati AIR 1972 All. 153……78
31. Kenyon v. Peo., 26 N.Y. 203, 84 Am.Dec. 177 (1863) (per Baltron, J.)...……....24
32. Knapp v. Knapp, 149 Md. 263, 131 A. 329 (1925)...……..…..24
33. Krishna v. Padma AIR 1968 Mys. 226……..78

34. Krishendevi v. Sheo Prashad, (1926) 48 ALL 126; ……..16
35. Lata Wadhwa v. State of Bihar AIR 2001 SC 321…….69
36. M.D. Krishna v. M.C. Padma, AIR 1968 Mys 226……67
37. Massa v. State, 37 Ohio App. 532, 175 N.E. 219 (1930)..…….....24
38. Mt. Noor Bibi v. Pir Bux AIR 1950 Sind 8 …….....53
39. Montogomery v. Blows, 1 KB 899 (1916) ……61
40. Nandini SanjivAhuja v. Sanjiv Birsen Ahuja,[1]AIR 1988 Bom. 239. ……...…...77
41. National Provincial Bank ltd. v. Ainsworth (1965) UKHL 1 (United Kingdom). ……7
42. Naveen Kholi v. Neelu Kholi, AIR 2006 SC 1675. ……..……...35 &52
43. Padma v. Padma Ram, AIR 1959 HP 37. ……..….4
44. Ponina v. Leland, 454 P.2d 16 (Nev.1969)…….……...24
45. Portwood v. Portwood, 109 S.W.2d 515……24
46. Pettitt v. Pettitt[2] 2 ALL ER 385 (1969, Court of Appeal). ……....63
47. Re Sims' Question, 2 All ER 138 (1946)……61
48. Rimmer v. Rjmmer (1952) 2 All E.R.863……..58
49. Russell v. Taglialavore, 153 So. 44 (La.App.1934)……...24
50. SangeetaBalkrishna Kadam v. Balkrishna Ramchandra Kadam, AIR 1994 Bom. 1…....78
51. Shukla v. Brij Bhushan, AIR 1982 Delhi 223…….…… 67 & 78
52. Shakuntala v. Mahesh, AIR 1989 Bom. 353…….……78
53. Silver v. Silver, 1 All ER 513 (1958). ……...61
54. Sobhag Mal Jain v. State of Rajasthan AIR 2006 Raj 66. …….69
55. State v. Burt, 75 N.H. 64, 71 A. 30, Ann.Cas.1912A, 232 (1908)…….24
56. State v. Seiler, 106 Wis. 346, 82 N.W. 167 (1908)……..…….....24
57. Subramania Iyer v. Ratnavelu Chetti, AIR 1918 Mad 1346….……16
58. Sudershan karir v. State, AIR 1988 Del 368…….....22
59. Surinder Kaur v. Madan Gopal, 1980 HLR 507 (P&H)……..……..…....68
60. Surya kant v. Jashumati, (1981) 1 HLR 473……..……..……..67
61. Syed Amanullah Hussain v. Rajamma, AIR 1977 AP 152…..……...……...17
62. Tasker v. Taske, (1895); Moate v. Moate, 2 ALL ER 486 (1948)…….……....61
63. Taylor v. Meads (1865)……...……..…….56
64. Thomas v. Novas, 47 Haw. 605, 393 P.2d 645 (1964)……...24
65. Ulrich v. Ulrich and Felton, (1968) 1 ALL ER 67, 72 (1968)……62
66. Umar Bibi v. Md. Din AIR 1945 Lah 51……...53
67. United States v. Lee Huen, 118 Fed. 442, 457 (D.C.N.D.N.Y.1902)…….... 26

[1] AIR 1988 Bom. 239.
[2] 2 ALL ER 385 (1969, Court of Appeal).

68. Wallace v. Screws, 227 Ala. 183, 149 So. 226 (1923)…….. 24
69. Wilson v. Wilson, 2 ALL ER 447 (1963)……..62

List of Statutes

INDIAN LAW:

1. Domestic Violence and Matrimonial Proceedings Act, 1976.
2. Dissolution of Muslim Marriage Act, 1939.
3. Hindu Marriage Act, 1955.
4. Hindu Adoptions & Maintenance Act, 1956.
5. Indian Christian Marriage Act, 1872.
6. Marriage Laws Amendment Bill, 2010.
7. Muslim Law.
8. Parsi Marriage and Divorce Act, 1936.
9. Special Marriage Act, 1954.
10. The Divorce Act, 1869.

FOREIGN LAW:

1. Family Courts Act, 1984.
2. Married Women's Property Act 1882.
3. Matrimonial Causes Act, 1973.
4. Matrimonial Homes Act, 1967.
5. Matrimonial Proceedings and Property Act, 1970.
6. The Marriage Act, 1973.
7. Uniform Marriage and divorce Act, 1970.

List of Tables

S. No.	Table No.	Page No.	Description
1	2.1	19 – 22	This table contains Marriage laws prevailing under different statutes in India.
2	3.1	37 – 47	This table contains Fault grounds of Divorce under different statutes in India.
3	3.2	48 – 50	This table contains provisions for Divorce by mutual consent under different statutes in India.
4	3.3	52-53	This table contains provisions for Irretrievable breakdown of marriage under different statutes in India.
5	4.1	59	This table contains provisions of the Matrimonial Proceedings and Property Act, 1970 passed in UK.
6	4.2	65	This table contains provisions of the Indian Divorce Act, 1869 relating to settlement of Spousal Property.
7	4.3	65	This table contains provisions of the Parsi Marriage and Divorce Act, 1936 relating to settlement of Spousal Property.

List of Figures

Sr. No.	Figure No.	Page No.	Description
1	5.1	69	Figure showing procedure to be followed in the spousal property settlement cases.

CHAPTER- 1

INTRODUCTION

1.1 INTRODUCTION

Law cannot be understood denude of the social conditions that give birth to it. History is witness of the fact that much distress, agony and injustice has been caused by overlooking the above statement. The only thing constant is change. Social change and legal change co-exist[3]. The denial of the above would lead to queer results. It would block all social progress and the decaying institutions which have outlasted their age and convenience, would lead to mass putrefaction and deterioration of the society and humanity. This is true in context of all the branches of law and chiefly for family law.

If society is to live in tranquillity and individual in contentment, our matrimonial laws must show an ongoing development so that their incompatible interests could be fine-tuned.

Family law and especially matrimonial law involves exceptional issues. They deal with interpersonal correspondence of spouses. Marriage, considered a contract or a sacrament gives rise to a status: it confers a status of husband and wife on the parties to the marriage and confers status of legitimacy on the children. Out of it arises certain rights and obligations of the spouses and also certain obligations and responsibility towards children of the marriage.[4] Marriage under Hindu law is a sacrament and original Hindu law recognized as many as eight form of marriages, namely, *Brahma, Daiva*[5], *Arsha*[6], *Prajapatya*[7] *(*approved ones), *Gandharva*[8], *Asura*[9], *Rakshasa*[10] *and pisachac* (unapproved ones)[11]. Out of these eight only Brahma, Asura and Gandharva are recorgined by present law, the rest have become outdated. The marriage law governing all Hindus is The Hindu Mrriage Act, 1955.

Muslim law does not lay down any form of marriages. Although a contract, Muslim marriage to be valid must comply with the formalities of marriage laid down under Muslim law. Marriage under Muslim law is called *nikah* on performance of which marital status arises between the parties.

---

[3] Dr. Paras Diwan, *Law of Marriage & Divorce*, v (7th ed., 2016).

[4] Ibid, at 47.

[5] According to Manu, "The gift of a daughter who has been decked with ornaments, to a priest who duly officiates at a sacrifice during the course of its performance, they call the *Daiva* rite", Manu Smriti, III, 29.

[6] According to Manu, "When the father gives away his daughter according to rule, after receiving from bridegroom, for fulfilment of sacred law, a cow and a bull or two pairs that is named to *Arsha* rite" Manu Smrit, III, 29.

[7] According to Manu, "The gift of a daughter by her father after he has addressed the couple with the text, 'May both of you perform together your duties' and has shown honour to the bridegroom is called the *Prajapatya* rite," Manu Smriti, II, 30.

[8] According to Manu, "The voluntary union of a maiden and her lover, one must be known to be the *Gandharva* rite, which springs from desire and has sexual intercourse as its purpose."

[9] According to Manu, "When a bridegroom receives a maiden after giving as much wealth as he can afford, to the kinsmen and bride herself, according to his own will, that is called the *Asura* rite."

[10] Acoording to Manu, "The forcible abduction of a maiden from her home, while she cries out, and weeps after her kinsmen have been slain or wounded and their house broken open, is called the *Rakshasa* rite," Manu Smriti, III, 33.

[11] According to Manu, "When a man by stealth seduces a girl who is sleeping, intoxicated, or unconscious, that is the eighth, the most base and sinful, *Pisachac* rite," Manu Smriti, III, 27.

Among Christians there is nothing like form of marriage, although Christians adhering to different churches marry in their own church. The law governing marriages among Christians is The Christian Marriage Act, 1872.

The Parsi Marriage and divorce Act, 1936 governs law relating to Parsi marriages. It does not prescribe any form of marriage but in different parts of the country there are found certain variations because of customs prevailing therein. The essential ceremony for all Parsi marriages is the ceremony of *Ashribad* performed in the presence of two witnesses by the Parsi priest.

A civil marriage in India can be performed only under the provisions of the Special Marriage Act, 1954. It is performed in the presence of the Marriage Officer and three witnesses.

Stability of marriage is *sine qua non* of every society, yet we would not muddle stability with indissolubility. A marriage which has broken down irretrievably is not a stable marriage, and stability of marriage would require that it should be dissolved with maximum decorum and minimum indecency, perplexity and comedown.

The fact that divorce is a necessity is now accepted on all hands. It is not converse of marriage. It is rather there to strengthen the institution of marriage. But initially adultery, cruelty and desertion were deeming to be matrimonial offences and it was conjectured that the purpose of divorce was to punish the guilty party and not to terminate any mirthless union. This manner of divorce was conceptualised as guilt or offence theory. This theory postulates that there was a guilty party, i.e., the one who has committed the matrimonial offence, and an innocent party, who has been wronged and who has played no role in the matrimonial offence committed by the other party. This meant that where both the parties were wrongdoers they were to continue to live together.

Later it was realised that there might be a situation where marriage would fail not because of fault of any of the parties but because despite of best of their efforts they have not been able to pull on together. In such a case the only reasonable outcome would be to dissolve the marriage but this could not be covered by fault theory and thus lead to acknowledgement of divorce by mutual consent of the spouses.

Then second advancement was to expand the scope and give an inclusive interpretation to some fault grounds, and cruelty was found to be most proficient. Physical as well as mental cruelty were considered ground of divorce and courts added that acts of cruelty are behavioural manifestations stimulated by different factors in the life of spouses and their surroundings, and therefore each case

will have to be determined by its own set of facts.[12] Some courts went to an extent of saying that husband's snoring during night which disturbed the sleep of the wife amounted to cruelty.[13]

It came to be firmly established that the purpose of divorce was not to punish the guilty party but to protect the innocent party. The present trend, therefore, is to consider divorce more approvingly, calling it the fleck of emancipation, specially, of the fair sex, a type of escape value for the release of undesirable tensions of marriage. It is indeed a part of the sifting out process, designed to produce a more rewarding and stable family life.[14] Divorce legally dissolves the marriage tie, but it cannot erase the past. For those women who are not economically independent divorce removes the ground under their feet. The divorced women of middle class strata of society find their remarriage difficult and sometimes may have to lead the life of 'desolate lone voyager'.[15] Sometimes a divorced wife loses those benefits that even a widow might derive. For instance, a widow becomes entitled to pension and other benefits of the husband and is also one of the heir to her husband. Thus, after divorce, the problem of her maintenance and support assumes importance. There are two types of statutory provision, which provide for the maintenance of a divorced wife. One is under the respective matrimonial statues[16] obtaining to various communities in India and other is section 125 of Code of Criminal Procedure which is of a general nature and obtains to ail the communities in India except Muslim divorced wives who are now governed by Muslim Women (protection of Rights on Divorce) Act, 1986. Thus there is a difference of opinion as to the manner and method of assessing maintenance under the various Acts. Every statute in India provides a different criterion for determining the quantum of maintenance. Even the judicial pronouncements are not uniform. A woman following Muslim faith may get lesser than what a women following Christian or a Hindu faith may get.

The financial aspect of the problem, which is concomitant of divorce relates to another field also what we may call, the distribution of 'spousal property'. "With a few important exceptions, all the property that was acquired during a marriage is considered as matrimonial/spousal property." The problem may be conversed from two angles. First, there is increase in the number of married women in the labour force, thus, the wife contributes significantly to the common pool from gains of the employment or other work, which results in the increase of the family income which can be utilized in the purchase of family assets including immovable property. This means that, increasingly, married women are acquiring property through their own work as distinguished form the property which comes to them, say by gift, succession, inheritance, etc. Secondly, a wife who devotes herself to the work of culinary

[12] Padma v. Padma Ram, AIR 1959 HP 37, Bhagat v. Mrs. D. Bhagat, AIR 1994 SC 710.
[13] Gollins v. Gollins, [1963] UKHL 5.
[14] Raj Kumari Agrawala, "Changing basis of Divorce and the Hindu Law", 14 JILI 431, 432 (1972).
[15] D.R. Khanna, 'Indissolubility of Marriage v. Easy Divorce', AIR. 1982 (Jour.) 134, 135.
[16] See for instance, Hindu Marriage Act, 1955; Special Marriage Act 1954; Parsi Marriage and Divorce Act, 1936 and Indian Divorce Act, 1869. There is no provision for maintenance of a Muslim wife under the Dissolution of Muslim Marriage Act, 1939.

and rearing of children indirectly helps her husband in the acquisition of family assets or other property by her thrift and skills. Moreover, her contribution towards the family by her physical work is no less important than the husband's financial contribution.

So far as the marriage is a going concern, while purchasing the property, the spouses little bother, in whose name the property is put irrespective of the fact from whom the consideration flows. They plan their future as a life-long affair the very idea of divorce is repugnant to the conjugal harmony. Both the spouses contribute either in cash or by his/her skill, thrift and hard work. But on divorce, the question of distribution of these assets assumes importance. It is in this backdrop that the problem of distribution of family assets arise. The broad question which arises is; How to find a compromise between the principle of separation and of community, while at the same time preserving the equality of the spouses in matters of property?

The answer to this question is that generally, during the subsistence of marriage, the legal systems throughout the world traditionally follow one of the two systems to govern the property of the spouses' *viz*., the separation of property and the community of property. In the former, as the name itself suggests, husband and wife have absolute freedom to manage their properties as if they are unmarried. The notion that marriage is an economic partnership does not find recognition and in particular, the mere fact of marriage does not affect the rights of property owners.[17] Therefore the sharing of assets of husband and wife is not institutionalized. On the other hand, in the community of property system the notion of partnership of husband and wife in the properties belonging to them has been institutionalized. The basis of the community property system is the idea that marriage also creates what amounts to an economic partnership between the husband and wife, in which they share ownership of certain property.[18] When the case for the dissolution of marriage is filed the assets of husband and wife (either by law or by contract) are treated as a single mass.[19] So, any earnings or debts originating after this time will be separate property.[20]

A third type of system known as deferred community system is adopted by many countries in the world. The deferred community system represents the convergence of the separation of property and community of property. It is an effort to combine the positive features of both the systems and to eliminate the disadvantages. Sweden took the lead in 1920 and introduced changes in community of property. According to these modifications married couples were governed by the legal community of property as distinguished from the contractual community of property) the spouses retained their right

[17]L. A. Buckley, *Matrimonial Property and Irish law: A case for community,* Northern Ireland Legal Quarterly, 30, 39 (2012).
[18]Jerry A. Kasner and Alvin J. Golden, *An Overview of Community Property Law*, American College of Trust and Estate Counsel, 1, 6 (1999).
[19]Charlotte K. Goldberg, *Opting in Opting out: Autonomy in the Community Property States*, 72 Louisiana Law Review, 1, 13 (2011).
[20]Friedmann, *Law in changing Society*, University of California Press, Berkeley, 236 (1959).

to manage their properties after marriage, the community of property became operative on the dissolution of marriage and the spouses would be entitled to one-half each, of the entire properties remaining at the time of dissolution of marriage.[21] Norway, Finland, Denmark and Iceland followed the lead given by Sweden. Holland, Germany and Quebec adapted the basic features of the deferred community of Sweden, although there are deviations on some points. Even some countries governed by common law, in the context of matrimonial property relations on divorce in their legislations, to a greater or lesser extent adapted the features of deferred community of property.

Indian matrimonial law is essentially based on then prevailing English matrimonial law. Most exiguous provisions in our laws are those relating to solution of causatum of divorce. Marriage dissolution leaves many unresolved problems concerning parties to the dissolved marriage, their children and settlement of their property. Our matrimonial laws singularly lack in provisions relating to the settlement of properties of the spouses and the matrimonial home. Section 27 of Hindu Marriage Act, 1955 provides only for settlement of property presented jointly to the husband and wife at or about the time of marriage; it does not talk about property owned by spouses jointly or separately. The fact of the matter is that if our law commission and the drafters of the amending bill would have looked at the Matrimonial Causes Act, 1973 (then prevailing English matrimonial law) carefully they would have found that the two-third of the Act deals with the causatum of dissolution of marriage. If we want to have a socially just law of divorce it is indispensable that we pay more attention to the causatum of divorce as that alone can lead to stability of marriage. Thus, it is crucial that we have a provision like that of section 24 of the Matrimonial Causes Act which stipulates for the transfer of property from one party to another as well as settlement of the spousal property for the benefit of the needy party and the children. The court also has power to vary any ante-nuptial settlement including the will of either party in the interest of the needy spouse and children. In the modern urban life, the matrimonial home plays a very important role during the subsistence as well as dissolution of marriage.

England has now a Matrimonial Homes Act, 1967 and the Domestic Violence and Matrimonial Proceedings Act, 1976. The matrimonial Homes Act, 1967 makes provision for de facto possession and use of the most important property owned by most families and needed by all human beings, i.e., a place of residence. This Act was primarily enacted to nullify the decision of the House of Lords in, National Provincial Bank ltd. v. Ainsworth[22], which held that the deserted wife has no license to stay. The Act states that "if one person has a right to occupy a property and his spouse does not, the spouse can occupy the property if it was used as a matrimonial home". The Domestic Violence and Matrimonial Proceedings Act, 1976 states that, "without prejudice to the jurisdiction of the High Court, on an application by a party to a marriage a county court shall have jurisdiction to grant an

[21] Kahn and Freund, *Matrimonial Property- Some Recent Developments*, 22 Modern Law Review, 241, 248 (1959).
[22] (1965) UKHL 1 (United Kingdom).

injunction containing one or more of the following provisions, namely, (1) a provision restraining the other party to the marriage from molesting the applicant; (2) a provision restraining the other party from molesting a child riving with the applicant; (3) a provision excluding the other party from the matrimonial home or a part of the matrimonial home or from a specified area in which the matrimonial home is included; (4) a provision requiring the other party to permit the applicant to enter and remain in the matrimonial home or a part of the matrimonial home; whether or not any other relief is sought in the proceedings." Thus the former protects the right of the wife, she being the one in need of protection, though at times husband may also need it, in the matrimonial home and the later protects her from domestic violence.

In India, we only have the provision for maintenance laws and the provisions for Spousal Property are very insufficient. Section 27 of Hindu Marriage Act, 1955 only talks about presents given to husband and wife only "at or about the time of marriage". The question raised by the author is that is the union of marriage only for one day i.e., the day of marriage? If the answer to this question is NO, then why provide a law that deals with properties presented only on the day of marriage. We are well aware of the problem yet we are not showing adequate consciousness and will to tackle it. And unless we allow our self to be more aware of the problem and more willing to take active steps to redress it, it will remain with us.

To explain this issue, the Author has divided this work into five different chapters. Chapter one gives the introduction of the topic. Chapter two deals with the evolution of concept of marriage in India, UK and U.S.A. and the statutes prevailing in all the three countries governing marriage laws. Chapter three deals with the evolution of concept of divorce and explains all the three theories of divorce i.e., Fault/Guilt theory, Consent theory, and Irretrievable breakdown of marriage theory and also different statutes dealing with the above in the all the three counties i.e., India, UK, and U.S.A. Chapter four deals with the concept of Spousal Property. Explaining it in detail. The evolution of the concept in the above countries has been also highlighted by the author. Other than spousal property the existing remedies have also been discussed. Chapter five deals with the conclusions drawn from all the other chapters and contains the suggestions of the author wherein author has highlighted the lacunas in the prevailing system and has suggested a uniform legislation on disposal of Spousal Property.

1.2RESEARCH OBJECTIVE AND RESEACH QUESTIONS

1) To study and understand the nature of the institution of marriage under different matrimonial laws in India.
    - Why do we have different legislations dealing with marriages?

- What are the various legislations governing different marriages as per that legislation in India?

2) To study and appraise the socio-economic factors associated with the institution of marriage under different matrimonial laws in India.
    - What is the nature of the marriage under different personal laws?
    - What are the finances involved in a marriage?

3) To analyse the institution of marriage and socio-economic factor related thereto in the United States' Legal System.
    - What are different state laws dealing with marriages in USA?
    - What are the finances involved in marriages in USA?

4) To analyse the institution of marriage and socio-economic factor related thereto in the UK.
    - What is the law dealing with marriages in UK?
    - What are the finances involved in marriages in UK?

5) To study, understand and compare the grounds and theories of divorce recognised by law in India, UK and USA.
    - What are the different theories of divorce recognised in India, UK and USA?
    - What are the grounds of divorce recognised in India, UK and USA?

6) To study and examine the scope of the economic interest accumulated between the spouses during the subsistence of marriage.
    - What is matrimonial property and types thereof?
    - How matrimonial property can be calculated?

7) To scrutinise, examine the adequacy and efficiency of Indian laws on economic interest of the spouses during the subsistence of marriage.
    - What method had been adopted by Indian government to define the extent of economic interest of spouses during subsistence of marriage?

8) To examine the legislative provision and judicial pronouncements propounded on division of economic interest of the spouses on dissolution of marriage in India.
    - What does disposition of spousal property means?
    - What are the different legislations dealing with disposition of spousal property?
    - What are factors to be considered by the court while disposing the spousal property?

9) To examine the growth in the legislative provisions of UK, dealing with settlement of economic interest of the spouses during subsistence and dissolution of marriage.
    - How has the law of disposition of spousal property evolved in UK?
    - What are the laws dealing with settlement of economic interest of the spouses during and on dissolution of marriage?

10) To study and scrutinise the situation in the USA pertaining to settlement of economic interest of the spouses during and on dissolution of marriage.
    - What are the laws dealing with settlement of economic interest of the spouses during and on dissolution of marriage?

11) To compare and evaluate the system prevailing in India, UK and USA pertaining to settlement of economic interest of the spouses during and on dissolution of marriage.
    - Which of the two methods is appropriate and rational while dealing with the settlement of economic interest of the spouses during and on dissolution of marriage?

12) To find out the key challenges and their solutions relating to settlement of finances in India, UK and USA.
    - What is the scope of term 'settlement of finance in marriage'?
    - Whether settlement of finance can be distinguished with the maintenance?
    - What are the different legislations dealing with maintenance and settlement of finance?
    - What are the factors to be considered by court while awarding maintenance and settling the finance of spouses at the dissolution of marriage?
    - Does the law of maintenance sufficiently cope up with the changed circumstances?

1.3HYPOTHESIS

Inadequacy and inconsistency in law governing the economic interest of the spouses during the subsistence and dissolution of marriage necessitates a uniform legislation.

1.4RESEACH METHODOLOGY

The researcher has used the method of Doctrinal Legal Research. As apprehended in the legal research domain the Doctrinal legal research, is research about what the prevalent state of legal principle, legal doctrine or legal rule is. A legal scholar doing the doctrinal legal research takes legal propositions, principles, rules or doctrines as a preliminary point and centre of his study. He 'locates' such a principle, rule or doctrine in statutory instruments, judicial opinions, discussions of the same in legal treatises, commentaries, textbooks, encyclopaedias, legal periodicals, and debates, if any, that took place at the foundational stage of such a rule, doctrine or proposition. Thereafter, he 'reads' them in a complete manner and makes an 'analysis' of the material as well as of the rules, doctrines and expresses his 'conclusions' and writes up his study.[23]

Thus the doctrinal legal research, implicates: (i) systematic examination of statutory provisions and of legal principles intricate therein, or resulting therefrom, and (ii) commonsensical and cogent ordering of the legal propositions and principles. The researcher gives prominence on fundamental law rules, doctrines, concepts and judicial pronouncements. He systematizes his study around the legal propositions and judicial verdicts on the legal propositions of the appellate courts, and other traditional legal materials, such as parliamentary debates, tightfitting the legislative intention, policy and history of the rule or doctrine. Classic works of legal scholars on the law of torts and administrative law do provide outstanding examples of doctrinal legal research.[24]

The researcher has identified the statutory provision dealing with the economic interest of the spouses during subsistence and on dissolution of marriage and legal principles involved therein. Due emphasis has been given to the substantive rules, doctrines, concepts and judicial pronouncements.

The researcher has compared the Indian law dealing with the economic interest of the spouses during subsistence and dissolution of marriage with that of UK and USA laws, as our Indian matrimonial law is primarily based on the English law and it is quite different from that prevailing in USA.

1.5SCOPE OF THE STUDY

The researcher aims at highlighting the institution of marriage in India, UK and USA and analysing the theories and reasons of divorce and technique of division of finances on divorce in the above mentioned countries as our Indian matrimonial law is primarily based on the English law and it is quite different from that prevailing in USA.

The researcher has focused on the changing scenario of determination of economic interest of the spouses during subsistence and dissolution of marriage. During a divorce, the task of dividing up property and other assets is a difficult and even contentious task for couples. While arriving at an

[23] Prof (dr) Khushal Vibhute and Filipos Aynalem, *Legal Research Methods (teaching material)*, 71 (2009).
[24] Ibid, at 72.

agreement without the need for anyone else to intervene is usually the ideal outcome for everyone involved, it can be very difficult for one person or the other to part with a cherished object or valuable asset, so every state has laws on the books governing how assets and some debts are to be split up. The researcher intends to look at the various definitions of "Matrimonial property" and scenario prevailing in Indian, UK and USA regarding the same. Broadly, marital property consists of items of value acquired during the marriage, whether purchased jointly or in one spouse's name with proceeds in a shared bank account, that will be divided during the divorce either in accordance with the terms of a prenuptial or postnuptial agreement or by the court as determined by the laws of the state in which the divorce is taking place.[25] The researcher aims to do a comparative study of the same and highlight the lacunas prevailing therein and suggest countermeasures.

One of the major limitation that the researcher faced during the work was non availability of sufficient text on laws of UK and USA, because of which the researcher had to rely on the internet sources alone. The researcher has tried level best to clear all the doubts that can arise in one's mind relating economic interest of the spouses during subsistence and on dissolution of marriage.

[25]*Divorce and Property Division: The Complete Guide*, www.divorceknowledgebase.com, Available at http://www.divorceknowledgebase.com/guides/property-division/, last seen on 09/03/2017.

CHAPTER- 2

MARRIAGE

2.1 MARRIAGE LAWS IN INDIA

2.1.1 INTRODUCTION

Marriage is an institution which develops from a systematic process. Initially it was based on practice and gradually it entered into legal recognition. The institution of marriage is viewed from different angels, for it is intimately connected with crude customs of locality.[26] Any broad definition of marriage thus excludes one or the other form of institution. Marriage, whether considered as a contract or sacrament gives rise to a status: it confers the status of husband and wife on the parties to the marriage for some social and legal purposes and a status of legitimacy on the children.

Marriage implies two things: (a) "act of marrying which means that parties to marriage should have capacity to marry and performs necessary ceremonies, rites and formalities", and (b) "the state of being married."[27]

The contract of marriage in some aspects resembles to any ordinary commercial contract while in certain aspects it differs from the later. Contract of marriage is "*sui generis*". It is not merely a contract but also a social institution

Appleton, C.J., an American judge said[28], "When the contracting parties have entered into the married state, they have not so much entered into a contract as into a new relation, the rights, duties and obligation of which rest, not upon their agreement, but upon the general law of state, statutory or common, which defines and prescribes those rights, duties and obligations. They are of law not of contract. It was of contract that the relation should be established, but, being established, the power of the parties, as to extent of duration, is at an end, their rights under it are determined by the will of the sovereign as evidenced by law. They can neither be modified nor can be changed by an agreement of

[26] H.K. Saharay, *Laws of Marriage & Divorce*, 11 (5th ed., 2007).
[27] Supra 2.
[28] Adams v. Palmer, (1863) 51 Maine 480.

the parties. It is a relation for life: and the parties cannot terminate it at any shorter period by virtue of any contract they may make. The reciprocal rights arising from this relation, as long as it continues, are such as the law determines from time to time, and none other."

In English common law, marriage implied merger of personalities of the husband and wife, which meant that wife's personality will be merged with that of her husband. As per this doctrine husband could not give anything to his wife as she was his-self and if there were any contracts between the two before marriage they stood dissolved on marriage. The landed property of wife appertained to the husband and during the coverture he managed the property and was entitled to have all the profits derived from it. This situation was ameliorated by the Married Women's Property Act, 1870 (as amended in 1917), by the virtue of which English women acquired the right to hold, own and acquire the property.

This English doctrine was never a part of Hindu or Muslim law. Although wife was *ardhangini* of her husbandunder Hindu law, it meant nothing more than spiritual unity between the two. Her property (*stridhan*) was her alone and husband had no right over it despite of the fact that most of her property was acquired by her during the marriage. Husband could use her property only during distress with a condition that he had to restore it later on.

Also under Muslim law, women's individuality was not lost on marriage, she could hold and acquire property in her own name even after marriage. Nor Parsis, nor Jews subscribe to this English doctrine.

2.1.2 FORMS OF MARRIAGES

2.1.2.1 AMONG HINDUS

Marriage for Hindus is a sacrament thus question of volition of parties does not arise. Hindus marriage is considered as a gift of the girl by her father to the husband. Original Hindu law recognized as many as eight form of marriages, namely, *Brahma, Daiva*[29], *Arsha*[30], *Prajapatya*[31] *(*approved ones), *Gandharva*[32], *Asura*[33], *Rakshasa*[34] *and pisachac* (unapproved ones)[35]. Out of these eight only *Brahma, Asura* and *Gandharva* are recorgined by present law, the rest have become outdated.

[29] According to Manu, "The gift of a daughter who has been decked with ornaments, to a priest who duly officiates at a sacrifice during the course of its performance, they call the *Daiva* rite", Manu Smriti, III, 29.
[30] According to Manu, "When the father gives away his daughter according to rule, after receiving from bridegroom, for fulfilment of sacred law, a cow and a bull or two pairs that is named to *Arsha* rite" Manu Smrit, III, 29.
[31] According to Manu, "The gift of a daughter by her father after he has addressed the couple with the text, 'May both of you perform together your duties' and has shown honour to the bridegroom is called the *Prajapatya* rite," Manu Smriti, II, 30.
[32] According to Manu," The voluntary union of a maiden and her lover, one must be known to be the *Gandharva* rite, which springs from desire and has sexual intercourse as its purpose."
[33] According to Manu," When a bridegroom receives a maiden after giving as much wealth as he can afford, to the kinsmen and bride herself, according to his own will, that is called the *Asura* rite."
[34] Acoording to Manu," The forcible abduction of a maiden from her home, while she cries out, and weeps after her kinsmen have been slain or wounded and their house broken open, is called the *Rakshasa* rite," Manu Smriti, III, 33.

2.1.2.1.1 *Brahma* Marriage:It is thegift of the daughter by father to the bridegroom and is considered the best form of marriage. According to Manu, "the gift of a daughter after decking her with costly garments and honouring her with presents of jewels, to a man learned in Vedas and of good conduct, whom the father himself invites is called the *Brahma rite*".[36]Originally it was available only to the persons belonging to the three superior classes, as learning of Vedas by bridegroom was a condition precedent but now it is available to all the classes and decking of bride with jewels and learning of Vedas by bridegroom is not necessary. What is important is the gift of the bride by her father to the bridegroom.

2.1.2.1.2 *Gandharva* Marriage: It is the only form of Hindu marriage which is based on agreement and mutual love of the parties. Where a maiden choses her bridegroom it is the *Gandharva* form of marriage.[37] Sometime ago there were raised some doubts as to validity of *Gandharava* marriage and it was erroneously considered as nothing better than concubinage.[38] But later on it was considered a perfectly valid marriage.[39] It appears to be similar to our modern day civil marriage and may be called as love marriage.

2.1.2.1.3*Asura* Marriage: The *Asura* marriage involves sale of the daughter by the father to the bridegroom. This form off marriage was not approved by our sages and is still an unapproved one. According to Manu, "when the bridegroom receives a maiden, after having given as much wealth as he can afford, to the kinsmen and to the bride herself, according to his own will, it is called the *Asura* rite".

Even today a man can marry as per *Asura* rite, but then if he gives anything to the bride's father in consideration of the later agreeing to give his daughter to the former, it would amount to dowry offence.

2.1.2.2 AMONG MUSLIMS

Muslim marriage (*Nikah*) is a contract but it must fulfill with the rules and regulations laid down by the Muslim law. Although Muslim law does not provide for any form of marriage, Muslims in India have arrogated various forms in which they marry.

Shias of *Ithna Ashari* School recognise Term marriage (*Muta marriage*) which in its essence is different from permanent marriage. All the formalities of marriage, such as offer, acceptance and dower have to be observed in a *muta* marriage. According to Amir Ali the form in which *muta*

---

[35] According to Manu," When a man by stealth seduces a girl who is sleeping, intoxicated, or unconscious, that is the eighth, the most base and sinful, *Pisachac* rite," Manu Smriti, III, 27.
[36] Manu Smriti, III, 27.
[37] Viramitrodaya, 177.
[38] Booni v. Maharaj Singh, (1881)3 ALL 738.
[39] See, Subramania Iyer v. Ratnavelu Chetti, AIR 1918 Mad 1346; Krishendevi v. Sheo Prashad, (1926) 48 ALL 126; Kamini Devi v. Kameshivar Singh, AIR 1946 Pat 316.

marriage may be solemnized is, "I have united myself to thee" or, "I have married thee"[40]. Every condition, (a. amount of dower, b. term of marriage) forming part of the contract should be spelled out at the time of entering the contract. Any condition stipulated before or after the contract is ineffective.

Muta marriage is a survival of pre-Islamic Arabic custom whereby the Arab women use to entertain men in their own tents. No mutual rights and obligations stemmed this union. Man had to pay an entrance fee before entering the tent and he could leave the tent whenever he wanted and the women could throw him out whenever she chose. Any child born out of this union belonged to the women. Later this developed to be a fixed term union on payment of consideration by the man, and was named as *muta*. On account of its widespread prevalence, the Prophet too tolerated it for some time, but after some time came out emphatically against such unions and declared them to be unlawful, but it survived inspite of that. It was *Caliph Omar* who liquidated it ruthlessly, but since the *Ithna Ashari* do not accept the first three Caliphs, they continue to recognize *muta*.

An *Ithna* male can contract any number of *muta* marriages (limit of four marriages doesn't apply on *muta* marriages) with a women who is Muslim, Chitsyian, Jewish or a fire worshipper, but with none else.[41] But an *Ithna* female can only contract *muta* marriage with a Muslim male. If the woman is major, her guardian (*wali*) cannot object even if she is a virgin. But a minor female cananot enter *muta* without the consent of her *wali.*

2.1.2.2.1 Classification of marriages:

Under Muslim law marriages are classified as:

a) *Sahih* (vaild),
b) *Batil* (void), and
c) *Fasid* (irregular).

Shias do not recognise *Fasid* marriages. As per them a marriage is either valid or void.

2.1.2.3 AMONG CHRISTIANS

Among Christians there is nothing like forms of marriages although Christians conforming to different Churches marry in their own Churches. A Christian marriage may be in the following forms:

a) Marriages performed in Churches of different denominations[42].
b) Marriage solemnizes by or in the existence of the marriage registrar[43].
c) Marriage of Indian Christians[44].

[40] Amir Ali, *Mohammedan law*, 398 (5th ed.,).
[41] Syed Amanullah Hussain v. Rajamma, AIR 1977 AP 152.
[42] See Part III, Christian marriage Act, 1872. Section 5 of the Act lays down a list of Ministers of Religion who are authorized to solemnize the marriage.
[43] Ibid, at Part II. Part VI of the Act deals with the solemnization of marriages of the Indian Christians.
[44] Ibid, at Part VI.

2.1.2.4 AMONG PARSIS

The Parsi law does not provides for any form of marriages although in different part of the country, particularly in cities and in Moffusils, some variations in form of custom prevails. Performance of ceremony of *Ashirbad* by priest in presence of two witnessesis essential for all Parsis.

2.1.2.5 CIVIL MARRIAGE

In India a civil marriage can be performed only as per the provisions of the Special Marriage Act, 1954. It is completed in the existence of the Marriage Officer and three witnesses.

2.1.3 CAPACITY TO MARRY

Every system in the world dealing with law relating to marriage lays down certain conditions on fulfilment of which alone a person can marry, these conditions are called *Capacity to marry* and these conditions vastly vary from system to system. System also vary in consequences of violation of these conditions. A marriage performed in violation of these conditions is not a valid marriage.

India is a multi-religious country and all the religions have their own personal law. Thus Hindus marry as per provisions of Hindu Marriage Act, 1955, Muslims as per Muslim law, Christians as per Indian Christian marriage Act, 1872 and Parsis as per Parsi Marriage and Divorce Act, 1936. Inter-religious marriages can take place under Special Marriage Act, 1954.

TABLE No. 2.1:

ACT	SECTION	CONDITIONS
Hindu Marriage Act, 1955	Section 5	1. "Neither part has a spouse living at the time of marriage." 2. Neither party is: a) "Incapable of giving a valid consent due to Unsoundness of mind." b) "Suffering from a mental disorder of such a kind or to such an extent as to unfit for marriage and procreation of children." c) "Has been subject to recurrent attacks of

		insanity.” 3. “The bridegroom has completed the age of twenty-one years and the bride has completed the age of eighteen years.” 4. “The parties are not within Prohibited degrees to each other, unless a custom or usage governing each of them permits of a marriage between two.” 5. “The parties are not Sapinda to each other, unless a custom or usage governing each of them permits of a marriage between two”.
Parsi Marriage and Divorce Act, 1936	Section 3	1. “The parties must not be related to each other by any of the degrees of consanguinity or affinity set forth in Schedule I.” 2. “Marriage must be solemnised as per Parsi form of ceremony called “*Ashirvad*” by a priest in the presence of two Parsi witnesses.” 3. “The bridegroom must be twenty-one years of age and bride must be eighteen years of age.”
Indian Christian Marriage Act, 1872	Section 60	1. “The bridegroom must be twenty-one years of age and bride must be eighteen years of age.” 2. “Neither party to marry shall have a spouse living at the time of marriage.”
Muslim Law		1. “No one can marry below the age of puberty.” 2. “Prohibitions on the ground of

		a) Consanguinity b) Affinity c) Fosterage d) Unlawful conjecture e) Prohibitions on the biases of religion, sect and status.”
Special Marriage Act, 1954	Section 4	1. “Neither party has a spouse living.” 2. Neither party is: d) “Incapable of giving a valid consent due to Unsoundness of mind.” e) “Suffering from a mental disorder of such a kind or to such an extent as to unfit for marriage and procreation of children.” f) “Has been subject to recurrent attacks of insanity”. 3. “The male has completed twenty-one years of age and female the age of eighteen years.” 4. “The parties are not within the degrees of prohibited relationship, unless a custom or usage governing any one of them permits of a marriage between two.” 5. “If the marriage is solemnized in state of Jammu and Kashmir, both the parties are citizens of India domiciled in the territories of which the Act extends. “
	Section 15	“A marriage solemnized under any

		personal law can also be registered under this act if", 1. "A ceremony of marriage has been performed between the parties and ever since they have been living together as husband and wife since then." 2. "At the time of registration of marriage neither party has a spouse living." 3. "Neither party is a lunatic or idiot at the time of registration." 4. "The parties have completed the age of twenty-one years at the time of registration." 5. "The parties are not within the degrees of prohibited relationship."

2.1.4 CEREMONIES OF MARRIAGE

Performance of appropriate ceremonies is a mandatory requirement for formal validation of marriage. All communities in India lay down different rites and ceremonies for the solemnization of the marriage. Some communities have laid down very elaborate rites and ceremonies to be performed at the time of marriage, while in some the ceremonies are very simple. Under English law and Indian Christian Act, 1872 the formalities are in two parts, (a) "preliminary formalities", and (b) "ceremonies for solemnization of marriage."[45] In some communities customary ceremonies are performed while in others mere consent to live together follow by actually living together as husband and wife is sufficient. It is well settled proposition of law that where requisite ceremonies of marriage are not performed the marriage is void.[46]

2.2 MARRIAGE LAWS OF USA

[45] Special Marriage Act, 1872, Chapter II; Supra 40, at Parts I to VI.
[46] Sudershan karir v. State, AIR 1988 Del 368.

American Federation is the result of an agreement between the states. There are different civil and criminal laws, differing from state to state. Union is based only on agreement. Any state can separate at any time. Hence, American Union is an indestructible union of indestructible states. In 1892, when the National Conference of Commissioners on Uniform State Laws was constituted, two major subjects considered suitable for uniform laws were commercial paper and marriage and divorce. the Conference on August 6, 1970, publicized the Uniform Marriage and divorce Act. It was then that an agreement was reached on a ration of combining the last two subjects i.e., Marriage and Divorce. In the intervening years, many statutes were accepted dealing with several facets of one or the other but none of them was acknowledged substantially by the states.

A review of the legal and non-legal literature on marriage and divorce suggested that entire conceptual structure dealing with marriage and divorce was in urgent need of reform. Statutory reform was accomplished in countries like, Italy and England and also in various states of American as well.

The Act impressively simplified pre-marital regulation without sabotaging the interest of the state in the stability of marriages. The notion of void marriages was completely eliminated by the Act and also the list of prohibited marriages was significantly reduced. The traditional sanctions applied to such marriages was also changed by the Act. The Act permits the courts to refuse to make the decree retroactive while permitting a declaration of invalidity in limited cases. Thus, as a result of the easy marriage regulations and restricted annulment doctrines maximum spouses who desire termination of their marriage now advance under the dissolution provisions of the Act instead of the invalidity provisions. This is reasonable as well as if the complaint is that the marriage is no longer workable then termination of the marriage is the appropriate remedy instead of the declaration of invalidity.

2.2.1 Formalities of Marriage:

Section 201 of the Act lays down the formalities of marriage. According to the section "marriage is a personal relationship between a man and a woman arising out of a civil contract to which the consent of the parties is essential. A marriage licensed, solemnized, and registered as provided in this Act is valid in this State. A marriage may be contracted, maintained, invalidated, or dissolved only as provided by law."[47]

Thus all the marriages performed in the specific state according to the provisions of that state are valid. Also, all the marriages performed in the state which are not "licensed, solemnized, and registered" according to the Act are not particularly invalid. For instance, even though an aspirant for a marriage license may have given a fabricated name to the clerk,[48] the marriage will be alleged legal since the overall policy favouring the legality of marriages would necessitates that. Certainly, since Section 208

[47] Uniform Marriage and Divorce Act, 1973 S.201 (United States).
[48] Ibid, at S. 202(a).

confines the traditional dissolution remedy consequently the recognized faults committed through the "licensing, solemnization, or registration" procedure could not be elevated under that section.

As per the provisions of this Act "the marriage is obligatory to be amid a man and a woman". The language of the Act covers all people sanctioned by the Act to marry, and is not limited to those who have gotten the permissible age of majority.[49] Thus not every deviation from the prescribed recommended procedures, stated in the Act, makes the marriage acquainted to a fruitful spasm. "Significant acquiescence, in the light of consequent circumstances and legal policy, results in a workable marriage."[50] As far as the marriages which though performed in harmony with the proper requirements of the Act, but are either illegal or are not permitted by the statutory requirements of sections 202 to 207, are to be read with section 208.

This section moreover highlights the legal perception of marriage as a civil contract in difference from any religious implication also attached to the marriage. Also while recommending that a "marriage may be contracted, maintained, invalidated or dissolved only as provided by law, the statutes and decisions of jurisdictions other than that of the enacting state are not eliminated".

2.2.2 Marriage License and Marriage Certificate:

Section 202(a) of the Act provides that, "the Secretary of State or Commissioner of Public Health shall prescribe the form for an application for a marriage license, which shall include the following information[51]:

1) name, sex, occupation, address, social security number, date and place of birth of each party to the proposed marriage;
2) if either party was previously married, his name, and the date, place, and court in which the marriage was dissolved or declared invalid or the date and place of death of the former spouse;
3) name and address of the parents or guardian of each party; and
4) whether the parties are related to each other and, if so, their relationship
5) the name and date of birth of any child of which both parties are parents, born before the making of the application, unless their parental rights and the parent and child relationship with respect to the child have been terminated."

[49] Cochran v. State, 91 Ga. 763, 185 S.E. 16 (1893); Thomas v. Novas, 47 Haw. 605, 393 P.2d 645 (1964); State v. Burt, 75 N.H. 64, 71 A. 30, Ann.Cas.1912A, 232 (1908); Kenyon v. Peo., 26 N.Y. 203, 84 Am.Dec. 177 (1863) (per Baltron, J.); Blackburn v. State, 22 Ohio St. 102 (1971); Massa v. State, 37 Ohio App. 532, 175 N.E. 219 (1930); State v. Seiler, 106 Wis. 346, 82 N.W. 167 (1908).

[50] Wallace v. Screws, 227 Ala. 183, 149 So. 226 (1923); Russell v. Taglialavore, 153 So. 44 (La.App.1934); Knapp v. Knapp, 149 Md. 263, 131 A. 329 (1925); Johnson v. Johnson, 214 Minn. 462, 8 N.W.2d 620 (1943); Hartman v. Valier & Spies Milling Co., 356 Mo. 424, 202 S.W.2d 1 (1947); Christensen v. Christensen, 144 Neb. 763, 14 N.W.2d 613 (1944); Ponina v. Leland, 454 P.2d 16 (Nev.1969); Portwood v. Portwood, 109 S.W.2d 515 (Tex.Civ.App.1937) (writ of error dismissed or refused).

[51] Supra 46.

Sub section (b) provides that "the Secretary of State or Commissioner of Public Health shall prescribe the forms for the marriage license, the marriage certificate, and the consent to marriage."[52]

The Act undertakes that each state will acclimate its prevailing marriage licensing law so that it adapts to the fundamental supervisory provisions of the Act. Such laws differ considerably from state to state; and there is no extraordinary attentiveness in gaining uniformity as to the form used for marriage licenses and registrations. This section authorizes the state to waive the parameter by parting the embellishment of forms to a suitable state official.

States disinclined to break entirely with previous legislative arrangements nevertheless may want to "review, modernize, and simplify legislation" defining license and registration forms. The enclosure of social security numbers will simplify the implementation of duties of support, if this becomes essential later on. The information concerning previous marriages and their dissolution will oblige in various circumstances for making suitable investigation. The name of the party married earlier should be that which he or she had for the duration of that marriage. "Information as to occupation may be useful to a determine whether an underage marriage should be approved[53], and also in passing orders on the issues of maintenance, support, property division, or child custody."

2.2.3 License to Marry:

"When a marriage application has been completed and has been signed by both the parties to a prospective marriage and at least one of the them has appeared before the marriage license clerk and paid the marriage license fee, the marriage license clerk shall issue a license to marry and a marriage certificate form upon being furnished with the following:[54]

1) satisfactory proof that each party to the marriage will be of 18 years of age at the time the marriage license is effective, or will be of 16 years of age and has either the consent to the marriage of both parents or his guardian, or judicial approval; or, if under the age of 16 years, has both the consent of both parents or his guardian and judicial approval; and
2) satisfactory proof that the marriage is not prohibited; and
3) a certificate of the results of any medical examination required by the laws of this State."

To evade troublesomeness where one of the parties to the forthcoming marriage is residing, "temporarily or permanently", at facade the state, the Act necessitates that only one of the parties appear afore the clerk to afford the facts requisite by the section. "Both parties must have signed the application." It is not envisioned that the state has to form a novel office to deal with the marriage license applications.

[52] Supra 45, at S. 202(b).
[53] Supra 45, at S. 205.
[54] Supra 51, at S. 203.

If both parties have attained the age of eighteen years, neither parental nor judicial consensus is mandatory to gain the license. Many states have by now implemented this position; and it is reliable with the tendency in federal as well as state law to lessen to the age at which folks are allowable to vote and to make independent choices about significant matters involving their lives. A person under eighteen years of age need have the consensus of both of his/her parents to the marriage, if both are alive and have ability to give permission. If one of the parents is inaccessible, or if any or both of his parents' declines to give permission for some reason, judicial approval must be acquired as per the requirements of Section 205. The Act necessitates judicial approval in addition to parental permission to the marriage if one of the individual is less than sixteen years of age. "The provision concerning the issuance of a license for marriage to persons under sixteen years of age is bracketed by the legislatures, to signify that states having a policy against marriage by persons so young may omit that provision, without doing violence to the concept of uniformity. The standard governing judicial approval is provided in Section 205."

"Satisfactory proof of age and of required consent includes such methods as may be prescribed under Section 202(b) in the license form, or any other proof that should satisfy a reasonable official exercising unarbitrary judgment."[55]

"The premarital medical examination requirement serves either to inform the prospective spouses of health hazards that may have an impact on their marriage, or to warn public health officials of the presence of venereal disease. For the latter purpose, the statutes have been proved to be both avoidable and highly inefficient."[56] Furthermore, the nippy blood test which fulfils the provisions of most of the states offers very petite service to the potential spouses themselves. "If a state decides to preserve its traditional premarital examination, a reference to its statute should be included in the cross-references to this section."

2.2.4 License, Effective Date:

"A license to marry becomes effective after three days from the date of issuance, unless the court orders that the license is effective when issued, and it expires after one hundred and eighty days from the date when it becomes effective."[57]

A moderately small premarital waiting period has been preferred. "The information available suggests that longer waiting periods do not discourage potentially unstable marriages and at any event are often waived by judges. The other major function served by a waiting period is to discourage or eliminate the "dare" and "gin" marriages."[58] Each state has to specify the name of the suitable court which holds

[55] See United States v. Lee Huen, 118 Fed. 442, 457 (D.C.N.D.N.Y.1902).
[56] See Monahan, State Legislation and Control of Marriage, 2 Journal of Family Law 30, 34-35 (1962).
[57] Supra 45, at S. 204.
[58] See Ellsey, *Marriage or Divorce*? 22 U Kan City L Rev 9, 17 (1953).

the power. The limit of one hundred and eighty days on the efficacy of the license is for the suitability of betrothed couples who have to plan for their wedding dates in advance.

2.2.5 Judicial Approval:

Section 205 provides for Judicial Approval in cases where parties are under aged. It states that, "after a reasonable effort has been made to notify the parents or guardian of each under aged party the court may order the marriage license clerk to issue a marriage license and a marriage certificate form:[59]

1) to a party aged 16 or 17 years who has no parent capable of consenting to his marriage, or whose parent or guardian has not consented to his marriage;[60] or
2) to a party under the age of 16 years who has the consent of both parents to his marriage, if capable of giving consent, or his guardian."[61]

"The state shall identify court given responsibility for approving youthful marriages in the statute itself. States, continuing existing practice, assigned this to the juvenile court and in other states the probate court is used and in still others the designated court is a family court or the trial court of general jurisdiction."

The Act intentionally evaded comprehensive procedural rules to administer the judicial proceedings. Thus, "subsection (a) requires that the court only makes a reasonable effort to notify the parents that an under aged party has sought judicial approval of a marriage license. Since a party under the age of sixteen years needs the consent of both his parents, if they are alive and have capacity to consent, as well as judicial approval, the court clerk will have to notify both parents when the judicial proceeding is commenced. But when a person aged sixteen or seventeen seeks judicial approval because one of his parents refuses to consent, the court can approve the application if the parent cannot be located or even if a disobedient parent avoids receiving formal notification."

Only if the court discovers that the under aged party is capable of performing the duties of marriage and that the marriage will serve his best interest, marriage license and a marriage certificate form will be allotted under this section. "Pregnancy alone does not establish that the best interest of the party will be served."[62]"The court shall authorize performance of a marriage by proxy upon the showing required by the provisions on solemnization."[63]

"The legal standard for judicial approval requires the judge to estimate the capacity of the under aged party to assume the responsibility of marriage and to determine whether the marriage would serve the best interest of that party. The judge obviously will want to obtain personal information about the

[59] Supra 45, at S. 205 (a).
[60] Ibid, at S. 205 (a) (1).
[61] Ibid, at S. 205 (a) (2).
[62] Supra 45, at S. 205 (b).
[63] Ibid, at S. 205 (c).

other party to the prospective marriage as well; but the statute does not permit the judge to refuse his approval because he believes the marriage would not serve the best interest of the party who is of age. The substantive standard necessarily is somewhat vague." Nevertheless, various contemplations are understood in the language and structure of the subsection: "since judicial approval is a standby for parental consent for sixteen and seventeen year old aspirants, such aspirants cannot be deprived of judicial approval merely because a parent or parents have declined to consent to the marriage; although the prospective wife's pregnancy is not alone a sufficient ground for judicial approval, neither does the subsection mean that the judge may withhold approval solely because the prospective wife (whether she or her prospective spouse is the applicant) is pregnant. Pregnancy is one, but only one, of the relevant considerations the judge will weigh in determining the applicant's best interest. Although the standard is the same whether the applicant is between the ages of sixteen and eighteen or is under the age of sixteen, the judge no doubt will investigate younger applicants more carefully. The provision indicates that the judge would be abusing his discretion if he were to decide that no sixteen or seventeen-year-old is mature enough to marry."

2.2.6 Solemnization and Registration:

Section 206 of the Act states that:

(a) "A marriage may be solemnized by a judge of a court of record or by a public official whose powers include solemnization of marriages or in accordance with any mode of solemnization recognized by any religious denomination, Indian Nation or Tribe, or Native Group. Either the person solemnizing the marriage, or, if no individual acting alone solemnized the marriage, a party to the marriage, shall complete the marriage certificate form and forward it to the marriage license clerk."[64]

(b) "If a party to a marriage is unable to be present at the solemnization, he may authorize in writing a third person to act as his proxy. If the person solemnizing the marriage is satisfied that the absent party is unable to be present and has consented to the marriage, he may solemnize the marriage by proxy. If he is not satisfied, the parties may petition the court for an order permitting the marriage to be solemnized by proxy."[65]

(c) "Upon receipt of the marriage certificate, the marriage license clerk shall register the marriage."[66]

(d) "The solemnization of the marriage is not invalidated by the fact that the person solemnizing the marriage was not legally qualified to solemnize it, if neither party to the marriage believed him to be so qualified."[67]

[64] Supra 45, at S. 206 (a).
[65] Ibid, at S. 206 (b).
[66] Ibid, at S. 206 (c).
[67] Ibid, at S. 206 (d).

Subsection (a) enumerates the officials allowed to solemnize the marriage. The phrase, "no individual acting alone", was intended to take account the growing inclination of marrying couples to want a modified ceremony, deprived of traditional church, religious or civil accessories. "This provision permits one of the parties to such a marriage ceremony to complete the marriage certificate form and forward it to the appropriate official for registration." The phrase "Native Group", was added to take account of "aboriginal or other autochthonous cultural groups who do not consider themselves to be Nations or Tribes, such as some of the native groups found in Alaska and Hawaii".

"Subsection (b) authorizes the solemnization of marriage by proxy. During World War II, special proxy marriage statutes were enacted to facilitate marriages when one of the prospective spouses could not be present because of military responsibilities. Although it is not expected that proxy marriages will be common, there are many reasons why, in individual cases, couples may prefer such a ceremony. So long as the marriage license procedure has been followed and the official performing the ceremony has no reason to doubt the intentions of the absent prospective spouse, there is no reason why a proxy marriage should be prohibited. As to the form of proxy, any written document in the well-known form of a proxy such as is used in other serious transactions suffices."[68] The proceeding for an order approving proxy marriage is exceptional, and may be unceremonious, as long as "the two conditions precedent to solemnization by proxy are demonstrated to the court's judicial satisfaction." "If the official solemnizing the marriage is not satisfied that the absent party has consented to the marriage, he may refuse to perform the ceremony until the parties obtain a court order authorizing the marriage by proxy."

"Subsection (c) does not deal with the subject of procuring a copy of the registration of the marriage. This will be governed by the law of each state as to the procurement of certified copies of public records. A state that does not provide for the registration of marriages should make provision therefor upon adoption of this Act, either through a special statute or by administrative rule."

Subsection (d) unquestionably puts forward as to what perhaps would be the significance of the section without it. However, it is possibly intelligent to eradicate any likelihood of misapprehension.

2.2.7 Common Law Marriages:

Section 211 recommends two alternatives as far as common law marriages are concerned. "These alternatives are presented because the line of cleavage in the states, between those which consider the common law marriage to be a highly useful social institution and those which insist that all marriages de jure should be contracted in accordance with prescribed statutory formalities, proved impossible to erase." Due to this plain clash as to the policy, the Conference determined that no matter which rule was embraced, there was no probability of realizing uniformity of enactment. Consequently, the

[68] Compare State v. Anderson, 239 Ore. 200, 396 P.2d 558 (1964).

alternative versions of this section authorizes each state to make its choice in accord with its own view as to policy, and to make amendment to its law at any time it desired without destroying the consequence of its implementation of the Uniform Act. Alternative A would, "preserve common law marriage in the form it has already taken by judicial decision". Alternative B would, "make clear that, common law marriages contracted in the adopting state in the future are not to be recognized". "The alternatives are an indication to the state legislatures that this issue should be re-examined even if the state is one of those which has already abolished common law marriage."

2.3 MARRIAGE LAWS OF UK

Marriage is a process by which two people make their relationship public. "Until the middle of the eighteenth century marriages could take place anywhere provided they were conducted before an ordained clergyman of the Church of England. This encouraged the practice of secret marriages which did not have parental consent and which were often bigamous. It also allowed couples, particularly those of wealthy background, to marry while at least one of the partners was under age. This practice had grown enormously in London by the 1740s."

The Marriage Act, 1973[69] endorsed by the Lord Chancellor, Lord Hardwicke, professed that, "all marriage ceremonies must be conducted by a minister in a parish church or chapel of the Church of England to be legally binding".

2.3.1 FORMS OF MARRIAGES

Following two form of marriages are recognised in UK:

2.3.1.1 Civil Marriages:

Civil marriages are "performed by a registrar". It "can take place in a Registry Office or any other premises approved for marriage by a local authority, for instance, a stately home, theatre, zoo or any other place". It is conceivable to have an al fresco ceremony in Scotland as long as the individual steering the ceremony is certified to carry it out and to make a registration. "A Government White Paper seemed set to change the law in England and Wales, bringing it into line with Scotland, but no steps have been taken as yet."

2.3.1.2 Religious Marriages:

Religious marriages are "performed by the minister of the church". Virtually anybody can have a religious marriage, though exceptions consist of "divorcees whose exes are still alive". "It can take place in any church or chapel of the Church of England or Church of Wales, or an Armed Forces Chapel, without the need to involve a Registrar. They can also take place in other places of worship,

[69] An Act for the Better Preventing of Clandestine Marriage popularly known as Lord Hardwicke's Marriage Act was the first statutory legislation in England and Wales to require a formal ceremony of marriage. It came into force on 25 March 1754.

but only if they are within the Registration District where the couple lives, and then only with the involvement of a Registrar."

2.3.2 CONDITIONS OF A VALID MARRIAGE:

Following conditions have been laid down:

1. "No person can be forced to marry against his/her wishes.
2. Both, bride and bridegroom, must be of sixteen years of age or more. A marriage between parties under sixteen years of age is not recognised by law.
3. Parent's and guardian's consent is required if any of the parties to marriage is under eighteen years of age. A marriage without parent's consent is valid but is a criminal offence.
4. None of the parties to marriage must have a spouse living.
5. Both must not be too closely related.
6. On the day of marriage at least two witness to sign the register on the day."

2.3.3 LEGAL REQUIREMENTS

"A notice must be given in person to a local register office at least fifteen days before the marriage. The couple must be resident in the catchment area of the register office for at least seven days prior to giving such notice. If the marriage is to take place in a different area, then where they reside then the couple must contact the register office in that area before giving such notice."

"The notice is displayed for fifteen days before the authorisation to marry is granted." In England, Wales and Northern Ireland the couple can marry within one year from the date when the notice has been displayed, and in Scotland the couple can marry within three months from the date when the notice is displayed. A new notice must be given if there is a change of venue for the marriage.

But "if marrying at the Church of England or Church in Wales, giving notice of marriage is not generally required. Instead, the vicar of the church should be contacted to organise the marriage. For all other religious ceremonies, formal notice must be given at the register office unless one of the couple is subject to immigration control."

"If one party is subject to immigration control, notice must be given at a designated register office."

2.3.3.1 Documents Required:

"The following documentation and information is required from each party when giving notice at a register office[70]:

1. Full name and address
2. Age

[70]*Marriage Requirements in United Kingdom*, Anglo Info, Available at https://www.angloinfo.com/how-to/uk/family/marriage-partnerships/marriage-requirements, last seen on 25/03/2017.

3. Nationality
4. Current status (single, divorced, widowed); proof of divorce or dissolution of a civil partnership is required if applicable
5. Occupation
6. Information on the intended venue for the marriage
7. Those subject to immigration control may need to provide additional documents (Certificate of Approval or visa).”

“Proof of identity, such as a passport, should be taken, with if applicable, proof of divorce or dissolution of a previous partnership. Also applicable fee is required to be paid.”

2.3.3.2 Change in name:

“A woman can either keep her maiden name when getting married or take her husband's surname. If she wishes to use both names, she will need to change her name by Deed Poll.”

“If the bride chooses to take her husband's surname, she must send a marriage certificate to the relevant organisations and government departments to advise them of her name change so that records can be updated.”

CHAPTER- 3

DIVORCE

3.1 INTRODUCTION

Such has been the development of law of dissolution of marriage that even when it came to be established that marriage is a civil contract and a dissoluble union, marriage could not be dissolved like any other civil contract.[71] There are several reasons for the same. It has been postulated that marriage is a contract but it is also a social institution and social interest is involved in its protection and preservation.

From time to time the judiciary ventilates the contents of divorce theories as per its extant experiences. In 2006, Supreme Court took a serious view of the withering away of pedestal of marriage in a case before it and ordered its dissolution and recommended the Union of India to amend the Hindu Marriage Act, 1955 to incorporate another ground of divorce namely, irretrievable breakdown of marriage.[72]

3.2 THEORIES OF DIVORCE

As per the first Matrimonial Causes Act, 1857, the ground of divorce was only one, husband could seek divorce on the ground of wife's adultery. But it should be noted that wife could not seek divorce on the simple adultery of her husband. She had to show "incestuous adultery, or bigamy with adultery, or rape, sodomy or bestiality or adultery coupled with such a cruelty as without adultery would have entitled her to divorce a *mensa et thoro* or adultery with desertion without reasonable excuse for a

[71] Supra 1, at 26.
[72] Naveen Kholi v. Neelu Kholi, AIR 2006 SC 1675.

period of two years." It was later on that desertion, insanity and cruelty were added as grounds of divorce.[73] Also wife could seek divorce on simple adultery by her husband.[74]

3.2.1. Offence or Guilt Theory:

There are two aspects from which grounds of divorce can be looked upon: (1) "Marriage ceases to be a marriage if it is not private union between the parties to marriage. Adultery is in direct violation of this foundation. Marriage also entails that parties to marriage will live with each other in harmony and in mutual confidence. This basic requirement of marriage is destabilized by cruelty or apprehension of cruelty. One of the basic conjecture of marriage is that parties will live together but if one of the parties deserts other this assumption no longer exists. Thus adultery, cruelty and desertion destroys the very foundation of marriage." (2) Also "these grounds are matrimonial offences committed by one of the parties to marriage, analogous to the perception of criminality." Perceived in this manner, divorce is a method of grueling the guilty party, thus was derived offence or guilt theory of divorce.

The offence theory was deliberated as the most apposite basis of divorce in the early law of England, in most of common wealth countries and is most of the states in U.S.A. As per this theory, a marriage can be dissolved only if after the solemnization of marriage, one of the parties to marriage has committed any of the recognized matrimonial offences. Parties though at liberty to enter in a wedlock were not equally free to get out of it.

The offence theory stipulates, (1) a "guilty party" on one hand, and (2) "an innocent party" at the other, who in no way is responsible for the offence committed by guilty party. This theory was taken way too far in English law, where it was held that the marriage could not be dissolved if both the parties to the marriage have independently of each other committed matrimonial offences. For instance, "if a petition is presented on the ground of respondent's adultery and it is established that petitioner is also guilty of adultery, the marriage could not be dissolved". This was named as *the doctrine of recrimination.* However, English law has now abandoned this position.

Since the theory requires petitioner to be innocent, English law evolved the doctrine of bars to matrimonial relief. This implied that the petitioner would fail to get divorce if one of the bars is proved against him even if he is able to establish a ground of divorce to the satisfaction of the court. The bars were further classified as; (1) "absolute bars"", and (2) discretionary bars". Absolute bars are: connivance, condonation, collusion and acquiescence. "Collusion was made a discretionary bar by the Act of 1963. The discretionary bars are: petitioner's own adultery, cruelty, unreasonable delay, conduct conducing to respondent's guilt, and the like."[75] The existence of absolute bar is fatal to the

[73] Matrimonial Causes Act, 1937.
[74] Matrimonial Causes Act, 1923.
[75] Supra 1, at 28.

petitioner while in case of discretionary bar the court uses its discretion and may or may not exercise it in favour of the petitioner. Divorce Reform Act, 1969 has abolished the above bars and thus modern English law has abandoned practically all these bars.

Insanity was added as a ground of divorce by Matrimonial Causes Act, 1937. However, it was a misfortune rather than the misdemeanours and hence, the party suffering from insanity could hardly be called as a guilty party. This led to the renaming of the guilt theory to the fault theory. Marriage could be dissolved if any of the parties had a fault in him/her, the fault could be due to his/her cognisant act or providential.

There exist several other grounds of divorce namely, whereabouts of a party not know for a specified period, sentence of imprisonment for a specified period, leprosy, venerable disease, rape, sodomy, bestiality, wilful refusal to consummate the marriage, etc.

Following is a table showing grounds of divorce based on Fault or Guilt theory under different laws in India:

TABLE No. 3.1: Fault grounds of Divorce

Act	Section	Number of grounds	Grounds of divorce
Hindu Marriage Act, 1955	Section 13(1)	(A). "Nine grounds", available to "both the parties to marriage", based on guilt theory	1. Adultery, 2.Cruelty 3. Desertion for a continuous period of two years, immediately preceding the presentation of petition. 4. Conversion to another religion. 5. Incurable insanity or mental disorder. 6. Virulent and incurable leprosy. 7. Venerable disease

	Section 13(2)	(B). Four grounds available to wife alone	in communicable form. 8. Renunciation of world by entering a holy order. 9. Presumption of death. 1. Pre Act bigamous marriage. 2. Since the solemnization of marriage husband has been guilty of rape, sodomy, bestiality. 3. Wife has been awarded maintenance under section 18 of Hindu Adoption and Maintenance Act, 1956 notwithstanding that she is being living separately, and one year has lapsed since the passing of the decree and the cohabitation between the parties have not been resumed. 4. Option of puberty.
Special Marriage	Section 27(1)	(A). Eight grounds	1. Adultery

Act, 1954	Section 27(1A)	Available to both the parties. (B). two grounds available to wife alone.	2. Desertion for a continuous period of two years, immediately preceding the presentation of petition. 3. Undergoing a sentence of imprisonment of seven or more years for an offence defined under Indian Penal Code, 1860 4. Cruelty 5. Respondent is Incurably of unsound mind. 6. Respondent is Suffering from venereal disease in a communicable form. 7. Respondent is suffering from leprosy, not contacted from the petitioner. 8. Presumption of death. 1. Since the solemnization of marriage husband has been guilty of rape, sodomy,

			bestiality. 2. Wife has been awarded maintenance under section 18 of Hindu Adoption and Maintenance Act, 1956 notwithstanding that she is being living separately, and one year has lapsed since the passing of the decree and the cohabitation between the parties have not been resumed.
The Parsi Marriage and Divorce Act, 1936	Section 32	Pre marriage impediments.	1. Non consummation of marriage even though it's been a year since its solemnisation, due to wilful refusal by the defendant. 2. Respondent was of unsound mind at the time of marriage and continues to be so till the filing of the suit, provided the plaintiff was not aware of it at the

		Post marriage guilt.	time of marriage and also the suit is filled within three years of solemnisation of marriage. 3. Pre marriage pregnancy of the defendant. 1. Adultery 2. Fornication 3. Bigamy 4. Rape or any other unnatural offence. [Provided the petition on any of the above grounds is filed within two years of knowledge of the act.] 5. Respondent has caused grievous hurt to the plaintiff 6. Infected the respondent with venereal disease. 7. Has compelled her (when defendant is husband) for prostitution. [Provided in 5, 6, 7, the suit must be filled within one year of commission of the act by the defendant.]

			8. Undergoing a sentence of imprisonment of seven or more years for an offence defined under Indian Penal Code, 1860 9. Desertion for a continuous period of two years, immediately preceding the presentation of petition. 10. non-resumption of marital intercourse for a period of two years or more after an order granting separate maintenance to the plaintiff. 11. Respondent has ceased to be a Parsi. [Provided suit is filed within two years of such conversion.] 12. Insanity. 13. Cruelty.
The Divorce Act, 1869	Section 10(1)	Ten grounds available to both the parties to marriage.	1. Adultery. 2. Respondent ceases to be

			Christian. 3. Respondent has been incurably of unsound mind and has been so for two years immediately preceding the presentation of petition. 4. Respondent has been suffering from a virulent and incurable form of leprosy for a period of not less than two years immediately preceding the presentation of petition. 5. Respondent has been suffering from venereal disease in communicable form for a period of not less than two years immediately preceding the presentation of petition. 6. Presumption of death. 7. Respondent has wilfully refused to consummate the marriage. 8. Respondent has

			failed to comply with the decree of Restitution of conjugal rights for a period of two years or upwards. 9. Desertion for a continuous period of two years, immediately preceding the presentation of petition. 10. Cruelty.
Dissolution of Muslim Marriage Act, 1939	Section 2	Nine fault grounds on which wife alone can seek divorce	1. Whereabouts of husband are not known for a period of four years. 2. Husband has neglected or failed to provide maintenance for a period of two years. 3. Husband has been sentenced to imprisonment for a period of seven years or upwards. 4. Husband has failed to perform his matrimonial obligations for a period of three years.

			5. That Husband was impotent at the time of marriage and continues to be so. 6. Husband has been insane for a period of two years or is suffering from virulent venerable disease or leprosy. 7. Wife exercising the option of puberty. 8. Husband has treated her with cruelty. 9. on any other ground recognised by Muslim law.

3.2.2. Consent Theory:

There may arise a situation where a marriage fails not because of fault or guilt of any of the parties but because parties to marriage find it impossible to stay together in spite of their best possible efforts. It is not because they are unrighteous people but just average human beings who have not been able to pull on together. In such a situation only possible outcome would be to get out of the matrimony. But they cannot do so as per Fault or Guilt theory, as the theory requires one of them to be guilty of some matrimonial offence. This lead to the introduction of Consent theory. It was emphasised that parties who have freedom to marry should also have an equal freedom to divorce each other. The protagonists of this theory that if marriage is a contract based on free volition of the parties, the parties should have equal freedom to dissolve it.

The supporters of this theory hold that the independence of divorce will fetch about happier marriages, and decrease the unhappy ones. It will support both the husband and wife to live in synchronization with each other and consolidate the unity of the family. Also because there is freedom of divorce, both the parties have serious and sincere attitude towards marriage.

"Soon after the Revolution, the Soviet Union introduced this theory in the family law. In the People's Republic of China, in most of Eastern-European countries, Belgium, Norway, Sweden, Japan, Portugal and in some Latin American States divorce by mutual consent is recognised in one form or the other." In India, Special Marriage Act, 1954 and the Hindu Marriage Act, 1955 (after amendment of 1976) recognize divorce by mutual consent.[76]

TABLE No. 3.2: Divorce by consent of the parties

Act	Section	Section Explained
Special Marriage Act, 1954	Section 28	1. No petition for divorce by mutual consent can be presented before a period of one year has elapsed since the solemnization of marriage. 2. Petition is to be presented to the district court by both the parties together. 3. On the ground that they have been living separately for a period of one year or more. 4. Both the parties have not been able to live together and they have mutually agreed that the marriage should be dissolved. 5. On the motion of both the parties made after six months and not later than eighteen months after the presentation of petition. 6. District court shall after hearing the parties and on being satisfied grant the divorce.

[76] Supra 1, at 33.

The Hindu Marriage Act, 1955	Section 13B	1. No petition for divorce by mutual consent can be presented before a period of one year has elapsed since the solemnization of marriage. 2. Petition is to be presented to the district court by both the parties together. 3. On the ground that they have been living separately for a period of one year or more. 4. Both the parties have not been able to live together and they have mutually agreed that the marriage should be dissolved. 5. On the motion of both the parties made after six months and not later than eighteen months after the presentation of petition. 6. District court shall after hearing the parties and on being satisfied grant the divorce.
Muslim Law		Two types of divorce by mutual consent: 1. KHUL: (a) Khul means "to put off". (b) Husband lays down his right to divorce his wife in exchange of some property. (c) It is a divorce by consent but at the instance of wife. (d) Wife may give up her dower or gives some other property to the husband. 2. MUBBARAAT: (a) An act of freeing one another mutually. (b) The proposal to divorce may

		emanate from either spouse. (c) Wife has to give up her dower or a part of it.
Parsi Marriage and Divorce Act, 1936	Section 32B	1. No petition for divorce by mutual consent can be presented before a period of one year has elapsed since the solemnization of marriage. 2. Petition is to be presented to the court by both the parties together. 3. On the ground that they have been living separately for a period of one year or more. 4. Both the parties have not been able to live together and they have mutually agreed that the marriage should be dissolved. 5. Court shall after hearing the parties and on being satisfied grant the divorce.
Indian Divorce (Amendment) Act, 2001	Section 10A	1. Petition is to be presented to the district court by both the parties together. 3. On the ground that they have been living separately for a period of two year or more. 4. Both the parties have not been able to live together and they have mutually agreed that the marriage should be dissolved. 5. On the motion of both the parties made after six months and not later than eighteen months after the presentation of petition. 6. District court shall after hearing the parties and on being satisfied grant the divorce.

Under modern English Law, the Matrimonial Causes Act, 1963, removed "collusion" from "absolute bars" and positioned it among "discretionary bars". As a result, several collusive agreements were acknowledged which implied recognition of divorce by mutual consent. Also the Matrimonial Causes Act, 1973, the consent theory was recognised and was laid down that if immediately preceding the presentation of petition the parties have lived separately for a continuous period of minimum two years, the divorce can be granted by mutual consent of the parties.

Two main criticism of this theory are, firstly, it makes divorce very easy, this criticism has been met by the law of different countries by providing several safeguards for the same, as seen above. Secondly it makes divorce very difficult, this gave rise to another theory of divorce named "irretrievable breakdown of marriage".

3.2.3. Irretrievable Breakdown of Marriage Theory:

Where a marriage has broken down beyond the point of repair, then the marriage should be dissolved, without looking into the fault of any of the party. The Archbishop of Canterbury, in 1964, appointed a committee under the chairmanship of Dr. Mortimer, Bishop of Exeter, to go into the depth of the matter. The committee recommended in its report that replacing all the fault grounds, the breakdown of marriage should be the sole ground of divorce and supersede all other grounds. The committee stated that when a marriage breakdown it is wrong to think in terms of guilty party and innocent party. It also recommended that relief should not be given in following three cases: (1) when the court thinks that the maintenance proposed to given to the dependent spouse and children is not just. (2) When the conduct of the petitioner was such that court thinks that grant of decree would be against the public interest. (3) When the court thinks that the provisions made for the care and upbringing of a child below sixteen years of age are not sufficient. (4) Where there is collusion between the parties.

The English Law commission also submitted its report on the matter. "The commission put down three proposals: (1) Breakdown without inquest: breakdown of marriage as evidenced by six months' separation. The commission said that divorce on the ground of breakdown encompasses four questions: (a) has the marriage broken down? (b) Is there a prospect of reconciliation? (c) Why the particular marriage should not be dissolved? (d) What should be the appropriate arrangements for parties and children? (2) Divorce by consent was suggested in following two situations: (a) where there were no dependent children. (b) Other grounds of divorce were remained available. (3) Divorce on the ground of separation. It may have two facets: (a) Separation for a shorter period, say, two years, in cases where both the parties consented to the divorce. (b) Separation for a longer period, say five to seven years, where one of the parties did not consent."

The Divorce Law Reform Act, 1969 accepted the recommendation of Mortimer Committee about only one single ground of divorce and it also accepted the third alternative proposal of the law commission but indirectly it also retained the traditional fault grounds of divorce.

The Indian Law Commission also recommended that marriage could be dissolved where parties are living apart for three years or more. Incorporating the recommendations, a bill was introduced in the parliament, but it lapsed.

On March 21, 2006 in Naveen Kohli v. Neelu Kholi[77], the Supreme Court recommended the central government to amend Hindu Marriage Act to include "irretrievable breakdown of marriage" as a ground of divorce.

Irretrievable breakdown of marriage in Indian statues:

TABLE No. 3.3: Irretrievable break down of marriage

Act	Section	Section Explained
Special Marriage Act, 1954	Section 27(2)	Two grounds: (1) That the parties have been living separately after passing of decree of judicial separation for a period of one year or more. (2) That there has been no resumption of cohabitation after the passing of decree of restitution of conjugal rights for a period of one year or more.
The Parsi Marriage and Divorce Act, 1936	Section 32A	Two grounds: (1) That the parties have been living separately after passing of decree of judicial separation for a period of one year or more. (2) That there has been no resumption of cohabitation after the passing of decree of

[77] AIR 2006 SC 1675

		restitution of conjugal rights for a period of one year or more.
Hindu Marriage Act, 1955	Section 13(1A)	Two grounds: (1) That the parties have been living separately after passing of decree of judicial separation for a period of one year or more. (2) That there has been no resumption of cohabitation after the passing of decree of restitution of conjugal rights for a period of one year or more.

The irretrievable breakdown theory finds its way into Muslim Law through judicial interpretation. After the enactment of the dissolution of Muslim Marriage Act, 1939 the courts have made a liberal interpretation of its provisions. "In Umar Bibi v. Md. Din[78] Lahore High Court refused to pass a decree of divorce on the ground that wife hated her husband so much so that she could not possibly live with him and there was total incompatibility of temperaments." Again an attempt was made to obtain divorce on the ground of incompatibility of temperaments after twenty five years in Mt. Noor Bibi v. Pir Bux[79]. C.J., Tayabji observed that:

"There is no merit in preserving intact the connection of marriage, when the parties are not able to, and fail to live within the limit of Allah!"

[78] AIR 1945 Lah 51.
[79] AIR 1950 Sind 8.

CHAPTER-4

ECONOMIC INTEREST OF THE SPOUSES DURING SUBSISTENCE AND ON THE DISSOLUTION OF MARRIAGE

4.1 INTRODUCTION

Under different legal systems the property of spouses is governed either by the (1) separation of property system, or (2) community of property system.

In Separation of property system, husband and wife have absolute freedom to manage their properties as if they are unmarried. The notion that marriage is an economic partnership does not find recognition and in particular, the mere fact of marriage does not affect the rights of property owners.

While, the foundation of the community property system is the impression that marriage also builds what amounts to an economic partnership between the husband and wife, in which they share ownership of some property.Here notion of partnership of husband and wife in the properties belonging to them has been institutionalized. Community property commences at the marriage and ends when the couple substantially separates with the intention of not continuing the marriage.This marital/spousal property includes, "earnings, all property bought with those earnings, and all debts accrued during the marriage".The generally accepted idea is that spouses are partners in the marital economic enterprise, which encompasses all acquisitions during marriage that result from the efforts of either spouse. Premarital acquisitions, as well as gifts or inheritances received by one spouse during marriage, are not considered part of this economic partnership. During the subsistence of marriage, these classifications may seem trivial, but in the unfortunate events of divorce, these details become very important.

On divorce, in the separation of property system, the right of the wife in the husband's property is restricted to getting maintenance.This system prevails in Common law and in other countries that have inherited English system of law. In India also, the separation of property system prevails in the personal law of Hindus, Muslims and Parsees.Whereas, in many European countries, as well as the

countries those were once their colonies the community of property, as a matrimonial regime, dominates and on the termination of marriage the assets are shared equally between both the spouses.In India it prevails in Goa and Pondicherry

4.2 SEPARATION OF PROPERTY SYSTEM

In England a married women had no legal existence as per common law. The wife's property was merged in that of her husband. In the words of Blackstone, "by marriage husband and wife are one person in law, that is, the very being or legal existence of women is suspended during marriage, or is at least incorporated and consolidated in that of the husband." He further adds that, "all the rights, duties and disabilities acquired by marriage depends upon this very principle."[80]

Thus her property, either possessed by her before the marriage or during the marriage, became that of her husband's absolutely or he may also choose to make his own during the coverture. Also if the wife survived the husband, the property so vested in the husband would pass on to his representatives and not to wife. Wife's freehold property that she held, vested in both of them and husband acquired sole management and control of it during marriage. [81] Husband could not sell this property but after the birth of a child he acquired an interest for life. Thus husband could say that," what is yours is mine, but what is mine is my own".

This scheme lasted until 1870, after which the courts of equity mitigated the hardships of the married women to some extent. Courts of equity were not bound by rules of common law and were free to consider all the facts and circumstances of the case before it and adapt the means to the end.[82] The goal was achieved by a systematic and inventive development of the principle that "even though a person might not be able to hold property of his own, it might be held for his benefit by a trustee whose sole duty was to carry out the terms of the trust."[83] This principle created a 'separate property' for the married woman for her 'separate use', on the basis of the declaration of the settlor.[84] With regard to this 'separate property', the married woman was "released and freed" from the shackles and incapacity of coverture, and invested with the rights and powers of a person who is sui juris.[85] Though this was a tremendous change bought in by the courts of equity, it still could not make a married women a feme sole, in respect of her own property.[86]

Thus, to some extent, equity provided protection to those married women whose property was the subject of a marriage settlement, but, the women who married without a marriage settlement, or

[80] Blackstone, *Commentaries on Law of England,* 430 (I).
[81] See Dicey, *Lectures on the Relation Between Law and Public Opinion in England During the Nineteenth Century*, 372(2nd ed., 1952).
[82] Pollock and Maitland," *The History of England Law"* 190 (2nd ed., 1968).
[83] Supra 79.
[84] Johnson v. Clark (1908)1.
[85] Taylor v. Meads (1865).
[86] Supra 79.

broadly speaking, women belonging to poorer classes, were still governed by the common law. Until this system affected only a small class of women it betrothed little attention. But in the nineteenth century, more women earned income of their own, either in trade or on the stage or by writing or pursuing other gainful professions, the earnings acquired by their labour were not their own. A number of appalling cases of husband's confiscating their wives earning for the benefit of their own creditors or even mistress came to facade.[87]

Therefore, the intervention of the Legislature became absolute and a series of Acts were passed to mitigate the hardships which arose from the time lag between social and legal developments. Starting from 1870, the Parliament changed the whole concept of married women's property by Married Women's Property Act. Certain property of the married woman, for instance, her wages and earnings, were deemed to be her separate property.[88]

The change introduced by the Act of 1870 was limited in nature and hence, a fundamental step in this respect was sought after which led to the enactment of the Married Women's Property Act, 1882, which repealed the Act of 1870. Historically, Married Women's Property Act, 1882, was very important. "Section 1(1) of the Act empowered a married to hold and dispose of her property as a feme sole." She could now enter into a contract and also sue and be sued in her own name.[89] Married women's Property Acts of 1884 and 1908, bought no change in principle but were enacted only to clear up difficulties and ambiguities in the Act of 1882.

In contrast, under the Matrimonial Causes Act, 1857, a wife was considered a feme sole in respect of her property that she might acquire after a decree for judicial separation was passed.[90] Additionally, on the resumption of cohabitation, all the property so acquired, could be used by her for her own separate use. Similarly, in case of desertion she could seek protection order and retain her property as a feme sole.[91]

Thus the new legislation did nothing more than extending the rules of equity made for the daughters of the rich, to the daughters of the poor. Rightly said, "it was putting old wine in new bottles, free-for-sale to all and sundry".

With the passage of time this traditional method of dealing with married women's property by extending the equitable concept of "separate property" became a cliché. Therefore, Law Reform (Married Women and Tortfeasors) Act, 1935[92], was passed which for the first time gave effect to three

[87] P.M. Bromley, *Family Law*, 434(5th ed., 1976).
[88] S.1, Married Women's Property Act, 1870 (United Kingdom).
[89] Ibid, at S.1(2).
[90] S.25, Matrimonial Causes Act, 1857 (United Kingdom).
[91] Ibid, at S.21.
[92] S.1(a), Law Reform (Married Women and Tortfeasors) Act, 1935 (United Kingdom).

basic principles: (1) Equality of status and capacity (2) Separation of property and (3) Separation of liabilities.[93]

The English Parliament achieved its object of conferring on the married women a full power to hold or dispose of their property, by the year 1935. This principle of separation of property worked well till the husband remained the sole bread-earner and the wife's role was restricted to the household work. Still it could be contended that the husband was the owner of the property which was purchased out of his earnings. But during the Second World War and thereafter most married women were wage earners and thus were contributing towards the purchase of 'family assets' directly when they made a down payment towards the purchase price or while paying the instalments. They made the contribution indirectly where they contributed in the household expenses and thus liberated the husband to save more for the purchase of such 'family assets'. The courts in an overall effort to do justice between the spouses protected the interests of such married women by outspreading the meaning of section 17 of the Married Women's Property Act 1882.

The courts thus were successful in doing justice to a wife who directly or indirectly contributed towards the acquisition of family assets but they failed in getting a wife a share in the property by reason of her other contributions. For instance, a wife who looked after the household could not get anything from what they acquired during marriage. She could claim maintenance from the husband. The wife could not even claim any interest in the balance or any property bought with what she saved through her skill and hard work from housekeeping money.[94] This situation was stated by Sir Jocelyn Simon, P., in an address by a telling metaphor "The Cock can feather the nest because he does not have to spend most of his time sitting on it."

The Royal Commission noticed the injustice caused to the wife and said that "if on marriage she gives up her paid work in order to devote herself to caring for her husband and children it is an unwarrantable hardship when in consequence she finds herself in end with noting she can call her own." Therefore another Law Commission[95] recommended that the contributions made by the wife in looking after the home and family had to be recognised.

Following the recommendations of the Law Commission Matrimonial Proceedings and Property Act, 1970 was passed.

TABLE No. 4.1:

Matrimonial Proceedings and Property Act, 1970	
Section	**Explanation**

[93] See O. Kahn-Freund, *Inconsistencies and Injustices in the Law of Husband and Wife*, (1952).
[94] See Blackwell v. Blackwell, (1943) 2 All E.R.579 (C.A.); Hoddinott v. Hoddinott, (1949) 2 K.B.406; Rimmer v. Rjmmer (1952) 2 All E.R.863.
[95] Report on Financial Provision in Matrimonial Proceedings, Law Comm. No. 25.

Section 4	"empowered the court to pass three types of property adjustment orders; (1) Transfer of property for the benefit of the other spouse or for the benefit of any child of the family; (2) Settlement of property for the benefit of the other spouse or any child of the family; and (3) Variation of anti-nuptial or post-nuptial settlements."
Section 5	"Provided the matters which the court was to take into account while making any such order under section 4."
Section 5(1)(f)	"Recognised the wife's "contribution made by looking after the home or caring for the family" as a matter relevant in deciding property adjustment order."

"The court was given an over-all power to place the parties in the similar financial position in which they would have been if the marriage had not dissolved and both of them had correctly discharged their financial obligations and responsibilities towards one another."[96] Now these provisions are replaced and re-enacted in the Matrimonial Causes Act, 1973.[97]

Thus a totally new approach to family property was introduced. Before the Act of 1970 the courts could exercise these powers only to a limited extent. For instance, it could order settlement of the wife's property only where divorce was granted on ground of her adultery for the benefit of the innocent party and children of the parties.[98] Similarly it could vary ante-nuptial or post-nuptial settlements.[99] The power to award a lump sum was introduced in 1963.[100] But such a power was to be used in rare cases where the party had sufficient assets to justify it.[101] Therefore this new power of adjustment of property was important as now the court may as an alternative to the payment of a lump sum order one spouse to transfer investments rather than compelling him to sell it in order to raise the necessary capital.

On the contrary the Hindu married women enjoyed these rights in property, which English married women were granted after a struggle of about a century, from antiquity. Sir Gooroodas Banerjee has remarked, "Nowhere were proprietary rights of women recognised so early as India; and in very few ancient system of law have these rights been so largely conceded as in our own."[102]

[96] S. 5(1), Matrimonial Proceedings and Property Act, 1970 (United Kingdom).
[97] S. 24(1) and S. 25(1), Matrimonial Causes Act, 1973 (United Kingdom).
[98] The provision first originated in S. 45 of the Matrimonial Causes Act 1857, and was carried in subsequent enactments till it was repealed by S. 42(2) of the Matrimonial Proceedings and Property Act, 1970 (United Kingdom).
[99] The provision first originated in S. 192 of the Judicature (Consolidation) Act, 1925, and carried in subsequent statutes, now section 24(1)(C) Matrimonial Causes Act, 1973 (United Kingdom).
[100] S.5, Matrimonial Causes Act, 1963 (United Kingdom).
[101] See Davis v. Davis (1967), P. 185, at p. 192 per Willmer, L. J.
[102] Gooroodas Banerjee, *Hindu Law of Marriage and Stridhana*, 370 (5th ed., 1915).

Perhaps in the ancient times before the concept of the property of the women had fully developed, the concept of co-ownership of property existed between the husband and wife. But the husband had the sole right to manage this community.[103] As remarked by G.C.S. Sastri, " It was for reason of this concept that the wife enjoys the husband's property and is entitled to get maintenance out of it; and it is also by virtue of this right that she gets a share equal to that of a son, when partition takes place at the instance of the male members."[104] Also as per *Apasthamba*, "it is try virtue of this principle that the wife is not guilty of theft if she expends her husband's property." But with the passage of time and with the development of the concept of property of the women this concept of the community faded into triviality.

Since ancient times a Hindu wife was entitled to own property which was called "*stridhana"*.[105] The word "*stridhana*" is derived from '*stri*' which means women and '*dhana*' means property, therefore, it literally means woman's property. The term "*stridhana*" was not used in its simple etymological sense, but had a methodological meaning. The "*smritikaras*" differ from each other as to what items of property constitute "*stridhana*".

On the biases of power of women to dispose of her property, *stridhana* was further divided into "*saudayika*" and "*non-saudayika*". She had absolute control over "*saudayika*". On the contrary she could not dispose of "*non-saudayika*" without the consent of her husband.[106] But a liberal view was taken in Bhagwan Lal v. Bai Divali[107], where the wife living separate from her husband for nearly thirty or forty years was held not to be under the control of her husband.

The Hindu Succession Act 1956 has done away with the distinction between "*saudayika*" and "*non-saudayika*". Act provides that all property held by a woman, acquired from any source or in whatever capacity or from any person is declared to be her separate property as full owner thereof.[108]

4.2.1 Movement from Separate Property to Spousal Property

4.2.1.1 Development under English Law

Normally the spouses use and enjoy their property together and often their money and goods are so intimately mingled that the appropriation of assets of one spouse from the other becomes a ruthless task. Married people do not arrange their home thinking about future discord or separation. The very idea of having a detailed statement or understanding as to where the ownership rested is bizarre and against the matrimonial union. In fact, there is no discussion, agreement or understanding as to sharing in the ownership in the case of breakdown of marriage resulting in divorce. English courts faced the

[103] See Gopal Chandra Sarkar Sastri, *Hindu Law*, 271 (8th ed.,).
[104] Ibid, at 278.
[105] P.V. Kane, *History of Dharamashstra*, 573(2nd ed., 1974); Supra 100.
[106] Supra 103, at 573.
[107] AIR.1925 Bom.445.
[108] S.14, Hindu Succession Act, 1956.

milieu of taking into account of the above facts without invading on the rule of separation of property. The primary question before the court was, "How to find a middle ground between the principles of separation and of community while preserving the equality between the spouses in matters of property and contract at the same time?"

Earlier the courts followed the general rule that the property purchased by one spouse with his or her own money belonged to that spouse in exclusion of the other. For instance, if the house was bought by the husband with his earnings, it belonged to him.[109] But if he had transferred the house to his wife, the presumption of advancement[110] worked to give whole interest to her.[111] However, now, in view of the principle of equality between both the spouses, the strength of the presumption has been moderated because this presumption dated back to the law of Victorian days when a wife was utterly subordinate to her husband, hence, this presumption has a very little place in the law today.[112]

Courts could intervene if the principle of separation of property proved to be severe to the wife when marriage broke. Various factors were responsible for this. Firstly, after World War II, even wives were engaged in lucrative employments and hence were contributing to the family pool. Secondly, with the expansion of market and economic growth it became easy for the couple to buy matrimonial home and other things on credit. Thirdly, due to the increase in the divorce cases, the courts found themselves trapped in the situation more often than earlier.[113]

Due to the provisions of section 17 of the Married Women's Property Act, 1882[114] and under the tutelage of Lord Denning, who rightly used the discretion vested in the court in respect of property between the husband and the wife, the Court of Appeal recognized the rule that if a wife contributed directly or indirectly in money or money's worth to the initial deposit or to the mortgage instalment she gets an interest proportionate to her contribution. Looking at the special nature of the relationship of husband and wife, the court held that the transactions between a husband and a wife when they are about to be married or when they are happily married cannot be evidenced in the same way as any other commercial transaction. Hence in such cases the court must try to find out as to what might have

[109] Re Sims' Question, 2 All ER 138 (1946) (Consequently, rent received from a lodger was held to belong exclusively to the husband; Montogomery v. Blows, 1 KB 899 (1916)

[110] This doctrine of "presumption of advancement" has existed in equity which implies that where a husband purchased property in his wife's name he intended a gift of that property to her. The earliest reported case appears to be Kingdon v. Bridges. 2 Vem 6 (1688); See also T.K. Earnshaw, *Presumption of Advancement*, 96(1971).

[111] Tasker v. Taske, (1895); Moate v. Moate, 2 ALL ER 486 (1948); Silver v. Silver, 1 All ER 513 (1958).

[112] See Falconer v. Falconer, 3 Ml ER 449, 452 (1970).

[113] In England in 1871 the ratio of new marriages to divorce was 1150:1, whereas in 1952 it was 10:1, See R.H. Graveson & F.R. Crane, A Century of Family Law, Grave son and Crane, 412(1957).

[114] The relevant part of S. 17 provided, "In any question between husband and wife as to the title to or possession of property the Judge may make such order with respect to the property in dispute as he thinks fit."

been the intention of the parties at the time when the transaction was made and then to make an order which serves best in the changed circumstances.[115]

The concept of "family assets", was suggested by Lord Denning, a concept which was later used to decide the disputes of property between husband and wife. For instance, in Hine v. Hine, Lord Denning, defined the expression "family assets" as, "something acquired by the spouses for their joint use, with no thought of what is to happen should the marriage breakdown."[116] Lord Denning went to lengths of saying that section 17 of the Married Women's Property Act, 1882, is completely discretionary.[117] The underlined words appeared to give the court unrestricted discretion in disputes between husband and wife by altering existing rights by assigning a fictional intention or agreement at the time of transaction which the parties never had.

Aforesaid were the cases where the wife had made direct contribution in the purchase price or in the payment of mortgage instalments. But if the wife paid the household bills and the husband paid the mortgage Instalments, yet, all of their resources were used for their joint benefit and thus it should belong to them jointly in equal shares.[118] Where one spouse enhanced the value of the property by making certain improvements, these improvements amounted to indirect contributions. But where a spouse did only flat pack Jobs[119], like mere painting or white washing, it did not amount to indirect contributions but if a spouse did a significant work of renovation, he/she was entitled to that much of the enhanced value of the property as was due to his work.[120]

The Court of Appeal followed Lord Denning's lead in the subsequent cases until this chosen instrument in section 17 was made blunt by two succeeding decisions of the House of Lords in "Pettitt v. Pettitt[121] and Gissing v. Gissing"[122]. But in both these cases the conflicting statements with reference to indirect contribution by one spouse where the beneficial interest is held by another spouse, left the law in an uncertain state.[123] No doubt, the majority of the House was of the opinion that a wife can claim interest in the house as a result of indirect contributions, but in these circumstances she must show that this was due to the acquisition of the house in the sense that it freed the husband's own money. In other words, without the wife's help the husband could not have bought the property at all. Still, it seems, the Court of Appeal did not follow such an Inference.

[115] See Cobb v. Cobb, 2 All ER 696 (1955); Wilson v. Wilson, 2 ALL ER 447 (1963); Ulrich v. Ulrich and Felton, (1968) 1 ALL ER 67, 72 (1968).
[116] 1 WLR 1124, 1127 (1962).
[117] Hine v. Hine, 1 WLR 1124 (1962, House of Lords).
[118] Fribance v. Fribance, 1 ALL ER 357, 370 (1957, House of Lords).
[119] Button v. Button, 1 ALL ER 357, 1128 (1968, House of Lords).
[120] Appleton v. Appleton, 1 WLR 25 (1965, House of Lords).
[121] 2 ALL ER 385 (1969, Court of Appeal).
[122] 2 ALL ER 780 (1970, Court of Appeal).
[123] Supra 85, at 466.

In Falconer v. Falconer, Lord Denning, was of the opinion that Gissing v. Gissing enabled the court to draw the inference of a trust whenever both spouses were working, and one pays the housekeeping and the other mortgage instalments. "It does not matter", said Lord Denning, "which way around it is" It does not matter who pays what.[124]

It was further emphasised by Lord Denning that it was not necessary that the contribution made by the wife must be for the acquisition of the property, but if she made the contribution, it would be her indirect contribution.[125]

Thus, under the leadership of Lord Denning the Court of Appeal succeeded in doing justice to a wife directly or indirectly contributing towards the acquisition of family assets. However, the Court of Appeal did not succeed in getting share to the wife who did not contribute in terms of money. A wife who looked after the family and did not go out to work could only claim maintenance. In 1970, the Parliament came to the help of such unfortunate wives by passing Matrimonial Proceedings and Property Act, 1970.

4.2.1.2 Development Under Indian Law

In India, the Indian Divorce Act, 1869 contains some provisions for settlement of property on the grounds similar to then English Law. Parsi Marriage and Divorce Act, 1936 also contains similar provisions. The Hindu Marriage Act, 1955 deals only with the settlement of joint property of the spouses. There are no provisions for settlement of property of spouses in Special Marriage Act, 1954.

4.2.1.2.1 Indian Divorce Act, 1869

The Indian Divorce Act, 1869, based on then English law, has some provisions for settlement of spousal property and financial adjustments.

TABLE No. 4.2:Provisions for settlement of spousal property and financial adjustments.

Under Indian Divorce Act, 1869

Section	Explanation
Section 39	1. On a decree of divorce or judicial separation, the court has a power to pass such orders for the settlement of property of wife, who has been found guilty of adultery, as it thinks fit and reasonable for the benefit of the husband or children or

[124] 3 ALL ER 449, 452 (1970, Court of Appeal).
[125] Hargrave v. Newton, 3 ALL ER 866 (1971, Court of Appeal). See also Hazell v. Hazell, 1 ALL SR 923 (1972, Court of Appeal), where Lord Denning took the argument to its logical extant that even if the husband did not need her help, but if he did accept her contributions, she would be entitled to a share.

	both. 2. The court may order that whole or a part of damages recovered by the husband from the co-respondent be settled for the benefit of the children or as a provision for maintenance of the wife.
Section 40	After passing of the decree of divorce or nullity of marriage, the court may inquire into the existence of any post-nuptial settlement between the parties and may make such orders, for whole or any portion of the property settled whether for the benefit of the wife or husband or children or both children and parents, as the court deems fit. Provided that the court shall not make any order for the benefit of the parents at the expense of the children.

4.2.1.2.2 Parsi Marriage and Divorce Act, 1936

The Parsi Marriage and Divorce Act, 1936 lays down following provisions regarding settlement of property.

TABLE No. 4.3: provisions regarding settlement of property under Parsi Marriage and Divorce Act, 1936

Section	Explanation
Section 42	In the final decree the court may make such provision, with respect to property presented at or about the time of marriage which may belong jointly to both the spouses, as it deems fit.
Section 50	In any case in which the court shall pass a decree of divorce or judicial separation for adultery of the wife, if it appears to the court that the wife is entitled to any property either in possession or reversion, the court may order such settlement as it shall think reasonable to be made of any part of such property, not exceeding one half thereof, for the benefit of the children or any of them.

In Banoo Jal Daruwala v. Jal C. Daruwala[126]it was held that sec 42 is limited to the joint properties presented to the parties at or about the time of marriage and does not relate to their separate properties.

4.2.1.2.3 Hindu Marriage Act, 1955:

As discussed earlier in this chapter, the interest of a Hindu women in the property is not effected by her marriage, she is entitled to own property independently. The Hindu Marriage Act, 1955, was passed by the Parliament. The Act recognises divorce, but may be the legislature did not think that facet of marital property could be problematic as well, and hence, a simple provision in the form of section 27 was enacted which provides for distribution of property presented to the husband and wife "at or about the time of marriage" and which may "belong to them jointly".

The reason for confining the concept of spousal property to the property given "at or about the time of marriage", was twofold. Firstly, in that 1950s the women in India were hardly engaged in any profitable employment. Educating the daughters at that time was more of a luxury, or was considered an addition in the dowry.[127] The wife did not directly contribute in the family pool. Therefore, the question of division of 'family assets' acquired during marriage did not arise on divorce. Her contribution towards the welfare of the family and rearing of children was reimbursed by awarding her maintenance. Secondly, the Hindu Marriage Act, 1955 was sculpted on the basis of contemporary English Matrimonial Causes Act, 1950, which itself was desirous of the concept of spousal property.

Section 27 empowers the court to make suitable provisions, for distribution of the property presented to the parties at or about the time of marriage, in the decree which it may pass in the proceedings under the Act. Since the relief is ancillary to the main proceedings no order can be passed under section 27 if the relief in the main proceedings is denied.[128]

The words "the Court may make such provisions in the decree", in the section do not automatically imply that the court will not entertain any application under section 27 after the decree in the main petition has been passed.[129] It was held that even after the disposal of the main proceedings the court does not lose its jurisdiction for the allocation of property which falls under the domain of section 27. Even under English law the court was empowered to make provision for periodical payments to the wife "on any decree", of divorce or nullity. However, all along the English Courts held that the word "on" was not confined to the time of making the decree absolute but might mean even "shortly after".[130] Therefore, we can say that the words "in any decree" in section 27 of the Hindu Marriage Act, 1955 do not confine the jurisdiction of the court to the time of passing the decree in the main

[126]AIR 1964 Bom 126.
[127] Rama Mehta, *Divorced Hindu Women*, 9 (1975).
[128] Supra 127.
[129] Bijoy Krishna Ghosal v. Namita Ghosal nee Ganguly, AIR 1991 Cal 34.
[130] See Raydon, *Rayden on Divorce*, 718 (8th ed., 1960).

petition. Thus even after the main proceeding is terminated the court would still have Jurisdiction to entertain an application under section 27.

The words "at or about the time of marriage" are imperative. The word 'at' give the impression of the actual time of marriage and the words "about the time of marriage" mean either prior to or after the marriage, i.e., it must be around the time of marriage. Accordingly, presents given after the marriage are not strictly covered by section 27. However, the word "about" is substantial, it gives a room to the court where the circumstances of the case permit.

High Courts vary in their interpretation of the term "belong jointly to both the husband and the wife". The Karnataka High Court[131], while interpreting the word 'jointly', reached the conclusion that the property must have been presented jointly to both the parties. Consequently, a present of rupees two thousand to the husband at the time of marriage was said to have been "paid to the husband alone by way of 'Vara Dakshina' and not jointly to husband and wife. Therefore, the claim of the wife for this amount failed. The Allahabad High Court[132] on the other hand invoked the inherent powers under section 151 of the Code of Civil Procedure[133]. According to A. K. Kirty, J., "section 27 does not exclude the power of the court to pass an appropriate decree in regard to property which may belong solely to the husband and solely to the wife."[134]

However, the Allahabad High Court's view that the court can invoke inherent powers to decide a matter under section 27 was not followed by other High Courts.[135] The reason was that the words 'belonging jointly' were taken to mean 'owning Jointly'. Sultan Singh, J.,[136] of the Delhi High Court observed, "under Section 27 of the Act power is conferred upon the court to make orders for the disposal of the properties which were Jointly owned by both the husband and the wife. The section does not make any reference to the properties belonging exclusively to either the husband or the wife. It must therefore be held that there is no provision conferring any power on the court tinder the Act to pass any order with respect to property owned by one of the parties."

M. M. Punchhi, J., of the Punjab and Haryana High Court explained the words 'belonging jointly' by in Surinder Kumar v. Madan Gopal Singh[137]. According to him the word 'belong' does not, necessarily reflect title to the property in the sense of ownership, but, denotes the "joint use in their day to day

[131] M.D. Krishna v. M.C. Padma, AIR 1968 Mys 226.
[132] Kamta Prasad v. Om Wati, AIR 1972 All 153.
[133] Act V of 1908. Section 151 of the Code reads, "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."
[134] Kamta Prasad v. Om Wati, AIR 1972 All 154.
[135] Surinder Kaur v. Madan Gopal, 1980 HLR 507 (P&H); Shukla v. Brij Bhushan Makkar, AIR 1982 Del 223; Surya kant v. Jashumati, (1981) 1 HLR 473.
[136] Shukla v. Brij Bhushan Makkar, AIR 1982 Del 223.
[137] 1980 HLR 507.

living", whether the property was received "individually or collectively". Hence, the entire prominence is on the nature of property and not on the fact that to whom it was presented.

From the above discussion we can conclude that the majority of courts have interpreted 'jointly' in section 27 in terms of 'ownership'. The word 'belong' does not necessarily mean 'title' to the property in the sense of ownership. It implies the connection of the person with property in his/her possession. Thus we can say that as per section 27, if some jewellery is presented to the wife, either by her own parents or parents of her husband, it will belong to both of them, irrespective of the fact that only wife used it. Likewise, a suit or gold ring presented to the husband by the parents of his wife, belongs to both of them. Hence following this connotation, we can say that properties which are meant for the separate use of the husband or the wife are not 'his' or 'her' belongings, but 'their' belongings.

The motive of the parliamentarians in enacting section 27 was, in case a marriage breaks down, the interest of the spouses (particularly wife) is protected and it also save spouses from approaching a different court for settling property disputes which are basically integral part of the matrimonial conflict itself.

4.2.1.3 Some Important Steps Taken

A committee was appointed by the Government of India in 1971 on the Status of Women, recommended that a divorced woman be given one-third of the assets acquired at the time and during the marriage.

Ms. Veena Verma, a member of the Rajya Sabha, made a courageous attempt by introducing a private member's bill in the Rajya Sabha in 1992, namely The Married Women (Protection of Rights) Bill, 1988.Sec 3(3) of the Bill provide that wife shall be entitled to have an equal share in the property of her husband from the date of her marriage and shall also be entitled to dispose of her share in the property.

Despite the lack of development of this branch of family law in India, other areas of law such as Tort law, Motor Vehicle law and Insurance have made some advances in this direction.In Lata Wadhwa v. State of Bihar[138],the court dealt with the monetary value of services rendered by the housewives to the households in order to compute the compensation under the Motor Vehicles Act, 1988. In Sobhag Mal Jain v. State of Rajasthan[139], quantification of the value of house work performed by woman has been followed in tort cases where there was medical negligence. Compensation amounting to Rs.6,12,000 was ordered to be recovered by the State from the negligent doctors.

In Marriage Laws Amendment Bill, 2010, an unblemished provision was made in the law that, "an equal share i.e., fifty per cent in the residential property of a man, whether acquired before or after the

[138]AIR 2001 SC 321.
[139]AIR 2006 Raj 66.

marriage, will go to his wife and children in case of divorce. The wife will have to move an application seeking the share. Not just that, the Cabinet further amended the Bill by granting women and children rights in the movable assets of the man in case of a divorce." But due to conflict of opinions within the government the matter was backed off.

Again in the year 2013, "Section 13(F) the Marriage Laws (Amendment) Bill 2013 as passed in Rajya Sabha, provides that the courts would decide the 'extent' of the wife's share in her husband's self-acquired property, both moveable and immoveable, in case of a divorce.While the wife will have no share in inherited property, its value will be taken into account by court while fixing the amount of compensation or alimony to her."

4.3 COMMUNITY OF PROPERTY SYSTEM

In the United States there are nine community property states: "Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington and Wisconsin". In all these states community of property prevails with or without "modifications, alterations and adaptation".

States following the community of property approach have enacted and adopted laws based on the basic model of Uniform Marriage and Divorce Act, 1973, which distinguishes separate property from marital property and lists out various factors that the courts must take into account while awarding maintenance to the claiming spouse equitably.

Uniform Marriage and Divorce Act, 1973 approves the, "division of the property belonging to either one or to both the spouses so that it serves as the principal means of providing for the future financial needs of the spouses and also as of doing justice between them. The Act provides that an award of maintenance may be made to either spouse under appropriate circumstances, where the property is insufficient for meeting the future financial needs of the spouses. Thus, because of its property division provisions, the Act does not continue the traditional reliance upon maintenance as the primary means of support for divorced spouses. Standards are set for the guidance of the court in apportioning property and in awarding maintenance."

4.3.1 Separation Agreement:

Section 306 of the act provides that, "upon their separation or the dissolution of their marriage the parties may enter into a written separation agreement to promote amicable settlement of disputes them. The separation agreement may contain provisions for disposition of any property owned by either of them, maintenance of either of them, and support, custody, and visitation of their children."[140]

[140] Supra 45, at S.306(a).

"In a proceeding for dissolution of marriage or for legal separation, the terms of the separation agreement are binding upon the court unless, after considering the economic circumstances of the parties or any other relevant evidence produced by the parties, on their own motion or on request of the court, it finds out that the separation agreement is unconscionable i.e., unfair or inequitable. The court may look into the economic circumstances of the parties resulting from the agreement or any other relevant evidence such as the conditions under which the agreement was made, including the knowledge of the other party in order to determine whether the agreement is unconscionable or not. The terms related to property division and maintenance may not be altered by the court at the hearing if the court finds that the agreement is not unconscionable. Also, terms in the separation agreement dealing the support, custody, and visitation of children, are not binding on the court."[141]

But, "it may request the parties to submit a revised separation agreement or may make orders for the disposition of property, maintenance, and support itself, if it finds out that the separation agreement is unconscionable."[142]

The Act permits the parties to choose whether the terms of separation agreement shall or shall not be set forth in the decree. In the former event, Act permits making these terms enforceable through the remedies available for the enforcement of a judgment, including contempt, and are enforceable as contract terms.[143]

If there still remain some agreements which the parties want to retain as private contracts only, the remedies for the enforcement of a judgment will not be available for such contract. "But the determination of the court that the terms are not unconscionable will prevent a later successful claim of unconscionability under the ordinary rules of res judicata. Also such an agreement will not be modifiable as to economic matters, unless its terms expressly so permit."

It also permits the parties to agree that, except in accord with their agreement, their future arrangements may not be altered. "Such an agreement maximizes the advantages of careful future planning and eliminates uncertainties based on the fear of subsequent motions to increase or decrease the obligations of the parties. However, this does not apply to provisions for the support, custody, or visitation of children."[144]

4.3.2 Disposition of property:

Section 307 of the Act lays down two alternatives, Alternative A and Alternative B, for disposition of property by the court, "as a number of Commissioners from community property states represented

[141] Ibid, at S.306(b).
[142] Supra 45, at S.306(c).
[143] Ibid, at S.306(d) & (e).
[144] Supra 45, at S.306(f).

that their jurisdictions would prefer to adhere to the distinction between community property and separate property, and providing for the distribution of that property alone, in accordance with an enumeration of principles, resembling, so far as applicable, to those set forth in Alternative A and also they would not substitute for their own systems, the great hotchpot of assets created by Alternative A." Both the alternatives have been discussed below.

Alternative A

a) "In a proceeding for dissolution of a marriage, legal separation, or disposition of property following a decree of dissolution of marriage or legal separation by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court, without regard to marital misconduct, shall, and in a proceeding for legal separation may, finally equitably apportion between the parties the property and assets belonging to either or both however and whenever acquired, and whether the title thereto is in the name of the husband or wife or both. In making apportionment the court shall consider the duration of the marriage, and prior marriage of either party, ante nuptial agreement of the parties, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties, custodial provisions, whether the apportionment is in lieu of or in addition to maintenance, and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution or dissipation of each party in the acquisition, preservation, depreciation, or appreciation in value of the respective estates, and the contribution of a spouse as a homemaker or to the family unit.
b) In a proceeding, the court may protect and promote the best interests of the children by setting aside a portion of the jointly and separately held estates of the parties in a separate fund or trust for the support, maintenance, education, and general welfare of any minor, dependent, or incompetent children of the parties."

Alternative A, is the alternative suggested in general for implementation. It is based upon the principle that, "all the property of the spouses, however acquired, should be regarded as assets of the married couple and should be available for distribution among them upon consideration of the various factors enumerated in subsection (a). Among these are, health, vocational skills and employability of the respective spouses and these contributions to the acquisition of the assets, including allowance for the contribution thereto of the 'homemaker's services to the family unit'. This last is a new concept in Anglo-American law."

Subsection (b) gives a way to, "protect the interests of the children against the possibility of the waste or dissipation of the assets allotted to a particular parent in consideration of being awarded the custody or support of a child or children."

Alternative B

“In a proceeding for dissolution of the marriage, legal separation, or disposition of property following a decree of dissolution of the marriage or legal separation by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall assign each spouse's separate property to that spouse. It also shall divide community property, without regard to marital misconduct, in just proportions after considering all relevant factors including:

1) contribution of each spouse to acquisition of the marital property, including contribution of a spouse as homemaker;
2) value of the property set apart to each spouse;
3) duration of the marriage; and
4) economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for a reasonable period to the spouse having custody of any children.”

CHAPTER- 5

CONCLUSION AND SUGGESTION

Hindus have always regarded marriage as a sacrament, "a tie which once tied cannot be untied". The Hindu notion of sacramental marriage varies from that of Christian marriage. For Hindus marriage is not merely a sacrosanct and inviolable union and an eternal union which subsist for all lives to come. In the words of Derrett, "the intention of a sacrament is to make the husband and wife one, physically and psychically, for secular and spiritual purposes, for the life and after lives."[145] The great Hindu sage Manu declared that, "the husband is declared to be one with wife. Neither by sale nor by repudiation is a wife released from her husband. Only once is a maiden given in marriage."[146] A passage in *Rig Veda* reads as, "be thou mother of my heroic children, devoted to gods, be thou queen in thy father-in-law's household. May all Gods unite the hearts of us two into one."[147] According to Vedas, marriage is a union of "bones with bones, flesh with flesh and skin with skin, the husband and wife become as if they are one person."[148]

Among Hindus, "the wife is not just *patni* (wife) but *dharmapatni* (partner in performances of duties).[149] She is also called *ardhangini*, half of her husband."[150] According to the Vedas dharma should be practiced by man together with his wife.

[145] J. Ducan M. Derrett, *A Critique of Modern Hindu Law*, 287 (1950).
[146] Manu Smriti, IX, 48
[147] Rig Veda, IX, 85
[148] Shyama Charan Sarkar, *Vyavastha Chandrika*, 480
[149] See Manu Smriti, IX, 64-68
[150] See Satapatha Brahma, V.I, 6.10

Very rarely one comes across a text or two which mentions certain circumstances in which a wife can give up her husband. One such text is of Narada which states that, "Another husband is ordained for women in five calamities, namely, if the husband be unheard of, or be dead, or adopts another religion, or be impotent, or becomes an outcaste."[151] Accordingly there are some texts as per which the husband can renounce his wife.[152]

Thus in the era of *Smriti* husband and wife were allowed to give up on each other in very exceptional circumstances. After the era of *Smriti* law became more rigid and marriage was regarded as an indissoluble union.[153]

Customary divorces were recognised in some caste and sub-castes.[154] But customary divorce was a privilege only for lower caste, only in a very high castes customary divorce was allowed. In the latter half of 19th century divorce was introduced in India for two classes of persons namely, those who converted to Christianity and consequently their spouses refused to live with them and secondly for Christians.

Baroda was the first state to introduce divorce laws for Hindus. the law was basically influenced by the then English matrimonial law, and thus the Baroda Act, 1937 was based on Matrimonial Causes Act, 1937.

Many attempts were made at introducing divorce law at an all India level and a breakthrough was made when in 1944 the Hindu Law Reform Committee was constituted under the chairmanship of Sir Benegal Narsing Rau. Committee suggested a Uniformed Hindu Code applicable to all Hindus but it invoked opposition from the orthodox section of Hindus. Finally, between 1954 to 1956 separate bills were introduced covering five areas of Hindu Law, i.e., Marriage and Divorce, succession, adoption, maintenance, and minority and guardianship and thus were passed respective legislations.

Though the maintenance has been advocated in these legislations but their adequacy has time again questioned by legal fraternity particularly by academicians.The terms "alimony" and "maintenance" owes its origin in Indian law to English law. In case the husband neglected or refused to pay the wife a suitable allowance on their separation the wife could sue the husband. The refusal by husband was considered as an injury to the wife and it was redressed by assigning her a competent maintenance. The concept of maintenance emerged because in earlier English law, "by marriage, husband and wife are one in law, the very being of legal existence of wife is suspended or merged with the husband during marriage." Since the wife had no independent personality, she was granted alimony on divorce, as she lacked any means. During this period concept of separate property of women evolved in English

[151] Narda. XII, 93
[152] Manu Smriti, IX, 80
[153] Pandurang Vaman Kane, *History of Dharamashasta*, 620 (1930).
[154] Banerjee, Goorudas Law of Marriage and Stridhan, 242 (1st 1879).

law. Then in 1857, the Matrimonial Causes Act, 1857 was enacted under which matrimonial courts began by making the decree of divorce conditional on the husband's setting some property for the wife which shall be sufficient to produce enough income for her support. In 1886 next step was taken by enacting Matrimonial Cause Act, 1886, which empowered the court to pass orders on husband to pay a reasonable sum to wife weekly or monthly for her support and maintenance.

It has been observed earlier that a Hindu married woman is entitled to own property independently. Marriage does not affect her interest in the property. When Indian Divorce Act, 1869 was passed it was based on the then existing Matrimonial Causes Act. What our legislatures failed to consider was that in India property of the women was her separate property. Husband had no rights at all in her property, neither he could avail any benefit from her property without her consent. Therefore, extending the concept of maintenance to all the women seeking divorce was never completely justified in India. A woman who has sufficient property in her own name should have been excluded from the women having insufficient means. Bracketing all of them together by the legislatures has created a vacuum which has been further left over for judicial scrutiny. Therefore, a positive right to claim maintenance has been conferred uniformly among all categories of women irrespective of their personal laws and also by a secular remedy under section 125 of Code of Criminal Procedure.

Thus there is a difference of opinion as to the manner and method of assessing maintenance under the various Acts. Every statute in India provides a different criterion for determining the quantum of maintenance. Even the judicial pronouncements are not uniform. A woman following Muslim faith may get lesser than what a women following Christian or a Hindu faith may get. In this regard, principles laid down under English Law may be found useful. Section 5(1) of the Matrimonial Proceeding and Property Act, 1970, in addition to specifying certain matters that must be taken into account provides that, "the court shall, giving regard to facts and circumstances of the case, exercise its power as to place the parties so far as practicable and having regard to their own conduct just to do so, in the financial position in which they would have been if the marriage had not broken down and each party had discharged his or her obligations."

In the present twenty-first century woman's contribute equally in the acquisition 'family assets'. These assets acquired by the spouses during the marriage are known as the marital/spousal property. Our statutes lack the provision on Marital/Spousal Property. Parliament passed the Hindu Marriage Act, 1955, recognizing divorce, but the aspect of marital property did not seem to pose the problem to the legislature. Therefore, a simple provision in the form of Section 27 was enacted which provided for the adjustment of presents made "at or about the time of marriage" and which may belong jointly to both the husband and the wife. Perhaps, the reason for confining the concept of spousal property to the property given "at or about the time of marriage," might be that the Indian women in 1950s were

hardly engaged in any gainful employment. Even, the giving of higher education to the daughters at that time was considered to be luxury, or was "like another item in dowry."[155]

An identical provision also exists in section 42 of Parsi Marriage and Divorce Act, 1936. In Banoo Jal Daruwala v. Jal C. Daruwala,[156] it was held that the matrimonial court constituted under the Act does not deal with the question of the titles to properties and questions arising between a husband and a wife as co-owner of properties except only in respect of joint properties presented at or about the time of marriage. Similarly in Nandini SanjivAhuja v. Sanjiv Birsen Ahuja,[157] the Bombay High Court held that section 42 empowers the court to make provisions with respect to property which may jointly belong to husband and wife and hence the subject matter of an order under this section would only be the joint property and nothing more.

Family Courts Act, 1984[158] is another statute which makes a general provision for settlement of disputes relating to family matters between husband and wife including disputes with respect to the property of the parties or of either of them.[159] It may be interesting to note that the Special Marriage Act 1954, which is a uniform civil code applicable to all the communities in India and provides for a civil marriage do not contain any provision in this respect. The probable reason seems to be that a civil marriage was thought to be a love marriage as opposed to arranged marriage and no dowry was expected.

Judiciary too differ in its approach from case to case as in Krishna v. Padma[160] the Mysore High Court held that the property which is not presented to spouses at or about the time of marriage, is outside the purview of section 27 of Hindu Marriage Act, 1955. Whereas the Allahabad High Court in Kanta Prasad v. Omwati[161] 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 the wife. The Court drew this power from Section 21 of Hindu Marriage Act, 1955 which stated that all powers of a civil court available when deciding cases under it. Again a contrary view was expressed by Delhi High Court[162] and Bombay High Court.[163] But in SangeetaBalkrishna Kadam v. Balkrishna Ramchandra Kadam[164] the wife claimed, among other things, jewelry, furniture and household gadgets purchased with her earnings and asked for their return under section 27. The Bombay High Court exercising its inherent powers ordered the return of these items even though the articles were not strictly within the scope of

[155] Rama Mehta, "Divorced Hindu Women". (1975), at p. 9.
[156] AIR 1964 Bom. 124.
[157] AIR 1988 Bom. 239.
[158] No. 66 of 1984.
[159] Section 7 (I) Exp. (c) of Family Courts Act 1984
[160] AIR 1968 Mys. 226.
[161] AIR 1972 All. 153.
[162] *Shukla v. Brij Bhushan*, AIR 1982 Delhi 223.
[163] *Badri Prasad v. Sanjiv*, AIR 1988 Bom. 239 and *Shakuntala v. Mahesh*, AIR 1989 Bom. 353.
[164] AIR 1994 Bom. 1.

the section. But it would be far- fetched to interpret the inherent powers as conferring a power to adjust the properties belonging to the husband and the wife.

Earlier the role of women was confined to the four walls of house-hold. Thus wife could not contribute directly to the family pool. Hence, on divorce, the question of division of family assets' acquired during marriage simply did not arise. At any rate, her contribution towards the welfare of the family and rearing of children was compensated through the award of matrimonial maintenance. Moreover, since matrimonial remedies under the Hindu Marriage Act were modelled on the basis of contemporary English Matrimonial Causes Act, 1950, which itself was wanting in terms of the concept of spousal property, therefore, there did not seem to be much occasion for anticipating the problems of twenty first Century in terms of settlement of property acquired during the subsistence of marriage.

The law has to evolve to meet the needs of the society. All the laws, be it the law of marriage and divorce, or succession and inheritance, have widened their horizons to meet the needs of the society. Scenario back in nineteenth century was much different than that prevailing today. Thus, the laws which provided effective remedies then now raise questions in our mind. Some of which being:

1. Today a large number of woman, especially in metro cities are either professionals or are engaged in other gainful employments are directly contributing in family assets. In an unfortunate event of divorce all she is awarded is maintenance. What about the assets acquired by her jointly with her husband during marriage? Or property bought by one spouse from his own income in the name of the other?
2. In our contemporary world, where women in a larger number are employed in gainful employments or have their own income, and where principal of equality of sexes is well realised, a view is gaining ground that in cases where husband has insufficient means he should be given maintenance by the wife. Hindu Marriage Act, 1955 provides for it, but this is not so under any other statute in India. Is this the feminist approach we are fighting for?
3. Should the household services performed by either of the spouse be taken into account while awarding maintenance? Is it possible to calculate the monetary value of these services?
4. After passing of Hindu Succession (Amendment) Act, 2005, daughter have been made coparceners in their father's property and have all the rights and liabilities that are available to the son. Thus they are entitled to fifty percent of the father's property and in an unfortunate even of divorce they are also entitled to maintenance from husband. Is this really the equality we are seeking for?
5. There are numerous cases where for tax planning the husband transfers his property in the name of wife. Hence, wife is the owner of the property purchased by husband with his own money. In whose name will such property stand on divorce? Should the property stand in name

of wife who has done nothing to earn it or should the Husband, who has cheated the government, be given a leverage?

6. Government has recently come up with a welfare scheme for upliftment of women where a 35% subsidy is given to the woman who starts a business in her name. There may be a case where primary capital investment is by husband and he is the one running business in his wife's name. Will court consider this factor on occasion of divorce?
7. How IPR will be divided, if Intellectual Property is developed by the Husband with idea given by the wife? Will she be entitled to a share in royalty?
8. Where business is established by both of them together and both have worked hard for goodwill of the business, how will their shares be determined on divorce? Will the maintenance suffice all the effort and hard work that has gone down in raising the business?
9. In this stage of digitalisation will the expenditure incurred by one spouse from the account of another be taken into the consideration by the court where the other spouse fails to pay his creditors?
10. Further the concept under Section 27 of Hindu Marriage Act, 1955 providing for the adjustment of presents made "at or about the time of marriage" and which may belong jointly to both the husband and the wife is itself insufficient. When we consider marriage as a union of souls, is this union only for the day of marriage?
11. Uniform Civil Code is a very heated topic of debate these days and also uniform Civil Code Bill in pending in the Parliament but nowhere in that bill is mentioned a uniform law for distribution of Spousal Property.
12. Our Matrimonial laws are based on English laws and so is our law of Maintenance. But now even the Court of Appeal in UK, has recognized the rule that if a wife contributed directly or indirectly in money or money's worth to the initial deposit or to the mortgage instalment she gets an interest proportionate to her contribution. Isn't it the time already that we need to develop law in this regard as well?

All these questions raise a serious doubt on the legislative system prevailing. The system which suffice the needs of the citizens then is now unable to meet their wants. It is time that the legislators fill in this gap of two hundred years by enacting a law which meets the requirements of its citizens and can also answer the above questions raised by the author. The insufficiency of the present system in dealing with the Spousal Property thus proves the hypothesis of the researcher that, "Inadequacy and inconsistency in law governing the economic interest of the spouses during the subsistence and dissolution of marriage necessitates a uniform legislation".

As Dr. Radhakrishnan rightly remarked, "To survive we need a revolution in our thoughts and outlook, from the altar of the past we should take the living fire and not the dead ashes. Let us remember that past, be alive to the present and create future with courage in our hearts and faith in

ourselves." Thus following are some suggestions which the researcher purposes keeping in mind the current perspective.

1. An exclusive uniform legislature dealing with the provisions of spousal property should be enacted.
2. Legislature should clearly define the concept of spousal property while distinguishing it from the provisions of Section 27 of Hindu Marriage Act, 1955, Section 42 of Parsi Marriage and Divorce Act, 1936,Section 7 (I) Exp. (c) of Family Courts Act 1984 and Maintenance.
3. The legislature should clearly differentiate and categorize the women working in gainful employments outside their household and the ones engaged in the domestic house hold work.
4. Provisions for division of property at the time of divorce shall be different for the above two categories of women as the probability of holding the property in one's name is very different in both the above categories.
5. In the event of divorce of a women engaged in domestic house-hold work and contributing indirectly in acquiring family assets, the legislators can make provision for maintenance at the time of divorce. These provisions can be similar to the ones prevailing today.
6. In the event of divorce of a women engaged in gain-full employments outside and making direct contributions in acquiring family assets, the legislature can adopt of the systems of divisions of spousal property, i.e., separate property system or community property system (as discussed in chapter 4).
7. Division of spousal property in any event besides divorce shall also be clearly mentioned. For instance: bankruptcy.
8. Rights of a spouse in the property of the other spouse during subsistence of marriage should also be clearly defined and demarcated.
9. The legislators should clarify once for all that whether the "inheritable or inherited property" of either of the spouse shall be taken into account while awarding maintenance or while dividing the matrimonial property.
10. The court should, having regard to facts and circumstances of the case, exercise its power as to place the parties as far as practicable in the financial position in which they would have been if the marriage had not broken down and each party had discharged his or her obligations.
11. A procedure shall be established wherein the parties will be given a right to raise necessary objections on the above order of the court.
12. Marriage Registration number should be linked with the ADHAAR card of the parties and ADHAAR should be made mandatory for acquisition of property, so that the court can verify the schedule of the property so attached with the application for distribution of Spousal Property.
13. A provision for Pre-Nuptial and Post-Nuptial agreements should be made.

14. The case regarding distribution of spousal property should be allowed to be filled only after the passing of decree of divorce, i.e., A Court for Distribution of Spousal Property on Dissolution of Marriage.
15. Any maintenance proceedings pending will not vitiate the courts power of distribution of spousal property.
16. Stages of the case have been enumerated below:

FIGURE No. 5.1

After passing of Decree of Dissolution of Marriage the interested party should make an application before the court for distribution of the Spousal Property. The Application should be accompanied with a Schedule containing details of the properties held by both the parties jointly and separately, indicating the source of such property as.

↓

Notice regarding same to be sent to the opposite party. The opposite party would file a reply for the same and present his/her case. Provisions for Ex-Parte settlement should be provided for in case of non-appearance of the one party.

↓

The court shall then appoint a mediator who would have the power to determine and define the scope of Spousal Property taking into consideration the objections raised by both the parties.

↓

Mediator shall have quasi-judicial powers and shall have all the powers of the civil court i.e., call for witness, examining witness on oath etc. Mediator can make its own rules and regulations for successful disposal of the case.

↓

After considering all the facts and circumstances and evidence before it, the mediator shall make an award.

↓

Execution of the award will be done by the civil court. And any further objections made by the parties shall be settled by the civil court.

17. The procedure must be completed within a period of sixty days from the date of appointment of the mediator.

Author suggests that proceedings before the mediator should be at par with the proceedings before an arbitrator under the provisions of Arbitration and Conciliation Act, 1996. The order of the mediator shall be allowed to be challenged only after passing of the final award by the mediator.

Author has suggested the legislators to categorize the women into two categories because in UK laws the legislators and judiciary are still struggling with the concept as to how the division of spousal property is to be made for women contributing to family assets directly and women contributing to family assets indirectly and USA laws are so developed that they don't face this problem now as their law dates back to 1943. Hence in India if we categorize the women in the above categories it will be easy for the judiciary to dispose of the cases and easy for citizens to adat to it.

Legislators would have to clearly define the concept of Spousal property and also chose one of the three systems of spousal property i.e., (1) separate property system, (2) community property system, and (3) deferred community system. These systems have been explained in detail by the author in earlier chapters.

Legislators should also clearly define the extent and manner in which the spousal property can be used by either of the spouse during subsistence of marriage. Whether a limit is to be imposed on such usage is left to their discretion but if they chose to limit it they must do it reasonableness.

Author feels that the "inheritable or inherited property" should be excluded as we are only confining the Act to the properties acquired during the marriage. Also under Hindu Law the "inheritable or inherited property" constitutes the joint family property of that person's coparcenary, middling with which could further complicate the matter.

While the concept of Digital India is in the making, linking the marriage registration number with the ADHAAR card of the parties would be a splendid step. Widening the horizon, it would solve many issues like bigamy as well. Chances of fraud will be minimized. When government will have everything already within its system the time taken for disposing of matrimonial cases will also be reduce.

Pre-Nuptial and Post-Nuptial agreements will further provide for transparency in the relationships and would also save the parties from unnecessary drama that happens on the division of their assets.

The only reason that the author is suggesting that the case for distribution of spousal property should allowed to be filed after passing of decree of divorce is because there is already a lot of other cases going on parallel with that of divorce and a lot of drama is happing at once. So once the decree for

divorce is passed the parties will have a clear and a rational mind and thus they will be able to deal with their properties more rationally. The author has considered all the possible outcomes while suggesting the stages of the proceedings.

Uniform law on distribution of Spousal Property is the need of the hour and legislators must take requisite steps in this behalf.

BIBLIOGRAPHY

BOOKS

1. Ali Syed Ameer, Principles of Mohammedan Law, Allahabad Law Emporium, fifth Edition, 1983.
2. Aggarwal S.N. revised by Prafulla C. Pant, Commentary on The Law of Maintenance, Orient Publishing Company, Third Edition, 1995.
3. American Law Institute, Principles of the Law of Family Dissolution: Analysis and Recommendations, 2008.
4. Banerjee Gooroodas, Hindu Law of Marriage and Stridhana, Fifth Edition, 1915.
5. Bromley P.M., Family Law, Fifth Edition, 1976.
6. Buckley L.A., Matrimonial Property and Irish law: A case for community, Northern Ireland Legal Quarterly, 2012.
7. Derrett J. Ducan M., A Critique of Modern Hindu Law, 1950.
8. Diwan Paras, Law of Marriage & Divorce, Universal Law Publishing, seventh Edition, 2016.
9. Dicey, Lectures on the Relation Between Law and Public Opinion in England During the Nineteenth Century, Second Edition, 1952.
10. Dr. Diwan Paras and Diwan Peeyushi, Modern Hindu Law, Allahbad Law Agency, Twentieth Edition,2009, reprint 2011.
11. Dr. Jain Ashok K, Family Law-1, Ascent Publication, Fifth Edition, 2014.
12. Dr. Myneni S.R., with a Foreword by Dr. Dwarakanath S. & Prof. Khan.A, Family Laws in India, 2009.
13. Freund O. Kahn, Inconsistencies and Injustices in the Law of Husband and Wife, 1952
14. Graveson R.H. & Crane R.F., A Century of Family Law, Grave son and Crane, 1957.

15. Homer J. Clark, Jr., The Law of Domestic Relations in the United States, Second Edition, 1988.
16. Kane P.V., History of Dharamashstra, Second Edition, 1974.
17. Mehta Rama, Divorced Hindu Women, 1975.
18. Parashar Archana & Prof. Dhanda Amita, Redefining Family Law in India, 2008.
19. Pollock and Maitland, The History of England Law, Second Edition, 1968.
20. Prof. (D) Vibhute Khushal and Aynalem Filipos, Legal Research Methods (Teaching Material), Justice and Legal System Research Institute.
21. Raydon, Reydon on Divorce, Eight Edition, 1960.
22. Saharay H.K., Laws of Marriage & Divorce, Eastern Law House, Fifth Edition, 2007.
23. Sahu Shweta, National Law University Odisha, Working Women and Changing Dynamics of Family: The Concept of Matrimonial Home Today.
24. Sarkar Lotika, Women's Movement and Legal Process, Occasional Paper, CWDS, No.2.
25. Sastri Gopal Chandra Sarkar, Hindu Law, Eighth Edition.
26. Scott Sorensen-Jolink, Hon. Katherine E. Tennyson, Trina J Storm, Family Law Series, Volume 3: Property Rights in Divorce, Oregon State Bar Legal Publications, 2013.

JOURNALS

1. A. N. Allott, The Effect of Marriage on Property in the Gold Coast, The International and Comparative Law Quarterly, Vol. 5, No. 4, Page 519-533 Cambridge University Press on behalf of the British Institute of International and Comparative Law, 1956.
2. Antony W. Dnes, The Division of Marital Assets Following Divorce, Journal of Law and Society, Vol. 25, No. 3, Page 336-364 Published by: Wiley on behalf of Cardiff University, 1998.
3. Alison Diduck and Helena Orton, Equality and Support for Spouses, The Modern Law Review, Vol. 57, No. 5, Page 681-702, Wiley on behalf of the Modern Law Review, 1994.
4. Back Matter, Family Law Quarterly, Vol. 42, No. 2, American Bar Association, 2008.
5. Barbara Brudno Gardner, Marital Property and the Conflict of Laws: The Constitutionality of the "Quasi Community Property" Legislation, California Law Review, Vol. 54, No. 1, Page 252-281, California Law Review, Inc. 1966.
6. Benjamin N. Henszey and Arnold F. Shapiro, Distribution of Pension Benefits on Divorce: Some Unresolved Analytical Issues, The Journal of Risk and Insurance, Vol. 58, No. 3, Page 480-496 Published by: American Risk and Insurance Association, 1991.

7. Betsey Stevenson, The Impact of Divorce Laws on Marriage-Specific Capital, Journal of Labour Economics, Vol. 25, No. 1, Page 75-94,The University of Chicago Press on behalf of the Society of Labour Economists and the NORC at the University of Chicago, 2007.
8. Charlotte K. Goldberg Charlotte K., Opting in Opting out: Autonomy in the Community Property States, 72 Louisiana Law Review, Page 1-13, 2011.
9. D. Bradley, Sexual Equality and Maintenance Allowances in Sweden, Oxford Journal of Legal Studies, Vol. 9, No. 3, Page 403-417, Oxford University Press, 1989.
10. Dorothy M. Stetson, Gerald C. Wright and Jr., The Effects of Laws on Divorce in American States, Journal of Marriage and Family, Vol. 37, No. 3, Page 537-547, National Council on Family Relations, 1975.
11. E. H. Scamell, Offer and Acceptance by Teleprinter, The Modern Law Review, Vol. 19, No. 1, Page 89-90, Wiley on behalf of the Modern Law Review, 1956.
12. E. K. Quansah, Determining Matrimonial Property Rights of Non-Domiciled Spouses: The Applicable Law in Botswana, Journal of African Law, Vol. 48, No. 1, Page 104-110, School of Oriental and African Studies, 2004.
13. Ellsey, Marriage or Divorce? ,22 U Kan City L Rev, Page 9-17, 1953.
14. E. R. S., Community Property: Division of Expectancies as Community Property at Time of Divorce, California Law Review, Vol. 30, No. 4, Page 469-472, California Law Review, Inc., 1942.
15. Friedmann, Law in changing Society, University of California Press, Berkeley, Page 236, 1959.
16. Ira Mark Ellman, The Maturing Law of Divorce Finances: Toward Rules and Guidelines, Family Law Quarterly, Vol. 33, No. 3, Page 801-814, American Bar Association,1999.
17. J. Thomas Oldham, the 1997 Marital Property Rights Symposium, Family Law Quarterly, Vol. 31, No. 1, Page 1-3, American Bar Association, 1997.
18. J. Thomas Oldham, MARITAL PROPERTY RIGHTS OF MOBILE SPOUSES, GPSolo, Vol. 26, No. 2, The Best Articles Published by the ABA, Page 12-13, American Bar Association, 2009.
19. Janet Leach Richards, A Guide to Spousal Support and Property Division Claims Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Family Law Quarterly, Vol. 41, No. 2, Symposium on Bankruptcy Law, Page 227-248, American Bar Association, 2007.
20. Jeffrey Traczynski, Divorce Rates and Bankruptcy Exemption Levels in the United States, The Journal of Law & Economics, Vol. 54, No. 3, Page 751-779, The University of Chicago Press for The Booth School of Business, University of Chicago and The University of Chicago Law School, 2011.

21. Jeffrey S. Gray, The Economic Impact of Divorce Law Reform, Population Research and Policy Review, Vol. 15, No. 3, Page 275-296, Springer in cooperation with the Southern Demographic Association, 1996.
22. Joseph W. Mcknight, Defining Property Subject to Division at Divorce, Family Law Quarterly, Vol. 23, No. 2, Special Issue on Property Division at Divorce, Page 193-217, American Bar Association, 1989.
23. Joanna Miles, Equality on Divorce? The Cambridge Law Journal, Vol. 60, No. 1, Page 46-49, Cambridge University Press on behalf of Editorial Committee of the Cambridge Law Journal, 2001.
24. John M. Nunley and Alan Seals, The Effects of Household Income Volatility on Divorce, The American Journal of Economics and Sociology, Vol. 69, No. 3, Page 983-1010, American Journal of Economics and Sociology, Inc. 2010.
25. June R. Carbone, A Feminist Perspective on Divorce, The Future of Children, Vol. 4, No. 1, Children and Divorce, pp. 183209, Princeton University, 1994.
26. Kevin Gray, The Family Home on Divorce, The Cambridge Law Journal, Vol. 41, No. 2, pp. 228-231, Cambridge University Press on behalf of Editorial Committee of the Cambridge Law Journal, 1982.
27. Kahn and Freund, Matrimonial Property- Some Recent Developments, 22 Modern Law Review, Page 241-248, 1959.
28. Kasner Jerry A. and Golden Alvin A., An Overview of Community Property Law, American College of Trust and Estate Counsel, 1999.
29. Laura S. Underkuffler, On Property: An Essay, The Yale Law Journal, Vol. 100, No. 1, Page 127-148, The Yale Law Journal Company, Inc, 1990.
30. Lee Whitmire, Jr., Maintenance on Appeal, Law and Contemporary Problems, Vol. 10, No. 5, Children of Divorced Parents, Page 757-777, Duke University School of Law, 1944.
31. Lenore J. Weitzman, Review by Kevin Stenson, The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America, The British Journal of Sociology, Vol. 38, No. 2, Page 288-289, Wiley on behalf of The London School of Economics and Political Science, 1987.
32. Lewellyn Hendrix and Willie Pearson Jr., Spousal Interdependence, Female Power and Divorce: A Cross-Cultural Examination, Journal of Comparative Family Studies, Vol. 26, No. 2, Page 217-232, Dr. George Kurian, 1995.
33. Marriage, The International and Comparative Law Quarterly, Vol. 25, No. 1, Page, 242-243, Cambridge University Press on behalf of the British Institute of International and Comparative Law 1976.

34. Monahan, State Legislation and Control of Marriage, 2 Journal of Family Law, Page 30, 34-35, 1962.
35. O. M. Stone, Private Contract and Family Law, The Modern Law Review, Vol. 19, No. 1, Page 90-92, Wiley on behalf of the Modern Law Review, 1956.
36. Property, Family Advocate, Vol. 35, No. 4, Page 34-37, American Bar Association, 2013.
37. Sheryl Scheible Wolf Introduction to the Special Issue on Family Law and Bankruptcy, Family Law Quarterly, Vol. 31, No. 3, Special Issue on Family Law and Bankruptcy, Page369-376, American Bar Association, 1997.
38. Simon Clark, Law, Property, and Marital Dissolution, The Economic Journal, Vol. 109, No. 454, Conference Papers, Page C41C54, Wiley on behalf of the Royal Economic Society, 1999.
39. Spiros Bougheas and Yannis Georgellis, The Effect of Divorce Costs on Marriage Formation and Dissolution, Journal of Population Economics, Vol. 12, No. 3, Page 489-498, Springer, 1999.
40. Stéphane Mechoulan, Divorce Laws and the Structure of the American Family, The Journal of Legal Studies, Vol. 35, No. 1, pp. 143-174, The University of Chicago Press for The University of Chicago Law School, 2006.
41. Thomas Wolfrum, The Case for Temporary Spousal Support: Demonstrate need and ability to pay as you set the tone for future negotiations, Family Advocate, Vol. 34, No. 3, Page 12-15, American Bar Association, 2012.
42. Vickie Enis, Yours, Mine, Ours? Renovating the Antiquated Apartheid in the law of Property Division in Native American Divorce, American Indian Law Review, Vol. 35, No. 2, Page 661-694, University of Oklahoma College of Law, 2010-2011.
43. William Binchy, Family Law Reform in Ireland: Some Comparative, The International and Comparative Law Quarterly, Vol. 25, No. 4, Page 901-909, Cambridge University Press on behalf of the British Institute of International and Comparative Law, 1976.

WEB SOURCES

1. www.springer.com, visited on 08/03/2017.
2. www.jstor.org, visited on 010/03/2017.
3. www.gov.uk, visited on 07/03/2017.
4. www.parliament.uk/.../relationships/overview/lawofmarriage, visited on 12/03/2017.
5. www.gov.uk/marriages-civil-partnerships/overview, visited on 12/03/2017.
6. www.theguardian.com › Opinion › Marriage, visited on 12/03/2017.
7. www.uniformlaws.org/shared/docs/Marriage and Divorce Act, visited on 08/03/2017.

8. www.divorceknowledgebase.com, Available at http://www.divorceknowledgebase.com/guides/property-division/, visited on 09/03/2017.
9. shodhganga.inflibnet.ac.in, visited on 08/03/2017.

ANNEXURE

Dissertation Ritika

by Ritika Malhotra

FILE	RITIKA_THESIS.DOCX (117.74K)		
TIME SUBMITTED	27-APR-2017 05:50PM	WORD COUNT	26430
SUBMISSION ID	805796042	CHARACTER COUNT	145533

Dissertation Ritika

ORIGINALITY REPORT

%18	%16	%6	%8
SIMILARITY INDEX	INTERNET SOURCES	PUBLICATIONS	STUDENT PAPERS

PRIMARY SOURCES

1	www.uniformlaws.org Internet Source	%2
2	shodhganga.inflibnet.ac.in Internet Source	%1
3	Submitted to Institute of Technology, Nirma University Student Paper	%1
4	chilot.files.wordpress.com Internet Source	%1
5	lawcafe.in Internet Source	%1
6	Submitted to Gujarat National Law University Student Paper	%1
7	shodhganga.inflibnet.ac.in:8080 Internet Source	%1
8	www.familylawweek.co.uk Internet Source	<%1
9	www.kswdc.org Internet Source	<%1

10	Internet Source	<%1
11	indiankanoon.org Internet Source	<%1
12	etheses.dur.ac.uk Internet Source	<%1
13	content.next.westlaw.com Internet Source	<%1
14	Submitted to National Law University New Delhi Student Paper	<%1
15	ubt.opus.hbz-nrw.de Internet Source	<%1
16	Submitted to University of Petroleum and Energy Studies Student Paper	<%1
17	www.ikardgolden.com Internet Source	<%1
18	councilofstates.nic.in Internet Source	<%1
19	www.gogna.co.in Internet Source	<%1
20	Submitted to National Law School of India University, Bangalore Student Paper	<%1
	www.sos-net.eu.org	

21	Internet Source	<%1
22	www.divorcephoenixarizona.com Internet Source	<%1
23	O. Kahn-Freund. "Matrimonial Property--Some Recent Developments", Modern Law Review, 05/1959 Publication	<%1
24	Submitted to Rajiv Gandhi National University of Law Student Paper	<%1
25	www.nou.edu.ng Internet Source	<%1
26	www.jeywin.com Internet Source	<%1
27	files.libertyfund.org Internet Source	<%1
28	Family Law and Customary Law in Asia, 1968. Publication	<%1
29	lawteacher.net Internet Source	<%1
30	archive.org Internet Source	<%1
31	Family Law, 1977. Publication	<%1

32	Submitted to University of the West Indies Student Paper	<%1
33	Submitted to Kingston University Student Paper	<%1
34	www.bailii.org Internet Source	<%1
35	O. Kahn-Freund. "Inconsistencies and Injustices in the Law of Husband and Wife", Modern Law Review, 04/1952 Publication	<%1
36	www.scribd.com Internet Source	<%1
37	www.shareyouressays.com Internet Source	<%1
38	devgan.in Internet Source	<%1
39	www.archive.org Internet Source	<%1
40	The Reform of Family Law in Europe, 1978. Publication	<%1
41	Submitted to Kenyatta University Student Paper	<%1
42	Submitted to University of Glamorgan Student Paper	<%1
43	youthnet-uk.net Internet Source	<%1

44	164.100.47.5 Internet Source	<%1
45	O. M. Stone. "The Matrimonial Homes Act 1967", Modern Law Review, 05/1968 Publication	<%1
46	www.turtle-mountain.cc.nd.us Internet Source	<%1
47	P. Uberoi. "When is a Marriage Not a Marriage? Sex, Sacrament and Contract in Hindu Marriage", Contributions to Indian Sociology, 01/01/1995 Publication	<%1
48	lawcommissionofindia.nic.in Internet Source	<%1
49	www.worldcourts.com Internet Source	<%1
50	chennaidivorcelawyers.in Internet Source	<%1
51	Dictionary of Political Economy, 1899. Publication	<%1
52	"Cross Refrence Citation Name: PRATIBHA RANI v. SURAJ KUMAR & ANR.", Financial Law Reporter, Sept 17 2011 Issue Publication	<%1
53	Submitted to Southampton Solent University Student Paper	<%1

54	Submitted to South Bank University Student Paper	<%1
55	www-rohan.sdsu.edu Internet Source	<%1
56	www.divorceonline.com Internet Source	<%1
57	B. MacKenna. "DIVORCE BY CONSENT AND DIVORCE FOR BREAKDOWN OF MARRIAGE*", Modern Law Review, 03/1967 Publication	<%1
58	Submitted to University of Warwick Student Paper	<%1
59	www.ijlp.in Internet Source	<%1
60	www.dvmen.org Internet Source	<%1
61	Submitted to NALSAR University of Law Hyderabad Student Paper	<%1
62	Nichols, Joel A.. "Multi-tiered marriage: ideas and influences from New York and Louisiana to the international communi", Vanderbilt Journal of Transnational Law, Jan 2007 Issue Publication	<%1
63	Submitted to University of Reading Student Paper	<%1

64	Submitted to University of Wales, Bangor Student Paper	<%1
65	jamilandjamil.com Internet Source	<%1
66	www.gerwlaw.com Internet Source	<%1
67	www.legalserviceindia.com Internet Source	<%1
68	hslsa.nic.in Internet Source	<%1
69	www.uniset.ca Internet Source	<%1
70	www.wikiprocedure.com Internet Source	<%1
71	www.du.ac.in Internet Source	<%1
72	www.demarcotriscaro.com Internet Source	<%1
73	www.legalindia.in Internet Source	<%1
74	sunlight2.hubpages.com Internet Source	<%1
75	www.angloinfo.com Internet Source	<%1
	www.parliament.uk	

76	Internet Source	<%1
77	www.nicholslaw.com Internet Source	<%1
78	www.theindianlawyer.in Internet Source	<%1
79	www.hrw.org Internet Source	<%1
80	E.K. Quansah. "Recent DevelopmentsDetermining matrimonial property rights of non-domiciled spouses: the applicable law in Botswana", Journal of African Law, 04/2004 Publication	<%1
81	Alison Diduck. "Equality and Support for Spouses", Modern Law Review, 09/1994 Publication	<%1
82	Douglas, Gillian. "Winner of the SLS Annual Conference Best Paper Prize 2015 : Towards an understanding of the basis of obligation and commitment in family law", Legal Studies, 2016. Publication	<%1
83	www.qazilawassociates.com.pk Internet Source	<%1
84	www.lawyerscollective.org Internet Source	<%1

96	uir.unisa.ac.za Internet Source	<%1
97	www.law.syr.edu Internet Source	<%1
98	Submitted to University of Cambridge Student Paper	<%1
99	"NOTES OF CASES", Modern Law Review, 11/1961 Publication	<%1
100	www.dailyexcelsior.com Internet Source	<%1
101	scholarship.law.wm.edu Internet Source	<%1
102	jonathanturley.org Internet Source	<%1
103	www.ncbi.nlm.nih.gov Internet Source	<%1
104	aaml.org Internet Source	<%1
105	www.geog.leeds.ac.uk Internet Source	<%1
106	www.ili.ac.in Internet Source	<%1
107	Family Law, 1993. Publication	<%1

108	"Private International Law South Asian States' Practice", Springer Nature, 2017 Publication	<%1
109	uniformdivorce.com Internet Source	<%1
110	www.citizenlaw.com Internet Source	<%1
111	"SC: Different divorce law for Christians unreasonable.(India)", The Times of India, April 21 2015 Issue Publication	<%1
112	Constitutions of Nations, 1968. Publication	<%1

EXCLUDE QUOTES	ON	EXCLUDE MATCHES	< 5 WORDS
EXCLUDE BIBLIOGRAPHY	ON		