

# Born a Eunuch? Harmful Inheritance Practices and Human Rights

Barbara R. Hauser\*

## Introduction

The guide in India offered reassurance: "Don't worry about the eunuch who was dancing. They are born eunuchs."

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At the time, I had been thinking about the acceptance of diverse cultural practices and how traditions, beliefs, and behaviors are passed on in a family as a part of the identity of a group. What does a child inherit? In addition to material goods, do children also inherit a set of beliefs, behaviors, and a position in society? Children of wealthy parents are "born with a silver spoon in their mouths,"<sup>1</sup> but is it possible for a child to be "born a

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\* Visiting Scholar of Law, University of Minnesota Law School. I also want to express great appreciation to Kim Donat, a candidate for joint degrees from the University of Minnesota Law School and the Hubert H. Humphrey Institute of Public Policy, for her outstanding research and editorial assistance.

1. The Italians say "nascere con la camicia" (to be born with the shirt); the Spanish say "nacer de pie" (to be born standing up); and the Basque say "hortzekin jai" (to be born with teeth). The Navajo equivalent of being "born with a silver spoon" translates as being born "with a hand underneath" the person, and that "coddled" person is frowned upon: "He or she is considered non-cooperative with the group, non-contributive to it, and therefore worthless to society." ALAN WILSON & GENE DENNISON, *THEY HAVE A SAYING FOR IT ... MULTINATIONAL IDIOMS AND THEIR NAVAJO EQUIVALENTS* 36-7 (2000). Inheritances of wealth and privilege cause great resentment. Andrew Carnegie, reflecting on his poor childhood in Scotland, wrote:

As a child I could have slain king, duke, or lord, and considered their deaths a service to the state.... There was still the sneer behind for mere pedigree – "he is nothing, has done nothing, only an accident, a fraud strutting in borrowed plumes; all he has to his account is the accident of birth; the

eunuch"? If it is possible, is that an example of a "harmful" inheritance practice? Are there other "harmful" inheritance practices? Who defines "harmful"? Shall we rely on principles of international human rights, and how can these be used to change an inheritance practice?

The literature has not addressed this particular issue. Several recent law review articles have discussed certain aspects of cultural relativity and human rights; some of these focus on women's rights.<sup>2</sup> Recent United Nations efforts have focused on the denial of women's property inheritance rights in a number of African countries as a denial of human rights.<sup>3</sup> The primary focus of those efforts has been the right of a widow to inherit the family home and/or land. One recent case in Tanzania held that a woman's restricted right (under applicable customary law) to inherit "clan" land was a violation of the Tanzanian Constitution.<sup>4</sup>

On an international level, there are a number of United Nations Conventions that contain provisions that should be relevant, as discussed in the final section of this article. Certain inheritance laws and practices do seem to violate internationally recognized human rights and children's rights.<sup>5</sup> The Universal Declaration of Human Rights, Convention on the Rights of the

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most fruitful part of his family, as with the potato, lies underground."

ANDREW CARNEGIE, AUTOBIOGRAPHY OF ANDREW CARNEGIE 9-10 (John C. Van Dyke ed., 1948). Yet when Carnegie created his own immense wealth, he proceeded to create his own "family crest" to pass on for the future. *Id.* at 11. Current issues of inherited wealth include parents' worries that their children will be spoiled and "spendthrift," and has resulted in recent books and articles. See, e.g., EILEEN & JON GALLO, SILVER SPOON KIDS (2001); SUZAN PETERFRIEND & BARBARA HAUSER, MOMMY, ARE WE RICH?: TALKING TO CHILDREN ABOUT FAMILY MONEY (2001); Barbara Hauser, *A Child's "Station in Life": Inheritance Rights and Expectations*, 4 J. OF WEALTH MANAGEMENT 9 (2001).

2. See, e.g., Leti Volpp, *Blaming Culture for Bad Behavior*, 12 YALE J.L. & HUMAN. 89 (2000); Leti Volpp, *Essay: Feminism Versus Multiculturalism*, 101 COLUM. L. REV. 1181 (2001); Yash Ghai, *Universalism and Relativism: Human Rights as a Framework for Negotiating Interethnic Claims*, 21 CARDOZO L. REV. 1095 (2000); Celestine I. Nyamu, *How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?*, 41 HARV. INT'L L.J. 381 (2000).

3. See generally discussion *infra* Part One, II.C.

4. See *Ephrahim v. Pastory and Kaizilege*, 87 I.L.R. 106 (1990). See also UNITED NATIONS DEVELOPMENT FUND FOR WOMEN, BRINGING EQUALITY HOME: IMPLEMENTING THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN 21 (Ilana Landsberg-Lewis ed., 1998); discussion *infra* Part One, II.C (explaining that customary law would permit a woman to inherit only a "life interest" in the land, with no right to sell it); Jeanmarie Fenrich & Tracy E. Higgins, *Promise Unfulfilled: Law, Culture, and Women's Inheritance Rights in Ghana*, 25 FORDHAM INT'L L.J. 259 (2001).

5. See *infra* Part One, III.

Child, the Convention on the Elimination of all Forms of Discrimination Against Women, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, all refer to the protection of basic human rights and freedoms.<sup>6</sup> What are the basic human rights in terms of inheritance?

Part One describes a number of what is referred to as “inheritance practices”<sup>7</sup> that are justified by their adherents as being part of that group’s tradition, law or culture, but which can be seen to have harmful effects on certain groups of individuals. The word “inheritance” is also used to cover more than the receipt of material goods upon the death of someone. Positions, classes, obligations, and expectations can all be inherited. With a primary focus on the child, those “inheritance” practices that harm a child are examined, both at birth (actually as soon as a fetus’s gender can be determined) and beyond. A secondary focus will be on inheritance rights of daughters and widows. The practices that will be covered in Part One are the following: being “born” a eunuch, inheriting the obligation of *sacra*, inheriting wealth, inheriting a family business, inheriting a name, inheriting a financial cost to the family (which includes a discussion of “bride-burning”), protecting the line of inheritors and immortality (which includes a discussion of harems, polygamy, and female genital mutilation), widows, child marriage, sex trafficking of girls, *trokosi*, and female infanticide.

Part Two examines the social culture connection to the inheritance practices. This is to better understand the deep-rooted nature of these inheritance practices. The connection of the described practices needs to be understood in the context of the historical and societal traditions. Merely passing “modern” laws

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6. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3rd Sess., PT. I, Resolutions, at 71, U.N. Doc. A/810 (1948), [hereinafter UDHR], *reprinted in* 3 Weston III.A.1; Convention on the Rights of the Child, G.A. Res. 44/25 (annex), U.N. GAOR, 44th Sess., Supp. No. 49, at 167, U.N. Doc. A/RES/44/49 (1990) (entered into force Sept. 2, 1990), *reprinted in* 3 Weston III.D.3 [hereinafter CRC]; Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR, Supp. No. 46, at 193, U.N. Doc. A/34/180, (entered into force Sept. 3, 1981) [hereinafter CEDAW]; International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) (entered into force Mar. 23, 1976), *reprinted in* 3 Weston III.A.3 [hereinafter CCPR]; International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. GAOR, Supp. No. 16, at 49, U.N. Doc. A/6316 (1966) (entered into force Jan. 3, 1976), *reprinted in* 3 Weston III.A.2 [hereinafter CESCR].

7. “Inheritance practices” include laws and customary traditions. *See infra* notes 8-313 and accompanying text.

will not address the harms that are perpetuated. As noted in Part One, many of the needed laws already exist; they are not followed.

Part Three examines seemingly applicable human rights conventions and international principles of human rights. The next development needs to be an analysis of the application of some of these international principles to prohibit a number of the inheritance practices examined in this article.

## Part One

### *I. Definition of "Inheritance Practice"*

As defined in the Oxford English Dictionary, "inheritance" has many meanings: (1) "Hereditary succession to property, a title, office, etc.," (2) "A coming into, or taking, possession of something, as one's birthright," (3) "Property, or an estate, which passes by law to the heir on the decease of the possessor," or "any property, quality, or immaterial possession inherited from ancestors or previous generations," (4) "Something that one obtains or comes into possession of by right or divine grant; birthright."<sup>8</sup> Note the number of references to "birthright." This article will hopefully generate additional research and debate in this fruitful and controversial area. Finally, the article will close with the question of whether or not there is an acceptable international standard by which some inheritance practices are simply unacceptable. Is it defensible to claim that someone is "born a eunuch"?<sup>9</sup>

This article argues that inheritance laws and traditions have not received enough attention in terms of their effect on questions such as the foregoing. Inheritance traditions may well be the most fundamental traditions of all kinds, across all cultures, and throughout all ages. A twofold result of that importance is first that they affect far more in a society than is customarily realized, and second that their "root" position in society makes them extremely resistant to change. The connection between a culture and its inheritance practices is discussed briefly, as well as the human need to belong to and identify with a culture.

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8. THE OXFORD ENGLISH DICTIONARY 970 (2d ed. 1989).

9. I have made a consistent effort to focus on issues that could affect anyone, although it turns out that the majority of the practices I will describe are ones that "harm" girls and women. A notable exception, in addition to eunuchs, is the inheritance passed on to oldest sons of substantial obligations. See discussion *infra* Part One, II.

## II. Assessment of Harmful Inheritance Practices

### A. Eunuchs

The American Heritage Dictionary defines "eunuch" as: (1) "A castrated man employed as a harem attendant or as a functionary in certain Asian courts," (2) "A man or boy whose testes are nonfunctioning or have been removed."<sup>10</sup>

There are estimated to be between 50,000 and 1.2 million eunuchs in India, where they are known as "hijras."<sup>11</sup> As to whether they are "born" eunuchs, the Wall Street Journal reported the breakdown of eunuchs in subcategories as follows: "Many were born with deformed genitalia; a small fraction are hermaphrodites, and others are homosexual cross-dressers. Some males undergo castration to be accepted in the community."<sup>12</sup> And there is a less pleasant side: "Eunuchs deny longstanding allegations that they kidnap and castrate boys to keep their secret society alive, though over the years there have been a number of documented cases of adolescent boys being forcibly mutilated sexually."<sup>13</sup> It is difficult to obtain accurate information. One news release described "hijras" as "mostly men castrated at puberty."<sup>14</sup> Another describes how they became "hijras" as follows: "Some have been born with incompletely formed genitals and come from families too poor to try a medical enhancement. Some have been castrated."<sup>15</sup> The castration may be at ages as young as six or seven.<sup>16</sup>

10. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 613 (4th ed. 2000). The word comes from the Greek word "eunoukhos," which is a combination of "bed" and "to keep." *Id.*

11. Jonathan Karp, *And She's a Eunuch: Ms. Nehru Goes Far in Indian Politics*, WALL ST. J., Sept. 24, 1998, at A1. See also *Eunuch MP Takes Seat*, BBC NEWS ONLINE, Mar. 6, 2000, at [http://news.bbc.co.uk/2/hi/south\\_asia/668042.stm](http://news.bbc.co.uk/2/hi/south_asia/668042.stm) (estimating 500,000 hijras live in India).

12. Karp, *supra* note 11.

13. *Id.*

14. Reuters, *Eunuch Elected Mayor of Indian Town* (Nov. 27, 2000), available at <http://www.ntac.org/news/00/12/08india.html>.

15. Barry Bearak, *A Pox on Politicians, A Eunuch You Can Trust*, KATNI JOURNAL, reprinted in N.Y. TIMES, Jan. 19, 2001, at A4.

16. See ZIA JAFFREY, *THE INVISIBLES* 42-43 (1996).

"[T]he only way they can increase their numbers is by kidnapping young people, because they can't really reproduce on their own.... You think there are not enough people who want to join of their own volition?" "I don't think so.... It's not the kind of thing a normal kid would want to get into. In an area dominated by hijras, possibly, because he doesn't know any different, but that would be the only reason.... If they take a child into their community, it's at a very early age, usually six or seven, and at that age, I don't think any child knows" ... "I agree with you ... but I have heard that they come voluntarily, and they don't really join until about fifteen."

While they may have occupied a place in prior centuries as “the esteemed special guardians of royal harems,”<sup>17</sup> their place today is “relegated to the fringes of society.”<sup>18</sup> Said one eunuch: “It is an unhappy life.... We leave our families at a young age and live together because no one else would want us.”<sup>19</sup> One reporter described them as “[r]eviled, sniggered at and feared as obnoxious and even sorcerous.”<sup>20</sup>

Inheritance in the traditional sense has been linked with eunuchs in two senses. First, there was a concern that a eunuch remain “neutral” and without wealth. Thus it was traditional that eunuchs were not allowed to inherit any wealth. As one scholar of ancient Sanskrit texts concluded, a eunuch “was not allowed to inherit property, and was to be maintained by the king, who could take his inheritance as though it were his own.”<sup>21</sup> Second, inheritance has been an issue in the sense that eunuchs themselves are incapable of having children (“natural heirs”) and this gives them a position of relative neutrality in the sphere of acquiring wealth for the purpose of passing it on to one’s own children.<sup>22</sup> The current spate of elections of eunuchs to political office in India may be related to the fact that eunuchs will not be motivated by accruing wealth for their children or by forming a family dynasty.<sup>23</sup> One reporter commenting on the successful elections seems to have reached this conclusion: “[T]hese social outcasts live in segregated communes and are unable to father children. They have no heirs. They are less likely to steal.”<sup>24</sup>

In the broader sense of “inheritance,” to include being born with a certain position or status, it may be that some boys are “born” eunuchs. When a family shuns a young boy because his natural behavior does not fit a certain male community stereotype, it may be more accurate to say that the boy is “born” to be a candidate for joining the community of eunuchs (either voluntarily

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“That used to be the case.... Because in those days, the eunuchs were the keepers of the king’s harem. So it was a pretty sought-after job. But right now, no kid of fifteen, even if he’s a homosexual, is gonna join. Because it’s a very painful thing. It’s like a very crude form of castration.”

*Id.* (interview by Zia Jaffrey with Dilip Bobb, a journalist for *India Today*).

17. Bearak, *supra* note 15.

18. *Id.*

19. *Id.*

20. *Id.*

21. JAFFREY, *supra* note 16, at 36.

22. See *infra* Part One, I.C (discussing the importance of protecting the line of inheritors and the role of inheritance for ensuring immortality).

23. Bearak, *supra* note 15.

24. *Id.*

or involuntarily). Thus, he “inherits” the risk of becoming a eunuch. It may also be that his family will want to exclude him from their line of heirs who can themselves continue to pass on the family’s legacies to future generations. If this is a condition of life that the boy “inherits,” in the sense of being excluded from having a position in the family as a legal successor and heir, it is not unreasonable to also view this as part of an inheritance practice. To add the last step of my argument, if “joining” this community (of eunuchs) is involuntary or occurs below a recognized age of “informed” consent, is this not a violation of the child’s basic human rights?<sup>25</sup>

### B. Inheriting the Obligation of *Sacra*<sup>26</sup>

In addition to the inheritance of a “position,” a child can also inherit serious obligations. For example, in Roman times, when the father was the legal ruler and manager of the family, one of the duties inherited by a son was the duty to continue honoring the family ancestors.<sup>27</sup> A direct result of the traditional assignment of this duty to sons, and not to daughters, meant that in Roman times every man had to have a son. If he did not have one of his own, he could adopt one.<sup>28</sup> Anthropologists theorize that “[t]he cultural creation of ancestors ... denies the finality of death.”<sup>29</sup> As an extreme illustration of using ancestors to deny death, the Mexican celebration of Día de los Muertos (“Day of the Dead”) is based on a belief that the dead ancestors are really “living,” and they must be worshipped and fed during the festival days.<sup>30</sup> I was recently told about a Japanese man who has inherited a family business, with the obligation to begin each day in the “room of the ancestors” where he pays respects to and receives inspiration from the thirteen generations of male ancestors who owned the business prior to his time. He is likely to

25. See *infra* Part Three (discussing the UDHR and the CRC).

26. *Sacra* refers to the honoring of the family ancestors. See, e.g., BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 238 (1977). See also ANDREW BORKOWSKI, ROMAN LAW 211 (2d ed. 1997).

27. See NICHOLAS, *supra* note 26, at 237-38. The author assumes that “[t]his continuation of the dead man in his *heres* or *heredes* probably had its roots in social and religious rather than in economic considerations. It manifested the continuity of the patriarchal family and ensured that there should be someone on whom the duty of maintaining the family *sacra* would devolve.” *Id.*

28. *Id.*

29. ROGER M. KEESING & ANDREW J. STRATHERN, CULTURAL ANTHROPOLOGY: A CONTEMPORARY PERSPECTIVE 62 (3d ed. 1998).

30. See generally ELIZABETH CARMICHAEL & CHLOE SAYER, THE SKELETON AT THE FEAST (1991) (describing the tradition and origins of Día de los Muertos).

be insistent on naming (and training) a successor to himself to ensure not only the continuity of the business, but also that he will continue to "live on" as a respected ancestor himself.<sup>31</sup>

Even in civil law societies today, the heirs of a deceased person inherit the liabilities as well as the assets, even where the liabilities exceed the assets.<sup>32</sup> This came from Roman times, where the heir assumed the complete legal persona of the deceased.<sup>33</sup>

When an important funeral or ancestral duty is to be performed by a son, there will be a natural desire to have a son.<sup>34</sup> Not only does the inheritance of an obligation negatively impact a son, it can also discourage the birth of daughters. A current example from India comes from a doctor who has performed abortions of girl fetuses.<sup>35</sup> In his words: "Amongst the Hindu community, the funeral pyre has to be lit by a male."<sup>36</sup> This sort of role, which requires a son, still occurs in parts of Africa. For example, among the Tellensi people, in Ghana, a man is required to have a son in order to "become an ancestor and hence be assured of a permanent place in the Tallensi cosmos."<sup>37</sup> An anthropologist, studying the customs surrounding death followed by the LoDagaba in West Africa, described the need for a male, a brother, or a sister's son to be the heir and to preside over the funeral.<sup>38</sup> He mentions that if a dying man has no brother, "the sister's son may also be called to the deathbed; for if he is the heir, he has certain duties to perform as soon as the funeral begins."<sup>39</sup> In fact, the funeral will be delayed until the male heir arrives.<sup>40</sup>

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31. A Japanese woman recently explained to me that in Japan a son will carry on the family business, and if there is no son in the family then the father will either select a man to marry a daughter or will adopt a man to be his son. She saw this as an improvement over the Chinese system. "The Chinese only trust blood. We are more practical." If this generalization has merit, that could explain the high rate of female infanticide in China. See discussion *infra* Part One, IV.E.

32. See, e.g., CODE CIVIL art. 1101 (90th ed. Codes Dalloz 1991) (Fr.).

33. See NICHOLAS, *supra* note 26, at 236.

34. See *infra* notes 35-41 and accompanying text.

35. ELISABETH BUMILLER, MAY YOU BE THE MOTHER OF A HUNDRED SONS 117 (1990).

36. *Id.*

37. KEESING & STRATHERN, *supra* note 29, at 61.

38. JACK GOODY, DEATH, PROPERTY AND THE ANCESTORS 50 (1980).

39. *Id.*

40. *Id.*

In one instance when a man in middle age had died, the killing of the funeral animals had to await the arrival of his full brother from a distant town, even though his father was still living; the reason given was that father and son do not "eat" together, that is, inherit movable property, and it has to be a member of the same property-holding



This role to be played by a son can directly affect the inheritance of land, as in the following explanation of the inheritance of "family land" by sons:

In Togo, there is a strong customary tenet that land forms part of a sacred and inalienable trust handed down to the head of the family. As such, it possesses not just material, but also spiritual value, and its current holders have an obligation to their ancestors to preserve its continuity within the family line. It is argued that inheritance by widows places this property in the hands of a stranger, while inheritance by daughters who will get married into another customary family alienates sacred property.<sup>41</sup>

These traditional inheritance practices do not seem to be questioned often. However, yet they do seem to result in preferences for sons, to the detriment of daughters. One writer suggests that "sons are not essential for the execution of Hindu rites and that daughters can act in their place, thus seeking to oppose the gender-based ideology according to which daughters are only burdens and no asset to a Hindu family."<sup>42</sup> But if a tradition concerning death, funerals, and the duty to worship ancestors assigns an essential role, one could say that sons are essential. This inheritance practice, one can then argue, has the harmful effect of discouraging the birth of daughters.

Finally, the obligation to perform funeral rites, or to carry on the tradition of worship of the ancestors, extends to a more general role of being "head" of the family, creating an inherited responsibility.<sup>43</sup> If it is the husband who inherits the position of head of the family, then it follows that the wife has less status within the family. The tradition of having the husband inherit the position of head of the family has continued notwithstanding explicit declarations of equality between husbands and wives. For example, when the Civil Code was adopted in Japan the explicit language of the law was consistently based on equal rights

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corporation who points out the beast to be slaughtered.

*Id.*

41. International Human Rights Law Group, Report on the West African Regional Consultation in Accra, Ghana 18-20 November 1998 and Subsequent Activities 1998-1999: Building the Capacity of Women's Rights NGOs in Africa to Promote and Protect "Women's Equal Rights to Equal Inheritance" 40 (Marie-Elena John Smith ed., 1999) (unpublished report, on file with the author).

42. SOUTH ASIANS AND THE DOWRY PROBLEM 10 (Werner Menski ed., Gems No. 6, 1998) (describing the paper, *The Daughters and Hindu Rights*, by Bandita Phukan).

43. See, e.g., MEYER FORTES & GERMAINE DIETERLIN, AFRICAN SYSTEMS OF THOUGHT 122-42 (1972) (describing the eldest son's responsibility to arrange funeral rites and perform ritual services for his ancestors).

between men and women, but the societal family assumptions from the prior *katoku-sozoku* system<sup>44</sup> continued. This can be seen in the rules followed by the Family Registration Act.<sup>45</sup> When there is a birth in Japan, it is registered not as an individual entry, in chronological order, it is entered on the family's page, and the father is listed as the *koseki-hittōsha* (head of a family in the family register).<sup>46</sup> A similar tradition continues in Vietnam: "Socialist revolution did not remove the belief that only sons can hold the ceremonies to honour the ancestors that bring good fortune to the living. Such beliefs support the idea that men alone should control property ..."<sup>47</sup>

In India, a proposed change in the Hindu Succession Act of 1956 would give the oldest child, not the oldest son, the responsibilities that were traditionally inherited by the oldest son.<sup>48</sup>

Under the proposed amendment, if the eldest child happens to be a daughter, she will be entitled to act as a "karta" of her parental family and discharge the "pious obligations," including marrying off the unmarried children, paying off the parent's debt etc., hitherto the prerogative of only the eldest male member.<sup>49</sup>

In sum, the inheritance practice of a number of important familial duties, being inherited only by sons, not only burdens the sons, but leads to a lesser position for daughters. This can range from the abortion of daughters, to giving daughters less food, less education and less economic wealth.

### C. Inheriting Wealth

The traditional concept of "inheritance" is that of receiving property in connection with the death of the previous owner of that property. When daughters or wives receive less than sons or husbands, whether as the result of the applicable law or by the

44. See INTERNATIONAL REVIEW OF COMPARATIVE PUBLIC POLICY 165-66 (Nicholas Mercurio et al. eds., 1988). The *katoku-sozoku* system provided that the oldest son inherited the status of "family leader" and also inherited the family property. *Id.* at 166.

45. See *id.*, citing Family Registration Law, No. 224 (1947) (Japan).

46. See *id.* at 167, citing Family Registration Law, No. 224 (1947) (Japan).

47. Malama S. Meleisea, *Gender and Peace: Issues of Structural Inequality*, available at [http://216.122.176.119/news/conf/2001/gender\\_m.htm](http://216.122.176.119/news/conf/2001/gender_m.htm) (last visited Nov. 7, 2002).

48. Swati Chaturvedi & Rajesh Kumar, *Law Panel Proposes Equal Share in Ancestral Property for Hindu Women*, THE INDIAN EXPRESS, MAY 11, 2000, available at <http://www.indianexpress.com/ie/daily/20000512/inal2053.html>.

49. *Id.*

operation of custom and tradition, there is a gender imbalance in the power that derives from the ownership of property. This is a critical point that is often overlooked. Even organizations such as the United Nations seem to miss the significance of this imbalance.

For example, the United Nations Population Fund ("UNFPA") defines "gender-based violence" as "violence involving men and women, in which the female is usually the victim; and which is derived from unequal power relationships between men and women."<sup>50</sup> What is intriguing to me is that the UNFPA sees this as a definition that "clearly states the social dimensions and root causes of violence against women and girls."<sup>51</sup> The question that needs to be asked is what creates the "unequal power relationships"? The answer will begin to unearth the real root causes. I submit that inheritance practices are a basic and reinforcing link in those unequal power relationships.<sup>52</sup>

The significance of rights to inherit family wealth cannot be overemphasized. As Edmund Burke said, "[t]he power of perpetuating our property in our families is one of the most valuable and interesting circumstances belonging to it, and that which tends the most to the perpetuation of society itself."<sup>53</sup>

Historically, laws have addressed inheritance issues since the beginning of written records. The Code of Hammurabi,<sup>54</sup> which predates the Twelve Tables (that are referred to as the "beginning of Western Law") by nearly a thousand years, contains a surprising number of provisions that deal with inheritance, often in complicated situations (e.g. when a man has children by both a wife and a maid-servant). The assumption is that property will go to the sons equally, although the father could alter the shares by making lifetime gifts.

50. UNITED NATIONS POPULATION FUND, VIOLENCE AGAINST GIRLS AND WOMEN: A PUBLIC HEALTH PRIORITY 5 (1999) [hereinafter UNFPA].

51. *Id.*

52. As correctly pointed out by Professor Daniel Farber, University of Minnesota Law School, commenting on a prior draft of this paper, the interdependence of gender-imbalance in inheritance rights and social structure make it difficult to isolate one factor as a cause. This paper argues, however, that it is easier to correct the inheritance factor than it is to correct the social structure factor, and that the simple fact of economic equality would lead to a gradual correction of the social structure.

53. EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 58 (Thomas H.D. Mahoney ed., Liberal Arts Press 1955) (1790).

54. THE OLDEST CODE OF LAWS IN THE WORLD: THE CODE OF LAWS PROMULGATED BY HAMMURABI, KING OF BABYLON B.C. 2285-2242 (C.H.W. Johns trans., T & T Clark 1903).

If a man has apportioned to his son, the first in his eyes, field, garden, and house, has written him a sealed deed, after the father has gone to his fate, when the brothers divide, the present his father gave him he shall take, and over and above he shall share equally in the goods of the father's house.<sup>55</sup>

Wives are also provided for upon the death of the husband.

If her husband did not give her a settlement, one shall pay her marriage portion, and from the goods of her husband's house she shall take a share like one son. If her sons worry her to leave the house, the judge shall enquire into her reasons and shall lay the blame on the sons, that woman shall not go out of her husband's house. If that woman has set her face to leave, the settlement which her husband gave her she shall leave to her sons, the marriage portion from her father's house she shall take and she shall marry the husband of her choice.<sup>56</sup>

There are many rules about inheritances in the Old Testament of the Bible. Deuteronomy states that sons are to inherit the father's estate, with a double portion to the first-born.<sup>57</sup> Genesis states that no inheritance is allowed to an illegitimate child.<sup>58</sup> As for female children, daughters may inherit only when there are no sons.<sup>59</sup>

In early Roman times, all rights to inherit had to be traced through the father's line.

The early Roman law only recognized as relatives those who would have been members of the same patriarchal family, and under the same patriarchal authority, had the common ancestor survived. As wives passed into the families of their husbands, and lost all connection with that in which they were born, relationship through females was altogether excluded.<sup>60</sup>

As part of the French Revolution, primogeniture<sup>61</sup> was abolished (with the notable exception of the inheritance of the ruler of the state).<sup>62</sup> Trusts could not be used to tie up family fortunes and perpetuate family dynasties.<sup>63</sup> Continuing a

55. *Id.* § 165, at 33.

56. *Id.* §172, at 36.

57. *See Deuteronomy* 21:15-17.

58. *See Genesis* 21:9-12.

59. *See Numbers* 27:1-8.

60. OLIVER WENDELL HOLMES, *THE COMMON LAW* 280 (Mark DeWolfe Howe ed., The Belknap Press of Harvard University Press 1963) (1881).

61. *See BLACK'S LAW DICTIONARY* 1210 (7th ed. 1999) (defining "primogeniture" as the "common law right of the firstborn son to inherit his ancestor's estate, usu. to the exclusion of his younger siblings").

62. *See infra* notes 70-71 and accompanying text.

63. *See JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY* 896 (William Ashley ed., Augustus M. Kelley 1987) (1909) (stating that trusts are not recognized under French law).

tradition from Roman law, children were assured a right to a large portion of the family's wealth.<sup>64</sup> Interestingly, in Roman law the children's inheritance rights seemed to represent the ongoing "immortality" of the family itself.<sup>65</sup> The family would "continue" through the inheritance by the next generation.<sup>66</sup> In fact, the head of the family could even "sell" the headship to his successor.<sup>67</sup> As summarized by Justice Holmes: "If the family was the owner of the property administered by a *paterfamilias*, its rights remained unaffected by the death of its temporary head. The family continued, although the head died."<sup>68</sup> The concept was similar to the abhorrence of a gap in the monarchy, expressed by "[t]he King is dead, long live the King."<sup>69</sup>

Article V of the French Constitution of 1804 is quite detailed about Napoleon's title's being hereditary in the direct, "natural and legitimate descendants ... of Napoleon Bonaparte ... in male line, by primogeniture, forever excluding females and their issue."<sup>70</sup> In the event that he had no sons, "[he] can adopt the children or grandchildren of his brothers."<sup>71</sup> One is reminded of Winston Churchill's quip, referring to his brother and himself as "the heir and the spare."<sup>72</sup>

Primogeniture was not the only inheritance model. Prior to the Norman Conquest in 1066, many parts of England followed a system of "gavelkind" in which all of the sons (and only the sons) divided the property equally.<sup>73</sup> The predominant system was, of course, primogeniture, under which the oldest son inherited everything, including titles.<sup>74</sup> An interesting "defense" of

64. See HOLMES, *supra* note 60, at 280-81.

65. See *id.* at 267.

66. See *id.*

67. See, e.g., *id.* at 281 (explaining early Roman law and claiming that "one of the early forms of instituting an heir was a sale of the *familia* or headship of the family to the intended heir, with all its rights and duties").

68. *Id.* at 267.

69. NICHOLAS, *supra* note 26, at 238.

70. FR. CONST. (Constitution of 1804) tit. II (On Succession), art. V, available at <http://www.geocities.com/Athens/Crete/2122/frenchimconst.html>.

71. *Id.* art. IV.

72. Jeffrey P. Rosenfeld, *The Heir and the Spare: Evasiveness, Role-Complexity, and Patterns of Inheritance*, in SOCIAL ROLES AND SOCIAL INSTITUTIONS 81 (Judith R. Blau et. al. eds., 1991) (citing Winston Churchill).

73. See THE COLUMBIA ENCYCLOPEDIA 1094 (6th ed. 2000) (defining "gavelkind" as the "custom of inheritance of lands held in socage, whereby all the sons of a holder of an estate in land share equally in such lands upon the death of the father").

74. See BLACK'S LAW DICTIONARY, *supra* note 61. See also MILL, *supra* note 63 (claiming primogeniture had many advantages because the family land holdings

primogeniture is offered by John Stuart Mill who wrote that in addition to the supposed economic efficiency of keeping large holdings of land intact, the younger sons, seeing the gap between their wealth and that of the oldest son, would be motivated to work that much harder in the hope of escaping their poor situation.<sup>75</sup> In fact, in Russia, Peter I [the Great] so admired the perceived benefits of primogeniture in England (avoiding the decimation of large estates and fostering ambitious educated younger sons) that in 1714, he ordered real property could only pass to one heir.<sup>76</sup> Prior to 1714 the traditional practice was to divide property equally among all sons.<sup>77</sup> That order proved to be highly unpopular, and Empress Anna repealed it in 1731.<sup>78</sup> In England, titles continue to be strictly regulated by inheritance patterns, generally in the form of succession known as "tail male."<sup>79</sup>

In contrast, primogeniture was abolished early in the history of the United States.<sup>80</sup> In all states except Louisiana there are no state restrictions on how a parent leaves inheritances to children.<sup>81</sup> If there is no will all of the children are treated equally.<sup>82</sup>

Elsewhere, there have been occasional instances of inheritance through the mother's line. An interesting example is the relatively isolated and independent Indian state of Kerala.<sup>83</sup> Kerala has a lower birth rate than the rest of India, a higher ratio of females to males, an older age of marriage for women, a higher literacy rate for women, and an infant mortality rate less than a

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were kept intact, and not diminished by subdivisions). Mill stated that the certainty of the system meant that all the children knew what the rules were and the parents did not have to fret about how to divide the wealth (or titles). *Id.* On the other hand, the same certainty led to a fair amount of sibling conflict and family murders. *Id.*

75. See MILL, *supra* note 63, at 899-909.

76. See JESSICA TOVROV, THE RUSSIAN NOBLE FAMILY: STRUCTURE AND CHANGE 14 n.5 (1987), cited in David Werblow, Noblesse Oblige: The Succession of Noble Titles, at 6 n.34 (May 11, 2001) (unpublished paper, on file with the author).

77. See *id.*

78. See *id.*

79. BLACK'S LAW DICTIONARY, *supra* note 61, at 1466 (defining "tail male" as a limitation of an estate so that it can be inherited to male heirs by the fee owner's issue or class of issue).

80. GLOBAL ESTATE PLANNING: A PRACTICAL GUIDE TO THE PRINCIPLES OF ESTATE, INHERITANCE AND GIFT TAXES 8 (Frans Sonneveldt et al. eds., 1995) [hereinafter GLOBAL ESTATE PLANNING].

81. *Id.*

82. *Id.*

83. See BUMILLER, *supra* note 35, at 276.

third of the national rate.<sup>84</sup> How is this explained? Through inheritance traditions. "The state was unique in India in that it traced its respect for women to the once-prevalent matrilineal society practiced among the warrior caste of Nayars, in which women inherited family property."<sup>85</sup> According to a reporter,

[w]hen a woman was married, for example, she remained in her parents' home, and saw her husband only when he came to visit at night. The woman made no effort to claim her husband's property because her parents gave her as many shares of family land as she had children. A son in a family received only one share of land for himself.<sup>86</sup>

When the British took over, they outlawed those practices, and current Hindu law requires equal inheritance by all children.<sup>87</sup> The influence of that prior tradition may still appear, though, as seen in a local woman's political platform of "gender justice" which included having the government build a house for every girl when she reached adulthood.<sup>88</sup> She said, "By being provided a house, a woman would get a sense of security, which I believe is every woman's birthright. I think a woman feels insecure without a piece of land."<sup>89</sup>

Insecurity leads to dependence and vulnerability. The studies of "bride burning"<sup>90</sup> in South Asia occasionally suggest that there might be a link between the practical lack of inheritance rights for girls and women and the lack of options for a vulnerable bride. Women who lack economic independence, beginning with

84. *Id.*

85. *Id.* at 277.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* One is reminded of Virginia Woolf's poignant title of her novel *A ROOM OF ONE'S OWN* (1929).

90. Tara Tilbury, *Inheritance Laws and Gender Inequality in India* 10-11 (2001) (unpublished paper, on file with the author), citing Gita Gorpai, *Gender, An Economic Inequality in India: The Legal Connection*, 13 B.C. THIRD WORLD L.J. 69-70 (1993), also citing U.S. DEPT OF STATE, *INDIA COUNTRY REPORT ON HUMAN RIGHTS PRACTICES FOR 1997* (Jan. 30, 1998), available at [http://www.state.gov/www/global/human\\_rights/1997\\_hrp\\_report/india.html](http://www.state.gov/www/global/human_rights/1997_hrp_report/india.html).

"Bride burning" is the practice of setting fire to a bride, in a kitchen setting, to eliminate someone whose family is not cooperating in making the additional dowry payments demanded by the groom's family. *Id.* The groom may remarry after the death of his wife and collect a new dowry. *Id.* Several attempts have been made to discourage this practice. *Id.* An amendment to the Penal Code includes a presumption that the in-laws are responsible for every unnatural death of a woman in the first seven years of marriage, if harassment is shown. *Id.* Another amendment provides that if a woman dies an unnatural death within seven years of her marriage, any dowry received by her or on her behalf is given to her children or her parents. *Id.* at 10.

the practical failure to inherit property from their parents, are dependent upon others to care for them and are at risk of being harmed. As one commentator noted,

Several participants in the dowry debates have treated the question of female inheritance rights as a kind of panacea to the dowry problem .... Although several of us disagree, we need to know more about how it would work in practice and whether it could save women from dowry-related deaths. In this regard, evidence from South Asian Muslim societies might be quite useful, since the Qur'an laid down that a family's women should have certain fixed shares of inheritance. We seem to know that, in practice, such shares are either denied women, or they "renounce" them in exchange for goodwill, as also observed among expatriate South Asians today, who may renounce their due shares of ancestral property but retain moral claims over entitlements to family support.<sup>91</sup>

In the Arabic tradition and under Islamic law, women do not even have those initial inheritance rights.<sup>92</sup> A daughter is entitled to inherit one-half of a son's share.<sup>93</sup> This has been justified as more than equal treatment when one considers the son's obligations to care for women.

It is in the context of the customary and legal obligations of men to women that the asymmetry in the Islamic law of inheritance must be understood. According to Islam, a man's share in inheritance is twice that of his sister. But he is also under a binding obligation to support financially her, his wife, his daughter, his mother, and any other dependent female relative, as well as the elderly males. In Islam, the woman is a lifetime beneficiary, and she is under no similar obligation.<sup>94</sup>

Another important role for women is as mothers, which becomes extremely important if the mothers themselves have not inherited property. Under Islamic law, for example, it is the sons who inherit most of the patrimony; a mother (widow) is entitled to only an eighth.<sup>95</sup>

Returning to women who have the legal inheritance rights and choose not to enforce them, this "bargain" on the part of women is mentioned in a recent study of a number of African jurisdictions.<sup>96</sup> Even though the law will give the wife substantial

91. SOUTH ASIANS AND THE DOWRY PROBLEM, *supra* note 42, at 226.

92. See FADWA EL GUINDI, VEIL: MODESTY, PRIVACY AND RESISTANCE 165 (1999).

93. *See id.*

94. *Id.* However, the same author notes that "Nowadays structures of male support are dismantled and men are not meeting their legal financial obligation toward the women in the family ...." *Id.* at 209, n.151.

95. ABDELWAHAB BOUHDIBA, SEXUALITY IN ISLAM 216 (Alan Sheridan trans., Saqi Books 1998).

96. *See generally* WIDOWHOOD, INHERITANCE LAWS, CUSTOMS & PRACTICES IN



inheritance rights, a typical woman might decide that she would prefer to continue to be included as part of the family group.<sup>97</sup> If claiming the legal inheritance rights would ostracize her from the community she, au prefer to forgo those rights.<sup>98</sup>

In Uganda, women have been lobbying for the right to co-own their land with their husbands<sup>99</sup> Under current law, a widow can receive fifteen percent of her husband's estate, but in practice even this small share is withheld.<sup>100</sup> In addition to the rarity of women inheriting land, she can be inherited herself!<sup>101</sup>

The Uganda Women's Network has been pushing for legislation to allow women to jointly own land on which the family home is situated or from which the family derives its sustenance.<sup>102</sup> A change in the land laws was proposed in 1998 by a woman who was then a member of Uganda's parliament and later became the Minister of Ethics and Integrity, which "would require a registered landowner to obtain the consent of all family members before selling the land on which he or she ordinarily resides with the spouse or children, or from which they derive

SOUTHERN AFRICA (Welshman Ncube et al. eds., 1995) (describing field research in the practical application of African inheritance laws).

97. See generally *id.*

98. See generally *id.*

99. Presumably this would result in full ownership upon the death of the husband, or vice versa. See Jennifer Bakyawa, *Ugandan Women Seek Right to Own Land*, WOMEN'S E-NEWS (Aug. 30, 2001), at <http://www.womensenews.org/article.cfm/dyn/aid/635/context/archive>. It is difficult to find accurate statistics on land ownership by women. One that is repeated is that women own only 1% of the land in the world, another is 2%. In any event it seems to be any extremely small percentage. See "Women Feed the World": FAO Announces Theme for World Food Day 1998, FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS (Mar. 9, 1998), at <http://www.fao.org/NEWS/1998/980305-e.htm> (citing 2% ownership). See also Emily MacFarquhar et al., *The War Against Women*, U.S. NEWS AND WORLD REP., Mar. 28, 1994, at 42, cited in Kenneth G. Dau-Schmidt, *Dividing the Surplus: Will Globalization Give Women a Larger or Smaller Share of the Benefits of Cooperative Production?*, 4 IND. J. GLOBAL LEGAL STUD. 51, 53 (1996) ("In 1980 the United Nations estimated that although women did two-thirds of the world's work, they earned only one-tenth of the world's income and owned only one-hundredth of the world's property.").

100. See Equality Now, *Uganda: Exclusion of Women from Land Ownership - The "Lost Clause" [sic]*, at [http://www.equalitynow.org/action\\_eng\\_17\\_1.html](http://www.equalitynow.org/action_eng_17_1.html) (last updated Aug. 2000).

101. See *id.* (explaining that "[u]nder customary law a widow may be 'inherited' by her in-laws and forced to marry a male relative, or displaced from her home ..."). See also LEGAL ASSISTANCE CENTRE, PROPOSAL FOR LAW REFORM ON THE RECOGNITION OF CUSTOMARY MARRIAGES (1999), available at <http://www.lac.org.na/word/cmarr rept.doc> (last visited Oct. 5, 2002) (summarizing current marriage law in Namibia).

102. See Bakyawa, *supra* note 99.

sustenance.”<sup>103</sup> An extra complication was the treatment of multiple wives. The ministry broadened the above principle “to include polygamous marriages so that wives living jointly on a piece of land with their husbands would all co-own it,” and wives who lived on independent parcels would co-own that parcel with the husband.<sup>104</sup> Unfortunately, the Cabinet to the Domestic Relations Bill, which itself has been “deferred” since 1964, deferred the co-ownership proposals.<sup>105</sup>

In rural India the actual ownership of land by women is extremely small. Even if the Hindu Succession Law allows a woman to inherit land from her father, only 13 percent of those women did inherit any land.<sup>106</sup>

In Kenya, a wife does not acquire any interest in her husband’s property,<sup>107</sup> but she retains any rights she had to property she owned prior to the marriage (and to her dowry as well).<sup>108</sup> When land registration laws were passed, the traditional usage rights that women did have were not among the recognized categories for registration, which has resulted in even fewer “legal” rights of women in the land.<sup>109</sup> In Ghana, “the African Women

103. *Id.*

104. *Id.*

105. *Id.*

106. See Bina Agarwal, *The Symposium on Decent Work for Women: Gender Inequality – Some Critical Neglected Dimensions* (Mar. 24, 2000), available at <http://www.ilo.org/public/english/bureau/gender/beijing5/sympo/agarwal.htm> (citing the results of a study in rural India that found that only 13 percent of surveyed women with landowning fathers inherited land).

107. Although the same is true in all states of the United States that do not have “community property” regimes (of which there now seem to be ten in some form or other: Arizona, California, Nevada, New Mexico, Oklahoma, Oregon, Texas, Utah, Washington, Wisconsin), it is also true that in all of those remaining states a surviving spouse is guaranteed certain inheritance rights (which can be waived by an agreement between the parties). See GLOBAL ESTATE PLANNING, *supra* note 80, at 11.

108. See Janet Kebeberi-Macharia, *Family Law and Gender in Kenya*, in 4 INTERNATIONAL REVIEW OF COMPARATIVE PUBLIC POLICY, FAMILY LAW AND GENDER BIAS: COMPARATIVE PERSPECTIVES 193, 202 (Nicholas Mercurio et al. eds., 1992) (explaining the property rights of women in Kenya).

109. See *id.* at 203.

The traditional rights of use over either a father’s or a husband’s property that a woman had under customary laws are not, however, recognized as registrable interests in already registered land. Therefore, unless one lodges a caveat against any dealings in registered land, the registered owner(s) can deal in any manner whatsoever with their land.... Despite laws enabling anyone to purchase and register property in their own name, the majority of property owners are men.

*Id.* See also generally Kivutha Kibwana, *Women and the Constitution in Kenya* (1989) (paper presented at AAWORD Conference on Sustainable Development with Women: Gender Relations Development and Change, Nairobi, Kenya, on file with

Lawyers Association (AWLA) an advocacy [sic] of Ghanaian women lawyers have called for review of portions of the Interstate [sic] Succession Law to provide security for spouses whose partners die interstate [sic]."<sup>110</sup>

A number of "shadow reports" prepared in conjunction with the official reports to the United Nations on a country's status on a number of women's issues have occasional references to the relevance of the inheritance laws and how they operate "in practice."<sup>111</sup> For example, a shadow report for Tanzania refers to the Constitutional provision that "[s]ubject to the provisions of the relevant laws of the land, every person is entitled to own property, and has a right to the protection of his property held in accordance with law."<sup>112</sup> However, there are four competing legal systems that could determine the specific inheritance rights: statutory law, customary law, Islamic law, and Hindu law.<sup>113</sup> Courts apply customary law for "a person who is or was a member of a community in which rules of customary law relevant to the matter are established and accepted."<sup>114</sup> Under customary law, and without a will that provides otherwise, if there are children, a widow would not receive any share of her husband's estate.<sup>115</sup> A shadow report for Croatia, prepared for the 71st Session of the Human Rights Committee by the Center for Reproductive Law

the author).

110. Press Release, The African Women Lawyers Association, Ghana: Review the Intestate Law (Aug. 29, 2001), available at <http://www.africaonline.com/search/search.jsp?a=v&contentid=30672&languageid=1>.

111. See generally CTR. FOR REPRODUCTIVE LAW AND POLICY, SHADOW REPORTS, available at [http://www.crlp.org/pub\\_shadow.html](http://www.crlp.org/pub_shadow.html) (last visited Oct. 6, 2002).

Organizations like CRLP and its partners, play an essential role in providing credible and reliable independent information to international human rights treaty monitoring bodies regarding the legal status and real-life situation of women and the efforts being made by governments to comply with human rights treaties. Shadow Reports work to supplement, or "shadow," governments' reports on human rights issues by calling attention to their strides, as well as their setbacks.

*Id.*

112. TANZ. CONST. (Constitution of The United Republic of Tanzania) pt. III, art. 24 (Right to Own Property), reprinted in 18 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 25 (Gisbert H. Flanz ed., 2000).

113. See THE LAW REFORM COMM'N OF TANZANIA, REPORT OF THE COMM'N ON THE LAW OF SUCCESSION INHERITANCE 25 (1995), cited in CTR. FOR REPROD. LAW AND POL'Y, WOMEN'S REPROD. RTS. IN TANZANIA: A SHADOW REPORT 14 n.131 (1998), available at [http://www.crlp.org/pdf/sr\\_tan\\_0798\\_eng.pdf](http://www.crlp.org/pdf/sr_tan_0798_eng.pdf).

114. CTR. FOR REPROD. LAW AND POL'Y, WOMEN'S REPROD. RTS. IN TANZANIA: A SHADOW REPORT 14 (1998), available at [http://www.crlp.org/pdf/sr\\_tan\\_0798\\_eng.pdf](http://www.crlp.org/pdf/sr_tan_0798_eng.pdf).

115. See *id.* at 14.

and Policy (CRLP) and Be Active, Be Emancipated (B.a.B.e.), refers to the written laws of property ownership and inheritance that treat men and women equally, and then comments on the "reality."

Despite legal equality, property ownership is concentrated in the hands of men, the result of traditional gender role expectations. For example, in 1992, all adult citizens of Croatia were given the right to buy their apartments from the state. In general, women waived their legal right to be named as a co-owner, ceding the entire property interest to their husbands.... Family businesses are usually registered in men's names. Women who enter into business partnerships with their spouses usually do not have equal ownership, even when they have helped develop the company.<sup>116</sup>

The Chairperson of AWLA noted that "ignorance of the law and cultural beliefs of the people has affected the effective implementation of the Interstate Succession Law."<sup>117</sup> One suggestion was to create a special court to share properties among named beneficiaries, because although the Law makes it a criminal offense to interfere with the property of beneficiaries, "some families flout it with impunity, which makes beneficiaries doubt their honesty."<sup>118</sup>

In 1998, a woman successfully challenged an inheritance provision in the customary law.<sup>119</sup> *Ephrahim v. Pastory and Kaizilege* involved a woman who was prevented by customary law from selling "clan land."<sup>120</sup> She had inherited the land from her father by his will, but when she tried to sell it her nephew claimed the sale was void.<sup>121</sup> Under Tanzania's Declaration of Customary Law the nephew was right: "Women can inherit, except for clan land, which they may receive in usufruct but may not sell."<sup>122</sup> She argued that the customary law violated the constitution of Tanzania's Bill of Rights and was also inconsistent with CEDAW,<sup>123</sup> which had been ratified by Tanzania.<sup>124</sup> The High

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116. CTR. FOR REPROD. LAW AND POL'Y, WOMEN'S REPROD. RTS. IN CROATIA: A SHADOW REPORT 15 (2001), available at [http://www.crlp.org/pdf/sr\\_croatia\\_0301\\_eng.pdf](http://www.crlp.org/pdf/sr_croatia_0301_eng.pdf).

117. See The African Women Lawyers Association, *supra* note 110.

118. *Id.*

119. *Ephrahim v. Pastory and Kaizilege*, 87 I.L.R. 106 (1990).

120. *Id.*

121. *Id.* at 107.

122. Laws of Inheritance of the Declaration of Customary Law ¶ 20, GN. No. 436/1963 (Tanz.), cited in UNITED NATIONS DEVELOPMENT FUND FOR WOMEN, *supra* note 4, at 21.

123. See CEDAW, *supra* note 6.

124. *Ephrahim*, 87 I.L.R. at 110.

Court of Tanzania upheld the plaintiff's argument and declared that particular customary law to be unconstitutional.<sup>125</sup>

The "head of household" concept<sup>126</sup> continues to impact women adversely. Under the agrarian reforms in many Latin American states, women are unable to inherit land unless the male "head of household" has deserted the family.<sup>127</sup> As a practical matter, the same author notes that even when women have equal written legal rights to own land, "local groups that decide disputes ... often give all real property to the sons, irrespective of the law."<sup>128</sup> In Costa Rica CEDAW was ratified in 1984, and the implementation legislation was passed in 1990.<sup>129</sup> This legislation includes a clear provision about land ownership: "Property titles must be registered under the names of both spouses, and single women's property must be registered in their own names."<sup>130</sup> It also includes a provision allowing women in common-law relationships to inherit the property from that relationship.<sup>131</sup>

In Nepal there are still inheritance laws that discriminate against women.<sup>132</sup> Even though Nepal ratified CEDAW, when the Forum for Women, Law and Development asked the Supreme Court of Nepal to overturn a law that gave sons a share of ancestral property at birth but only limited rights to daughters, the Court chose to defer to the legislature and request that it introduce an "appropriate" bill within one year.<sup>133</sup> The original law had provided that a daughter could not receive any share of her parent's property until she reached age thirty-five and was not married.<sup>134</sup> Even then, if she later married she would lose all

125. *Id.*

126. See discussion *infra* Part One, II.B.

127. See Steven E. Hendrix, *Property Law Innovation in Latin America with Recommendations*, 18 B.C. INT'L & COMP. L. REV. 1, 13 (1995).

128. *Id.* at 13-14 (referencing an interview with Santiago Pozo, an Inspector from Cochabamba, Bolivia, July 8, 1992). See also Leslie Kurshan, *Rethinking Property Rights as Human Rights*, 8 AM. U. J. GENDER SOC. POLY & L. 353, 358-61 (1999).

129. Law of Promotion of the Social Equality of Women (1990) (Costa Rica), *cited in* UNITED NATIONS DEVELOPMENT FUND FOR WOMEN, *supra* note 4, at 30.

130. *Id.*

131. *Id.*

132. See NATIONAL CODE, *Partition*, § 16 (Nepal), *cited in* UNITED NATIONS DEVELOPMENT FUND FOR WOMEN, *supra* note 4, at 22.

133. See *Dhungana v. Nepal*, Sup. Ct. of Nepal, Writ. No. 3393 of 1993 (1995) (unreported), *cited in* UNITED NATIONS DEVELOPMENT FUND FOR WOMEN, *supra* note 4, at 45.

134. See NATIONAL CODE, *Partition*, § 16 (Nepal), *cited in* UNITED NATIONS DEVELOPMENT FUND FOR WOMEN, *supra* note 4, at 22.

ownership rights to the property.<sup>135</sup> Drafts of the new proposed legislation, however, allows the initial inheritance by daughters but provides that upon her marriage any share she held in her father's property would revert to the successors of her maternal home.<sup>136</sup>

There has been a recent focus on viewing "women's rights" as "human rights," which has included a consideration of the right to own land and other property:

Acquiring property rights is a particularly important human rights issue because without property rights women are unable to effectively exercise other human rights. Inequality in property rights is a major hindrance to correcting internationally recognized problems women face such as generally inferior economic status, domestic violence, and female genital mutilation. Without property rights, it is difficult for women to be individual economic actors.<sup>137</sup>

As commented on in the UNIFEM report, the controversy in Nepal, described above, has begun a process of change and awareness:

Because of the court decision [on the inheritance inequality for daughters], the entire society was challenged to start rethinking the patriarchal structure, male supremacy, and the status and individual freedom of women. Women have begun to be vigilant about the issue and to link it to the broader issue of equality.<sup>138</sup>

Another issue that affects children's inheritance rights is the difference between civil law countries and common law countries. In the former, the laws give automatic inheritance rights to children (equally). In the United States, individualism is emphasized and one has complete freedom to disinherit one's children (with limited exceptions in Louisiana, which followed French law when it was settled).<sup>139</sup> Parents in the United States thus also have the freedom to treat their children unequally. In the United States, we refer to the French system as being one of "forced heirship."<sup>140</sup> This puts the focus on having the state "force" an individual to leave his or her property a certain way, which generally carries a very negative connotation in the United States (although the individual states all enforce rights of spouses to

135. *Id.*

136. *See id.*

137. *See* Kurshan, *supra* note 128, at 357.

138. UNITED NATIONS DEVELOPMENT FUND FOR WOMEN, *supra* note 4, at 22-23.

139. *See* LA. CIV. CODE, art. 1729 (2001), *cited in* GLOBAL ESTATE PLANNING, *supra* note 80.

140. *See* GLOBAL ESTATE PLANNING, *supra* note 80.

inherit property).<sup>141</sup>

Given that freedom to leave inheritances among children as the parents wish, the United States still reflects significant gender-imbalances in wealth inheritance. The inequality is just not as obvious. In my own estate planning practice, the proportion of wives for whom trusts were created (not for tax purposes, but to provide management of the assets for them) far exceeded the number of husbands who would receive their inheritance in a trust.<sup>142</sup> The husbands chose to have someone else manage the property for their wives because of their belief that the wives would not be able to handle that responsibility. In other words, the wives still needed to be taken care of, almost always by another man.<sup>143</sup> In wealthy families it is still more often the practice to protect family wealth in trusts for daughters than for sons.<sup>144</sup>

The inheritance preferences for sons are so widespread that an anthropologist uses the following description of inheritance practices among the Lango society in Africa to show that the maternal ties do count.

The rules of inheritance were also consistent with this close tie to maternal relations. A man's eldest son was normally his heir. But if the eldest son were a ne'er-do-well, another son could be chosen. In the absence of sons, or suitably responsible sons, the inheritance might pass to the deceased's brother's son or, if he were ineligible, to the deceased's sister's son. The wives of the deceased could choose among the various possible heirs the one with whom each decided to live.<sup>145</sup>

These are not new preferences. There was a strong notion throughout Roman history of the natural right of family members to family property.<sup>146</sup> As mentioned earlier, the father, who managed family property on behalf of the whole family, headed the family. The jurist Paulus (and others) could write that when *sui heredes* (heirs) succeeded to property, there was no inheritance since they were already in a sense owners (*quodammodo*

141. *Id.*

142. In the instances when a woman created a trust for her husband, it was almost always the case that she had inherited wealth from her own family.

143. I have been unable to think of any husband, in my estate planning practice, who named a woman as trustee for his wife.

144. The reason often stated, almost always by fathers, is that they do not want the husband to take advantage of their daughter.

145. LAURA NADER, *LAW IN CULTURE AND SOCIETY* 388 (1969) (citation omitted).

146. See HOLMES, *supra* note 60, at 266.

*domini*).<sup>147</sup> This continues in France today, where children from birth have a “vested” ownership right in the family property.<sup>148</sup> Upon a death there is no process of inheritance (such as the probate process in the United States and England).<sup>149</sup> Instead the saying is: “*Le mort saisit le vif*.”<sup>150</sup> One study of land ownership in the South Pacific described a “communal” ownership system by family groups and found that although “kinship” was the ideology and the rule, in practice there was quite a bit of flexibility.<sup>151</sup> For example, “If ... my father admitted an unrelated or distantly related man to his land and they got on well together, my children would simply “know” that the two had been brothers.”<sup>152</sup>

Society and the law took a dim view of the transfer of property away from those who had a natural claim on it. Thus there is a real tone of disapproval in the observation of the jurist Gaius that “[w]e must not approve of parents who injure their own children in their wills, which many do, ill-naturedly passing judgment on their own blood, corrupted by the wiles and incitements of stepmothers.”<sup>153</sup>

In the United States, although many believe that children (sons and daughters) inherit equally from their parents, this is not true in practice. More accurately, that is the rule that applies only if the parent does not have a will.<sup>154</sup> Parents can treat their children unequally, except in Louisiana where French law, is followed, and even disinherited entirely.<sup>155</sup> As stated above, nearly all fathers who own businesses leave that business to a son. It should be noted that this can be seen as an obligation that is inherited:

Outsiders may think that the children born into such venerable companies have it made, but no one wants to be the heir who manages to crater the 100-year business. “There are high standards, and much responsibility that you’re expected to live up to,” Mr. Rosenwach, [a man who inherited his

147. See *id.* at 266-67.

148. See THOMAS GYLN WATKIN, AN HISTORICAL INTRODUCTION TO MODERN CIVIL LAW 201 (1999).

149. See *id.*

150. “Death seizes the living” is a literal translation. See, e.g., LEXImot, Expressions: Gros plan sur l’expression, at [http://www.leximot.net/expression.php3?id\\_expr=1705](http://www.leximot.net/expression.php3?id_expr=1705).

151. Ron Croombe, *Customary Tenures and Incentives to Produce*, reprinted in 2 LAND TENURE 284, 291 (University of the South Pacific, ed. 1974).

152. *Id.*

153. EDWARD CHAMPLIN, FINAL JUDGMENTS 15 (1991).

154. See generally GLOBAL ESTATE PLANNING, *supra* note 80.

155. *Id.* at 8.



business through the patrilineal line from his great grandfather] said. "It's difficult to follow in your father's footsteps when your father has been successful."<sup>156</sup>

In fact, the duty to carry on the family business, or the family farm, can be a largely negative prospect in some cases:

Being an heir has its drawbacks too .... [W]hen farming began to decline in the Spanish Basque heartland during the 1960s, it became desirable to leave the farm and migrate to urban areas. Suddenly, being heir to the farm was a demotion rather than an honor – an albatross around the neck of he [sic] who had to inherit the land. Parents in these declining farm villages started waiting to see which son was dullest and least talented, and belatedly named this "ugly duckling" as heir to the barren farmstead.<sup>157</sup>

Whether obligation or entitlement, it is still true that the vast majority of cultures in the world today prefer sons to daughters for their inheritance traditions:

Of 165 cultures in which it has been determined that rules for inheritance of real property favor either the male or female line, 144 favor the male line and 21 the female. Similarly, for the inheritance of movable property, 176 out of 211 favor the male line and 35 the female.<sup>158</sup>

Inequalities in inheritance and in ownership have lasting and pervasive effects. The link between those inequalities and human rights should be obvious. As stated in the UNIFEM report, changing the more visible "public" law is not enough:

The Indian personal laws, which control matters such as inheritance, property rights, and adoption, continue to follow patriarchal principles. For example, according to Hindu personal law, daughters are denied most of the important coparcenary property rights that are granted to sons; women's right to the family dwelling home is subordinate to men's rights ... and wives cannot initiate adoptions. Women's NGOs characterize the present Indian legal order as guaranteeing only formal, and not substantive, equality for women. They believe that so long as private life is thoroughly regulated according to patriarchal principles, it will not be possible for women to exercise their public rights in a meaningful way.<sup>159</sup>

156. Glenn Collins, *Still Family After All These Years*, N.Y. TIMES, Jan. 29, 2002, at B1.

157. Rosenfeld, *supra* note 72, at 82.

158. John Hartung, *On Natural Selection and the Inheritance of Wealth*, 17 CURRENT ANTHROPOLOGY 607, 612 (1976).

159. UNITED NATIONS DEVELOPMENT FUND FOR WOMEN, *supra* note 4, at 40.

#### D. Inheriting a Family Business

In the United States, it remains traditional that a family-owned business will be passed on to a son.<sup>160</sup> The New York Times recently profiled a large group of old family businesses. A typical approach was "In Mr. Rosenwach's family, succession has always been from father to son ...."<sup>161</sup>

In my own practice, during fifteen years of estate planning at one law firm, where the client base was predominantly owners of family businesses, I encountered only one business that a father was leaving to his daughter, and that was a "one person" sales representative business. In all other cases the father would leave the operating business to one or more sons, and any daughters were given some amount of liquid wealth instead. In one sad example, the father had left his substantial business, through an irrevocable trust, to the three husbands of his daughters. After one daughter's divorce, the father came to me to ask if his irrevocable trust could be changed.<sup>162</sup> As one family business consultant writes: "Even in this gender-enlightened era, most families favor sons over daughters as successors to the business."<sup>163</sup> I might note that the one daughter who now runs one of the family businesses profiled in the New York Times article does so as a result of her having bought out her brother.<sup>164</sup>

One might argue that which child inherits a family business cannot rise to the level of a violation of basic human rights, but it can. There are instances when the preference to leave a business to a son can result in female infanticide and gender-sensitive abortions.<sup>165</sup> For example, a doctor in India, who has performed amniocentesis for the purpose of determining the sex, and sometimes then performs the abortion of girl fetuses, explained "[u]ntil the attitude of the whole Asian community changes, where a male issue in the family is a must, ... we as scientists can help out the poor mother who year after year produces a baby until a

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160. See, e.g., JAN POTTKET, BORN TO POWER: HEIRS TO AMERICA'S LEADING BUSINESSES (1992) (discussing the profiles of sons of well-known business inheritors and noting that only a few inheritors of family business are women, like the daughter who inherited the Playboy empire, and another inheriting a hair salon). See also Collins, *supra* note 156 (discussing commonalities and profiles of people who have inherited businesses in the United States).

161. Collins, *supra* note 156.

162. Fortunately, we were able to obtain court approval for the changes.

163. GERALD LE VAN, THE SURVIVAL GUIDE FOR BUSINESS FAMILIES 64 (1999).

164. Collins, *supra* note 156.

165. BUMILLER, *supra* note 35, at 117.

boy is born.”<sup>166</sup> When questioned further, he pointed to some “underlying” reasons for the preference for boys: “I’m not very happy about it ... [b]ut you have to think that the child is not wanted.”<sup>167</sup> The desire for male children, he explained, was even stronger among the business community – the very people who could afford to have girls. “I wouldn’t completely blame them,” he added, “because if they’ve established a business, they need somebody to carry on the business after them.”<sup>168</sup> When asked why a daughter could not run the business, he responded that daughters are given away in marriage to another family.<sup>169</sup>

If a son is needed, to inherit the father’s business, wealth, status, etc., the need to give birth to sons can lead to marrying additional wives.<sup>170</sup> When a “first” wife is unable to have a son, and a “second” wife succeeds, a sad corollary can be intense resentment of the son:

In a village near our own, a woman has just killed the son of her husband’s second wife. She was jealous and could see that her lot in life from the time the child was born would be no other than that of a servant and slave to her husband’s second wife and her male child, and so she decided to do away with the baby. She took him one day when no one was looking and placed him in the large earthenware jug, which contains our drinking water. The child was found there, drowned. He had not reached the age of one.<sup>171</sup>

In many instances the “family business” is a farm. One study has examined a number of effects the selection of the heir can have on the entire family:

He [sic] who inherits the ancestral estate will be schooled differently than his brothers or sisters. There is no shortage of marriage partners for a designated heir in Basque villages like Echalar or Murelage. And, of course, the heir is expected to eventually run the family farm by himself when the system is based on impartible inheritance as it is in the German-speaking Alpine village of St. Felix or in the Irish peasant communities. The heir will also be included more in local politics and religious ceremonies, which again reflects the status-enhancing experience of being designated early in life

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* We should note that even now in the United States a typical wedding service will include the question, “Who gives this woman to be married?” Today many young men still ask the woman’s father for “permission” to marry her.

170. NAYRA ATIYA, *KHUL-KHAAL: FIVE EGYPTIAN WOMEN TELL THEIR STORIES* 129 (1988).

171. *Id.*

as the heir and not the spare.<sup>172</sup>

Parents in these communities raise the child they have identified as the heir differently than they do their other children: "From infancy, he [i.e. the heir] is socialized into the role of heir .... Frivolity and mischievousness, permitted in his siblings, are sharply rebuked when he displays them."<sup>173</sup>

The need to have a male heir to inherit the family land is an ancient principle, and therefore, I would argue, difficult to eradicate notwithstanding written laws to the contrary.<sup>174</sup> The "legacy" of one's life was closely connected with being able to continue family ownership of the land for future generations.<sup>175</sup>

For example, if a deceased landowner had no son, his daughter or wife would lose possession of the home to a distant male relative. It appears that the local officials sometimes negotiated "deals" on behalf of the female relatives.<sup>176</sup> The male heir might be told by a local official that in exchange for registration of title to the land in his name, he should promise to continue to let the widow or an unmarried daughter live in the house.<sup>177</sup> In fact, such obligations to widows and unmarried daughters are also a part of Chinese customary law.<sup>178</sup> But the New Territories' women in Hong Kong complained that, while the rule of male-only inheritance of land was strictly enforced by Hong Kong legislation and government officials, the supposed benefits to women under customary law were treated much more loosely – more like moral obligations of the male heir than rights which women could enforce.<sup>179</sup>

### E. Inheriting a Name

Nothing is tied to one's identity more closely than one's name. The question "Who are you?" is answered by "My name is \_\_\_\_\_." The right to a name has been called "a threshold

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172. Rosenfeld, *supra* note 72, at 81 (citing Gary S. Watson, Intergenerational Transmission of Family Property: Some Preliminary Observations in European Farm and Peasant Communities 9, 11 (1980) (paper presented at annual meeting of the Law and Society Association)).

173. *Id.* at 82.

174. *See infra* Part Two (discussing the force of tradition).

175. JOHN KING FAIRBANK & MERLE GOLDMAN, CHINA: A NEW HISTORY 21 (Belknap Press 1998) (1992) (describing the custom of transferring property from father to son in Chinese culture).

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

requirement for one's private and public existence."<sup>180</sup> The United Nations Declaration on the Rights of the Child, adopted in 1959, includes as its third principle: "[The child] shall be entitled from his birth to a name and a nationality."<sup>181</sup>

In most societies a daughter who marries loses the identity that her surname gave her<sup>182</sup> and is added to her husband's family by giving her his family's surname.<sup>183</sup> In Roman times, the bride's relocation to a new family was more complete: "[W]hen a girl married she was ritually removed from her lineage, and was ritually introduced into her husband's lineage – even acquiring a new set of ancestors, those of her husband."<sup>184</sup> The importance of carrying on the father's name (and not the mother's) is assumed in statements such as: "[I]n Egypt, Iran and Turkey surnames are well-established, presumably because of legal sanctions, and they are perpetuated from generation to generation."<sup>185</sup> In Spain national law strictly controls the method in which surnames are to be given.<sup>186</sup> In Spain the selection of a child's name is heavily regulated. Parents may choose a first name (although it can not be one that would be embarrassing to the child, or cause confusion as to gender)<sup>187</sup> but there must be two surnames: the mother's surname and the father's surname.<sup>188</sup> The parents may choose the order, but the same order must be used for all of their children.<sup>189</sup> A person's name does not change upon marriage.<sup>190</sup>

180. K. M. Sharma, *What's in a Name?: Law, Religion and Islamic Names*, 26 DENV. J. INT'L POL'Y 151, 193 (1997).

181. Declaration on the Rights of the Child, G.A. Res. 1386, U.N. GAOR, 14th Sess., Supp. No. 16, at 19-20, U.N. Doc. A/4354 (1959). See also CRC, *supra* note 6, at 167.

182. INTERNATIONAL SUCCESSION 3 (Louis Garb ed., 1998). See generally *id.* at Spain, 57-64 (discussing the law related to naming in Spanish jurisdictions).

183. By contrast, a Hopi man joins his wife's household; she keeps her name and "she can send him packing any time she pleases." KEESING & STRATHERN, *supra* note 29, at 194.

184. *Id.* at 192. As a corollary, the husband acquired full legal rights over her as a successor to her father who had possessed those rights. *Id.*

185. Sharma, *supra* note 180, at 160-61.

186. See INTERNATIONAL SUCCESSION, *supra* note 182.

187. Law of the Civil Register art. 54 (Spain), cited in INTERNATIONAL SUCCESSION, *supra* note 182, at 60.

188. "Every Spaniard has the right to identify himself by two surnames: the first surname of the father and the first surname of the mother, in that order." *Id.* at 57.

189. Parents may choose by agreement the order of their sons and daughters surnames, "that will be the same for all of them, with which the equality between both parents is assured." INTERNATIONAL SUCCESSION, *supra* note 182, at 57. However, the child upon majority may apply to change the order of his or her surnames. C.C. art. 109 (Spain).

190. INTERNATIONAL SUCCESSION, *supra* note 182, at 57. "[U]nder Spanish law

The surname is said to "reinforce a child's continuity of identity ... with one's ... parents" and "operates as a vehicle for transferring to a child the goodwill associated with a particular name in a community."<sup>191</sup> That statement seems to presume that the transfer is within the father's family, which the woman becomes a part when she marries his son. Even when the law requires the woman to keep her own name, as it apparently does in Iraq, Ethiopia, Morocco, and Senegal, "in practice, her husband's name is invariably used."<sup>192</sup> In Arab countries, writes one author, "name patriliney applies equally to men and women – a woman, like her brother, keeps her maiden name irrespective of marital affiliation. Officially there is no name change for women after marriage. She is identified with her natal kin for life."<sup>193</sup> The "name patriliney" however means that the woman's name continues to be defined in terms of her father's family.<sup>194</sup>

It is not only men who use their name as a way of identifying members of their (family) group. The Council of Trent decreed, in 1562, that Roman Catholic priests administering a "baptism" must enforce a rule that children could only be given names of Catholic saints (and not names of characters from the Old Testament, which had become a Protestant trend).<sup>195</sup>

The use of a man's name to continue his existence through his son is clear when the son is given the father's identical name, and then referred to as "Junior" (until the death of his father), and for his son to continue the traditions and be referred to as "the Third" and so on.<sup>196</sup> One researcher comments that the act of naming a son "Junior" "is evidence that the Hamlet hypothesis is working; that is, that the father wants to perpetuate himself

marriage never causes the married woman to lose her maiden name, and gives her the power of transmitting it to her children." *Id.*

191. Sharma, *supra* note 180, at 160-61.

192. *Id.* at 178.

193. FADWA EL GUINDI, *supra* note 92, at 164.

194. *Id.* The expression "a chip off the old block" seems to be used for father/son relationships (and the perpetuation of the father in the son) in all cultures. The German expression is very clear: "Ganz der Vater sein" (to be entirely the father). WILSON & DENNISON, *supra* note 1, at 52.

195. See Omi Morgenstern Leissner, *The Problem That Has No Name*, 4 CARDOZO WOMEN'S L.J. 321, 336 (1998), citing SHARON LEBELL, NAMING OURSELVES, NAMING OUR CHILDREN: THE LAST NAME DILEMMA 6, 7-8 (1988).

196. Life as a "Junior" is not always simple. One researcher found that the percentage of "Juniors" among mental patients at a particular veterans hospital was three times greater than the number of "Juniors" in any other group of people. See Robert Plank, *The Use of "Jr." in Relation to Psychiatric Treatment*, 19 NAMES 132, 134 (1971).

through his son, thereby causing conflict.”<sup>197</sup> That women do not have names continued in this matter proves to one writer that “females are not regarded as part of a dynasty.”<sup>198</sup>

In Japan there have been proposals to change the law so that a married woman may retain her father’s name. First suggested in 1996, the idea has generated substantial controversy.<sup>199</sup> In addition to frustrations about not keeping a career name, one comment explicitly tied in the continuation of a family:

Daughters from single-child households often come under pressure from parents who want the family name to succeed another generation. The dilemma for the parents is that while they want to see their daughter married, they also know that marriage will mean she will inevitably take on her husband’s name.<sup>200</sup>

#### F. Inheriting a Financial Cost to the Family

If a daughter is viewed as an economic burden to a family, it follows that a family would prefer to have sons not daughters. Law or morality usually restrains the extent to which a family would be able to implement this preference. There is, however, a report of at least one extreme. A British official in India in 1835 wrote about a village in Uttar Pradesh, where he had referred to one villager as the son-in-law of another villager:

This mistake raised a sarcastic laugh among them ... and a bystander briefly explained that he could not be a son-in-law since there were no daughters in the village. “[The British official] was told that the birth of a daughter was considered a most serious calamity and she was seldom allowed to live. No violent measures were however resorted to, but she was left to die from neglect and want of food.” He added that, “a chief reason for the murders was the exorbitant cost of dowries among the upper castes.”<sup>201</sup>

The tradition of “dowries” has been linked with a particular kind of murder: “bride-burning,” where a young wife living with her husband’s family burns to death from an “accidental” kitchen fire.<sup>202</sup> A recent study estimates that more than 25,000 young,

197. *Id.* at 133.

198. Leissner, *supra* note 195, at 340.

199. See, e.g., Kyodo News, *Surname Rigidity Frustrates*, THE JAPAN TIMES, May 15, 2001, available at <http://www.japantimes.co.jp/cgi-bin/getarticle.p15?nn20010515b4.htm>. See also Tetsushi Kajimoto, *Surname Law Now Said Out of Sync*, THE JAPAN TIMES, Nov. 7, 2001, available at <http://www.japantimes.co.jp/cgi-bin/getarticle.p15?nn2001107b8.htm>.

200. Kajimoto, *supra* note 199.

201. BUMILLER, *supra* note 35, at 104.

202. See SOUTH ASIANS AND THE DOWRY PROBLEM, *supra* note 42, at xiii-xv. This

married women in India die or are maimed each year from “dowry and bride-burning”.<sup>203</sup> These numbers are said to be increasing, and spreading with the movement of the population to England and the United States.<sup>204</sup>

These “kitchen accidents” have been the study of several conferences, and seem to have no agreed-upon causes.<sup>205</sup> This is not a matter of law. Dowry has been prohibited by law in India since 1961, yet the tradition continues.<sup>206</sup> I find it interesting that the “problem” stems from the lack of equal inheritance rights (in practice) for daughters. In examining the justification of “tradition,” as a reason for continuing with dowry,<sup>207</sup> Professor Witzel<sup>208</sup> noted that the ancient Sanskrit texts mention that “brotherless daughters could inherit property and could also become an ‘appointed’ daughter, which meant that such a daughter’s son would then be acknowledged as continuing his grandfather’s patriliney<sup>209</sup> and would inherit the maternal grandfather’s property.”<sup>210</sup>

The definition of “dowry” is not clearly agreed upon, but it

apparently is related to post-wedding demands for additional dowry payments. *Id.* at xv.

203. *Id.* at xiv. I am aware of the argument that the number of women in the United States who suffer from “domestic abuse” (including the crimes of rape and murder) is equally significant. See, e.g., FEMICIDE IN GLOBAL PERSPECTIVE 16 (Diana E.H. et al. eds., 2001) (linking deaths of women in the United States to femicide and estimating that femicide is the leading cause of death in the United States for African American women aged fifteen to thirty-four and the seventh leading cause of premature death for women overall). My focus, however, is on practices that seem to have an identifiable relation to an inheritance practice. In terms of costs of daughters, it might be worth noting that the traditional practice in the United States is for the bride’s family to pay the cost of the wedding.

204. See SOUTH ASIANS AND THE DOWRY PROBLEM, *supra* note 42, at xiv.

205. Two conferences took place at Harvard in 1995 and 1996, a third at London University in 1997, and a fourth was planned for Harvard in 1998. *Id.* at xvii.

206. Dowry Prohibition Act, No. 28 (1961) (India), available at <http://law.indiainfo.com/enactments/dowry.html> (last visited November 9, 2002).

207. SOUTH ASIANS AND THE DOWRY PROBLEM, *supra* note 42, at 4. The term “dowry” is not a simple one to define, but usually refers to the expectation that the groom’s family will receive a bride who comes with some wealth (even if it is labeled as her own, it is still often taken over by the groom’s family). *Id.*

208. Professor Michael E. J. Witzel is a noted scholar of Sanskrit and South Asian Studies at Harvard University.

209. SOUTH ASIANS AND THE DOWRY PROBLEM, *supra* note 42, at 4. Again, we need to ask why this continuation so often appears as a “given” and why it can only be achieved through sons. Like so many other of these questions, which tradition or assumption came first? Did this begin with the pattern of naming sons after fathers and having daughters change their names as they were given to their husband’s family? Or did it begin with the giving of daughters away and a result was that they might as well have their names changed?

210. *Id.*



does involve the giving of money and/or property by the bride's family either purportedly to the bride or to the new family she joins (who seem to control it in most cases). The connection to inheritance is clear:

The giving of dowry in the first place is traditionally justified in terms of giving the daughter her "inheritance" at the time of marriage ... [T]his is the argument most often used by women themselves to justify their own dowries [to the reporter]: "Why should they be forced to give up a dowry, they argued, when they knew their parents would not give them a share in the family estate? If I did not have a means of ensuring that daughters got their due share in parental property, what business did I have to prevent them from getting dowries? In their view, it would only serve their brothers' interests, as they [the brothers] would get an even larger share of the inheritance."<sup>211</sup>

I will close this section with two quotes from Mahatma Gandhi, the "father" of modern India:

I am uncompromising in the matter of women's rights. In my opinion she should labour under no legal disability not suffered by men. I should treat the daughters and sons on a footing of perfect equality.

Of all the evils for which man has made himself responsible, none is so degrading, so shocking or so brutal as his abuse of the better half of humanity to me, the female sex, not the weaker sex ... [which] is even today the embodiment of sacrifice, silent suffering, humility, faith and knowledge.<sup>212</sup>

### *III. Protecting the Line of Inheritors & Immortality*

This theme is on the importance to a man of knowing that he is the father of a child. The safest method is to control the freedom of the intended mother. Why is it so important to be certain of fatherhood? I suggest that once again it is the role of inheritance that needs to be examined.<sup>213</sup>

#### A. Man's Need for a Son

A father may see his need to have a son in terms of there

211. *Id.* at 23-24. Kim Donat, my research assistant, suggested that the receipt of the early inheritance could be seen as a symbolic death of the parents of the daughter, who has now joined a new family.

212. MAHATMA: A GOLDEN TREASURY OF WISDOM-THOUGHTS & GLIMPSES OF LIFE 18, 65 (Sri. Meghshyam T. Ajaonkar ed., 1995).

213. See generally Barbara Hauser, *Death Duties and Immortality: Why Civilization Needs Inheritances*, 34 REAL PROP. PROB. & TR. J. 363 (1999).

being someone who will carry on his own identity – his name, his business, his property, reverence for his memory, and so on. A man who died without sons in ancient India and who “appointed” his daughter as an heir through whom her sons could carry on and receive the inheritance, was using what Witzel referred to as a clever legal fiction “to ensure the continuity of a bloodline which was in danger of being discontinued.”<sup>214</sup> This same mechanism was used in Israel: when Seshan had no sons he gave one of his daughters to his male Egyptian servant and counted her resulting son, Attai, as his descendant.<sup>215</sup>

### B. The Role of Women as Mothers

One study of Hindu culture notes a shift from a time when the female “element” of a couple was more important than the male because of her monopoly on giving birth, to a modern attitude that “families need brides to reproduce themselves, so *kanya*, the ideal virgin daughter, becomes the most precious social good ... In other words, the most precious gift possible is the fertile, nubile woman, the idealized future ‘mother of a hundred sons,’ as so many wedding *mantras* put it.”<sup>216</sup>

The unique ability of women to bear children has led to their “protection” in a variety of ways over time and across cultures. In tracing the origins of the Hindu religion, a scholar has commented that, “[t]here seems to be much unspoken agreement in the specialist literature that the birth monopoly protected ancient South Asian women against annihilation.”<sup>217</sup>

For example, in the Nuer society, a woman’s permanent reproductive rights are acquired by the husband upon marriage, so that even if the husband dies, she “remains subject to a legal contract through which rights to the children she bears were transferred to her husband’s group ... Ideally, if the husband dies, the contract will be sustained by her remarrying, to the deceased husband’s brother or some other member of his group.”<sup>218</sup> But the children she bears from sexual relations with her second husband are socially defined as the offspring of her dead first husband (hence ‘ghost marriage’).<sup>219</sup>

In a more rare form in the Nuer society, an old and important

214. SOUTH ASIANS AND THE DOWRY PROBLEM, *supra*, note 42, at 4.

215. *See* I *Chron.* 2:34-36.

216. SOUTH ASIANS AND THE DOWRY PROBLEM, *supra* note 42, at 225.

217. *Id.*

218. KEESING & STRATHERN, *supra* note 29, at 179.

219. *Id.*

woman may (by acquiring cattle) "marry" a girl.<sup>220</sup> The senior woman finances the marriage transactions as if she were a man.<sup>221</sup> The young woman then bears children by lovers.<sup>222</sup> "They are socially defined as the children of the female 'husband,' who in turn is their 'father' (hence they belong to her father's group, even though membership in it is transmitted in the male line)."<sup>223</sup> This practice was also followed in Israel:

In a number of cases a barren wife would use her own slave girl to bear children on her behalf. Sarah gave her handmaid Hagar to Abraham, and she bore him a son, Ishmael. That in these unions the handmaid is a substitute for her mistress is seen by the statement of Rachel when she offers her maid Bilhah to Jacob: "She shall bear upon my knees, that I may also have children by her."<sup>224</sup>

In some communities the fathers, and not the mothers, have the legal rights with respect to their children.<sup>225</sup> For example, under Islamic law guardianship of the children belongs to the father.<sup>226</sup> If the father has died and the mother remarries, she loses the children to the relatives of her deceased husband.<sup>227</sup>

Finally, another method of having "sons" is to treat a daughter's offspring as descendants of her father<sup>228</sup> (or, as the anthropologists put it, she brings him to live at her father's home "while at the same time her paternal kin retain rights to the offspring").<sup>229</sup> The tie between paternal names and inheritance is an assumed pattern: "The Old Testament, for example, records that the children of Barzillai were named after their mother's father, Barzillai the Gileadite,<sup>230</sup> and they were presumably entitled to inherit his property."<sup>231</sup>

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. GOODY, *supra* note 38, at 353, citing 21 *Genesis* 16:1-3, 30:3.

225. The mother has custody rights of boys until age seven and girls until age nine. Frances Raday, *Israel: The Incorporation of Religious Patriarchy in a Modern State*, 209, 212, in *INTERNATIONAL REVIEW OF COMPARATIVE PUBLIC POLICY*, *supra* note 44.

226. *See id.*

227. *Id.* at 212.

228. GOODY, *supra* note 38, at 353.

229. *Id.*

230. *Id.* at 354.

231. GOODY, *supra* note 38, at 353, citing *Ezra* 2:61, *Neh* 7:63. However, as a contrast to the dowry payments from the family of the bride, some societies have a tradition of the husband's family making payments to the bride's family. This practice is known as "bridewealth," it is paid to compensate for the rights that are transferred to the husband's group, which include rights over a woman's fertility.

### C. Fear of Mortality and Greed of Inheritors

In some societies the existence of a son, even though required, is an unpleasant reminder to the father that he will be replaced. In the Tallensi society, in Ghana, a son is not permitted to "eat from the same dish as his father, may not wear his father's cap or tunic, carry his quiver or use his bow, and he may not look into his father's granary."<sup>232</sup>

### D. Purity and Positions of Inheritors

Another factor in "protecting" the line of inheritors has to do with keeping the identity of the line intact. For example, there have long been prohibitions against marrying an "outsider", someone of another race, another religion or even someone in another "class". One of the oldest written Roman laws are those of The Twelve Tables, c. 450 B.C., which include a clear class prohibition of marriages between plebeians and patricians.<sup>233</sup> Religions and states have often prohibited marriage outside a defined class.<sup>234</sup> Those who disobeyed could even lose their rights to inherit titles.<sup>235</sup>

As European, English, and Chinese dynasties and monarchies progressed, a child's station in life became well defined by class. Succession to thrones was strictly decreed, nearly always to the oldest son. (Some laws allowed the oldest child, of whichever sex, to ascend, which they were considering in Japan when their princess became pregnant.)<sup>236</sup> During times when "titles" were important, they were usually inherited by the oldest son.

In France titles were attached to the land. "The land, and with it the title, followed special rules of inheritance ... (usually by male primogeniture with succession by females in default of males) .... The inheritor ... could use the title after payment of a tax and the (usually) automatic authorization of the sovereign

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*Id.* at 52-54.

232. KEESING & STRATHERN, *supra* note 29, at 61. The son is shown the inside of the granary for the first time as part of the funeral service. *Id.*

233. BORKOWSKI, *supra* note 26, at 30. This prohibition apparently sparked years of controversy and was subsequently repealed. *Id.*

234. NICHOLAS, *supra* note 26, at 247.

235. In 1936, British King Edward VIII abdicated his throne in order to marry his mistress Wallis Simpson, an American commoner without a title. CLAYTON ROBERTS & DAVID ROBERTS, A HISTORY OF ENGLAND, VOL. II 768 (3d ed. 1991).

236. *Lawmakers Cautiously Back Female Ascension*, THE JAPAN TIMES, Dec. 4, 2001, available at <http://www.japantimes.co.jp/cgi-bin/getarticle.pl15?nn20011204a5.htm>.

...”<sup>237</sup>

It is interesting that even after the French Revolution and clear court rulings that the concept of “nobility” is incompatible with the equality of all citizens, titles remain in France as part of a person’s legal name. The descent of these titles follows the rules of inheritance that were in the original grant of the title. One exception is that even though some pre-1789 titles<sup>238</sup> could be inherited in the female line, “the courts have decided that this cannot take place anymore.”<sup>239</sup>

In England the oldest son would inherit any number of titles, including the right to be a Lord in the House of Commons, which was changed only in 1999.<sup>240</sup> All of these are instances of “immortalizing” a status, position or family.

#### E. Multiplication of Sons (Harems and Polygamy)

Some commentators note that if it were allowed, it would be natural for a man to have as many wives as possible in order to increase the number of heirs (or sons) he could have.<sup>241</sup> One scholar has attempted to demonstrate statistically that a man can achieve the most “leverage” in his disposition of an inheritance by leaving it to sons, who have a higher likelihood of producing more offspring to carry on the family (man’s) line than a daughter can (limited as she is by having no more than one during a nine or ten month period).<sup>242</sup> It is not always easy to draw the line between a rational (even if unconscious) desire by a man to ensure the creation of his own progeny and the desire to engage in sexual relations themselves. For example, one author links the seclusion of women with their required sexual availability:

Not only do women face humiliating practices such as the *sigheh*,<sup>243</sup> but at the same time they must submit to the

237. Francois Velde, *Nobility and Titles in France*, at [www.heraldica.org/topics/france/noblesse.htm](http://www.heraldica.org/topics/france/noblesse.htm) (last modified Aug. 21, 2002).

238. 1789 was the year that the Declaration of the Rights of Man and of the Citizen was passed. (1789) (Fr.), available at <http://www.hrcr.org/docs/frenchdec.html> (last visited Nov. 9, 2002).

239. Velde, *supra* note 237.

240. See House of Lords Act 1999, ch. 34 (U.K.), available at <http://www.hmso.gov.uk/acts/acts1999/19990034.htm> (last visited Nov. 9, 2002).

241. Laura Betzig, *Roman Polygyny*, 13 ETHOLOGY AND SOCIOLOGY 309, 310 (1992) (presenting the Darwinian theory of sexual selection as an explanation of polygyny in pre-industrial society).

242. John Hartung, *On Natural Selection and the Inheritance of Wealth*, 17 CURRENT ANTHROPOLOGY 607 (1976). See also Hartung, *supra* note 158, at 1.

243. *Sigheh* is defined as a process in which a man can temporarily marry a woman, usually for a few hours, thus legitimizing the sexual activity. Kouroush

husband's every sexual desire, otherwise they are viewed as being not Islamic ... "A woman who has been contracted permanently must not leave the house without the husband's permission and must surrender herself for any pleasure that he wants and must not prevent him from having intercourse with her without religious excuse. If she ... obeys the husband must [provide] her [with] food and clothing and dwelling ...."<sup>244</sup>

Polygamy continues in many countries. In an article in a popular Indian women's magazine, a doctor recalls how she gave advice to a first wife, who had been supplanted upon the financial success of her husband by an additional younger and prettier wife.<sup>245</sup> The same article describes how a young unmarried woman agreed to sleep with a married man in return for a plot of land: "Reena struck a bargain with him with her mother's approval. She was willing to sleep with him, provided he gave her a 25 yard plot in the colony he was developing ... Only after having a plot registered in her name did she agree [to have an abortion]."<sup>246</sup>

#### F. Control of Mothers (Female Genital Mutilation)

Another way to protect the line of inheritors is to discourage wives from having a general interest in sex. The practice of removing the clitoris ("female genital mutilation") is a way of removing the enjoyment of sex.<sup>247</sup> Estimates are that between 85 to 114 million women and girls worldwide have been subjected to female genital mutilation ("FGM").<sup>248</sup> Another estimate is that in East, West and Central Africa alone, 110 million women and girls have been affected,<sup>249</sup> and that in Egypt a government report estimates that ninety-seven percent of Egyptian women have been circumcised.<sup>250</sup> A "shadow report" prepared in 1999 (by the Center for Reproductive Law and Policy (CRLP) and the Association Camerounaise des Femmes Juristes (ACAFEJ)) for Cameroon noted that: "FGM is still practiced in certain regions of Cameroon

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Eshgipour, *The Islamic Revolution's Impact on the Legal and Social Status of Iranian Women*, 3 NEW ENG. INT'L & COMP. L. ANN. n.99 (1997), at <http://www.nesl.edu/intljournal/vol3/iran.htm>.

244. *Id.* at n.98.

245. Amrinder Bajaj, *Double Trouble*, WOMEN'S ERA, Nov. 1, 1999, at 34.

246. *Id.* at 34, 36.

247. See UNFPA, *supra* note 50, at 7.

248. *Id.*

249. John Tochukwu Okwubanego, *Female Circumcision and the Girl Child in Africa and the Middle East*, 33 INT'L LAW. 159, 160 (1999).

250. *Id.* at 160. See also *Female Genital Mutilations*, 6 ECHO 7 (2001) (data from Senegal).

... [and] affects about 20% of the female population.”<sup>251</sup> It is usually practiced at the age of puberty although sometimes on girls as young as six or eight years old.<sup>252</sup> Seen as simply a health risk, the report adds that FGM “is often performed without anesthesia under non-hygienic conditions by untrained practitioners, sometimes leading to fatal or serious health complications.”<sup>253</sup> Human rights activists estimate that more than one million girls have died from the practice of FGM.<sup>254</sup>

The social purpose is a belief that female sexuality must be controlled and this is a way to achieve that.<sup>255</sup>

The Israeli Bedouin community of the southern Negev desert insist [sic] that female circumcision is a means of purifying the girl child who, prior to this ritual, is essentially an “unclean animal.” Preserving the female honor is a collective responsibility, and female circumcision is a preventive medicine that ensures that a Bedouin man can safely leave his wife at home while he is away grazing the flocks.<sup>256</sup>

In a 1999 survey in Senegal, 95% of the women felt that FGM must be undertaken in order to respect tradition.<sup>257</sup>

Anthropologist John Hartung, observes that female circumcision is clearly a way of “protecting” the man’s line of inheritors:

Another cultural practice that can be seen as a means, albeit gruesome, of dealing with probability of paternity is destruction of the potential for experiencing sexual pleasure among women. It has been alleged that our own culture (especially in its most Victorian-puritanical phases) has attempted to accomplish this through psychological conditioning.<sup>258</sup>

251. THE CTR. FOR REPROD. LAW & POL’Y, WOMEN’S REPROD. RTS. IN CAMEROON: A SHADOW REPORT 13 (1999), available at [http://www.crlp.org/pdf/sr\\_cam\\_1199\\_eng.pdf](http://www.crlp.org/pdf/sr_cam_1199_eng.pdf) [hereinafter REPROD. RTS. IN CAMEROON]. In one survey fifty-seven percent of the operations were on girls under age seven. *Female Genital Mutilations*, *supra* note 250, at 7.

252. REPROD. RTS. IN CAMEROON, *supra* note 251, at 13.

253. *Id.*

254. See Okwubanego, *supra* note 249, at 169.

255. See UNFPA, *supra* note 50, at 7.

256. Okwubanego, *supra* note 249, at 167 (citation omitted).

257. *Female Genital Mutilations*, *supra* note 250, at 7.

258. Hartung, *supra* note 158, at 612-13. He adds:

Throughout Ethiopia (and in parts of other countries), the female sex drive is bludgeoned both psychologically and physiologically via complete excision of the clitoris. Having made informal inquiries over a period of years (while living in Ethiopia), I found that, in addition to citing religious instruction, many males responded that this practice keeps women from having extra-marital affairs.

*Id.* at 613.

As Hartung concludes,

Those not accustomed to thinking in evolutionary terms might suppose that the forces outlined are not relevant to modern, monogamous industrial societies with readily available contraception and sophisticated educational systems. It should be kept in mind that man has been evolving as a cultural animal for some 3,000,000 years and that we have existed in modern form for over 50,000 years. *The degree to which modern cultural practices are vestiges of our past can hardly be overemphasized.*<sup>259</sup>

A number of the inheritance practices reviewed here might well be vestiges of ancient human needs: to reproduce, to provide offspring to continue the race and to care for aging parents, to worship ancestors, to attempt "immortality," and so on.

#### IV. Women and Girls at Risk

If the primary function of a woman is to provide sons for a man so that he will have someone to inherit his name, his position, and his identity, then girls by definition will be at risk from birth. A wife will also be at risk once the man who had responsibility for protecting her dies. This risk is exacerbated if she has not herself inherited sufficient property from her own parents or from her husband.

##### A. Widows

When daughters have not inherited from their parents, and live in a position of economic dependence upon their husbands, they are at risk upon the death of the husband. This is aggravated when they do not inherit property from their husbands, either by law or by tradition. Very little attention has been given to the needs of widows throughout the world.<sup>260</sup> A survey in 1995 showed that widows represented from seven to sixteen percent of all adult women, and the proportion of widows to non-widows was highest in the most developed countries, but if only those over age sixty were included.<sup>261</sup> A more recent study shows that in Northern Africa, of the women over the age of sixty, fifty-nine percent are widows.<sup>262</sup> Common restrictions on the inheritance of

259. *Id.* at 613 (emphasis added) (citation omitted).

260. See discussion *infra* Part One, IV.A.

261. Martha Alter Chen, *Why Widowhood Matters*, in WOMEN: LOOKING BEYOND 2000 99, 99 (1995).

262. In Western Europe the incidence is forty percent. Margaret Owens, U.N. Div. for the Advancement of Women, Dept. of Econ. & Soc. Affairs, *Widowhood: Invisible Women, Secluded or Excluded*, WOMEN 2000 3 (Dec. 2001).



the matrimonial home, remarriage and social identity “place widows in a situation of acute dependence on economic support from others.”<sup>263</sup>

India has the largest number of widows, some 33 million, which is ten percent of the female population.<sup>264</sup> Widows are in a difficult situation legally, economically and socially.<sup>265</sup> If a widow did keep some property, she may be required to return it to her deceased husband’s family if she remarries.<sup>266</sup> Often, widows are “thrown out of their homes in the context of land and inheritance disputes.”<sup>267</sup> In an article entitled “India’s widows live out sentence of shame, poverty,” a reporter for CNN wrote:

In India, Vrindavan is known as the “city of widows.” Even in these modern times, Hindus frown on widows who remarry. The women are often shunned by their families, blamed by their in-laws for the deaths of their husbands. Many more flee their homes voluntarily, fearing they’ll be abused if they stay ... So, by the thousands, they flock to the ashrams of Vrindavan, where they are provided with the daily rations of a cup of rice and 7 cents.<sup>268</sup>

A research fellow at the Harvard Institute for International Development wrote:

[The widow’s] ability to engage in income-earning activities of her own is severely restricted, partly due to various patriarchal norms such as patrilineal inheritance and the division of labour by gender. The consequences as far as one can tell from the limited evidence available, must be serious in terms of poor health and high mortality rates. This is consistent with the traditional perception of Hindu widows as inauspicious and potentially suspect women who, ideally, should lead a life of austerity devoted to the memory of their husband. This ideological influence, however, may be less crucial than the simple fact that widows are often seen as an economic burden.<sup>269</sup>

Another 16,000 widows live in nearby Mathura and in Varanasi,

263. See Chen, *supra* at note 261, at 101.

264. Owens, *supra* note 262, at 6. See also WIDOWS IN INDIA: SOCIAL NEGLECT AND PUBLIC ACTION (Martha Alter Chen ed., 1998), at <http://www.vedamsbooks.com/no13285.htm> (last visited Feb. 20, 2002).

265. “Indian society, like all patriarchal societies, confers social status on a woman through a man; hence, in the absence of a man, she herself becomes a nonentity and suffers a social death.” Owens, *supra* note 262, at 6.

266. *Id.*

267. *Id.*

268. *India’s Widows Live Out Sentence of Shame, Poverty*, CNN INTERACTIVE (NOV. 16, 1997), at <http://www.cnn.com/WORLD/9711/16/india.women>.

269. Marty Chen, *People & that Planet: Widows in India*, at [http://www.widowsrights.org/patp\\_widowbox.html](http://www.widowsrights.org/patp_widowbox.html) (last visited Nov. 10, 2002).

two other cities considered holy by Hindus.<sup>270</sup> The 1956 Hindu Succession Act would allow women to inherit, but includes a reference to applying customary law, which generally does not allow them to inherit.<sup>271</sup> There have been proposals to change the law: "One of the radical changes suggested as part of the Hindu Succession (Amendment) Bill 2000 is equal rights for daughters in coparcenary property. This means that in a Hindu joint family, the daughter shall have the same property rights as a son and the property will be equally divided."<sup>272</sup>

A change in the daughters' rights to inherit would have far-reaching effects, and if successful should alleviate the economic plight of widows (who would have had their own property): "[t]he changes will have far-reaching social and legal implications for Hindu society. Currently, women can claim an equal share only in their parents' self-acquired property and demand dwelling rights in their parental house in the event of their divorce, widowhood or desertion by husband."<sup>273</sup>

The plight of widows in several African countries has also been of great concern. The first issue of *Action Woman*, a publication by the Women's Aid Collective in Africa features on its cover "The Scourge of Widowhood."<sup>274</sup> Local cultural traditions impose a variety of behaviors upon widows: drinking the water that was used to wash the corpse, sleeping next to the corpse, staying in confinement, and so on.<sup>275</sup>

A final note for this section is that in terms of inheritance, not only is a widow often likely to receive no property but in some communities she herself can be inherited:

[W]idows are regarded as property that can be inherited by any male relation of the husband. Widows who refuse to be inherited by the husband's relation are confronted with two opinions, either to marry the allocated person and remain in the family household or marry outside the family to persons of their choice and lose all her entitlements including in most cases her children.<sup>276</sup>

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270. See Subrata Nagchoudhury, *West Bengal Eager To Stop Widow Migration to UP*, THE INDIAN EXPRESS, Feb. 5, 2000, available at <http://www.indianexpress.com/ie/daily/20000206/ina06002.html>.

271. Owens, *supra* note 262, at 6.

272. Chaturvedi & Kumar, *supra* note 48.

273. *Id.*

274. Ike Chux, *Scourge of Widowhood*, 1 ACTION WOMAN 4 (2002).

275. *Id.*

276. *Id.* at 4-5.

### B. Child marriage

Parents who view their daughters as economic burdens, because the daughters are not expected to inherit their own property, sometimes choose to "marry them off" as soon and as young as possible.<sup>277</sup> The UN addresses the health risks of young marriages:

In many regions of the world where virginity is given a high social value, girls are married off at a young age, often to men many years older. A child bride faces greater health risks and experiences real physical violation and trauma as her young body is forced to deal with early sexual activity and the strains and pains of pregnancy and childbirth.<sup>278</sup>

Allowing girls of a young age to be married can be seen as a violation of basic human rights of those girls. The laws in this area have been changing. A study by the United Nations' Economic and Social Commission for Asia and the Pacific summarized some legal difficulties in marriage legislation as follows:

Child marriage is another crucial area in which contrasting policy approaches show the importance of adopting a consistent value system. Sri Lanka and in South East Asian countries, state initiative in providing access to education and facilities for registration of birth have contributed to raising the age of marriage for women. In some countries of South Asia the exploitation of the girl child in the form of child brides and child widows has been a continuing malaise despite legal reforms enacted to discourage early marriage. These laws are ineffective without the supportive policies on access to registration of birth and marriages, education, and a consistent legal policy. An example of inconsistent legal policy can be seen [sic] in laws which place restraints on early marriage by setting minimum ages of marriage, and yet recognize the validity of underage marriage. In the process, a legal system that prohibits child marriage confers legal rights on the husband/guardian of a child bride.<sup>279</sup>

### C. Sex Trafficking of Girls

The gruesome practice of selling young girls for sexual exploitation is connected to inheritance practices. If there is an

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277. The youngest marriage recorded is said to be in 1986 when an eleven-month-old boy was married to a three-month-old girl in Bangladesh to end a twenty year feud over a farm. Uche Jinegwo, *Marriages in Nigeria*, 1 ACTION WOMAN 13, 13-14 (2002).

278. UNFPA, *supra* note 50, at 8.

279. U.N. ECON. & SOC. COMM'N FOR ASIA & THE PAC., HUMAN RIGHTS AND LEGAL STATUS OF WOMEN IN THE ASIAN AND PACIFIC REGION, at 35-36, U.N. Doc. ST/ESCAP/1730, U.N. Sales No. E.97.II.F.31 (1997).

assumption that daughters will be an economic burden to a family (because they will not be inheriting family wealth, and the family will have to pay to marry them), it can be tempting to eliminate the cost and make a profit instead, by selling girls for sexual exploitation.<sup>280</sup> The problem seems particularly acute in Thailand.<sup>281</sup> Estimates for the number of child prostitutes now in Thailand range from 30,000 to 35,000.<sup>282</sup>

As with many other such issues, the problem is not that the laws to remedy (or prohibit) this practice do not exist. The laws do exist. Thailand's Criminal Code prohibits child prostitution.<sup>283</sup> The problem is that the practices continue in an accepted disregard of the laws.<sup>284</sup>

According to Patricia Levan,

[t]he root causes of child prostitution in Thailand are deeply embedded in the nation's culture and history: "Poverty, coupled with few job opportunities, compel many young women to become prostitutes. Family disintegration, incest, and domestic violence also contribute to the problem. Additionally, Thai culture, with its dualistic system of morality, provides a fertile environment for the sexual exploitation of children. For example, the sale of children, often by their parents, substantially contributes to the spiraling of the sex trade industry."<sup>285</sup>

Levan examines a number of causes, including poverty<sup>286</sup> and

280. *Id.*

281. See Patricia D. Levan, *Curtailing Thailand's Child Prostitution Through an International Conscience*, 9 AM. U.J. INT'L. L. & POL'Y 869 (1994) (presenting an extensive review of the sexual exploitation of children in Thailand).

282. *Children in Prostitution, Pornography and Illicit Activities: Thailand*, at <http://www.globalmarch.org/virtuallibrary/amnestyinternational/cl-thailand.htm> (last visited Oct. 20, 2002).

283. Levan, *supra* note 281, at 890 citing The Prohibition of Prostitution Act of B.E. 2503 (1960) (Thail.) (prohibiting all forms of prostitution). "Additionally, a host of international conventions also touch upon this issue. Most of these attempted remedies, however, suffer from a paucity of accessions by States, and ineffective enforcement mechanisms." *Id.* at 872.

284. The penalties are also quite small. For example, a violation of the prostitution law can result in a fine of no more than 4,000 bahts (\$160). *Id.* at 889.

285. *Id.* at 871 (citations omitted).

Children easily become the unwilling "supply" due to the ever-present "demand," especially in the wake of the burgeoning sex-tourism business that became the financial substitute for the U.S. military's presence in Indochina. The tourist industry has created so much profit that the procurers are seeking progressively younger children to keep their countries competitive. Touring customers seek out younger prostitutes, placing a high premium on virgins in hope of avoiding the AIDS plague that afflicts many of the participants in the trade.

*Id.*

286. *Id.* at 872. "Poverty has long been identified as one of the fundamental reasons children from poor backgrounds enter into prostitution." *Id.* at 872-73.

wartime conditions.<sup>287</sup> Of interest here is her description of the family structure.

The extreme parental authority of Asian parents helps partly to explain [the fact that parents often take an active role in selling the children] ....<sup>288</sup> This forced sale is often in the form of debt or bonded labor. The process of debt labor begins when local moneylenders allow parents to borrow money, but charge an extremely high interest rate for their service. To reimburse this money, parents contract their children into different forms of labor, which knowingly or not includes prostitution, until the amount owed is paid in full ... Though many children are coerced into the sex trade, there is a significant amount of self-selling due to the more subtle inducements that come from within the family framework. Many young girls decide to enter the sex trade on their own to support their families out of a long-standing cultural perception of family obligation. In these cases, the girls in the rural villages are not trying to escape village society. Rather, they send money home seeking to strengthen ties with the family.<sup>289</sup>

Levan also argues that the high number of child prostitutes corresponds to a history of cultural biases attaching to females in Thailand: "Throughout Thailand's history, its social customs have accorded men the right to control and use female sexuality for their own ends."<sup>290</sup>

287. *See id.* at 879.

288. *Id.* at 874-76.

That older relatives have 'ownership' rights over their younger family members in some societies demonstrates this authority. Thus, whether due to a family right, extreme poverty, indifference, or the misguided belief that earnings from the profession will give their children a better life, parents still practice a long tradition of selling their children into prostitution. One study concluded that sixty-three percent of the girls below the age of sixteen were brought to brothels by their parents and twenty-one percent through neighbors or friends who also sold their daughters to brothels.

*Id.* at 875 (citations omitted).

289. *Id.* at 875.

290. *Id.* at 876-77, 879 (citations omitted).

In Thailand's patriarchal society, there are two systems of morality – one for males and one for females.... Before slavery was abolished at the turn of the century, women in economic straits were purchased and sold to become wives of the lowest category. Even after the abolition of the slavery of wives, women's economic conditions did not improve. As a result, many resorted to the then legal profession of prostitution to earn a living.... These immigrant communities are claimed to have first introduced the practice of polygamy and concubinage into rural society. Thai nobility legitimized these sexual roles and marriage systems, as their increasingly open and elaborate system of grading wives and concubines made it a popular custom. In the middle of the last century polygamy gave way to the sanctioning of the now pervasive practice of prostitution.

*Id.* at 877-79.

#### D. Trokosi Slavery (an inheritable position)

A related category is the use of girls as slaves, including the right to use them sexually (without payment), as apparently still happens in Ghana, where it is alleged that “[tens] of thousands of pre-teen [and teenaged girls] are being kept as unpaid servants and sex slaves by West African voodoo priests to pay for the sins of their families against traditional gods and spirits.”<sup>291</sup> The girls are known as “Trokosi,” slaves of the gods.<sup>292</sup> Originally the families offered cattle, money or liquor, but the priests began to demand virgin girls in their place, which may have been cheaper for the families anyway.<sup>293</sup>

This use of a girl child to pay for alleged sins by her family is a practice that can be “inherited” generation after generation:

Sometimes, even lifelong servitude may not settle the debt to the gods. Occasionally, the family must offer another female virgin if the Trokosi dies while at the shrine. If the Trokosi is not replaced, it is alleged that the refusal “will lead to a recurrence of calamities in the family of the wrongdoer.” It can go on for generations.... Today, there are some women bound to shrines who “represent the fifth successive generation to pay for a [single] crime.”<sup>294</sup>

In addition, if the priest to whom the young girl belongs dies, she is inherited by his successor: “In the event that the priest dies, the woman becomes the property of his successor. But if the girl dies without her family redeeming her, they are obligated to replace her with another virgin, and thus the cycle can continue for generations.”<sup>295</sup>

The United States Department of State has expressed concern:

The Trokosi system, a traditional practice found among the Ewe ethnic group in the Volta Region, has been described in the United States Department of State 2000 Annual Report on International Religious Freedom as a “severe human rights abuse and a flagrant violation of women’s and children’s rights.” The report, which covered January to August [2001] further disclosed that even though legislation has been passed

291. Amy Small Bilyeu, *Trokosi – The Practice of Sexual Slavery in Ghana: Religious and Cultural Freedom vs. Human Rights*, 9 IND. INT’L & COMP. L. REV. 457, 457 (1999) (citations omitted) (quoting Sam Kiley, *Child Slaves Used by West Africans to Appease Spirits*, TIMES (London), Sept. 17, 1996, available at 1996 WL 6519665).

292. Bilyeu, *supra* note 291, at 466.

293. *See id.* at 472.

294. *Id.* (citations omitted).

295. Obenewa Amponsah, *The Trokosi: Religious Slavery in Ghana*, at <http://anti-slavery.org/global/ghana> (last visited Sept. 13, 2002).

banning the system it ([the] system) still persists, howbeit on a limited scale. Although the constitution of Ghana prohibits slavery, religious slavery exists, the report disclosed. "Trokosi, a traditional practice found among the Ewe ethnic group and primarily in the Volta Region, is an especially severe human rights abuse and a flagrant violation of women's [and] children's rights." The report described *trokosi* as a system in which, a young girl, usually under the age of 10 years, is given by her family as a slave to a fetish shrine for offenses allegedly committed by a member of the girl's family.<sup>296</sup>

This concern is shared by anti-slavery groups in the international human rights community:

[T]hrough the initiative of International Needs Ghana – a private non-profit group addressing the issues of the *Trokosi* and their children – over 31 shrines have stopped the practice of *Trokosi* and 1000 women have been freed. Fortunately the Ghanaian government has denounced *Trokosi* and deemed the practice unacceptable. Although a law was passed in June of 1998 outlawing the practice, many women remain enslaved because the law is difficult to enforce.... Some view the banning of *Trokosi* as the equivalent of banning their culture.... Women's rights advocate, Audrey Gadzekpo, was quoted in a January 20th 1997 article of *The New York Times* as saying, "This is something rooted in a very powerful superstition. The trokosi [sic] are not recruited or captured. They are sent to the shrines by people who fear that something bad will happen to them if they do not atone in this way. This will continue to be true for a time regardless of the law."<sup>297</sup>

Current estimates are that up to 3,000 females are held in this slavery.<sup>298</sup>

#### E. Girl Babies Killed or Neglected

As mentioned above, if the need to have a son is predominate, so that there will be someone qualified to inherit (carry on) the father's name and identity, then a daughter is unnecessary. If the inheritance patterns include a payment by the girl's parents to marry her off, she will be an economic burden to the parents. With limited resources, there would be a natural preference to avoid having daughters. In fact, this seems to be carried out by gender-

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296. *Ghana: United States Condemns Trokosi*, GHANAIAN CHRON., Aug. 23, 2001, available at <http://africaonline.com/site/Articles/1,3,27442.jsp>.

297. Amponsah, *supra* note 295.

298. Brian Carnell, *The Tragedy of Female Slavery in Ghana* (Feb. 12, 2001), at <http://www.equityfeminism.com/articles/2001/000016.htm>. "The BBC recently ran a sad report about the persistence of trokosi – a form of religious slavery – in rural parts of Ghana. Although a law was passed three years ago in Ghana outlawing it, up to 3,000 women are still estimated to be enslaved as a result of the practice." *Id.*

sensitive abortions (i.e. aborting the female fetuses), murders of female infants at birth, and less care during early years. There are many statistics about the number of "missing girls."<sup>299</sup> A census survey in China in 1987 showed half a million fewer female infants than would be expected on a statistical basis.<sup>300</sup> Another study showed some sixty million "missing girls" in China, South Asia and North Africa.<sup>301</sup> Another study showed fifty million "missing" females in India alone.<sup>302</sup> In the remote state of Bihar India "a midwife is paid 10 rupees for delivering a boy, five for a daughter – and 100 rupees if she immediately kills the female infant at the family's orders."<sup>303</sup>

There are some intriguing anthropological arguments that a society facing scarce resources will "unconsciously" kill its girl babies, to keep the reproduction level down.<sup>304</sup> The provocative author, Marvin Harris, is convinced: "the most widely used method of population control during much of human history was probably some form of female infanticide."<sup>305</sup>

This is quite different from a bias in favor of having sons, as discussed above.<sup>306</sup> Responses to the predictable scarcity of women as sexual partners can lead to the practice of sharing a woman, known as polyandry.<sup>307</sup> Anthropologists note that in the case of "fraternal polyandry" a group of brothers will share a woman.<sup>308</sup>

299. "Missing girls" refers to the disproportional number of girls present in societies where female infanticide and selective abortion of female fetuses occurs due to the preference for boys. See UNFPA, *supra* note 50, at 6.

300. *Id.* at 6.

301. *Id.* In addition there is a higher mortality rate among girls aged one to four in developing countries, presumably from poorer treatment and less food. See *id.*

302. Sonali Verma, *Indian Women Still Awaiting Independence*, REUTERS (New Delhi), August 12, 1997, available at <http://www.hartford-hwp.com/archives/52a/034.html>.

303. Roger Bernheim, *Emancipating India's Women: Discrimination as Part of Hindu Culture*, NEUE ZÜRCHER ZEITUNG, Jan. 31, 2001, available at <http://www.nzz.ch/english/background/2001/01/31india.html>.

304. See, e.g., MARVIN HARRIS, *CANNIBALS AND KINGS* 25 (Vintage Books 1991) (1977). See also KEESING & STRATHERN, *supra* note 29, at 112.

305. HARRIS, *supra* note 304, at 6. "Infanticide during the paleolithic period could very well have been as high as 50 percent – a figure that corresponds to estimates made by Joseph Birdsell of the University of California in Los Angeles on the basis of data collected among the aboriginal populations of Australia." *Id.* at 21. In eras of insufficient resources there is a predictable response to limit births in general, but female births in particular: "The optimal method would be to neglect only the girl babies, since the rate of growth in populations that do not practice monogamy is determined almost entirely by the number of females who reach reproductive age." *Id.* at 25.

306. See discussion *supra* Part One, III.A-E.

307. KEESING & STRATHERN, *supra* note 29, at 228.

308. *Id.*



There are current concerns about the disproportionate female to male ratio in Asia, with speculation that the shortage may even lead to increases in armed aggression.<sup>309</sup>

The issue of "missing girls" has been taken seriously by the United Nations:

The prejudice against the female sex in many Asian countries is so great that even before girls are born, they suffer from the prevalent preference for sons. Aside from the practice of female infanticide, the increased availability of reproductive technology such as amniocentesis and ultrasound now allows the selective abortion of female fetuses. The results of such practices can be measured in countries such as China, where the 1987 census showed half a million fewer female infants than one would expect, given the normal biological ratio of male-to-female births. The ratio of males to females has been rising in China since 1982. Similar patterns of higher than normal male-to-female sex ratios are found in India and the Republic of Korea. As the Nobel prize-winning economist Amartya Sen concluded ten years ago, if those countries had normal sex ratios, there would have been more than 60 million more females alive then.<sup>310</sup>

An old Chinese proverb says "ten fine girls are not equal to one crippled boy."<sup>311</sup> Current orphanage statistics in China might support changing the proverb to "Ninety-nine girls are just about equal to one disabled boy."<sup>312</sup> If all Chinese children under fourteen are lined up with one row for boys and one row for girls, there would twenty million more boys.<sup>313</sup>

## Part Two

### Social Traditions ("Culture") and Inheritance Practices

This section explores the sources of inheritance practices. In

309. See Meleisea, *supra* note 47.

Demographers studying trends of birth sex ratios conclude that the masculinization of births will result in large cohorts of young unmarried males. This will pose social and cultural challenges to countries that are already undergoing rapid economic and political change. It is salutary to consider what the effects might be on male behavior in countries where one, or even two in every ten young men had no prospect of ever finding a wife. Might this increase trafficking in women? Could it push up the level of violence in society? Might it not threaten prospects for world peace, by increasing militarism and war-like attitudes?

*Id.*

310. *Id.*

311. Nury Vittachi, *Losing out in the Battle of the Sexes*, S. CHINA MORNING POST (H.K.), Oct. 24, 1998, available at <http://www.scmp.com/showarticles.php>.

312. *Id.*

313. *Id.*

particular it focuses on the forces that impel individuals to belong to a group, and to participate in that group's set of traditions. This seems particularly important in this area because the law itself may be fine in terms of providing protection and equal rights, but the societal traditions continue notwithstanding the written laws.<sup>314</sup> As can be seen throughout this argument, in many cases, the law itself will "defer" to customs, which often negatively impact women and daughters. As stated by one author: "[T]he power of tradition controls a country more than any other power.... [T]raditions always overcome other factors in a society and ... even influence the laws of that society.... This evidence of history confirms and demonstrates that the status of women is inseparably tied to the status of a nation."<sup>315</sup>

The woman's role in the nation is connected with inheritance practices. Reports from U.N. organizations occasionally comment on the impact those inheritance practices may have.<sup>316</sup> For example,

Amartya Sen argued that sex ratios are more normal in countries where men and women have similar rights to personal independence and property, and similar opportunities to participate in the formal labour force. In other words women are valued most highly when their rights are more nearly equal to those of men. The countries that discriminate most harshly against women, even to the extent of denying them the right to be born, are those that stick to old customs which deny women rights of inheritance, and restrict their right to work in public places. In such countries women are a burden because they cannot earn an income and do not own or inherit land.<sup>317</sup>

Different societies have different views of which property rights are important and how they should be passed on at the death of the owner. Many of those views are expressed in laws,

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314. *E.g.*, Sharon K. Hom, *Law, Ideology, and Patriarchy in China: Feminist Observations of an "Ethnic Spectator,"* reprinted in *INTERNATIONAL REVIEW OF COMPARATIVE PUBLIC POLICY*, *supra* note 44, at 179.

Although the 1980 Marriage Law [in China] prohibits the exchange of money or gifts in marriage (Chapter I, Art. 3); guarantees free choice of marriage partners; prohibits infanticide (Chapter IV, Art. 13-14), the maltreatment (Art. 21) and the abandonment of children, early marriages (despite age limits set for marriage in the 1980 Marriage Law), child marriage, high prices "paid" for brideprice, and the ambivalent attitude of the authorities toward granting divorces, all continue to exist.

*Id.*

315. QASIM AMIN, *LIBERATION OF WOMEN 6* (Samiha Sidhom Peterson trans., The American University in Cairo Press 1992) (1899).

316. See Meleisea, *supra* note 47.

317. See *id.*

but many are not. In practice, many of the laws are subordinate to custom. In the current climate's interest in "multiculturalism," "cultural diversity," and "cultural relativism," many consider that whatever is practiced is to be respected as a part of one's culture. As Yash Ghai notes: "The most extreme position is that the validity of human rights depends entirely on the culture of the community. It is therefore not possible to criticize the conduct of a state on grounds of some supposed universal norms ...."<sup>318</sup>

As people in different groups move into other communities, the clash of values becomes both more apparent and more needful of response.<sup>319</sup> The question is whether everyone continues to maintain their separate values (including inheritance values) or do some values become historical relics (like the separate currencies within Europe, now supplanted by the unified "Euro" currency).

In looking at the deep-seated nature of "traditions" the underlying question that needs understanding is why it is so important to "belong" to a group. Groups presumably begin with one's immediate family. Thus, families seem to be the first group to which one belongs.<sup>320</sup> When several families join together for protection or efficiency, one then also belongs to a "clan."<sup>321</sup> As people have settled down, once traveling clans, now formed villages. It is often said that the move from clans to larger groups is the beginning of "civilization."<sup>322</sup> A village gave each member a

318. Ghai, *supra* note 2, at 1097.

319. See generally ROBERT WRIGHT, *NONZERO: HISTORY, EVOLUTION & HUMAN COOPERATION* 23 (2000).

320. See, e.g., *id.* at 23. "Love of kin is human nature. In every hunter-gatherer society the family is the basic molecule of social organization." *Id.* It is interesting to consider how often the use of "family" occurs as a way of bonding a group together.

Thus the various families in a Northwestern clan would celebrate their common, distant ancestor (sanctified by their totem pole), though it's not clear that this ancestor had in all cases actually existed. And in a New Guinea Big Man society, a men's organization that lent cohesion to the suprafamilial fabric was called "Brothers Under the Skin."

*Id.* at 38.

321. The term "clan" is defined as: "a Celtic group especially in the Scottish Highlands comprising a number of households whose heads claim descent from a common ancestor" or, "a group united by a common interest or common characteristics." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (9th ed. 1991). The word comes from the "Scottish Gaelic clan, family, from Old Irish cland, offspring, from Latin planta, plant." THE AMERICAN HERITAGE DICTIONARY, *supra* note 10, at 245.

322. See also Zhmin An, *Discussion on the Origin of Civilization*, 5 KAOGU 453-57 (W. Tsao trans., B. Gordon, ed., 1999) (1987). The author explains the evolution of the clan system, stating,

In the history of human social development, the age of civilization became a more advanced stage after the Barbaric Period. The definition of the

sense of identity, and also traditions that were passed down to future generations, beliefs and practices that were “inherited” by members of the village.<sup>323</sup> For example: “Permanent houses ... and crops growing in the fields sharpened the sense of territorial identity. Villages tended to remain enemies across the generations ....”<sup>324</sup> At different times in different locations, larger geographic divisions were identified as “countries” with a central government.<sup>325</sup> Even on a national level the group’s traditions appear to be an essential part of the identity of each member.<sup>326</sup> As “globalization” pressures continue, one could expect these national differences to subside. However, there seems to be a significant resistance to giving up portions of what one feels are one’s “identity.”<sup>327</sup> This backlash is not restricted to European countries.<sup>328</sup> Ironically, the global reach of the internet which could make everyone more alike, has itself made it easier to find and identify with small “communities of interest.”<sup>329</sup> Several

“age of civilization” was not synonymous with “material or spiritual civilization,” nor “archaeological civilization.” In current academic fields, the term “civilization” is generally used to indicate the dissolution of the ruling family clan system, and advancing to the class society of organized countries and representing a stage of social development.

*Id.*

323. See KESING & STRATHERN, *supra* note 29, at 46-48.

324. See HARRIS, *supra* note 304, at 50.

325. See generally, MYTHS & NATIONHOOD (Geoffrey Hosking et al. eds., 1997) (describing the beliefs and myths that create a nation’s identity and with which its members relate).

326. See generally *id.*

327. See, e.g., Thomas Hylland Eriksen, *Globalization and the Politics of Identity*, 36 U.N. CHRON. No. 4, at 8 (1999). The author states, “we have in recent years witnessed the growth in very many societies in all continents of political movements seeking to strengthen the collective sense of uniqueness, often targeting globalization processes, which are seen as a threat to local distinctiveness and self-determination.” *Id.* at 9. See also Thomas Hylland Eriksen, *Globalization and the Politics of Identity*, at <http://folk.uio.no/geirthe/UNChron.html> (last visited Nov. 11, 2002) (full length version).

328. Eriksen, *supra* note 327. In the full-length version of his article posted on his website, Erikson points out,

In Asia, two of the most powerful recent examples are the rise of the Taliban to power in Afghanistan and the meteoric success of the Hindu nationalist BJP (Bharatiya Janata Party, “Party of the Indian People”) in India; and many African countries have also seen a strong ethnification of their politics during the last decade, as well as the rise of political Islam in the north. In the Americas, various minority movements, from indigenous groups to African Americans, have with increasing success demanded cultural recognition and equal rights.

*Id.*

329. See, e.g., Sherpa Friendship Association, at [http://www.bena.com/sherpa1/sfa/sFA\\_home.htm](http://www.bena.com/sherpa1/sfa/sFA_home.htm) (serving the international “community” of sherpas) (last visited Nov. 11, 2002); Western Cherokee, at <http://www.westerncherokeenation.org> (calling for the “Cherokee community to

commentators have speculated as to the reason for this "regression" to community identification, or "identity politics."<sup>330</sup>

Indeed, it may be a given that the push to broaden the base of a category is inevitably accompanied by a retreat to a smaller group for a stronger self-identification. As noted by the anthropologist Richard Schweder: "The development of a global world system and the emergence of local ethnic or cultural revival movements seem to go hand in hand."<sup>331</sup> He concludes "Multiculturalism is a fact of life."<sup>332</sup> This view is shared by Yash Ghai, who notes that "[G]lobalization itself has produced a sense of alienation and powerlessness in the face of new global forces, in which one's identity depends even more fundamentally on one's culture, while that culture may be perceived to be under threat from external forces."<sup>333</sup>

The United Nations Educational, Scientific and Cultural Organization (UNESCO) sponsored and published a study of the "futures of cultures" to address the concern that globalization

come together") (last visited Nov. 11, 2002).

330. See generally Eriksen, *supra* note 327.

Many writers see identity politics in general as an anti-modern counter-reaction to the individualism and freedom embodied by globalization, while others see it as the defense of the weak against foreign dominance, or even as a concealed strategy of modernization. Some emphasize the psychological dimension of identity politics, seeing it as nostalgic attempts to retain dignity and a sense of rootedness in an era of rapid change; others focus on competition for scarce resources between groups; some see identity politics as a strategy of exclusion and an ideology of hatred, while yet others see it as the true-born child of socialism, as an expression of the collective strivings of the underdog.

....

In a certain, important sense, the present human world is more tightly integrated than at any earlier point in history. In the age of the jet plane and satellite dish, the age of global capitalism, the age of ubiquitous markets and global mass media, various commentators have claimed that the world is rapidly becoming a single place. Although this slightly exaggerated description has an important point to make, a perhaps even more striking aspect of the post-cold war world is the emergence – seemingly everywhere – of identity politics whose explicit aim is the restoration of rooted tradition, religious fervour and/or commitment to ethnic or national identities.

*Id.*

331. Richard A. Schweder, *Moral Maps, "First World" Concepts, and the New Evangelists*, in *CULTURE MATTERS* 167 (Lawrence E. Harrison et al. eds., 2000) ("Thirty years ago, many social scientists predicted that, in the modern world, religion would go away and be replaced by science. They predicted that tribes would go away and be replaced by individuals. They were wrong. That has not and will not happen, either globally or locally.")

332. *Id.*

333. Ghai, *supra* note 2, at 1096.

would endanger the existence of separate cultures.<sup>334</sup> It found that: "Exclusion from this globalization process – or the decision of certain cultures to remain behind and not be part of the progress paradigm, according to which science and technology offer the only solution – generates hostility, with the emergence of localisms or even nationalisms in the effort to regain self-esteem through the self-assertion of cultures."<sup>335</sup>

Nonetheless the process of globalization, or "westernization," continues. The focus is on multinational summits and with organizations such as the United Nations. The multinational grouping of the European Community is predicted to become a new single "nation." On the other hand, if a nation comes under attack, as occurred in the United States on September 11, 2001, the "national identification" of those who live there can surface as a unifying call of identity. For example, "I am an American" became a widely distributed media message. Flags of the country were draped and hung in public, and worn on lapel pins, something that had not occurred in fifty years.

However, within the realm of anthropologists, there is often an affirmative refusal to use categories of "national" identity. As stated by Richard Schweder: "I am not going to have much to say about 'national character' studies here, but they went out of fashion about forty years ago, and for good reason."<sup>336</sup> On the other hand, it could be argued that as a result of globalization the resurgence of interest in separate national identities is inevitable. As noted in the UNESCO study:

Quite independent of the pace of change and the particular historical moment, there is a growing awareness of the right of every identity to survive by its own values, and of the need to find a way of respecting other identities which have the same rights. Cultural identity thus comes close to nationalism.<sup>337</sup>

The need to identify with a group is not easily altered:

Identity politics is frequently dismissed as an anachronistic survival from a time when kinship ("blood relations"), religion or local belonging formed the basis of politics. Against this view, it has been argued many times, always correctly, that although identity politics tends to be dressed in traditional garb, beneath the surface it is a product of modernity. The

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334. U.N. EDUC., SCI. AND CULTURAL ORG., *THE FUTURE OF CULTURES* (1994) [hereinafter *FUTURE OF CULTURES*].

335. *Id.* at 11.

336. Schweder, *supra* note 331, at 163. The author adds: "It is far better to think about human behavior and motivation the way rational choice theorists or sensible economists do, rather than the way personality theorists do." *Id.*

337. *FUTURE OF CULTURES*, *supra* note 334, at 13.

strong emotions associated with a tradition, a culture or a religion can never be mobilised unless people feel that it is under siege.... Viewed in this way, the collective emotions identity politics depend on reveal themselves to be deeply modern emotions associated with the sense of loss experienced in situations of rapid change. Ethnic nationalism, minority movements and politicized religion offer ... a positive sense of self, and like it or not, these movements will remain influential in most parts of the world until something better comes along.<sup>338</sup>

Inheritance practices such as those examined in this article are traditions within a group, so although they can change over time, or be changed, the change would not come easily or quickly. It seems essential to human nature to follow the traditions of a group in order to be entitled to belong, and it seems essential to belong.

This need for maintaining identification with a group is not a trivial matter. Even if countries desire economic growth, they can refuse to participate if to do so would subvert their special culture. If modernity challenged deeply-held inheritance beliefs, modernity might be refused. As stated by Schweder:

With regard to globalizations, westernization, and economic growth, I would hazard this guess. If it should turn out as an empirical generalization that economic growth can be pulled off relying only on the shallow or thin aspects of Western society (e.g., weapons, information technology, Visa cards), then cultures won't converge, even as they get rich. If economic growth is contingent on accepting the deep or thick aspects of Western culture (e.g., individualism, ideals of femininity, egalitarianism, the Bill of Rights), then cultures will not converge and will not develop economically because their sense of identity will supersede their desire for material wealth.<sup>339</sup>

The role of myth in social cohesion and identity should not be underemphasized. As a closing thought on this topic, we have the observation by Charles Darwin:

As man advances in civilization, and small tribes are united into larger communities, the simplest reason would tell each individual that he ought to extend his social instincts and sympathies to all the members of the same nation, though personally unknown to him. This point being once reached, there is only an artificial barrier to prevent his sympathies extending to the men of all nations and races.<sup>340</sup>

The final topic to consider in this section is the recent literature on

338. Eriksen, *supra* note 327.

339. *Id.* at 171.

340. WRIGHT, *supra* note 319, at ii (quoting Charles Darwin) (citation omitted).

cultural relativism and human rights. It is in the instances where this "universal" acceptance of human rights clashes with traditional respect given to "other" cultures that the recent writing has occurred.<sup>341</sup>

One theme in the recent literature is to recognize that our perception of "culture" differs and is reflected when "we" see "them" behaving differently. From this we conclude that their behavior is due to "their" culture (and ours is not). See, for example, *Blaming Culture for Bad Behavior*,<sup>342</sup> in which the author points to two similar situations in the United States of a young female marrying a much older male.<sup>343</sup> In only one, where the parties were Mexican, was this widely berated as a "cultural phenomenon."<sup>344</sup> Volpp ends with a request:

I am calling for an approach to combat gendered subordination across communities, an approach that neither attacks the cultures of communities of color based on racial assumptions, nor presumes that the United States is always a site of liberation.<sup>345</sup>

A general inquiry has been whether or not there is a clash between universal human rights and multiculturalism, and if so, how is that to be addressed.<sup>346</sup> This is also the topic of an extensive article by Celestine Nyamu.<sup>347</sup> In her article she argues that:

Human rights and development are the two fields of international law that have addressed gender and culture in developing countries. Human rights scholars and practitioners have invoked domestic and international human rights standards to eradicate certain Third World cultural practices, particularly with regard to women. Similarly, the

341. Eriksen, *supra* note 327, at 8.

In the course of the second half of the twentieth century, the ideas and values associated with human rights have spread from educated elites worldwide (and not just, as some wrongly believe, in the West) to villagers and farmers in remote areas. The rapid dissemination of human rights ideas is probably one of the most spectacular successes of globalization.

*Id.*

342. Volpp, *supra* note 2, at 89-93, 116.

343. *Id.* at 90.

344. *Id.* at 92-93.

345. *Id.* at 116. Another theme is the exploration of whether "feminism" is inconsistent with (or endangered by) certain cultures, and if so how are these differences to be "negotiated."

346. See, e.g., Ghai, *supra* note 2 (examining the use of a framework of rights, based on universalist concepts, in four countries to resolve cultural or ethnic conflicts).

347. See generally Celestine I. Nyamu, *How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?*, 41 HARV. INT'L L.J. 381 (2000).



field of development has predominantly treated culture as an obstacle to women's full participation in society. These approaches have highlighted specific negative cultural practices such as female genital surgeries. Human rights and development have, however, made minimal contributions to building a dialogue balancing the goals of gender equality and cultural identity. As long-term strategies, the approaches of these two fields are limited in their ability to address forms of gender hierarchy that cannot be easily characterized as cultural oppression.<sup>348</sup>

She also suggests different methods of conceptualizing and remedying cultural justifications for practices that reinforce gender hierarchy in the Third World.<sup>349</sup>

In terms of inheritance traditions and practices, anthropologist Carolyn Fluehr-Lobban offers an interesting definition of "harmful."<sup>350</sup> In *Cultural Relativism and Universal Human Rights*, she comments on the traditional practice of anthropologists to study and report, not to judge, and describes how she and others have changed their minds.<sup>351</sup> Her test is a simple one: "Harm may be considered to take place when there is death, pain, disability, loss of freedom or pleasure that results from an act by one human upon another."<sup>352</sup> She suggests using the notion of harm done to individuals or groups to explore the terrain between universal rights and cultural relativism.<sup>353</sup>

Of course cultures are constantly changing, since they are organic communities, but deeply-held beliefs change slowly. As noted by Cynthia Epstein, "Custom and tradition die hard, and because culture and social structure are interactive and entwined,

348. *Id.* at 381.

349. *See generally id.*

350. *See generally* Carolyn Fluehr-Lobban, *Cultural Relativism and Universal Human Rights*, 20 ANTHRONOTES 1 (1998), available at <http://www.nmnh.si.edu/anthro/outreach/anthnote/Winter98/anthnote.html> (last visited Sept. 16, 2002).

351. *Id.* Fluehr-Lobban claims:

Anthropologists can lend their knowledge and expertise to the international discussion and debates regarding human rights. And, in fact, anthropologists have spoken out against reprehensible practices such as genocide. They have testified in U.S. courts against government rules that impinge on the religious traditions or sacred lands of Native Americans. But there are other human rights issues, from domestic abuse to female circumcision to culturally based forms of homicide, about which anthropologists have remained silent.

*Id.* at 8.

352. *Id.* at 7, citing BERNARD GERT, *MORALITY: A NEW JUSTIFICATION FOR THE MORAL RULES* 47-49 (1966).

353. *Id.*

change does not come easily, nor is it permanent.”<sup>354</sup> It has been said that to change a culture, people need a sense of urgency. This usually comes from knowledge of outside events and a sense of purpose.<sup>355</sup> Some have said that vision serves to create a sense of purpose that encourages people to change their actions.<sup>356</sup>

If there is an agreed upon knowledge that certain of the inheritance practices described are in fact “harmful” then those practices can (and should) be changed. The fact that they are deep-rooted and “traditional” does not mean they cannot be changed. If it is true that certain inheritance practices violate human rights, and that those practices are part of a deep-rooted cultural tradition, then the only way for change to occur is to provide a model of a less harmful approach. If this vision shows an improved life for all, it could motivate the required change.

### Part Three

#### International Human Rights and The United Nations

This section examines a few provisions in five major documents promulgated by the United Nations: the Universal Declaration of Human Rights;<sup>357</sup> the Convention on the Rights of the Child;<sup>358</sup> Convention on the Elimination of all Forms of Discrimination Against Women;<sup>359</sup> International Covenant on Civil and Political Rights,<sup>360</sup> and International Covenant on Economic,

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354. Cynthia Fuchs Epstein, *The Difference Model*, in BLAU & GOODMAN, *supra* note 72, at 54.

355. See generally WRIGHT, *supra* note 319.

356. It may be that economic arguments will be more effective, stressing the increase in a country's production rates when the women and children have access to more resources. As Florence Butegwa has argued, if addressing inheritance gender-inequalities as a cultural issue does not seem to work, addressing it as a legal issue involves costs and delays, and addressing it as a political issue depends too much on the current party rulers, then it may be more practical and effective to address it as simply an economic issue and gather the statistics that will show that a country's national production and attraction to foreign investors will be improved by improving the equality of inheritance. See Florence Butegwa, Denial of Inheritance Rights is an Economic Rights Issue, Remarks for the United Nations Development Fund for Women at the Church Center for the United Nations (March 6, 2002) (notes on file with author).

357. UDHR, *supra* note 6.

358. CRC, *supra* note 6.

359. CEDAW, *supra* note 6. CEDAW was adopted by the United Nations General Assembly on December 18, 1979 and entered into force as an international treaty on September 3, 1981, but the United States is not a party to the Convention. *Id.*

360. CCPR, *supra* note 6.

Social and Cultural Rights.<sup>361</sup> It should also be noted that the United Nations Charter itself states that: "the United Nations shall promote ... universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."<sup>362</sup>

The following provisions can be used as a base standard against which to judge the inheritance practices described in the earlier sections of this article. Begin the analysis by asking whether the language in the Convention appears to prohibit the particular practice. Continue by determining whether there is enough ambiguity in the language to allow a practice to be considered in compliance.

### *I. Universal Declaration of Human Rights*

The Universal Declaration of Human Rights, Article 7 states that: "All are equal before the law and are entitled without any discrimination to equal protection of the law."<sup>363</sup> Article 29 provides:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.<sup>364</sup>

The Universal Declaration of Human Rights discusses property rights at Article 17 stating: "Everyone has the right to own property alone as well as in association with others."<sup>365</sup>

### *II. Convention on the Rights of the Child*

The Convention on the Rights of the Child has a preamble that is worth repeating, for its application to a child's inheritance "rights":

*Recognizing* that the United Nations has, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

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361. CESCR, *supra* note 6.

362. U.N. CHARTER art. 55, *reprinted in* 1 Weston I.A.1.

363. UDHR, *supra* note 6, at art. 7.

364. *Id.* at art. 29, para. 2.

365. *Id.* at art. 17, para. 1.

*Recalling* that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance,

*Convinced* that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,

*Recognizing* that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,

*Considering* that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity,

*Bearing in mind* that the need to extend particular care to the child has been stated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959 and recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular in articles 23 and 24), in the International Covenant on Economic, Social and Cultural Rights (in particular in article 10) and in the statutes and relevant instruments of specialized agencies and international organizations concerned with the welfare of children,

*Bearing in mind* that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth,"

*Recognizing* that, in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration,

*Taking due account* of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child,

*Recognizing* the importance of international co-operation for improving the living conditions of children in every country, in particular in the developing countries ....<sup>366</sup>

To further the individual rights of the child, Article 2 provides:

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race,

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366. CRC, *supra* note 6, at pmb1.

colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.<sup>367</sup>

One could argue that the practice of leaving a large inheritance of wealth to a child is in violation of the above prohibition against "discrimination" based on the "status" of the parents.

The Convention also provides that "every child has the inherent right to life."<sup>368</sup> This Article would clearly prohibit infanticide, but one of the "ambiguous definition" questions may be whether it would also prohibit gender-sensitive abortions.

A requirement that every child "shall have the right from birth to a name,"<sup>369</sup> could imply prohibition of removing or replacing a name by the act of marriage. However, this was presumably not intended when the Convention was drafted. Article 8 provides:

States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.<sup>370</sup>

Furthermore, Article 24, section 3 provides that: "Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children."<sup>371</sup> It could be argued that this prohibits the practice of female genital mutilation and/or the traditional practice of "coercing" certain boys to become eunuchs. This is further supported by Articles 34 and 35 of the Convention.

Articles 34 provides:

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

(a) The inducement or coercion of a child to engage in any

367. *Id.* at art. 2.

368. *Id.*, at art. 6.

369. *Id.* at art. 7.

370. *Id.* at art. 8.

371. *Id.* at art. 24, para. 3.

unlawful sexual activity;

(b) The exploitative use of children in prostitution or other unlawful sexual practices;

(c) The exploitative use of children in pornographic performances and materials.<sup>372</sup>

Article 35 provides:

States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.<sup>373</sup>

The Convention on the Rights of the Child has been ratified by more than 190 nations, which is part of a substantial increase during the last decade in the acceptance of international human rights treaties in general.<sup>374</sup>

### *III. Convention on the Elimination of all Forms of Discrimination Against Women.*

The Convention on the Elimination of all Forms of Discrimination Against Women [CEDAW]<sup>375</sup> is based on the principle that "the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women on equal terms with men in all fields."<sup>376</sup>

CEDAW requires that participating States Parties shall take all appropriate measures:

(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;

(b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.<sup>377</sup>

The provisions supported by Articles 15 and 16 could be interpreted to invalidate the harmful practices discussed earlier.<sup>378</sup>

372. *Id.* at art. 34.

373. *Id.* at art. 35.

374. DAVID WEISSBRODT ET. AL., *INTERNATIONAL HUMAN RIGHTS: LAW, POLICY AND PROCESS XXXV* (3rd ed. 2001).

375. CEDAW, *supra* note 6.

376. *Id.* at pmbl.

377. *Id.* at art. 5.

378. Article 15 includes "all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women

*IV. International Covenant on Economic, Social and Cultural Rights*

The Covenant on Economic, Social and Cultural Rights, which has been ratified by 145 nations as of August 2002,<sup>379</sup> provides that even though "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."<sup>380</sup> In Article 3 the Covenant states, "The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant."<sup>381</sup>

*V. International Covenant on Civil and Political Rights*

The International Covenant on Civil and Political Rights, which has been ratified by 148 nations as of August 2002,<sup>382</sup> may provide the strongest repetition of the prohibition against discrimination based on sex. The provision allows a certain amount of flexibility "[i]n the time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed."<sup>383</sup> However, the Covenant continues to prohibit any discrimination based on sex even during such times, "... provided that such measures ... do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."<sup>384</sup>

Not every difference in treatment constitutes discrimination, however. As the Committee on the Elimination of Racial Discrimination observed in its General Recommendation 14, adopted in 1993:

[A] differentiation in treatment will not constitute discrimination if the criteria for such discrimination, judged

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shall be deemed null and void." Additionally, Article 16 includes that women and men shall have: "The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation. The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration." *Id.* at art. 16.

379. OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, STATUS OF RATIFICATIONS OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES 9 (August 12, 2002), available at <http://www.unhchr.ch/pdf/report.pdf>.

380. CESCR, *supra* note 6, at pt. I, art. 1, para. 1.

381. *Id.* at pt. II, art. 3.

382. STATUS OF RATIFICATIONS OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES, *supra* note 379, at 9.

383. CCPR, *supra* note 6, at art. 4, para. 1.

384. *Id.*

against the objectives and purposes of the Convention, are legitimate .... In considering the criteria that may have been employed, the Committee will acknowledge that particular actions may have varied purposes. In seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin.<sup>385</sup>

The Human Rights Committee has similarly observed that differences in treatment may be permissible under the Covenant, if the criteria for such differentiation are "based on reasonable and objective criteria"<sup>386</sup> and if the aim is to achieve a purpose which is legitimate under the Covenant.

As a practical matter, the United Nations,<sup>387</sup> assisted by a number of international lawyers' associations, could act as the effective catalyst for such deep changes.

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385. *Compilation of General Comments and General Recommendation Adopted by Human Rights Treaty Bodies*, Committee on the Elimination of Racial Discrimination, 42nd Sess., General Recommendation 14 on art. 1, at 67, U.N. Doc. HRI/GEN/1/Rev.1 (1994), available at <http://www1.umn.edu/humanrts/gencomm/genrxiv.htm> (last visited Oct. 7, 2002).

386. U.N. GAOR, Hum. Rts. Comm., 49th Sess., para. 452, at 82, U.N. Doc. A/49/40 (1994), available at <http://www1.umn.edu/humanrts/hrcommittee/hrc-annual94.htm> (last visited Nov. 10, 2002).

387. With the recent addition of Switzerland on Sept. 10, 2002, 191 states are now members of the United Nations. U.N. DEPT OF PUB. INFO., GROWTH IN UNITED NATIONS MEMBERSHIP, 1945-2002, U.N. Sales No. E.00.I.21 (2002) available at <http://www.un.org/Overview/growth.htm> (last undated Sept. 27, 2002)..