Women and Poverty in India: Law and Social Change

Brenda Cossman and Ratna Kapur

Dans cet article, Brenda Cossman et Ratna Kapur étudient le rôle du droit quant à l'inégalité socio-économique et la pauvreté des femmes en Inde. Les auteurs examinent plusieurs domaines du droit afin d'illustrer dans quelle mesure le droit est fondé sur la dépendance économique des femmes et sert à la renforcer. Le droit de la famille, le droit du travail et le droit relatif au développement rural servent tous, quoique de façons très différentes, à affirmer les suppositions sur la dépendance économique des femmes au sein de la famille, puis à renforcer les conditions socio-économiques actuelles qui génèrent cette dépendance économique. Dans la deuxième partie de l'article, Cossman et Kapur examinent comment on a contré certaines tentatives d'utilisation du droit, particulièrement du discours sur les droits, visant à améliorer les conditions socio-économiques des femmes en Inde. De plus, les auteurs étudient l'expérience de l'Inde concernant les litiges d'intérêt public et ses limites quant au féminisme, ainsi que le défi croissant que le fondamentalisme religieux pose à la lutte des femmes pour le changement social en Inde.

In this article, Brenda Cossman and Ratna Kapur explore the ways in which law is implicated in women's socio-economic inequality and poverty in India. The authors examine several different areas of the law to illustrate the extent to which law is based on and serves to reinforce women's economic dependence. Family law, labour law, and rural development law all serve, although in very different ways, to reinforce assumptions about women's economic dependence in the family, and in turn, to reinforce the actual socio-economic conditions that produce that economic dependency. In the second part of the paper, Cossman and Kapur examine some of the ways in which attempts to use the law, and particularly, rights discourse, to improve women's socio-economic conditions in India, have

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been undermined. The authors consider the Indian experience with public interest litigation and its limitations for feminism, as well as the growing challenge of religious fundamentalism to women's struggles for social change in India.

I. Introduction

The Indian State is formally committed to promoting women's equality and eradicating women's poverty. Formal equality for women is explicitly enshrined within Indian law. Yet, a deeper analysis of the State's approach to the legal regulation of women in particular, and of the development process in general, reveals that the law in many important respects continues to reinforce Indian women's socio-economic inequality. This contradictory role of law raises serious questions about the potential for using law in women's struggles to overcome their socio-economic inequality. This paper will consider the role of law in feminist struggles for social change.

II. Women, Law and Poverty
A. Some Introductory Comments

Before beginning to explore the role of law in reinforcing women's poverty, it is important to make some introductory remarks regarding the very terms of the debate — namely, of poverty, of women, and of law. The discourse through which these issues are constructed and conveyed is problematic. There is the very real danger that the discourse used to describe the legal regulation of women in India will reinforce notions of "positional superiority", that is, the colonialist idea of the superiority of West over East, and in turn, of the superiority of the conditions of Western women over Eastern women. We fear, in other words, that the very

1. Article 14 of the Constitution of India, 1950 [hereafter the Indian Constitution] guarantees equality before the law and equal benefit of the law. Article 15 of the Indian Constitution prohibits discrimination, including discrimination on the basis of sex. Article 16 guarantees equality of opportunity in employment, and prohibits discrimination, including discrimination on the basis of sex, in respect of employment. In addition to these constitutional provisions, there are numerous legislative provisions to protect and enhance the social, economic, and political rights of Indian women.

2. The concept of "positional superiority" was developed by Edward Said, in Orientalism (New York: Vintage Books, 1979) in which he attempted to illustrate how the Western construction of Orientalism was a mechanism through which the West established its relation of dominance and superiority to the East. As Said has described, Orientalism is a "Western style for dominating, restructuring and having authority over the Orient ... by making statements about it, authorizing views of it, describing it by teaching it, settling it, ruling over it" (at 3) "an accepted grid for filtering the Orient into Western consciousness" (at 6). Laura Nader, in "Orientalism, Occidentalism and the Control of Women" (1989) 2 Cult. Stud. 323 has attempted to use Said's thesis of Orientalism and positional superiority to illustrate how both Eastern and Western women are subordinated. The construction of Eastern, or more specifically, muslim women as "other" is
discourse we invoke may serve to perpetuate stereotypic images of Indian women, and at the same time, deflect attention away from the continuing subordination of women in the West. In an attempt to minimize this effect, we begin by directly addressing and deconstructing some of the central terms of our discourse.

Speaking of Poverty:

There are several problems in using the discourse of poverty. Firstly, the discourse reinforces the stereotypic image of India as nothing more than poverty-ridden. Yet, at the same time, we need to use the discourse, as it describes one of the multidimensional realities of women in India. To speak of women in India is in effect to speak of women in poverty. Notwithstanding the enormous diversity among Indian women, including significant differences of class and the emergence of a new urban middle class, the majority of Indian women, like the majority of the Indian population, live in poverty. Approximately 75 percent of Indian women live in rural areas, and, despite the significant differences among rural women, including differences of class, a majority of rural women, reflecting the socio-economic position of the majority of rural peoples, live in some form of poverty.

an important means by which the West reinforces its positional superiority, while at the same time deflecting attention away from the conditions of women in the West. Nader argues, at 333: at 192:

In large measure stereotypes of the Muslim woman are of a pitiable, downtrodden woman ... There are political implications to such stereotyping. The Middle East is backward and deserving of cultural disrespect, needs to be modernized and in the process civilized. The grid through which we rank the humanity of the area is based on how “we” perceive their treatment of their women-folk. The way in which we construct the place of Arab women is one of the keys to the control of others, and the converse is true as well. The West is more civilized by the status and rights of its women.

While Nader’s analysis focuses on the construction and portrayal of muslim women in particular, the potential for the neo-colonialist manipulation of these images of women is, we believe, of equal relevance in the construction and portrayal of women in India. Indeed, the British construction of the treatment of hindu women was an important aspect of colonial discourse, justifying British rule.

3. The dilemma of writing about “Third World” women within a Western context is that it becomes virtually impossible to break away from the Western reference point. Attempts to seriously consider the conditions of these women, and thus begin to break down the white, middle-class, Western bias of feminist literature, and particularly, of feminist legal literature nevertheless risks reinforcing Western domination. Both speaking and not speaking about non-Western women risks reinforcing the West as the reference point, and thus reinforcing the neo-colonialism of positional superiority. Even the language used to describe these women – “Third World” women, “non-Western” women, “developing country” women – are all constructs that only make sense in a discursive framework in which the West is the central signifier.
Secondly, there is the problem of defining poverty.\textsuperscript{4} As the World Bank has observed: "No one indicator can fully capture the numerous facts of poverty among which low average consumption and wages, inadequate nutritional intake, vulnerability to various diseases, low literacy rates and gender-related disadvantages have been discussed."\textsuperscript{5} In this study, however, the World Bank goes on to discuss the relative usefulness of the index of the population living below the poverty line, which is defined as "the expenditure level at which minimum caloric intake and indispensable non-food purchases are assured".\textsuperscript{5} Using this definition, the percentage of India's population living below the poverty line was: 1970 - 52 per cent, 1983 - 45 per cent, 1988 - 42 per cent.\textsuperscript{7}

Thirdly, it is important to differentiate the discussion of women and poverty in India from the concept of the feminization of poverty. The feminization of poverty thesis is that more and more women are making up a larger and larger percentage of the population living in poverty. The thesis has been the subject of an incisive critique by both socialist and black feminists in the West for its failure...

\textsuperscript{4} World Bank studies on poverty have discussed the difficulties of measuring standards of living and setting poverty lines. For example, income or consumption-based measures have limitations: "Neither measure ... captures such dimensions of welfare such as health, life expectancy, literacy and access to public goods or common property resources. Being able to get clean drinking water, for example, matters to one's standard of living, but is not reflected in consumption or income as usually measured. Households with access to free public services are better off than those without, even though their incomes and expenditures may be the same". World Bank, World Bank Development Report 1990: Poverty-World Development Indicators (New York: Oxford University Press, 1990) at 26. The Report uses a consumption-based poverty measure supplemented with other measures, including nutrition, life expectancy, under five mortality and school enrolment rates. The Report suggests that there are two elements to a consumption-based poverty line: "the expenditure necessary to buy a minimum standard of nutrition and other basic necessities, and a further amount that varies from country to country reflecting the cost of participating in the everyday life of society". \textit{Ibid.}

\textsuperscript{5} Ibid. Statistics also illustrate that the incidence of poverty is higher in rural areas than in urban areas. See B.N. Uniyal, Partha Majumdar, and Kumaresh Chakravarty, eds., \textit{India: 1991, Observer Statistical Handbook} (New Delhi: Observer Research Foundation, 1991); World Bank, \textit{supra} note 5 at 57. Further, there are striking regional differences in the prevalence of poverty, as well as differences within areas:

\begin{quote}
Between 1970 and 1988, the regional concentration of poverty became more pronounced -- the combined share of the Eastern and Central regions which account for 54 per cent of total population increased from 56 per cent to 60 per cent (60 to 65 per cent for the ultra poor), while actual numbers below poverty line and below the ultra-poverty line grew significantly. The number of poor in Bihar alone grew by a third in this period. On the other hand, the number below poverty line in the South fell by over four million -- this decline occurred mainly in Kerala and Tamil Nadu."
\end{quote}

\textit{World Bank, supra} note 5 at 58.
to adequately locate women’s poverty within the broader context of class and race. Our point parallels this critique of the feminization of poverty thesis insofar as we believe that an understanding of women’s poverty in India must be seen within the broader context of gender and class inequalities, as well as the multiplicity of differences of caste, religion, region, and language. Indeed, while more and more women may in fact be living in poverty, this cannot be isolated from the broader context of the growth of the urban and rural poor. More generally, Women in India live in poverty, but they often live there with men.

We can, however, speak of the gendered nature of the impact of poverty. While women and men often live together in poverty, they live there differently. Indeed, there is much evidence of the disproportionate burden of poverty on women. The continuing significance of the sexual division of labour and the inferior socio-economic status of women in India results in a disparate impact of poverty on women. Intrahousehold distributional differences are such that not all members of poor households are equally poor. Rather, women continue to have unequal access to family resources, from wages to land. Similarly, women have unequal access to such essentials as food and health care, and thus, suffer disproportionately from malnutrition, morbidity, and mortality:

Poor girls and women are disproportionately burdened with sickness and its consequences. This is seen in the generally lower survival rates of female infants and children and the high rates of maternal mortality which prevail in India ... Deaths related to childbirth account for a quarter of female mortality overall and nearly a half of the deaths in the 15-24 age group. Complications of abortion, haemorrhaging during delivery and toxemia are among the major causes of pregnancy-related death. But perhaps a quarter of all such mortality is due to anemia which both complicates and is exacerbated by pregnancy and which is a major cause of low birth weight, ... lower child survival chances and other

8. Johanna Brenner, in "Feminist Political Discourses: Radical Versus Liberal Approaches to the Feminization of Poverty and Comparable Worth" (1987) 1 Gender & Soc’y 447 at 453 writes: "In addition to ignoring class and race differences among women, the feminization of poverty campaign denies the poverty of men, especially minority men. Women make up an increasing proportion of the poor because more women are falling into poverty, not because more men are getting out." See also Juliet Cook and Shantu Watt, "Racism, Women and Poverty" in Caroline Glendenning and Jane Millar, eds., Women and Poverty in Britain (Brighton: Wheatsheaf Books, 1987) 53.

Further, women have unequal access to education, which is reflected in the relative literacy rates for women and men. While literacy remains low among both the rural and urban poor as a whole, women again suffer disproportionately. While the comments that follow will review some of this gendered experience of poverty and of the role of law in reinforcing this experience, it is important to distinguish the discussion from one premised on the feminization of poverty thesis.

Speaking of Women:

To speak of “Indian women” is to obscure the diversity of women living in India. As Chandra Talpade Mohanty has argued, the positing of the category of “women”, and particularly, of “Third World women”, sets up a false homogeneity:

The assumption of women as an already constituted, coherent group with identical interests and desires, regardless of class, ethnic or racial location, or contradictions, implies a notion of gender or sexual difference or even patriarchy which can be applied unusually and cross culturally.

Mohanty argues that the discursively constructed homogeneity of the category of women sits in sharp contrast, and indeed, serves to obscure “the historically specific material reality of groups of women”. To speak of “Indian women” is to play directly into this problem, by assuming the homogeneity of the category and of the forms of oppression to which they are subjected. Rather than attempting to generalize on the nature of gender subordination, it is important to recognize that the oppression of women takes many different forms across class, caste, religion, ethnicity, and region. In fact, many of the stereotypic images of the form of women’s oppression in India, such as seclusion, dowry, restrictions on widow remarriage, and personal mobility, are associated with greater increases in class and status, making these particular forms of oppression more prevalent

13. Ibid.
among the middle classes, particularly, the urban middle class. Further, there is no one experience of socio-economic inequality and poverty, nor is there any uniformity in how law affects and reinforces that inequality. Different women may come to experience poverty in different ways. While middle-class women may come to experience poverty as a result of marital breakdown, the majority of urban working class and rural women will experience poverty throughout their lives. The diversity of women means that different laws and policies necessarily affect different women differently. And yet it is impossible to do justice to the enormous diversity of Indian women within such a limited time and space. The remarks that follow are thereby limited precisely by the claim to be speaking as if such a general category of Indian women does exist.

Speaking of Law:

Speaking of law is similarly problematic. First, there is the problem that the legal regulation of women is, in many respects, based on the assumption of the homogeneity of women. With the exception of personal laws, which recognize women as members of different religious communities, law tends to posit women as a "coherent group with identical interests and desires." Any attempt to discuss and analyze the legal regulation of women is therefore plagued by a discourse which, in and of itself, obscures the diversity of women.

Secondly, there are many levels on which the legal regulation of women and the contradictions within this regulation can be explored. For example, it can be explored in terms of legal rules and customs on their face, revealing those that

14. Joanna Liddle and Rama Joshi, Daughters of Independence: Gender, Caste and Class in India (New Delhi: Kali for Women, 1986), for example, argue that the impact of a rise in caste hierarchy is an increase in the control over women. At 59, they write:

Specifically, this control involves two major aspects. One is women's disinheriting from immovable property in the form of land, and their exclusion from the productive economy, involving removal from public life to the domestic sphere of the home in the form of seclusion or purdah. The second is far greater control exercised by men over women's sexuality, through arranged marriage, child marriage, the prohibition of divorce, and strict monogamy for women, leading to sati and a ban on widow remarriage, including infant or child widows.

15. However, the economic position of poor urban and rural women is also mediated through their family status. The World Bank has observed, supra note 5 at 57, that:

Poor women face a constant threat of a sudden, sharp decline in welfare when normal sources of support are withdrawn. The grimmest prospect is widowhood, especially when children are young or if there are no surviving adult sons. Unmarried women and those who are divorced or rejected because of infertility or an inability to bear sons are in a comparable position. For such women, the loss of land and other assets is almost inevitable, either through distress – sales to finance purchase of food and medicine, transfer to relatives in return for often perfunctory income support or through fraud and forcible expropriation.

continue to discriminate against women. Such an approach would focus on highlighting the continuing inequality in the formal legal status of women despite other guarantees to the contrary. On another level, the analysis might explore the enormous gap between the guarantees of formal equality and the reality of substantive inequality in the lives of Indian women. Such an approach would highlight the inefficacy of those laws intended to promote women's equality, as a result of such factors as the under-enforcement of legislation and women's lack of access to the law and legal institutions. On yet another level, the analysis might explore the role of law in implementing government development policies that produce massive displacements of peoples from their land and livelihood, and thereby create a large, landless labour force. These government development policies are rarely gender-specific, although there is a gendered experience of the social and economic consequences of these policies. This approach might begin to explore the broader ideological dimensions of law, that is, the role of law in promoting patriarchal and capitalist relations.  

To speak of the role of law in women's poverty is thereby to speak of the broader dilemmas — of the role of law in regulating women's lives, and of the role of law in rural development — dilemmas that can be explored at multiple levels. Our intention is not to choose among these different approaches, as we believe that each level of analysis can contribute to a more complicated understanding of the role of law. Indeed, exploring these various dimensions can illustrate the "uneven development of law" — that is — the idea that law's role in women's subordination is contradictory. 

17. Shelley A.M. Gavigan, "Law, Gender and Ideology" in Anne F. Bayefsky, ed., Legal Theory Meets Legal Practice (Edmonton: Academic Printing, 1988) 283. Along with other feminist sociologists of law, Gavigan argues at 293-94 that if we only examine "explicit discrimination or differential treatment in law or in the courtroom, we will miss the subtle processes (which are less visible but even more important) by which legal doctrine, and judicial interpretation and decision making reproduces and reinforces the subordination of women". See also Carol Smart, "Legal Subjects and Sexual Objects: Ideology, Law and Female Sexuality" in Julia Brophy and Carol Smart, eds., Women in Law: Explorations in Law, Family and Sexuality (London: Routledge and Kegan Paul, 1985) 50; Susan Boyd, "Child Custody, Ideologies and Female Employment" (1987) 3 C.J.W.L. 111. For a more general discussion of law as ideology, see Alan Hunt, "The Ideology of Law: Advances and Problems in Recent Applications of the Concept of Ideology to the Analysis of Law" (1985) 19 L. & Soc'y Rev. 11. 


19. Carol Smart, ibid. at 177, describes the idea of the uneven development of law:

It allows for an analysis of the law that recognises the distinctions between law-as-legislation and the effects of law, or law in practice. It rejects completely any concept of law as a unity which simply progresses, regresses, or reappears as a cycle of history to repeat itself. It perceives law as operating on a number of dimensions at the same time. Law is not identified as a simple tool of patriarchy or capitalism. To analyze law in this way creates the possibility of seeing law both as a means of liberation and, at
The discussion of women, law, and poverty that follows attempts to mitigate these problems by focusing on three different examples of the ways in which law contributes to women’s unequal economic status. These examples were selected to represent the ways in which different laws may have different effects on different women. The first example is taken from the legal regulation of women in the family. It is used to illustrate both the continuing inequality in the formal status of women in India and the particular ways in which middle-class women may come to experience poverty. The second example is taken from the legal regulation of women in the labour force. It illustrates both the continuing gap between formal equality and substantive inequality, and the impact of the laws on working women. The third example is taken from the legal regulation of rural development. It is intended to illustrate the gendered impact of government development policies on poor rural women.

It is important to note that these examples are not mutually exclusive. It is not, for example, only family law that includes formal inequalities, nor is it the case that only labour law is characterized by a gap between formal and substantive equality. Similarly, it is not only middle-class women who are affected by family laws, nor only poor rural women who are affected by government development policies and laws. However, we hope to illustrate that as a result of the diverse forms of gender subordination, it is these women who tend to more directly and disproportionately experience the effects of these different forms of legal regulation. The examples chosen cannot adequately represent the full extent of the diversity among Indian women or the differential impact of the different forms of legal regulation that reinforce economic equality. Instead, they are intended only to provide a sense of that diversity and of the different legal dimensions and dilemmas that need to be considered.

**B. The Legal Regulation of Women in the Family: Formal Inequality**

The *Indian Constitution* formally guarantees women’s equality. Moreover, the women’s movement in India has successfully campaigned since the late 1970s for legislative and judicial reform to remove legal obstacles to women’s equality, and to guarantee women the right to equal participation in social, economic, and political life. For over a decade, Indian feminists have struggled for law reform in the areas of rape, dowry, sati, and prostitution, and much legislative reform has been brought about as a result. In many respects, women in India have achieved formal equality in law. But there remain important dimensions of social and familial life in which such formal equality has not been guaranteed.

Matters relating to the family such as marriage, divorce, succession,
maintenance, adoption, guardianship, and child custody continue to be governed by personal laws of the different religious communities. Hindu law, Muslims by Muslim law, Parsis, Christians, Tribals and so on, by their own respective religious laws. Despite the differences among these personal laws, many aspects of these laws continue to treat women differently than men. Many of the laws continue to be informed by assumptions about women's economic dependency, and many continue to reinforce women's unequal economic status.

The law regulating family property exemplifies the continued discrimination against women within the law. Within Hindu personal laws, for example, the son of a Hindu male has a birthright to the family's ancestral property, but a daughter does not enjoy a similar right. The Hindu Succession Act, 1956 attempted to make some provision for females. The Act provides that in the case of ancestral property, when a Hindu male dies intestate, the surviving widow, sons, daughters, and mother of the intestate shall each take one share. Yet, in the case of sons, this share will be in addition to the share they acquire at the time of birth. Further, if the intestate's property includes a dwelling house, then none of the female heirs will have the right to partition such a house until the male heirs choose to divide their respective shares. If the female heir is a daughter, however, she shall be entitled to residence only if she is unmarried, deserted, separated, or widowed. The Hindu Succession Act, 1956 confers on a woman the right of absolute ownership over property as well as the right to make a will leaving her property to her heirs. However, the Hindu Marriage Act, 1956 does not allow a divorced woman an equal share of property, income, and assets unless these are in joint name or were gifts before, or at the time of her wedding. Thus, the work that women contribute, both directly and indirectly, to the acquisition and maintenance of property during the marital relationship goes unrewarded on marital breakdown if the property is registered in the husband's or his family's name.

The personal laws of the various communities all recognize some right to maintenance, but these rights differ significantly. Under the Indian Divorce Act, 1969, which is applicable to Indian Christians, a woman is entitled to interim maintenance from her husband during the matrimonial proceedings for nullity, judicial separation, divorce, and restitution of conjugal rights. However, the amount cannot exceed more than one-fifth of the husband's income. At the time

21. Article 44 of the Indian Constitution declared the adoption of a uniform civil code as an objective. However, the Indian Government has not enacted a uniform civil code, and the issue has been and continues to be highly controversial and divisive.


23. Hindu Succession Act, 1956, s. 10.
of a divorce or judicial separation, there is no limit in determining permanent
maintenance. In view of the limited grounds on which a christian woman can
secure a divorce,\textsuperscript{24} the right of permanent alimony arises in very limited
circumstances.\textsuperscript{25}

In muslim personal law, a woman is only entitled to support for a period of
iddat, that is, for three months following divorce. In a recent case, \textit{Shah Bano}, a
muslim woman brought a petition for maintenance from her husband under s.125
of the \textit{Code of Criminal Procedure}, 1973.\textsuperscript{26} While the Supreme Court of India
upheld her claim, the legislature responded to the subsequent outcry within the
muslim community by enacting the \textit{Muslim Women (Protection of Rights on
Divorce) Act}, 1986, which specifically provides that s.125 of the \textit{Code} does not
apply to divorced muslim women. The legislation has in effect reinforced muslim
women’s position under muslim personal law, wherein a husband is only obliged
to return her mehr (dower, or marriage settlement), and pay her maintenance
during the period of iddat. If the divorced woman cannot maintain herself after
that three-month period, her children, parents, or other relatives entitled to inherit
her property are responsible for her support. If she has no relations the court may
direct the already impoverished State Wakf Boards to pay the maintenance
determined by the court.

So, notwithstanding the formal guarantees to equality, many dimensions of
personal laws continue to explicitly discriminate on the basis of sex. These laws
continue to reinforce women’s economic dependency within the family, and thus,
their social and economic inequality. The impact of these laws varies according to
class. Property laws, for example, are only significant to families with property,
and maintenance laws are only significant to families with sufficient income or
property to pay maintenance. Further, among poor urban and rural families, family
law matters, such as divorce, separation, and child welfare are of secondary
importance to issues of basic necessity and survival. Husbands and wives are often
separated by necessity, and the household becomes the more significant social
unit; this more informal relationship is therefore the one in which such issues are
dealt with.\textsuperscript{27} While women within these households continue to be affected by
familial ideology, they are less directly affected by family laws. The women most
likely to be affected by these discriminatory personal laws are therefore women

\textsuperscript{24} Divorce is available to the wife if she can prove the adultery of the husband coupled with cruelty
or desertion: \textit{Indian Divorce Act}, 1969, s. 10.

\textsuperscript{25} \textit{Ibid.}

\textsuperscript{26} See the cases noted \textit{supra} note 22. The controversy sparked by the \textit{Shah Bano} case is discussed
below. Section 125 of the \textit{Code of Criminal Procedure}, 1973 enables wives, including divorced
wives, to make an application for maintenance from their husbands to prevent destitution.

\textsuperscript{27} Devaki Jain and Nirmala Banerje, eds., \textit{Tyranny of the Household: Investigative Essays on
Women’s Work} (New Delhi: Shakti Books, 1983). The economic household is defined as “the
entire group of persons who commonly live together and take their meals from a common
means”.
within families living well above the poverty line.

C. The Legal Regulation of Women in the Labour Market: Substantive In/Equality

Despite the proliferation of laws intended to guarantee women's rights, many of these laws remain inaccessible to the vast majority of Indian women. An enormous gap exists between formal equality rights and the substantive inequality that continues to characterize women's lives. Women lack access to effective enforcement mechanisms. Women may not be aware of their legal rights; they may face too many social pressures within their families and communities to make a claim for their rights; and they may lack economic, geographic, and even political access to the legal system. While the discussion in this section is focused on the legal regulation of women in the labour market, it is important to note that this problem of under-enforcement exists in relation to a broad range of laws affecting women and other disadvantaged groups.

The "Directive Principles of State Policy of the Indian Constitution" provide for the protection of women workers. There are special provisions in various labour laws protecting and promoting the rights of women. However, these labour laws remain largely ineffective in substantively securing these rights. Women workers suffer from the under-enforcement of labour legislation in general, as well as from the under-enforcement of legislation specifically designed to protect and promote the interests of women workers.

In discussing the legal regulation of women's work, it is important to recognize the distinction between the organized and unorganized sectors of the economy. As the Report on the Status of Women in India described:

The difference between these two is not functional, as between agriculture, industry and services because these functions can be found in both the sectors. The real difference between them lies in the organization of productive relations, the degree of penetration of public control and regulation, and recognition by data-collection agencies and scientific investigators. The organized sector is characterized by modern relations of production and is regulated by laws that seek to protect the security and working conditions of labour as well as by labour organizations that can engage in collective bargaining. This includes the entire public sector ... as well as that part of the private sector which is

28. Indian Constitution, Articles 39 and 42.
29. See, for example the Factories Act, 1948; the Plantations Labour Act, 1951; the Mines Act, 1966 and the Bidi and Cigar Workers Act, 1966.
regulated. The unorganized sector, which includes agriculture as well as various industries and services, is characterized by the absence of all the protective measures and machinery.\textsuperscript{31}

The Report found that 94 per cent of women workers were in the unorganized sector.\textsuperscript{32} More recently, a government study on the status of women reported that "approximately 90 per cent of women workers are engaged in the unorganized sector. Of these over 80 per cent are in agriculture and allied occupation. In the organized sector, women constitute only 13.3 per cent of all employees."\textsuperscript{33} This distinction between the organized and unorganized sector is an important factor in explaining why working class women are more affected by the gap between formal rights and their substantive under-enforcement. Women employed in the organized sector have more direct access to labour regulations. Moreover, women employed in the organized sector of the economy are primarily middle-class.\textsuperscript{34} In contrast, the overwhelming majority of women workers are employed in the unorganized sector which, by the very definitions of the distinction between these


\textsuperscript{32} \textit{Ibid.} Notwithstanding these statistics, it is important to note that recent studies have highlighted the difficulties in obtaining accurate and reliable statistics about women's work. Data collection for the Indian census has been limited by the distinction between paid and unpaid labour. As Maithreya Krishnaraj has illustrated, questions such as "Did you work at any time at all last year" do not capture women's unpaid labour within the family, including labour within family farms and/or other businesses. The census has recently been amended to include a clause specifically including "unpaid work on the family farm or family enterprise", which is expected to capture this labour. Maithreya Krishnaraj, "Women's Work in Indian Census: Beginning of Change" \textit{Economic and Political Weekly} (1-8 December 1990) 2663. As Krishnaraj has also observed, there are major obstacles in collecting data on women, including the segregation of the sexes that often makes women inaccessible to data collectors, the male head of the household speaking on behalf of the members of the household, and an ideology of women as housewives that legitimates the invisibility of women's work. See also Abusaleh Shariff, "Women Workers: Gender Equality and Female Autonomy" (1990) 20 Soc. Change 44, who argues at 44:

A major hurdle in analyzing the issues relating to female work in the Indian context was the conceptual, which distinguished between productive and unproductive work (household chores and child care). Secondly, the concepts of female work working time, gender equality and female autonomy need to be understood within the desegregated framework consisting of the two modes of production which exist simultaneously in the Indian production sectors, namely, the "familial mode" and the labour mode of production.

As Shariff argues, the familial mode of production is still predominant within agriculture, and women's work therein tends to go largely unrecognized.


\textsuperscript{34} It is also important to recognize that it is only within middle-class families that women can afford not to work outside the home. See Liddle and Joshi, \textit{supra} note 14.
sectors of the economy, is effectively outside the purview of most labour legislation.

A brief review of two of the most significant labour laws enacted to protect and promote the particular interests of women workers will illustrate the continuing gap between formal and substantive rights. The *Maternity Benefits Act*, 1961 (MBA) provides for 12 weeks maternity leave and benefits. Women are prohibited from working for a six-week period immediately following childbirth. Pregnant women are also entitled to take up to six weeks paid leave of absence prior to their expected date of delivery, entitling women to a total of 12 weeks paid maternity leave. The Act further provides for nursing breaks, twice a day, when the woman returns to work, until the child is fifteen months old. In order to qualify, women must have worked a minimum of 30 days within the 12 months prior to childbirth. The Act prohibits the employer from discharging a woman during her maternity leave, or otherwise changing her conditions of employment. Within the unorganized sector, women often are unable to work at the same place of employment for the required qualifying period. Employers may manipulate women’s working conditions to ensure that they do not qualify. Moreover, as Faith Herndon has argued:

> Perhaps the greatest weakness of the Act lies in its extremely limited response to the problem of widespread discrimination that women workers face during and after their pregnancy. It is a common practice among employers to refuse to hire pregnant women, to demote or terminate women if they become pregnant, and to deny them promotion and pay raises. The MBA provides only minimal protection against these practices.

As Herndon concludes, “by requiring employers to pay maternity benefits without extending extra protection to women, the Act actually encourages employers to

35. The *Maternity Benefits Amendment Act*, 1961 has been amended by the *Maternity Benefits (Amendment) Act*, 1988, which has strengthened the Act by broadening its application, increasing penalties, and providing additional remedies. As amended, the Act applies to publically and privately owned factories, mines, plantations, shops, and establishments that employ a minimum of 10 to 20 workers.
37. *Ibid.*, s. 6(2). According to s. 5, benefits must be paid at the rate of the average daily wage paid to the woman for the three-month period she worked prior to maternity leave, or 10 rupees, the minimum wage established under the *Minimum Wages Act*, 1948.
discriminate against them”. Further, the nursing provisions of the Act are in many respects contingent upon the availability of on-site child care facilities. Labour laws specifically provide for creches for children of working mothers in factories and on plantations. However, these laws are rarely enforced, and in many work sites, particularly in the unorganized sector, women are actively discouraged by their employers from bringing their children. When women do bring their children, they are often prohibited by their supervisors from tending to and even nursing them. Further, where creche facilities are available, these facilities are well below the prescribed standards and level of supervision.

The Equal Remuneration Act, 1976 (ERA) provides for equal pay for equal or similar work. The ERA further prohibits discrimination in the recruitment of workers. However, the practice of paying women lower wages for equal or similar work persists. Firstly, the ERA does not impose a duty on employers to evaluate whether the work of women and men is of a similar nature, nor does it establish any institutional procedure by which such evaluations would be made. Further, women continue to be employed in lower paying occupations. As the National Perspective Plan for Women has observed: "In the economy, women are concentrated in occupations which are usually at the lowest rung of the ladder. In most occupations, they are involved in the more arduous and less skilled areas of work.”

41. Ibid. She observes further: “According to an Assistant Commissioner of Labour for Maharashtra, employers are responding to the MBA by hiring men over women in the desire to avoid shoudering payment of benefits. As long as the MBA is not combined with strict government oversight of recruitment, this paradoxical situation will remain.” Although penalties have been raised under the recent amendments to the Act, the penalties are “still not high enough to deter many employers from the temptation of trying to evade the Act.” Ibid.

42. For example, according to the Factories Act, 1948, (which applies to a premise where a manufacturing process is carried on with power and with 10 employers, and to a premise without power with 20 or more employees) every factory in which more than 30 women workers are ordinarily employed must provide suitable rooms for the care of children under six years of age. Similar provisions are found in the Plantation Labour Act, 1961 (applicable to all tea, coffee, rubber and other plantations requiring creches where 50 or more women are employed), and in the Beedi and Cigar Workers Act, 1986 (applies to all beedi and cigar establishments, requiring creches where 50 or more women are employed).

43. K. Chandru, “Women’s Rights in the Labour Laws” Legal Perspectives; [n.d.] see also Saran and Sandhwar, supra note 40 at 176.

44. Saran and Sandhwar, supra note 40 at 177.

45. Equal Remuneration Act, 1976, s. 4.

46. Equal Remuneration Act, 1976, s. 5 establishes a “duty of employer to pay equal remuneration to men and women workers for same work or work of a similar nature”.

47. As Chandru, supra note 45 at 3 has observed, “whether a particular work is work of a similar nature or not, is a complicated question, and the Act has not provided any machinery to decide whether a work is of a similar nature or not”.

48. For example, according to the Factories Act, 1948, (which applies to a premise where a manufacturing process is carried on with power and with 10 employers, and to a premise without power with 20 or more employees) every factory in which more than 30 women workers are ordinarily employed must provide suitable rooms for the care of children under six years of age. Similar provisions are found in the Plantation Labour Act, 1961 (applicable to all tea, coffee, rubber and other plantations requiring creches where 50 or more women are employed), and in the Beedi and Cigar Workers Act, 1986 (applies to all beedi and cigar establishments, requiring creches where 50 or more women are employed).
work."48 Since their work is not equal or similar to that being performed by men, there is no violation of the Act. In fact, this approach has been expressly adopted by the Supreme Court. In *Mackinnon, Mackenzie & Co v. Audrey D’Costa*,49 one of the few cases to reach the Supreme Court under the *Equal Remuneration Act, 1976*, while finding that the women and men stenographers in question did the same work and that the female petitioner was thus entitled to equal pay, the Court went on to state:

> We do not suggest that there can be no discrimination at all between men and women in the matter of remuneration. There are some kinds of work which women may not be able to undertake. Men do work like loading, unloading, carrying and lifting heavier things which women cannot do. In such cases there cannot be any discrimination on the ground of sex.50

The Court thus appears to have rejected a comparable worth, or equal pay for work of equal value approach, so that the continuing sexual division of labour within the labour market will preclude any increase in women’s wages.

Lastly, it is important to recognize that the rights contained in the *Equal Remuneration Act, 1976*, remain effectively inaccessible to the vast number of women workers in the unorganized, and particularly the agricultural sector. The arduous working conditions and insecure employment situation virtually preclude any recourse to the Act’s enforcement mechanisms.

**D. Legal Regulation of Rural Development**

Government development policies and the laws by which these policies are implemented have had a destructive impact on the lives of rural peoples. As Bina Agarwal writes:

> After three and a half decades of State-directed development, India continues to be characterized by high levels of poverty and economic inequality. Over the past two decades in particular, the pursuit of primarily growth-oriented policies, without due consideration of distributional aspects and structural reform, has resulted in its own contradictions: agricultural stagnation in several parts of the country, and the rapid degradation of the natural resource base which will ultimately constrain long-term agricultural growth rates; a continuing large

48. *National Perspective Plan, supra* note 33 at 28. At 142-43, the *Plan* observes that in the agricultural sector, there is a provision for fixing a statutory minimum wage, but invariably the work women do is classified as semi-skilled or unskilled and they are paid much less, often less than the minimum wage.


population under poverty; and a deteriorating physical, social and political environment.  

The law has played an important role in government development strategies. Both the Land Acquisition Act, 1894 and the Forest Act, 1927 are used to displace peoples from the land, primarily for development purposes. Both of these Acts confer broad discretion on the Central Government to appropriate land for “public purposes” which, in effect, has come to mean for commercial and industrial purposes. There is no national law governing the issues of resettlement and rehabilitation.

The forest laws in particular are used to displace, and indeed destroy India’s Tribal peoples. The Forest Act, 1927 empowers the government to proclaim forest as reserved or protected forests, and thus, displace the forest dwellers from these lands. The Act similarly confers on government officials an inordinate discretion, which is frequently exercised in an arbitrary and discriminatory manner. The forest laws abolish all occupancy or possessory rights of the forest dwellers. The policies underlying the forest laws is that the claims of communities in or near forests should not override the national interests, that in no event can the forest dwellers use the forest wealth at the cost of wider national interests, and that relinquishment of forest land for agriculture should be permitted only in very exceptional and essential cases.

The impact of these forest laws on India’s indigenous peoples is devastating. These peoples have traditionally relied on the forests for their survival. The forests have provided their food, fuel, building materials, and medicines. Government forest policy, by displacing these peoples from the forests, is destroying their livelihood, their environment, and their culture. But the impact of these laws, like the experience of poverty more generally, also has a gendered dimension. The displacement has significantly increased women’s workload. Women, who have traditionally been responsible for gathering food, fuel, and water, must travel

51. Agarwal, supra note 9 at 83.
52. Walter Fernandes and Geeta Menon, Tribal Women and Forest Economy: Deforestation, Exploitation and Status Change (New Delhi: Indian Social Institute, 1987); see also Agarwal, supra note 9 at 104-113; B.K. Roy Burman, “Challenges of Development and Tribal Women” in J.P. Singh, N.N. Vyas, and R.S. Mann, eds., Tribal Women and Development (Jaipur: Rawat Publications, 1988) 11; Buddmadeb Chaudhuri, “Tribal Women and the Economy: The Case of Forest Dwellers, Craftsmen, Artisans and Cultivators” in Tribal Women and Development at 52-53: The situation is also critical in the case of the tribal communities which follow agriculture and do not directly depend on the forest. Due to expansion of agriculture, animal dung is increasingly being used as manure, thereby leaving very little of it for use as a substitute fuel. So the improvement and expansion of agricultural and the alternative use of traditional fuel items add to the energy problem and consequently increase the drudgery and workload of the tribals and in particular, their [sic] women.
longer distances and spend more time on this work. Moreover, the deforestation and environmental degradation produced by government policies is resulting in scarcity of forest products required for the survival of tribal peoples. While this scarcity reduces the overall standard of living, women often bear a disproportionate impact of this scarcity due to the unequal distribution of essential needs within households. For example, not only do women receive less food within the family, but they are unlikely to receive the additional nutritional requirement for the additional energy they expend on fuel, fodder, and water collection.

The impact of deforestation and environmental degradation is not limited to indigenous women, but also affects poor rural women throughout India:

In parts of Bihar where up to a few years ago, women of poor rural households could get wood for self-consumption or sale within a distance of one or two kms., they now have to trek 8-10 kms. daily. In some villages of Gujarat, even a daily search of four to five hours can no longer yield enough and dependence on tree roots, weeds and shrubs is increasing. These do not provide continuous heat thus also increasing women's cooking time.

The impact of these and other government development policies and the laws that facilitate their implementation is experienced overwhelmingly by the rural poor. For example, the Land Acquisition Act, 1894 has been used to displace rural peoples and create a landless peasantry. While both women and men are being displaced from the land, there are further gendered implications. Men are more

53. Fernandes and Menon, *ibid.*
57. Agarwal, *supra* note 9 at 106.
59. The oustee is not adequately compensated for his/her loss. The Act acknowledges the existence of privately held land but fails to acknowledge that an oustee is deprived of a historic right of access to natural resources and a way of life, for which the oustee is therefore not compensated. Menezes, *ibid.*; see also Chattapati Singh, "Rehabilitation and the Right to Property" in Walter Fernandes and Enakshi Ganguly Thukral, eds., *Development, Displacement and Rehabilitation* (New Delhi: Indian Social Institute, 1989) 91.
likely to be absorbed in waged labour within both the industrial and agricultural sectors. Maria Mies notes that while agricultural workers have increased by 43 per cent, male agricultural workers have increased by more than double that rate (88 per cent). She concludes that while both women and men are becoming landless, women are not being "proletarianized" at the same rate as men, and are thus being further marginalized within the development process. Further, while over 50 per cent of rural women are agricultural labourers, their labour tends to be more seasonal and lower paying. The marginalization of women within the development process thus serves to reinforce women's economic dependency on men within the family. Despite their waged labour, women often remain dependent on the higher wages of men for family subsistence. Their economic position becomes ever more precarious. Men are less likely than women to spend their wages on the family. Further, the absorption of men into the industrial sector often involves the men migrating to urban areas, and women are left to provide for their families notwithstanding their vulnerable economic position. Recent studies indicate that 30 to 35 per cent of rural households are headed by women as a result of male migration and/or abandonment.

It is important to recognize that it is not only poor rural women who are affected by these development policies. The economic positions of women within more affluent rural families are also affected, although they are affected through very different social processes. These development policies have resulted in the emergence of a rich peasant class. Women within this class, on the one hand, enjoy a higher standard of living. However, the impact of this process on these women is also to reinforce their economic dependency within the family. As standards of living increase, women are increasingly withdrawn from agricultural

60. Maria Mies, "Capitalist Development and Subsistence Production: Rural Women in India" in Maria Mies, Veronika Bennholdt-Thomsen, and Claudia Von Werlhaf, eds., Women: The Last Colony (London: Zed Press, 1988) 27. The process of modernization has been shown to have displaced women and resulted in a further erosion of their economic authority and status. Social and cultural attitudes towards women's work, in which mechanized labour is seen as men's work whereas women's work is manual in nature, continues to stream women away from the necessary skills training, and continues to further marginalize their worth within the development process. Despite some of the opportunities offered by technological progress, more often than not, women are pushed into less skilled and lower paying jobs. When newer equipment is introduced, men are trained to use it while women are relegated to the older equipment. Further, newer technologies that are introduced in the workplace often replace the manual, labour-intensive work of women. See generally S.C. Jain, ed., Women and Technology (Jaipur: Rawat Publications, 1985); Appropriate Agricultural Technologies for Farm Women: Future Research Strategy and Linkages with Development Systems (Conference proceedings, 30 November-6 December, 1988, New Delhi) [unpublished]; National Perspective Plan For Women, supra note 33. See also Govind Kelkar, Women's Work and Agricultural Technology (Occasional Paper #3) (New Delhi: Centre for Women's Development Studies, 1985), for the impact of the Green Revolution on women's agricultural work.

61. National Perspective Plan, supra note 33 at 142-43; World Bank, supra note 5 at 62.

62. National Perspective Plan, supra note 33 at xi-xii.
work and secluded in domestic work within the home. While the development process may be reinforcing women’s economic dependency across class lines, the law does not equally ensure women’s access to the maintenance intended to compensate for this economic dependency. In the event of marital breakdown, poor rural women are unlikely to have access to any maintenance.

III. Evaluating Legal Strategies for Social Change

In light of the role of law in reinforcing women’s poverty, the question that must be asked is what role, if any, can law play in improving women’s socio-economic status. This is a particularly significant question insofar as the law has been a central focus in Indian women’s struggles for social change. Indeed, law has been viewed by many as an important instrument of social engineering, and has frequently been invoked by a broad range of disadvantaged and marginalized groups in an attempt to advance their interests. However, the way in which we understand law’s role in women’s poverty will obviously affect our approach to this remedial question. For example, while the continuing existence of formal inequalities in the law might lead to the argument that further law reform is required to improve women’s socio-economic position, the analysis of the continuing gap between formal equality and substantive inequality might lead to a focus on the need for improved access to legal institutions. In contrast, the role of law in rural development raises serious doubts about the efficacy of law and law reform. Such an approach might lead to an emphasis on the need to challenge the underlying social relations that are reflected and reinforced in and through law. This remedial question thus raises the broader issue of the complicated and indeed

63. Amrita Chhachhi, “The State, Religious Fundamentalism and Women: Trends in South Asia” (Institute of Social Studies Working Paper) (September 1988) [unpublished]; Liddle and Joshi, supra note 14 at 90 argue that notwithstanding the withdrawal from work of upper caste/class women:

The sexual division of labour is maintained throughout the caste hierarchy, but in different forms ... Amongst the higher castes, the men supervise the work of servants, hired labourers and tenants, whilst the women are responsible for domestic work. Neither sex labours in the fields, but amongst all the castes, domestic work is performed exclusively by the women. For upper-caste women, then, withdrawal from work outside the home (paid or unpaid) marks a release from arduous physical labour and a significant reduction in the amount of labour required of them.

This withdrawal from work thesis has more recently been criticized, as “developed primarily to deal with status ranking among middle and higher castes in rural India. Its generalizability to urban contexts where class formation is marked is questionable. The changing meanings of work and of public activities as well as the increased wage dependency of households alter the nature of “status” considerations.” Hilary Standing, Dependence and Autonomy: Women’s Employment and the Family in Calcutta (London: Routledge, 1991) at 11.

contradictory role of law in general, and rights in particular, in feminist struggles for social change.

A. Public Interest Litigation

The development of public interest litigation (PIL) by the Supreme Court of India in the early 1980s created a new interest in the role of law, and particularly of constitutional rights discourse, in social change. The rationale of PIL was to provide effective access to justice to the economically weaker classes and meaningful realization of fundamental rights guaranteed in the Indian Constitution. The Supreme Court held that any member of the public acting bona fide may bring a petition for judicial redress for public injury arising from breach of a public duty or from the violation of some provision of the Indian Constitution or law, and seek enforcement of such public duty and observance of such Constitutional provisions. In the Court's view, this access is essential for maintaining the rule of law, furthering the cause of justice, and accelerating the pace of realization of constitutional objectives. The petition is for the enforcement of the specific rights of a determinate class or group of people who are primarily injured by the impugned action. The injury suffered by members of this class must be direct, although redress may be sought on their behalf if they are unable to approach the Court on account of indigence, illiteracy, and social and economic disabilities. The Supreme Court has established new strategies for establishing the claims of petitioners, including the appointment of socio-legal commissions of inquiry.

These and other early cases in the development of public interest litigation led many commentators and activists alike to the view that constitutional rights could play an important, even a leading role in these democratic struggles. There are, however, some important limitations that must be considered. First, although PIL has been used from time to time when there has been a violation of a fundamental right of a woman or women by the State, it has not been a major strategy in

67. For example, in Upendra Baxi v. State of Uttar Pradesh (1981), 3 S.C.A.L.E. 1136 [hereafter referred to as the Agra Protective Home Case] the Court appointed the District Judge of Agra as Commissioner to visit a Protective Home and to make a detailed report in regard to the conditions in which the women were living in the home. It was on the basis of this report that various directions were given by the Court from time to time, which resulted in the improvement of the living conditions for the women in the home.
68. See for example the Agra Protective Home Case, supra note 67; Chinnamma v. State (Administration) W.P. 2536 of 1982 where Nandita Haksar initiated proceedings similar to the Agra Protective Home Case; Ms. Comi Caopor, Aswini Sarin and Aurun Shourie v. State of Madhya Pradesh, W.P. 2229 of 1981 in which three journalists exposed a thriving market in
the women's movement. Only fundamental rights are enforceable against the State.69 This public/private distinction has thus precluded PIL from being invoked to challenge and redress the violations that women experience within the private sphere, and most significantly, within the family.

Secondly, the increase in the number of PIL petitions, coupled with the enormous backlog of cases in the Supreme Court of India and the State High Courts, has prompted a change in the judicial attitude. The Court is currently of the view that only when it is apprised of gross violations of fundamental rights by a group, when basic human rights are invaded, or when there are complaints of acts that shock the judicial conscience, that procedural obstacles should be overridden and such petitions heard.70 Therefore, the initial spate of PIL cases heard by the Court has decreased and has further reduced the possibility of using it as an effective tool for redressing wrongs that women suffer. Moreover, there is a serious question of the institutional limitations of public interest litigation, that is, that the judiciary is not institutionally capable of ensuring compliance with its orders. Public interest litigation has come to be limited in much the same way that legislation is limited— it is under-enforced. Despite the legal victories, the socio-economic conditions that the judicial orders were intended to address often remain unchanged.

The need to complicate our understanding of rights is thus only further supported by this development of public interest litigation. PIL has proven to be limited in its ability to bring about socio-economic change. Despite its attempt to broaden the individualistic nature of liberal rights discourse, judicial institutions have proven ineffective in enforcing decisions. Moreover, public interest litigation has played directly into the dangers of litigation strategies. The political struggles have been legalized; the agendas have been set by lawyers; and the inability of the strategy to deliver on its false promise of social and economic change has often times been demoralizing and depoliticizing at the community level. The experience with public interest litigation highlights the importance of locating such rights claims within the broader political struggle and involving the people affected more directly in deciding if, when, and for what purpose rights claims should be pursued.

which women were bought and sold as chattels. They filed a writ petition demanding the prohibition of this practice and the immediate relief for the women through a program of compensation and rehabilitation.


B. The Challenge of Religious Fundamentalism

The dilemmas of rights are further heightened in the current context of the growth of religious fundamentalism and the emerging relationship between this fundamentalism and the State. The legitimacy of the liberal democratic secular State is in crisis. The Indian State has been unable to adequately deal with the proliferation of movements for regional autonomy, competition for economic resources, and decentralization of power resulting from uneven regional development. The legitimacy derived from the anti-colonial nationalism of the post-independence period is no longer sufficient. The centralizing tendency of the post-colonial State requires new ideological legitimacy — legitimacy that the growth of religious fundamentalism has the potential to provide.

Indeed, religious fundamentalism and its new alliance with the State has begun to present the women’s movement with yet another formidable challenge. Fundamentalists are increasingly claiming their own rights, as fundamentalism permeates the courtrooms and directly challenges women’s hard-won rights. Today, the agenda of religious fundamentalism is taking over the terrain of the courtroom and having a very specific impact on women’s rights. It is threatening to undermine some of women’s secular rights and to revive battles that were won long ago.

The Shah Bano controversy highlights the emerging tension between religious rights and women’s rights, and the successful incursions of religion into the terrain of women’s basic secular rights. The muslim community reacted sharply to the Shah Bano decision. Although there had been several previous decisions by state high courts awarding muslim women maintenance, the case marked the Supreme Court’s first attempt to interpret the Quran. This attempt was regarded as a usurpation of the authority of the muslim theologians who alone are permitted to interpret the Holy Book. The fact that the Court was comprised entirely of non-muslim men led these theologians to believe that the Court had in fact deliberately misinterpreted the Code of Criminal Procedure. Even more significantly, the muslim community suspected that the judgment was intended to undermine Islamic law, and thus designed to serve the interests of hindu

71. Chhachhi, supra note 63.
72. See Nandita Gandhi, “Impact of Religion on Women’s Rights in Asia” Economic and Political Weekly (23 January 1988) 127, arguing that it is religion as a substitute for economic and social change and as a political weapon that forms the basis of fundamentalism and communalism. Ali Asghar Engineer argues that while religion provides an important means of mobilization, the communalism of the working class has focused around immediate economic grievances. Asghar Ali Engineer, “Socio-Economic Basis of Communalism” Mainstream (July 1983) 45; A.R. Desai argues that there has been a deliberate encouragement of religious fundamentalism by ruling classes to manage economic crisis: A.R. Desai, “Congress (I), Communist Parties and Communalism” Economic and Political Weekly (29 July 1984) 1196.
73. Supra note 22.
fundamentalists.\textsuperscript{74} Conservative hindu groups had been advocating a uniform civil code. Under the guise of secularism, these groups argued that there ought to be no separate law for muslims.\textsuperscript{75}

Ironically, progressive muslims had been arguing for the secularization of these aspects of muslim law that treated women unfairly.\textsuperscript{76} The women’s movement had similarly been arguing in favour of the adoption of a secular uniform civil code that would promote women’s equality. The interests of progressive muslims, hindu fundamentalists, and feminists thus appeared to coincide. Muslim theologians and community leaders decided to take political action and called for a national protest of the \textit{Shah Bano} decision. The action eventually led the Central Government, concerned with losing the muslim vote, to enact the \textit{Muslim Women’s (Protection of Rights on Divorce) Act}, 1986, a law that did not simply give priority to religious rights over women’s rights,\textsuperscript{77} but further denied muslim women’s access to what had been until that time a secular provision of the law.\textsuperscript{78} A secular law – the \textit{Code of Criminal Procedure} – that was uniformly applicable to all persons, was thus communalized in the process. The \textit{Shah Bano} case, and the subsequent enactment of the \textit{Muslim Women’s Act} thus exemplifies the extent to which the State is fostering communal identities in and through the law.

The discourse within which this controversy was, and continues to be, expressed is equally problematic and must be recognized as further contributing to communal tendencies – hindu and muslim alike. The issue was constructed in the media by both progressives and hindu fundamentalists primarily as a critique of muslim law and its treatment of women, which is seen as inherent in

\textsuperscript{74} The Bharatiya Janata Party (BJP), a party that is committed to the establishment of a hindu theocratic state, advocates a uniform civil code. This argument is frequently cloaked in the discourse of secularism. For example, some of their recent party literature includes an article written by Arin Jaitley, Ex-Assistant Solicitor General, entitled “Equality and Justice for Women under Indian Law” [unpublished], which argues for a uniform civil code in the interests of promoting women’s equality. See, further, BJP National Executive meeting, 3-5 January 1986, resolution on \textit{Shah Bano}, at 3, attacking the response of the Muslim League and the Jamaat-e-Islami following the Supreme Court decision, portraying itself as the defender of women’s rights and the integrity of the Court. It further makes a plea to the Central Government to move towards a uniform civil code.

\textsuperscript{75} Asghar Ali Engineer, \textit{The Shah Bano Controversy} (Hydrabab: Orient Longman, 1987) at 12.

\textsuperscript{76} For a general discussion of the attempts to reform within the muslim community, see Shaida Lateef, \textit{Muslim Women in India: Political and Private Realities}, 1890’s – 1990’s (New Delhi: Kali for Women, 1990).


\textsuperscript{78} Chhachhi, \textit{supra} note 63 at 166: “What is significant about the Muslim Women’s Bill is ... that the state is intervening to prevent Muslim women from recourse to secular law, and is imposing communal control over them.”
“muslimness”. In this respect, the Shah Bano controversy continues to serve as a focus in the promotion of communal identities. Indeed, hindu fundamentalists continue to generate support for their pro-hindu, and specifically anti-minority political agenda by focusing attention on this case. Further, as the attacks on the muslim community continue to escalate, so this community is forced to adopt increasingly defensive positions, within which even progressive voices must be careful not to play into the discourse and political agenda of hindu fundamentalists.

Another example of the undermining of a secular law is found in the area of women's reproductive rights. The Medical Termination of Pregnancy Act, 1971 gives a woman the exclusive right to decide if she wants to terminate her pregnancy and does not require the consent of any other party. In a Delhi High Court case, a woman allegedly terminated her pregnancy on two occasions. Her husband subsequently filed a petition for divorce under the Hindu Marriage Act, 1956, on the grounds that his wife had terminated the pregnancy without his consent, and that such action constituted cruelty. The Court found that the husband, his sister, and his parents were “always crazy to have a child in the family, but the appellant [wife] dashed their hopes by resorting to termination of


This case was picked up by the media, and by Hindu fundamentalists as well as by the liberal intelligentsia as an illustration of the unchanging oppression of Muslim women, inherent in their Muslimness rather than in the particular socio-economic conditions of Muslims in India and the role of the state in fostering communal identities. Newspaper headlines focused on Muslim women as victims of Muslim law ... with gruesome stories of divorced and deserted women. Hindu fundamentalists 'picked up the burkha, talaq and other discriminatory aspects of Muslim personal law and practice to prove how barbaric, Muslims and Islam is ... '. Many feminists inadvertently adopted the same discourse and found themselves side by side with the Hindu fundamentalists in demanding a uniform civil code without a clear elaboration of what such a code should entail to distinguish their position from fundamentalists.

80. Nasreen Fazalbhoi, “The Debate on Muslim Personal Law” (Paper presented at the Third National Conference on Women's Studies, Chandigarh, 1-4 October 1986) [unpublished] argues that the discourse of the Shah Bano case was dichotomized. She argues at 8 that the issue was “reduced simply to a fight between those who were, (for) and those who were (against) the judgment. Those who took a position (for) became the progressives” and those against the “fundamentalists”. This dichotomized discourse virtually displaced any progressive muslim voice within the debate. At 9, she writes:

Those who were against the judgment were the protectors of the Shariat, fighting against distortion in the Quran and those who supported the judgment were those who wanted to destroy Islam or use it for their own purposes. Muslims who supported the judgment were simply excluded from participating in the debate since they were considered to be outside the pale of Islam. The protagonists here were therefore muslims and non-muslims.

The Court held that the wife's conduct amounted to mental cruelty:

If the wife deliberately and consistently refuses to satisfy a husband's natural and legitimate craving to have a child, the deprivation reduces him to despair and it naturally affects his mental health. This is more so in the case in hand where the parties to the litigation are Hindus. In this sort of case the Court has to attach due weight to the general principle underlying the Hindu law of marriage and sonship and the principle of spiritual benefit of having a son who can offer a funeral cake and libation of water to the manes of his ancestors.

The Court upheld the decision of the lower court, and granted the husband a divorce on the ground of cruelty.

The net effect of this case was to communalize the Medical Termination of Pregnancy Act. While all women are ostensibly given the secular right to terminate their pregnancies without the consent of their husbands, married Hindu women will now be required to obtain that consent if they do not want to give their husbands grounds for divorce. It should be further noted that the position of the Court is consistent with statements of Hindu fundamentalists. During the communal violence in Ahmedabad, fundamentalists put forward their theory of truth (satyawad) in which they condemned abortion as murder and advocated that women return to the home, giving up their jobs in favour of unemployed men.

The experience of rising religious fundamentalism thus also highlights the need for a more complicated understanding of the role of rights claims. Religious fundamentalists are proving to be effective in mobilizing around rights, exemplifying the tendency observed by Carol Smart and Judy Fudge that rights discourse may be equally efficacious for feminist and anti-feminist movements. Yet, religious fundamentalism is at the same time challenging the very institutions and discourses of secular democracy, advocating that it be supplanted by religious institutions and discourses. Paradoxically, fundamentalism is laying claims to rights at the same time as it threatens to undermine the very secular commitment to the discourse of rights. At this particular moment in history, when secularism is being challenged by religious fundamentalism, and when religious

82. Ibid. at 253.
83. Ibid.
85. Judy Fudge, "The Efficacy of Entrenching a Bill of Rights upon Political Discourse: Feminist Demands and Sexual Violence in Canada" (1989) 17 Int'l J. Soc. of Law 445 and Carol Smart, Feminism and the Power of Law (London: Routledge, 1989). Both Judy Fudge and Carol Smart have challenged the role of rights in feminist mobilization, noting that anti-feminist groups have been just as effectively mobilized.
fundamentalism is providing meaningful discourse and participatory structures for women, this requires not only communicating the discourse of rights, but legitimating the discourse of secularism. Meaningful participatory structures on a grassroots level must be developed to adequately compete with fundamentalism.

The dilemma is how to legitimate the discourse of secularism without subjugating women to the discourse of liberalism. A secular state is essential if women are to be able to make claims regarding their rights to equality. And yet, we also understand that such claims are inherently limited — that is, social reconstruction will not occur within the sphere of law alone. A secular state is perhaps a necessary but insufficient condition for social transformation.

In this paper, we have explored some of the ways in which the legal regulation of women in India continues to reinforce women’s unequal socio-economic position. We have also considered some of the debates around the role that law can reasonably be expected to play within women’s struggles to overcome their subordination. Our objective has been to reveal the contradictory nature of legal regulation of women — that is — the extent to which law is both a site of oppression and, at the same time, an important site of struggle. Thus, it is important for feminists to continue to engage with law — to work, for example, for legislative reform and enforcement, while recognizing that neither reform nor enforcement of the law alone will fundamentally alter the social relations of women’s oppression.