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Gender and Economic Inequality in India: The Legal Connection

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GENDER AND ECONOMIC INEQUALITY IN INDIA: THE LEGAL CONNECTION

DR. GITA GOPAL*

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*A woman is never fit for independence; her father protects her in childhood, her husband protects her in her youth, and her sons protect her in her old age.*¹

I. INTRODUCTION

The definition and institutionalization of equal rights at law is an important tool to combat the high degree of gender inequality in India. Gender equality is a constitutional mandate and many laws have been passed to improve the traditionally inferior social and

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¹ G. BUHLER, *THE LAWS OF MANU* 195 (F. Max Muller ed., 1990). Hindu law is based upon the Manusmritis or code of Manu, of which Manu is the author. *Id.* According to the laws of Manu a woman must worship her husband as God even if he is a womanizer. NEERA DESAI & MAITHREYI KRISHNARAJ, *WOMEN AND SOCIETY IN INDIA* 28-29 (1987). A woman also should be kept dependent by her husband because she is passionate and disloyal by nature. *Id.* at 29.

economic status of women. Only a few privileged women benefit from this legal reform. Such legal reform includes the right to receive equal pay,² to receive maternity benefits,³ to own or inherit property,⁴ to terminate unwanted pregnancies,⁵ and to be protected from cruelty at the hand of husbands through divorce or judicial separation.⁶

These legislative reforms have perpetuated a myth that Indian women occupy a high status in Indian society.⁷ The reality is, however, that legislation has not improved everyday life for the majority of women. Seventy-one percent of Indian women are illiterate.⁸ Ninety percent of the female labor force works in the underpaid and largely unregulated sectors of the economy.⁹ A majority of women hold little or no property in their own names. Economically, socially, and politically, women remain at the lowest strata of society in India.

The inferior status of women in India is often attributed to the ineffective and inadequate implementation of existing laws.¹⁰ While this is a problem, the key factor is the interrelation between legislation and the treatment of women: many gender biased legislative

² The Equal Remuneration Act, No. 25 (1976) (India), *reprinted in* P.L. MALIK, *INDUSTRIAL LAW* 821 (1990).

³ The Maternity Benefits Act, No. 53 (1961) (India), *as amended by* Act Nos. 51 of 1970, 21 of 1972, 52 of 1973, 53 of 1976, and Act 61 of 1988, *reprinted in* MALIK, *supra* note 2, at 1309; The Employees' State Insurance Act, No. 34 (1948) (India) § 50, *reprinted in* MALIK, *supra* note 2, at 609.

⁴ Hindu Succession Act, No. 30 (1956) (India), *reprinted in* ALLAHABAD LAW AGENCY, *NEW ACTS OF HINDU LAW* (1992).

⁵ Medical Termination of Pregnancy Act of 1971 § 3 (wife does not need husband's consent to terminate pregnancy).

⁶ Hindu Marriage Act, No. 25 (1955) (India), *reprinted in* ALLAHABAD LAW AGENCY, *NEW ACTS OF HINDU LAW* (1992); INDIA PEN. CODE § 498-A. Cruelty is any willful conduct by a husband, or a relative of the husband, which is likely to drive the woman to commit suicide or to cause grave injury or danger to her life, limb, or health. *Id.*

⁷ DESAI & KRISHNARAJ, *supra* note 1, at 46.

⁸ GOVERNMENT OF INDIA, MINISTRY OF INFORMATION AND BROADCASTING, RESEARCH AND REFERENCE DIVISION, INDIA 1991, A REFERENCE ANNUAL 13 (1992) [hereinafter INDIA 1991]. This figure refers to the 1981 census.

⁹ GOVERNMENT OF INDIA, SHRAMSAKTHI, REPORT OF THE NATIONAL COMMISSION ON SELF-EMPLOYED WOMEN 28 (1988) [hereinafter SHRAMSAKTHI REPORT]. The female labor force also has little occupational diversification. According to a 1981 census, approximately 79.4% of female workers are engaged in agricultural activities, mainly as laborers. *Id.* The large female representation in the agricultural sector can be misleading, as this type of employment is not an adequate substitute for challenging employment by which women can become financially independent.

¹⁰ See Meredith Sherman Fahn, *Noncompliance with India's Dowry Prohibition Act of 1961: A Society's Reactions to Imposed Law*, 4 TEMPLE INT'L & COMP. L.J. 101, 120-129 (1990).

provisions, despite the constitutional guarantee of equality, continue to reiterate traditional feudal attitudes about women's property rights and fail to provide women with equal access to economic resources. The focus must be shifted towards the basis of discriminatory legislative provisions to understand why legislation perpetuates the economic dependency of women on men.

To illustrate this economic dependence of women, this article analyzes the role of modern legislation in defining property rights of Hindu women in India.¹¹ It examines the interrelations between law and women's economic status within the family. This article submits that while law technically confers an equal social status on women, it also constrains the potential development of women by sustaining patriarchal norms, thereby denying women the access to economic resources outside the family, and providing an inequitable distribution of property within the family.¹² Part II provides a brief overview of the Indian legal system in order to provide background necessary to understand the impact of the courts on women's property rights. Part III discusses women's property rights related to marriage. Part IV explores women's property rights upon divorce. Part V explains gender and property rights upon death: it begins with the devolution of property through testamentary powers and then focuses upon gender inequalities in the intestacy context. Part VI discusses the institutionalized discrimination that prevents equal opportunities to own land. This article concludes that legal reform must be approached with the goal of eliminating underlying patriarchal beliefs that exist in many of India's modern laws concerning the economic rights of women.

II. THE INDIAN LEGAL SYSTEM

A. *The Indian Legal System*¹³

The Constitution of India, adopted by the Constituent Assembly on November 26, 1949, came into force on January 26, 1950.

¹¹ Hindu law only applies to Hindus. See *infra* text accompanying note 24. India's population consists of Hindus (82.6%), Muslims (11.4%), Christians (2.4%), and Sikhs, Buddhists, Jains and other minorities (3.6%). INDIA 1991, *supra* note 8, at 18.

¹² This article confines itself to an examination of economic rights of Hindu women within the family structure. For an examination of women within the workplace, see DESAI & KRISHNARAJ, *supra* note 1, at 50-136. For a detailed analysis of Indian women's political progress, see LESLIE J. CALMAN, TOWARD EMPOWERMENT: WOMEN AND MOVEMENT POLITICS IN INDIA (1992).

¹³ See INDIA 1991, *supra* note 8, at 25, 32, 52, 784-89; MARC GALANTER, LAW AND SOCIETY

The Constitution guarantees fundamental rights—certain basic freedoms—to all citizens individually and collectively.¹⁴ These include the right to equality before the law,¹⁵ prohibition of discrimination by the State on grounds of religion, race, caste, sex, or place of birth,¹⁶ and equality of opportunity in matters concerning public employment.¹⁷

The Constitution divides legislative powers between the Union and twenty-five states. The Indian Constitution is quasi-federal in that it is applicable to all states.¹⁸ The Union government has exclusive powers to legislate on matters enumerated in List I of the seventh schedule of the Constitution.¹⁹ The state governments have exclusive jurisdiction over matters enumerated in List II of the seventh schedule.²⁰ The Union and the states have concurrent powers over matters in List III of the seventh schedule.²¹ Personal or customary laws in List III govern matters such as marriage, divorce, intestacy, succession, joint family and partition, and adoption.²² Consequently, personal laws applicable to Hindus in one state need not necessarily be applicable to Hindus in other states.

There is an integrated system of courts to administer both Union and state laws. At the apex of the judicial system is the Supreme Court of India (Supreme Court). There is a High Court in each state or group of states. The Supreme Court has original, appellate, and advisory jurisdictions. Appellate jurisdiction can be invoked in matters involving a constitutional question or questions of law of general importance, or if a High Court is of the opinion that a question needs to be decided by the Supreme Court. Under each High Court there is a hierarchy of subordinate courts with the High Court having supervisory powers over all courts within its jurisdiction.

IN MODERN INDIA (Rajeev Dhavan ed., 1989); THE INDIAN LAW INSTITUTE, THE INDIAN LEGAL SYSTEM (Joseph Minattur ed., 1978).

¹⁴ INDIA CONST. pt. III.

¹⁵ *Id.* art. 14.

¹⁶ *Id.* art. 15(1).

¹⁷ *Id.* art. 16.

¹⁸ See DR. DURGA DAS BASU, INTRODUCTION TO THE CONSTITUTION OF INDIA 30 (1976).

¹⁹ DURGA DAS BASU, CONSTITUTIONAL LAW OF INDIA 496 (1977).

²⁰ *Id.* at 507.

²¹ *Id.* at 515.

²² See Paras Diwan, *Family Law*, in THE INDIAN LEGAL SYSTEM 633 (Joseph Minattur ed., 1978).

B. *The Constitution and Personal Laws*

Article 44 of the Constitution makes it a directive policy of the states "to endeavor to secure for the citizens a uniform civil code throughout the territory of India."²³ This has not been achieved: each religious group in India is governed by separate personal laws.²⁴ Hindu personal laws have been codified by the federal and state governments.²⁵ Many provisions in such laws, however, reflect gender biases prevalent in traditional Hindu law, which clearly contravene the constitutional guarantees of gender equality.²⁶ According to Article 13(1), the courts have the power to declare that all "laws in force" before the Constitution are void if they conflict with these fundamental rights.²⁷ State legislation that abridges fundamental rights is also void.²⁸

The courts, however, have been reluctant to hold that gender bias in personal laws rises to the level of a constitutional violation. In *State of Bombay v. Narasu Appa Mali*,²⁹ for example, the court had to decide the validity of the Bombay Prevention of Hindu Bigamous Marriage Act of 1946 which did not apply to polygamous Muslims. The petitioner argued that Article 13 of the Constitution rendered personal Muslim law permitting polygamy void because the Muslim law violated Article 15(1)'s prohibition of sex discrimination.³⁰ The court rejected this argument and upheld the validity of the Hindu statute on two grounds. First, the court held that the Constitution excludes personal law from the purview of Article 13.³¹ Second, even if the term "laws in force" included personal laws, the practice of polygamy would not violate Article 15(1) because the article is based on "vital and compelling" social, economic, and religious grounds, and not on grounds of gender.³²

²³ INDIA CONST. art. 44.

²⁴ Diwan, *supra* note 22, at 633-34.

²⁵ Hindu Marriage Act, *supra* note 6; Hindu Succession Act, *supra* note 4; Hindu Adoption and Maintenance Act, No. 78 (1956) (India), *reprinted in* ALLAHABAD LAW AGENCY, NEW ACTS OF HINDU LAW (1992); Hindu Minority and Guardianship Act, No. 32 (1956) (India), *reprinted in* ALLAHABAD LAW AGENCY, NEW ACTS OF HINDU LAW (1992).

²⁶ See *infra* parts III & IV (Hindu Marriage Act); part IV (Hindu Adoption and Maintenance Act); part V.B (Hindu Succession Act); part VI (land reform laws).

²⁷ INDIA CONST. art. 13(1). For an in-depth discussion on the scope of Article 13, see DR. DURGA DAS BASU, *SHORTER CONSTITUTION OF INDIA* 63-65 (1989).

²⁸ INDIA CONST. art. 13(2).

²⁹ 1952 A.I.R. 84 (Bom.).

³⁰ *Id.* at 88.

³¹ *Id.* at 89.

³² *Id.* *But see* Krishna Singh v. Mathura Ahir, 1980 A.I.R. 707 (S.C.) (Supreme Court indicated in dicta that part III of the Constitution does not affect personal law).

Courts have also been reluctant to apply constitutional principles to statutory provisions affecting the domestic domain. For instance, in *Kaur v. Chaudhary*³³ the issue was whether the statutory remedy of the restitution of conjugal rights violated the constitutional right of "personal liberty" in Article 21.³⁴ The Delhi High Court held that "in the privacy of the home and the married life neither Article 21 nor Article 14 have any place."³⁵ Upon review, the Supreme Court affirmed the decision, but did not address the question of whether constitutional principles apply to the home.

A recent ray of hope was seen in *In re Amina*,³⁶ a decision by a single judge bench of the Bombay High Court. The *Amina* judge held that the *Narasu Appa Mali* decision was erroneous and that personal laws must also be subject to fundamental rights.³⁷ The judge requested that this matter of public importance be heard by a larger bench.³⁸ While the matter appears straightforward, the religious and political underpinnings may prevent it from being taken up for further discussion. Nevertheless, it remains a matter of crucial importance for Indian women and requires resolution in order to achieve gender equality.

C. *The Challenge for Women: Social vs. Economic Laws*

Despite this existing confusion over whether constitutional principles are applicable to personal laws, the concept of gender equality has found significant legislative acceptance in redefining the social status of Hindu women, even in the realm of personal law. For example, the concept of equality prevails within the home, as the law refuses to accord men higher social status over women.³⁹

³³ 1984 A.I.R. 66 (Del.).

³⁴ Article 21 protects life and personal liberty. INDIA CONST.

³⁵ *Kaur*, 1984 A.I.R. at 75. The court further stated:

Introduction of constitutional law in the home is most inappropriate. . . . In a sensitive sphere which is at once intimate and delicate the introduction of cold principles of constitutional law will have the effect of weakening the marriage bond.

Id.

³⁶ 1992 A.I.R. 215 (Bom.).

³⁷ *Id.* at 219.

³⁸ *Id.* at 222.

³⁹ *See, e.g.*, Hindu Succession Act, *supra* note 4, § 14 (both spouses may hold and alienate property), § 30 (both spouses have full testamentary powers over their property); Hindu Marriage Act, *supra* note 6, § 13(1) (both spouses may sue for divorce on identical grounds), § 25(1) (both spouses may sue for maintenance), and § 9 (both spouses may sue for judicial restitution of conjugal rights); The Suppression of Immoral Traffic in Women and Girls Act, No. 104 (1956) (India) (prohibits immoral trafficking of women and protects the victims of prostitution); INDIA PEN. CODE § 498-A (cruelty by husband is a criminal offense); The Dowry

The constitutional guarantee of equality is therefore partially fulfilled. Indian women enjoy a social status of equality under the law that is enviable when compared with the position of women in other developing countries, and in some aspects, in developed countries. To enjoy such social status it is important that women have access to economic resources. Legislation regulating such access, however, is not based on standards of equality. Legal reform has sustained patriarchal norms and has fostered the dependence of women through their economic marginalization. Equality is sometimes overtly rejected, as legislative provisions may express a clear preference for males. In other cases, equality is covertly rejected by imposing gender blind norms upon an inherently unequal socio-economic relationship, which strengthens the powerful male interest. Parts III–VI illustrate the inequitable relationship between women and access to property within the family structure.

III. WOMEN'S PROPERTY RIGHTS UPON MARRIAGE

A. Dowry and Stridhan: *The Introduction to Property*

Traditionally, a woman had access to, and control over, any *stridhan* she received upon marriage.⁴⁰ *Stridhan* is movable property voluntarily presented to the bride from her family and friends. It consists mainly of jewelry, money, and clothing.⁴¹ While a woman does not have a legal right to receive *stridhan*, customary rules place an obligation on her family to provide her with some property upon marriage. The practice of *stridhan* has changed over the years and has been replaced by the concept of dowry: a price paid to the bridegroom's family in connection with the marriage. The size and nature of the dowry often controls the bargaining and finalization of the marriage plans. The custom of dowry places women in situations of unconscionable stress and violence. Young women some-

Prohibition Act, No. 28 of 1961 (India) § 4, *reprinted in* JUSTICE B.P. BERI, COMMENTARIES ON THE DOWRY PROHIBITION ACT, 1961 127–35 (1988) (asking for a dowry is a punishable offense); Medical Termination of Pregnancy Act, *supra* note 5, § 3 (husband's consent not required for medical termination of pregnancy); The Maternity Benefits Act, *supra* note 3 (provides maternity leave); The Factories Act, No. 63 (1948) (India), *reprinted in* MALIK, *supra* note 2, at 856 (provides maternity leave); The Mines Act, No. 35 (1952) (India), *reprinted in* MALIK, *supra* note 2, at 1339 (provides maternity leave); The Plantation Act (1951), *reprinted in* MALIK, *supra* note 2, at 1709 (provides creches).

⁴⁰ For a detailed discussion on the nature of *stridhan*, see BERI, *supra* note 39, at 289–473; A.S. ALTEKAR, THE POSITION OF WOMEN IN HINDU CIVILIZATION 217–33 (2d ed. 1987).

⁴¹ See Fahn, *supra* note 10, at 119.

times commit suicide to release their parents from the burden of dowry or to escape the emotional pressure from their inlaws' request for additional dowry.⁴² Another far-reaching effect of dowry abuse is the rise in female infanticide.⁴³

In 1961, the Parliament responded to these increasing atrocities by enacting the Dowry Prohibition Act,⁴⁴ which prohibits the giving or taking of any dowry in connection with marriage.⁴⁵ Merely demanding a dowry is a punishable offense.⁴⁶ Any person other than the woman who receives a dowry holds it in trust for the benefit of the woman.⁴⁷ A judicial magistrate may act upon a complaint registered by a recognized welfare institution or organization.⁴⁸ One accused of taking or demanding a dowry has the burden of proof.⁴⁹ The judge has the discretion to grant bail and set the amount.⁵⁰ If a woman dies an unnatural death within seven years of her marriage, any dowry received by her or on her behalf will be transferred to her children, if any, or to her parents.⁵¹ Further, the Indian Penal Code has codified the offense of dowry death—a woman dying of unnatural causes under harassment by her husband or any relative.⁵² The Evidence Act also has been amended so that the person accused of committing a dowry death is presumed guilty when it is

⁴² *Id.* at 113.

⁴³ *Female Infanticide in Rajasthan*, INDIA SPEAKS, Oct. 8, 1992, at 21, provides a chilling story:

The Rajput families have only one daughter each. Only the eldest daughter is allowed to survive as it is difficult to get a daughter married. The women admit that almost every family in the village is guilty of murdering their second daughter.

See generally John Van Willigen & V.C. Channa, *Law, Custom, and Crimes Against Women: The Problem of Dowry Death in India*, 50 HUM. ORGANIZATION 369, 370 (1991).

⁴⁴ Dowry Prohibition Act, *supra* note 39.

⁴⁵ *Id.* § 4. Dowry is:

[A]ny property or valuable security given or agreed to be given either directly or indirectly (a) by one party to a marriage to another party to the marriage or (b) by the parents of either party to a marriage or by any other person, to either party to the marriage or to any other person at or before or any time after the marriage.

Id. § 2. There are certain exceptions. For example, gifts voluntarily given at the time of marriage, entered on a list made for this purpose, granted by relatives of the bride, and having values that are not excessive with respect to the financial status of the donor are of a "customary nature." *Id.* § 3.

⁴⁶ *Id.* § 4.

⁴⁷ *Id.* § 6.

⁴⁸ *Id.* § 7(c).

⁴⁹ *Id.* § 8-A.

⁵⁰ See *id.* § 8(2).

⁵¹ *Id.* § 6(3).

⁵² INDIA PEN. CODE § 304-B (1986).

shown that a woman has been subjected to cruelty or harassment for, or in connection with, a demand for dowry.⁵³

The significant and well-intentioned legal reforms, however, have not been effective.⁵⁴ Dowry remains an increasing problem. Bride burning—often reported as kitchen accidents—is the most common form of violence against women. In 1986 alone there were 1,319 reported cases of bride burning nationally.⁵⁵

The fault lies with the nature of the legislative intervention. *Stridhan* traditionally provided a woman with socially acceptable access to a share of her family's property upon marriage when she moved into her husband's family. Any remaining property was reserved for her brothers or, in other words, kept within her parents' family. Once legislation gave women access to family property through inheritance, irrespective of their marital status,⁵⁶ the belief was that the practice of giving *stridhan* would be redundant. Dowry could then be restricted, provided that there were exceptions for legitimate gifts upon marriage. While the reasoning behind the Dowry Prohibition Act appeared technically logical, the reality was that, given patriarchal traditions and attitudes, women do not normally inherit family property. For example, there are no prohibitions on a person's testamentary power to will exclusively family property to the sons.⁵⁷ In this situation, the prohibition of dowry weakens the socially accepted access to property by women.

If prohibiting dowry was the only solution, such legislation should have included complimentary measures to provide women with meaningful access to alternative property. For example, "jointly-owned matrimonial property" remains a foreign concept in India.⁵⁸ If women were allowed to jointly own their *stridhan* and

⁵³ INDIA EVIDENCE ACT § 113-A, No. 1 (1872) (India). The India Evidence Act is analogous to the United States Federal Rules of Evidence.

⁵⁴ See Fahn, *supra* note 10, at 120–29 (arguing that the Dowry Prohibition Act is a failure because of lack of enforcement, legal loopholes, judicial bias against women, women's lack of financial resources, and lack of support from the Indian people).

⁵⁵ Van Willigen & Channa, *supra* note 43, at 369. "Police records do not match hospital records for third degree burn cases among younger married women; far more violence occurs than crime reports indicate." *Id.*

⁵⁶ See *infra* part V.B (intestacy).

⁵⁷ See *infra* part V.A (wills).

⁵⁸ By contrast, United States law provides a surviving spouse with rights to property regardless of gender. There are two prevailing views in the United States. First, separate property states have "elective share" statutes that allow a "surviving spouse to take a fee interest in property against a will only in property which the decedent owned at death." WILLIAM M. MCGOVERN ET AL., WILLS, TRUSTS & ESTATES INCLUDING TAXATION AND FUTURE

any marital property, a woman would be entitled to a more equitable distribution of resources within the family. Section 6 of the Dowry Prohibition Act currently provides that, in cases of dowry death, the dowry devolves upon a woman's children or her parents. This provision only affects property falling within the definition of the term "dowry." Although Section 6 is a positive provision, it should be modified to apply to any property belonging to the woman including her share of the newly provided marital property. A husband and his family would then run the risk of losing far more than just dowry upon committing a dowry offense which leads either to the woman's death or termination of the marriage. If the husband were forced to weigh his need for a greater dowry against losing half of the marital property, there may be fewer instances of wife harassment or wife burning. Without such precautions, however, it is not surprising that legislation such as the Dowry Prohibition Act has been highly ineffective and has had a significantly adverse effect on women's property rights, social welfare, and personal safety.

B. A Wife's Economic Rights

In patriarchal societies in India, although it is customarily accepted that a woman belongs to her husband's family upon marriage, a woman's rights to property within her husband's family are meager. Marriage in India is considered in terms of *obligations*, not *rights*. The law offers little help to a wife who seeks to be economically independent.

As a wife, a woman has little or no control over her husband's property. She has no right over any property legally belonging to her husband during his lifetime, even if it may have been acquired during the pendency of their marriage. The husband may will, gift, or waste the entirety of his property as he pleases. In *Vinod Kumar v. State*,⁵⁹ for example, the Punjab High Court held that a husband cannot be charged with criminal breach of trust for failure to return the wife's *stridhan* because "the matrimonial home connotes a jointness of possession and custody by the spouses even with regard to

INTERESTS § 3.8, at 117 (1st ed. 1988). The amount of the elective share varies from state to state. Second, community property states (there are only eight) view marriage as a partnership and recognize contributions made by a non-wage earning spouse such as a housewife. *Id.* § 3.10, at 136. Therefore, a surviving spouse receives half of the couple's community property—everything earned during the marriage. *Id.* § 3.10, at 133.

⁵⁹ 1982 A.I.R. 372 (P&H).

the moveable property exclusively owned by each of them.”⁶⁰ The Supreme Court overruled *Vinod Kumar’s* “jointness” concept in *Pratibha Rani v. Suraj Kumar*, holding that *stridhan* is the wife’s absolute property.⁶¹ Thus, the husband or his relatives would have no rights over the *stridhan* and they would be deemed trustees if the *stridhan* was ever placed in their hands.⁶²

The *Pratibha Rani* holding is very short-sighted and does not promote a women’s meaningful access to property.⁶³ A stronger statement would have been to accept and expand the “joint possession” theory articulated in *Vinod Kumar*⁶⁴ and to expand it so as to provide that, if a husband acquires an equal right to the wife’s *stridhan*, the wife acquires an equal right to the husband’s separate property. Furthermore, by restricting its holding to gifts which were for the wife’s sole use, the *Pratibha Rani* court may have encouraged the taking of dowry or gifts in forms that could be used only by husbands. For example, the husband could argue that the gift of a television is not *stridhan* because the wife does not exclusively use the item. While an opportunity to introduce the concept of matrimonial property at a national level was lost in these cases, it will hopefully be raised again.

A woman is also entitled to acquire economic resources through employment. Even in such situations, however, the access remains limited by legal hurdles. The remedy of restitution of conjugal rights⁶⁵ poses such a problem. One may apply for restitution of conjugal rights when either spouse has “withdrawn from the society of another” without a reasonable excuse.⁶⁶ Courts have permitted husbands to use this legal remedy to prevent women from working in places away from the matrimonial home if a husband does not agree with a woman’s desire.⁶⁷ The reasoning behind these decisions

⁶⁰ *Id.* at 376.

⁶¹ 1985 A.I.R. 628 (S.C.).

⁶² *Id.* at 633–36.

⁶³ For a contrary view on *Pratibha Rani v. Suraj Kaur*, see P.S. Jaeswal & Nishtha Jaeswal, *Anti-Dowry Legislation in India: An Appraisal*, 30 J. OF INDIAN LAW INST. 78 (1988).

⁶⁴ 1982 A.I.R. 372 (P&H).

⁶⁵ Hindu Marriage Act, *supra* note 6, § 9. In 1983 the High Court of Andhra Pradesh held that the restitution of conjugal rights violated the fundamental right of privacy and human dignity guaranteed by Article 21 of the Constitution. *Sareetha v. Venkata Subbaiah*, 1983 A.I.R. 356 (A.P.). The Supreme Court, however, later overruled this decision. *Saroj Rani v. Sudarshan Kumar*, 1984 A.I.R. 1562 (S.C.).

⁶⁶ Hindu Marriage Act, *supra* note 6, § 9.

⁶⁷ *Surrinder Kaur v. Gurdeep Singh*, 1973 A.I.R. 134 (P&H); *Gaya Prasad v. Bhagwati*, 1966 A.I.R. 212 (M.P.); *Pothuraju v. Radha*, 1965 A.I.R. 407 (A.P.); *Tirath Kaur v. Kirpal Singh*, 1964 A.I.R. 28 (Punjab). *But see* *Radhakrishnan v. Dhanalakshmi*, 1975 A.I.R. 331, 332

is that, because it is the husband's prerogative to choose the site of the matrimonial home, it therefore is the wife's obligation to live with the husband.

In *Garg v. Garg*,⁶⁸ however, the Delhi High Court held that it would be unconstitutional to give the husband the exclusive right to select the matrimonial home.⁶⁹ The court indicated that where the husband has a less remunerative position than the wife, and where the husband's conduct has been reproachable, the wife has a valid reason to live separately.⁷⁰ *Garg* does not actually provide a significant advancement for women because the court also held that, where a husband and wife cannot agree on the matrimonial home, the husband must have the final say.⁷¹ For example, the law does not support a wife's desire to work in a distant place if the husband has the financial ability to look after her. In such a case it would be possible for the husband to obtain a decree of restitution of conjugal rights. Furthermore, the husband may obtain a decree of divorce one year after a decree of restitution of conjugal rights.⁷²

Similarly, in the absence of a matrimonial proceeding for divorce or maintenance, the wife has no right to be maintained if she chooses to live separately, except upon proof of specific conditions.⁷³ By failing to place an obligation on the husband to support an economically dependent wife who chooses to live separately, the law does not provide the woman with an alternative remedy if there are inadequate grounds for divorce or judicial separation. Courts have both legitimized spousal abuse and shown a willingness to define narrowly stringent conditions by holding that beating a wife "once or twice" during a span of three years is not an adequate ground for living separately.⁷⁴

Consequently, during the course of the marriage, the wife remains under the economic control of her husband. In light of the strong social and traditional attitudes that perpetuate such control,

(Mad.) (holding there is no unqualified rule that the wife must remain with her husband where separation results from financial needs or an implied arrangement between the couple); *Pravinaben v. S.T. Arya*, 1975 A.I.R. 69 (Guj.) (same).

⁶⁸ 1978 A.I.R. 296 (Del.).

⁶⁹ *Id.* at 301.

⁷⁰ *Id.* at 302.

⁷¹ *Id.*

⁷² Hindu Marriage Act, *supra* note 6, § 13 (1-A)(ii).

⁷³ Such exceptions occur when the husband: deserts the wife, acts with cruelty causing apprehension that she will be harmed or injured, suffers from virulent leprosy, has another living wife, keeps a concubine in the house, ceases to be a Hindu, or any other cause that justifies her living separately. Hindu Adoption and Maintenance Act, *supra* note 25, § 18(2).

⁷⁴ *Shobha v. Manohar*, 2 DIVORCE AND MATRIMONIAL CASES 169, 170 (1989).

it is disheartening that legal reform not only fails to attempt to break the economic dependence of women within the relationship of marriage, but even perpetuates it through existing archaic legal provisions.

IV. WOMEN'S PROPERTY RIGHTS UPON DIVORCE

Before the Hindu Marriage Act of 1955, divorce was not permitted.⁷⁵ The Hindu Marriage Act provides both the husband and the wife the right to file a petition for a divorce decree.⁷⁶ Aside from its social unacceptability, divorce is usually not a realistic option for most women who have little or no financial independence or education.⁷⁷

The legal system is inherently unfair to women seeking a divorce. As mentioned previously, a woman is the legal owner of her *stridhan*.⁷⁸ Under Section 27 of the Hindu Marriage Act, a divorce court may only adjudicate rights regarding property "presented, at or about the time of the marriage, which may belong jointly" to the couple.⁷⁹ Because *stridhan* is not joint property, a woman must endure two lawsuits. She must first participate in the divorce proceedings. The woman must then bring another suit in a civil court against her ex-husband to recover her *stridhan*. The additional legal expenses and stress from prolonged litigation deter women from trying to recover their property.⁸⁰ Another unpleasant alternative is that the wife can initiate an action against her husband for a criminal breach of trust if she can prove that the disputed property is part of a dowry which is illegal.⁸¹ Section 27 of the Hindu Marriage Act therefore operates against a woman's economic interests.

Upon separation or divorce, both spouses have the right to ask for maintenance, although many women do not even know of this

⁷⁵ Vinaya Saijwani, *The Personal Laws of Divorce in India with a Comment on Chaudry v. Chaudry*, 11 WOMEN'S RTS. L. REP. 41, 50 (1989) (provides comparison between Hindu and Muslim personal laws of divorce).

⁷⁶ See *supra* note 6, § 13(1). The grounds for divorce include: adultery, cruelty, desertion, apostasy, mental disorder, leprosy, sexually transmitted diseases, entrance into a religious order, or absence. *Id.*

⁷⁷ Terree McGovern, *Modern Matrimonial Matters in India*, 70 WOMEN LAW. J. 18, 19 (1984).

⁷⁸ *Pratibha Rani v. Suraj Kumar*, 1985 A.I.R. 628, 636 (P&H).

⁷⁹ See *supra* note 6, § 27.

⁸⁰ See *Maharajan v. Sarojini*, 1988 A.I.R. 175, 178 (Or.). The court further stated that "the consequence is not an enviable one, particularly in view of the weaker status of women in our society and thus there is urgent need of a remedial measure through appropriate legislation." *Id.*

⁸¹ *Pratibha Rani*, 1985 A.I.R. at 643.

right.⁸² Although maintenance orders are case-specific, courts have been relatively sympathetic towards women. Thus, in *Radhakumari v. Nair*,⁸³ the court held that a husband could not claim immunity from liability to pay maintenance even if the wife was supported by her parents.⁸⁴ There is no statutory definition of maintenance. Courts therefore consider factors such as social status, age, education, and the needs of the children.⁸⁵ In *Urmila Devi v. Hari Prakash Bansal*,⁸⁶ for instance, the court held that an able-bodied husband is capable of working, and, thus, should maintain and support his wife despite the fact that neither spouse had an income.⁸⁷ Furthermore, in *Waghmare v. Waghmare*,⁸⁸ the court held that the wife's right to *pendente lite* maintenance and to litigation expenses should be available without reference to conduct because the wife's claim to maintenance is an incident of the status of matrimony.⁸⁹

A woman must face many hurdles in her fight to obtain maintenance. For example, in *Guredev Kaur v. Channo*,⁹⁰ the Punjab and Haryana High Court held that because it is a personal obligation, the payment of maintenance must cease with the death of the husband.⁹¹ The widow would then have to file an application for maintenance against her husband's estate pursuant to Section 22 of the Hindu Adoption and Maintenance Act.⁹² Another court has held that an agreement in which a husband waives his right to child custody in exchange for the wife's relinquishment of her right to maintenance does not violate public policy.⁹³

Courts traditionally have not been generous regarding the amount of a maintenance order granted to a wife. In *Rambu Sharma v. State*,⁹⁴ the court held that *pendente lite* maintenance is one-fifth of the husband's average net income for the past three years minus the wife's income.⁹⁵ If a person who has sufficient means refuses to

⁸² Hindu Marriage Act, *supra* note 6, §§ 24, 25; Hindu Adoption and Maintenance Act, *supra* note 25, § 18; INDIA CODE CRIM. PROC. § 125; *see* McGovern, *supra* note 77, at 19.

⁸³ 1983 A.I.R. 139 (Ker.).

⁸⁴ *Id.* at 143.

⁸⁵ *Id.* at 145.

⁸⁶ 1988 A.I.R. 84 (P&H).

⁸⁷ *Id.* at 86.

⁸⁸ 1979 A.I.R. 264 (Bom.).

⁸⁹ *Id.* at 266. *Pendente lite* maintenance provides support during the proceedings.

⁹⁰ 1986 A.I.R. 251 (P&H).

⁹¹ *Id.* at 252.

⁹² *Id.*

⁹³ *Manjit Singh v. Savita Kiran*, 1983 A.I.R. 281 (P&H).

⁹⁴ 1989 A.I.R. 261 (M.P.).

⁹⁵ *Id.*

provide maintenance, the Code of Criminal Procedure requires such person to make a monthly maintenance allowance that cannot exceed 500 rupees (\$18.00 per month).⁹⁶ Moreover, the Code does not require the magistrate to consider the husband's financial strength. Positive movement in the area of maintenance amounts, however, was seen in *Hema v. Lakshmana Bhat*.⁹⁷

In *Hema*, the court rejected the contention that the "one-fifth of the husband's income" ceiling in the Indian Divorce Act applies to Section 24 of the Hindu Marriage Act.⁹⁸ After considering the parties' affluent background and length of marriage, the court held that 1,000 rupees per month, and not 800 rupees per month as the lower court had ordered, was a reasonable amount.⁹⁹ Hopefully courts will follow *Hema's* lead and grant financially realistic amounts after consideration of factors such as the length of the marriage and the woman's contribution to the marriage.

The standard for modifying or rescinding maintenance orders varies between husbands and wives. The concept of "chastity," an archaic provision that survived legal reform, also deters a woman from litigating her right to maintenance. Before granting a maintenance order against her husband, a court must inquire into the wife's chastity.¹⁰⁰ Courts can manipulate easily the concept of "chastity," as there is no statutory definition. If the husband's matrimonial petition is granted on the basis of the wife's adultery, the wife cannot claim maintenance.¹⁰¹ Courts have held, however, that a wife may receive a subsistence maintenance even if the divorce was granted on the grounds of the wife's adultery.¹⁰² One court has held that while a claim regarding a wife's chastity is relevant to determine the quantum of maintenance, it cannot be the basis to refuse mainte-

⁹⁶ INDIA CODE CRIM. PROC. § 125(1).

⁹⁷ 1986 A.I.R. 130 (Ker.).

⁹⁸ *Id.* at 132. The court further stated that "the [c]oncept of equality between the spouses has gained recognition. That is why [Section] 24 of the Act enables either spouse to make a claim. [The] [s]tatus of the wife as an equal partner in marriage is now generally accepted." *Id.*

⁹⁹ *Id.* at 133.

¹⁰⁰ Hindu Marriage Act, *supra* note 6, § 25(3); Hindu Adoption and Maintenance Act, *supra* note 25, § 18(3); INDIA CODE CRIM. PROC. § 125(4) (1973).

¹⁰¹ Hindu Marriage Act, *supra* note 6, § 25(3); *Sardari Lal v. Vishano*, 1970 A.I.R. 150 (J&K); *Sachindra Nath v. Banamala*, 1960 A.I.R. 575 (Cal.) (a wife divorced on the grounds of proven unchastity should be left to the resources of her immorality). See PARAS DIWAN, MODERN HINDU LAW 224-26 (1981) for a more detailed discussion of the preceding cases.

¹⁰² *Gulab Jagdusa Kakwane v. Kamal Gulab Kakwane*, 1985 A.I.R. 88 (Bom.); *Yogeshwar Prasad v. Jyotei Rani*, 1981 A.I.R. 99 (Del.); *Nathulal v. Mana Devi*, 1971 A.I.R. 208 (Raj.).

nance.¹⁰³ Existing maintenance orders may be modified or cancelled if the woman can be characterized later as "unchaste."¹⁰⁴

By contrast, if the husband's adultery is the grounds for divorce, a grant of maintenance in favor of a husband may be modified or rescinded only if "he has sexual intercourse with any woman outside wedlock."¹⁰⁵ The "chastity" standard for women and the "intercourse outside wedlock" standard for men creates the situation where a husband's maintenance order will not be disturbed. It is impossible for a husband to have a relationship "out of wedlock" because the divorce and order of maintenance dissolve the "wedlock."

Even if the court grants a maintenance order to a woman, she still faces difficulties in collecting the money.¹⁰⁶ Thus, while the area of maintenance has been more favorable to women, the fight to enjoy these benefits is tedious because of archaic legal provisions and a costly legal process. There has been substantial legal progress in that both a husband and wife have the right to seek maintenance.¹⁰⁷ Legal reform, however, will not be complete until the elimination of many archaic provisions can be achieved. The law must recognize that the concept of maintenance is in itself obsolete. A woman seeking maintenance is merely asking for the return of her own property—a share of the joint marital property which she has helped amass during the marriage. Rules of chastity¹⁰⁸ and one-fifth share¹⁰⁹ have no place in such a proceeding.

V. GENDER AND PROPERTY RIGHTS UPON DEATH

A. *Right to Inherit Property by Will*

Under Indian law, a will always takes priority over the devolution of property through an intestacy statute.¹¹⁰ Both a husband

¹⁰³ *Yogeshwar Prasad*, 1981 A.I.R. at 99.

¹⁰⁴ Hindu Marriage Act, *supra* note 6, § 25(3); Hindu Adoption and Maintenance Act, *supra* note 25, § 25.

¹⁰⁵ Hindu Marriage Act, *supra* note 6, § 25(3).

¹⁰⁶ In *Pankajakshan v. Challamma*, the court stated:

Even after fighting many courts for establishing a meager sum by way of maintenance, [the woman] is driven to a second set of legal proceedings to effectively get the money in hand.

2 DIVORCE AND MATRIMONIAL CASES 135, 138 (1987).

¹⁰⁷ Hindu Marriage Act, *supra* note 6, §§ 24, 25.

¹⁰⁸ *Id.* § 25(3).

¹⁰⁹ See *Rambu Sharma v. State*, 1989 A.I.R. 261 (M.P.).

¹¹⁰ Hindu Succession Act, *supra* note 4, § 30. The India Succession Act governs all questions regarding the validity of a will.

and a wife have full testamentary powers over their property.¹¹¹ Although there is no prima facie discrimination, such unrestricted testamentary power is detrimental to women in a patrilineal and patriarchal society. Because property normally passes to male heirs, female heirs often lose all rights to property, except the right to be maintained in some cases. The propounder of the will has the burden to remove all reasonable doubt surrounding suspicious circumstances regarding the execution of the will, such as a shaky signature, a feeble mind, or *unfair and unjust disposition of property*.¹¹² In *Khusbir Singh v. The State*,¹¹³ the Delhi High Court did not consider the total disinheritance of the wife and daughter by will in favor of a son as an *unfair or unjust disposition of property*.¹¹⁴ The *Singh* court highlighted the fact that the father "could have well thought that he will solemnize the marriage of his daughter during his lifetime and that may have led him to disinherit her."¹¹⁵ The court further stated that "it is not unknown of Indian parents to deprive their daughters of any share in their estate."¹¹⁶ This reasoning illustrates the traditional belief that a father's obligation consists of conducting his daughter's marriage and transferring his own remaining property to his male progeny.

B. Right to Inherit Property Upon Intestacy

Access to productive resources or other family property through inheritance may be the only source of economic power for seventy-one percent of illiterate and unskilled women.¹¹⁷ The Hindu Succession Act, which governs all issues concerning intestacy, provides significant changes to women's traditional property rights.¹¹⁸ This statute eliminates traditional distinctions between married or unmarried daughters and women who have or do not have children.¹¹⁹ Under the Hindu Succession Act, daughters, sons,

¹¹¹ *Id.*

¹¹² Venkatarama Aiyar v. Thimmajamma, 1959 A.I.R. 443, 444 (S.C.) (emphasis added).

¹¹³ 1990 A.I.R. 59 (Del.).

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 64.

¹¹⁶ *Id.*

¹¹⁷ See INDIA 1991, *supra* note 8, at 13.

¹¹⁸ An intestate is one who does not dispose of property through a will. See Hindu Succession Act, *supra* note 4, § 3(g).

¹¹⁹ See Chando Mahtain v. Khublal Mahto, 1983 A.I.R. 33 (Pat.) (holding the Hindu Succession Act abrogates the divestiture of property upon marriage provision in the now repealed Hindu Widows Remarriage Act of 1937).

widows, and widowers have equal rights to inherit their parents' or deceased spouse's self-acquired and intestate property.¹²⁰ A widowed daughter-in-law also has a right to her father-in-law's intestate property¹²¹ if she does not remarry before her father-in-law's death.¹²² Women are the absolute owners of any property acquired through intestacy.¹²³ The Hindu Succession Act, however, only represents partial reform of women's rights, as many discriminatory traditions have been codified.

1. Women's Right to Inherit Joint Family Property

The joint family, or "coparcenary" is the typical Indian family where three generations of patrilineal kinship live in the same household.¹²⁴ In such a patrilineal family, the son is the natural successor, a good investment, and insurance for the family.¹²⁵ The joint family continues as long as there is a male member, even by adoption. Coparceners control property in a joint family. A coparcener is a lineal male descendant (up to the third generation) who acquires the right of ownership by birth;¹²⁶ however, women cannot be coparceners.¹²⁷ Each coparcener has ownership over the entire property until partition,¹²⁸ and may ask for such a partition.¹²⁹ Furthermore, possession and enjoyment of property is common.¹³⁰

¹²⁰ See *supra* note 4, § 8 (lists those entitled to property of male Hindu intestate) and § 15(1) (lists those entitled to property of female Hindu intestate). Self-acquired property is individually acquired and can be distinguished from inherited or joint family property.

¹²¹ *Id.* § 8.

¹²² *Id.* § 24.

¹²³ *Id.* § 4.

¹²⁴ DESAI & KRISHNARAJ, *supra* note 1, at 186–87. Hindu law comprises the branches of Mitakshara and Dayabhaga. This part analyzes the Mitakshara coparcenary in which the three generations of males are "related to the male ego as grandfather and his brothers, father and his brothers, cousins, sons and nephews, and their wives, unmarried daughters and sisters." *Id.* at 187; see SUNDERLAL T. DESAI, MULLA PRINCIPLES OF HINDU LAW 238–317 (1990); Gurupad v. Hirabhai, 1978 A.I.R. 1239 (S.C.) (defining coparcenary). Unlike the Mitakshara coparcenary, which is applied in the majority of India, the Dayabhaga coparcenary is confined to Bengal and Assam. Lucy Carroll, *Daughter's Right of Inheritance in India: A Perspective on the Problem of Dowry*, 25 MODERN ASIAN STUDIES 791, 793 (1991). For a detailed explanation of the Dayabhaga coparcenary, see *id.* at 802–05.

¹²⁵ DESAI & KRISHNARAJ, *supra* note 1, at 187–88.

¹²⁶ Carroll, *supra* note 124, at 793.

¹²⁷ See Raghunath Tiwary v. Rikhiya, 1985 A.I.R. 29, 30 (Pat.) (daughter does not have right to joint property upon birth).

¹²⁸ See Carroll, *supra* note 124, at 793.

¹²⁹ *Id.* at 794. A partition increases the number of joint family estates; it does not create separate estates. *Id.*

¹³⁰ See Carroll, *supra* note 124, at 793.

Property may be alienated for legal necessity only upon concurrence of other coparceners.¹³¹ A deceased member's interest lapses upon his death and merges into the coparcenary property; however, his interest does not devolve upon his natural heirs.¹³² Other dependent females have the right to be maintained by joint family property. A widow obtains an equal share upon partition, but does not have the right to ask for a partition of family property.¹³³ The law recognizes this inequitable customary arrangement and even encourages the formation of such units by treating these joint families as separate taxable entities.¹³⁴

Traditionally, the joint family system excluded the Hindu daughter from succession to her father's property if there was a son, son's son, or a widow.¹³⁵ The Hindu Succession Act, however, does not significantly alter the inequitable distribution of joint family property to women.¹³⁶ The statute only partially amends the customary property rules, allowing a coparcener's interest to devolve through a will or through the Hindu Succession Act to a surviving female relative specified in Class I or to a male relative in Class I who claims through such female relative.¹³⁷ Therefore, while Hindu males own a share of the family rights at birth, females must inherit it.¹³⁸

¹³¹ Gurupad v. Hirabhai, 1978 A.I.R. 1239 (S.C.).

¹³² Carroll, *supra* note 124, at 793.

¹³³ Hindu Succession Act, *supra* note 4, § 23.

¹³⁴ Income Tax Act §§ 2(31), 10(2), as amended by Finance Act, 1989 and Direct Tax Laws (Amendment) Act, No. 3 (1989) (India), reprinted in M.C. BHANDARI, *THE INCOME-TAX ACT/RULES WITH REFERENCER* (1989-90); See Maureen A. Maloney, *An Analysis of Direct Taxes in India: A Feminist Perspective*, 30 J. INDIAN L. INST. 397, 404 (1988).

¹³⁵ Carroll, *supra* note 124, at 791-92.

¹³⁶ The Hindu Succession Act addresses only the Mitakshara system. See *supra* note 4, § 6; *supra* note 124 and accompanying text (definition of a Mitakshara coparcenary).

¹³⁷ See *supra* note 4, § 6; see *infra* note 147 (list of persons in Class I of the Schedule). Raj Rani v. The Chief Settlement Commissioner, 1984 A.I.R. 1234 (S.C.), provides an example of property succession:

Where a Hindu died after the enforcement of the Act leaving behind him his widow, three sons and three daughters, the devolution of his Mitakshara coparcenary property would be as follows: . . . [H]e would have [received] one-fifth interest on partition between him and his wife and three sons. If once his interest was determined to be one-fifth before his death, his interest would devolve upon his widow, three sons and three daughters equally and thus the share of each one of them would be one-fifth [multiplied by] one-seventh that is one thirty-fifth each and because the widow had inherited her husband's interest after his death her share would be augmented by one-fifth that is one thirty-fifth [plus] one-fifth [which] equals eight thirty-fifths.

Id. at 1235.

¹³⁸ Van Willigen & Channa, *supra* note 43, at 374.

Because inheritance is an area where the state and national government can legislate concurrently,¹³⁹ a few states have provided women more equality in the joint family system. For example, the states of Andhra Pradesh and Tamil Nadu have improved significantly a woman's status under the joint family system by permitting women to assume the status of a coparcener.¹⁴⁰ The state of Kerala has even abolished the joint family system altogether.¹⁴¹ Hopefully, other states will follow these leads and recognize the social and economic value of women.

2. Women's Right to the Dwelling House

Female heirs to a male Hindu intestate's property cannot ask for a partition of the intestate's dwelling house in which the intestate's family lives *until* the male heirs choose to divide their respective shares.¹⁴² This is so even if the house is part of the intestate's separate property. A female heir who is a daughter has the right of residence in the dwelling house only if she is single, has been deserted by or is separated from her husband, or is a widow.¹⁴³ A widowed daughter loses her right to residence upon remarriage.¹⁴⁴ Thus, the law in this area reiterates traditional patriarchal concepts towards women.

3. Property Succession of Male and Female Intestates

Under the Hindu Succession Act, the property of male and female intestates devolves differently. There is a clear preference for agnates¹⁴⁵ over cognates.¹⁴⁶ Living children and the widow share a male's intestacy property with relatives listed in Class I of the schedule.¹⁴⁷ In the absence of these heirs, the property devolves

¹³⁹ BASU, *supra* note 19, at 515.

¹⁴⁰ Van Willigen & Channa, *supra* note 43, at 375.

¹⁴¹ *Id.*

¹⁴² Hindu Succession Act, *supra* note 4, § 23; *see* Punwasi v. Sukha Devi, 1986 A.I.R. 139, 140 (All.) (male intestate's married daughter may not ask for a partition of the dwelling house).

¹⁴³ Hindu Succession Act, *supra* note 4, § 23.

¹⁴⁴ *Id.*

¹⁴⁵ A person is an agnate of another if the two people are related by blood or adoption wholly through males. *Id.* § 3(a).

¹⁴⁶ A person is a cognate of another if the two are related by blood or adoption, but not wholly through males. *Id.* § 3(c).

¹⁴⁷ Class I includes the son, daughter, widow, mother, son of a pre-deceased son, daughter of a pre-deceased son, son of a pre-deceased daughter, daughter of a pre-deceased daughter, widow of a pre-deceased son, son of a pre-deceased son of a pre-deceased son, daughter of

upon relatives listed in Class II of the schedule, which gives priority to the male intestate's father and does not make any provisions for the intestate's wife's relatives.¹⁴⁸

By contrast, succession to a female intestate's property depends on the type of property. In the absence of children, property inherited from the female intestate's parents devolves upon her father's heirs.¹⁴⁹ Property inherited from her husband or father-in-law would go to the husband's heirs in the absence of children by the husband.¹⁵⁰ A female intestate's self-acquired property, a gift, or property received under a valid will first devolves upon her children and her husband.¹⁵¹ Absent the preceding heirs, the property devolves upon her husband's heirs¹⁵² and then upon her parents.¹⁵³ Once again, concepts of gender equality give way to patriarchal considerations that treat women as extensions of their husbands by favoring their husbands' heirs.

C. Widows' Property Rights

As previously mentioned, a widow has the right to inherit property from her husband's estate, but she cannot prevent her husband from transferring his property to a third person through a will.¹⁵⁴ Her father-in-law has a legal obligation to maintain her only if he has coparcenary property and only if she cannot maintain herself through her husband, parents, children, or their estates.¹⁵⁵ A widowed daughter-in-law ceases to receive maintenance upon her remarriage.¹⁵⁶ Patriarchy is abandoned, as the father-in-law's obligation does not attach unless the widow's parents are financially unable to maintain their daughter.

a pre-deceased son of a pre-deceased son, and widow of a pre-deceased son of a pre-deceased son. *Id.* § 8(a). "The Schedule," which is listed as an appendix, is read in conjunction with Section 8 of the Hindu Succession Act.

¹⁴⁸ *Id.* § 8(b).

¹⁴⁹ *Id.* § 15(2)(a); see *Raghuvar v. Janki Prasad*, 1981 A.I.R. 39 (M.P.) ("inheritance" in Hindu Succession Act § 15(2)(a) refers to intestacy property, not property passed under a will).

¹⁵⁰ Hindu Succession Act, *supra* note 4, § 15(2)(b); see *Jayantilal v. Chhanalal*, 1968 A.I.R. 212 (Gug.).

¹⁵¹ Hindu Succession Act, *supra* note 4, § 15(a)(1)(a).

¹⁵² *Id.* § 15(1)(b).

¹⁵³ *Id.* § 15(1)(c).

¹⁵⁴ *Id.* § 30.

¹⁵⁵ Hindu Adoption and Maintenance Act, *supra* note 25, § 19.

¹⁵⁶ *Id.*

An illustration may help to clarify this concept. Consider an uneducated woman living in a nuclear family without any source of independent earnings. This woman has been married for fifteen years. Her husband dies, transferring his property to a third party by will. The wife cannot prevent this transfer nor can she sue her husband's estate for maintenance under the Hindu Marriage Act or the Criminal Procedure Code. Her father-in-law does not have the obligation to maintain her because there is no coparcenary property.¹⁵⁷ Her parents are not legally bound to maintain her because she is not a minor¹⁵⁸ and is married.¹⁵⁹ The law casts an obligation on the husband's heirs (the third party) to maintain the widow.¹⁶⁰ A better resolution would be to restrict the husband's testamentary powers so that he would be obligated to leave a specific percentage of his property for his dependents.

VI. WOMEN'S ABILITY TO OWN AGRICULTURAL LAND

Hindu women traditionally have had few opportunities to be landholding members of their families. This injustice remains true in modern India and elevates the level of economic disparity between men and women because land is an important source of economic and social power in this predominantly agricultural society. Legislative reform has institutionalized the gender bias by giving male family members more access to land ownership and land resources than female family members. For example, in Uttar Pradesh, a state which comprises one-sixth of the population, the interest in land passes first "to the male descendants in the male line of descent."¹⁶¹ The land passes to the widow or widowed mother of the pre-deceased male descendant only if there are no such males available and only if the widow has not remarried.¹⁶²

Agricultural land comprises the bulk of real property in India.¹⁶³ The Hindu Succession Act, however, does not govern the devolution of tenancies of agricultural land.¹⁶⁴ Agricultural land

¹⁵⁷ Hindu Succession Act, *supra* note 4, § 4.

¹⁵⁸ Hindu Adoption and Maintenance Act, *supra* note 25, § 21(v).

¹⁵⁹ *Id.* § 20.

¹⁶⁰ *Id.* §§ 21, 22.

¹⁶¹ GOVERNMENT OF INDIA, DEPARTMENT OF SOCIAL WELFARE, NEW DEHLI, TOWARDS EQUALITY, REPORT OF THE COMMITTEE OF THE STATUS OF WOMEN IN INDIA 137 (1975) [hereinafter TOWARDS EQUALITY].

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ See *supra* note 4, § 4(2).

devolves according to the legislation of individual states.¹⁶⁵ Land reform laws cannot be challenged on grounds of violating a fundamental right because they fall within the Indian Constitution's ninth schedule.¹⁶⁶ Furthermore, the lack of statutory definitions in the Hindu Succession Act or the General Clauses Act of 1897 for terms such as "tenancy rights" has given the states a great amount of discretion. The result has been the enactment of many state laws that restrict a woman's interest in agricultural land even though women constitute the majority of the labor force in agricultural industries—a key sector of India's economy.¹⁶⁷

Land reform laws and procedures restrict the size of land holdings. Surplus land is distributed to landless persons or used for developmental purposes.¹⁶⁸ These laws also discriminate on the basis of gender. For example, when determining the ceiling on land that a family may hold in Maharashtra, land held by a daughter comprises part of the total amount of land held by the family, while a son holds land separately.¹⁶⁹ Government regulations regarding development projects also reflect the bias against the concept of women owning land. In the Sardar Sarovar Project, a power project in Gujarat, the state resettlement policy provides separate agricultural and residential land for adult male sons of those families affected by the project.¹⁷⁰ The project considers adult daughters as members of their primary families instead of providing them with separate property.¹⁷¹

Land is a scarce but very important economic resource in India. Admittedly, dividing land between sons and daughters may split the size of the holding which may diminish the land's economic value.¹⁷² This economic disadvantage, however, does not justify depriving women of land, the means to empowerment. Gender-neutral efforts must be formulated to maintain land holdings at a productive economic level, especially in a country that claims to uphold the constitutional principle of gender equality.

¹⁶⁵ BASU, *supra* note 19, at 507.

¹⁶⁶ INDIA CONST. art. 31-B.

¹⁶⁷ See TOWARDS EQUALITY, *supra* note 161, at 137.

¹⁶⁸ The ninth schedule of the Indian Constitution lists various Land Reform and Land Ceiling Acts for the states.

¹⁶⁹ Maharashtra Agricultural Land (Ceiling on Holdings) Act, No. 26 (1961) (India) § 3.

¹⁷⁰ Government of Gujarat, Government Resolution No. RHB-1085-D (Nov. 1, 1985), at 5.

¹⁷¹ *Id.*

¹⁷² See ALTEKAR, *supra* note 40, at 246.

VII. CONCLUSION

Gender analysis of Hindu law relating to a woman's access to property within the home reveals a consistent pattern of subordination of women's economic interests. The combination of high levels of illiteracy, lack of outside training, and discriminatory social traditions further prevents a woman from gaining access to economic resources. While enjoying the formal status of equality at law, in essence, a woman remains economically dependent on her parents, husband, or children from birth until death. Manu lives with a vengeance!¹⁷³

Law can be an important tool for social transformation. In India, however, law often perpetuates the economic subordination of women through the lack of an equitable framework. The primary task remains to amend all legislative provisions that institutionalize economic distributions based on gender differences and those that increase a woman's economic dependency. Such legislative reforms must be accomplished in a sensitive manner, recognizing that the implementation of gender-neutral legislation will not be accepted automatically into the hierarchical and male-dominated society. The present impact of legislation on Indian society admittedly has been very limited. Patriarchy, age-old social traditions, unequal economic relationships, lack of enforcement, and lack of means for women to become more independent, all play a significant role in creating and sustaining the inequality of women. Examination of women's status in the family and society is incomplete without the discussion of problems in a holistic manner.

Removal of legal constraints and legitimization of reform of property rights is an important and catalytic first step for women. Equal access to productive resources will provide women with an enabling environment in which they can break down gender-based traditional barriers that currently seem impenetrable. An equitable share of family property, however little at first, will give women relative strength within the family to resist oppressive relationships. Women will be taken seriously only when they have these economic rights. Until then, the emergence of women as equal players in the mainstream of Indian life will remain as it has for the last four decades—a slow, tedious, and sometimes regressive process.

¹⁷³ See *supra* note 1 and accompanying text.