

# GENDERING TAX

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*A close look at tax systems demonstrates how fiscal policies affect patterns of marriage, childbearing, work and education. Coupled with social norms and biases, the fiscal system can be seen to exercise coercive force, entrenching social life patterns in an endless feedback loop. The liberal feminist perspective throws light on how, amongst other factors, a regressive taxation system, many of the special tax deductions, and even tax benefits for savings, benefit women less than men. We examine how the seemingly gender-neutral provisions of Indian taxation law fulfil the aims of substantive equality, and to what extent they further the existing stereotypes favouring one-breadwinner families.*

## I. INTRODUCTION

We understand average differences between men and women in the economic, political and social sphere to be the product of social relations that ascribe different roles, rights, responsibilities and obligations to males and females.<sup>1</sup> In partaking a gender analysis, we delve into an examination of inequalities, an enquiry into social power relations.<sup>2</sup>

A closer and more detailed look at tax systems shows that they have deep, persistent consequences on multiple levels. The tax system exacerbates marketplace discrimination against traditionally subordinated groups.<sup>3</sup> Fiscal policies affect patterns of marriage, childbearing, work, savings, education, charity, homeownership, and more. Social norms and biases are further reflected in fiscal–tax and transfer–systems, and such systems, in turn, exercise coercive force, tending to entrench patterns of social life in an endless feedback loop.<sup>4</sup>

Tax laws raise issues of gender and sexuality which may get ignored in mainstream debates involving questions of gender equality. Regressive taxes would hit a majority of women harder than men while special tax

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<sup>1</sup> TAXATION AND GENDER EQUITY 1 (Carren Gowen and Imran Valodia eds., 2010).

<sup>2</sup> *Id.*

<sup>3</sup> Anthony C. Infanti, *A Tax Crit Identity Crisis: Tax Expenditure Analysis, Deconstruction and the Rethinking of a Collective Identity*, (University of Pittsburgh School of Law Working Paper Series, Paper No. 3, 2004).

<sup>4</sup> Edward J. McCaffery, *Where's the Sex in Fiscal Sociology?: Taxation and Gender in Comparative Perspective* in *THE NEW FISCAL SOCIOLOGY: TAXATION IN COMPARATIVE AND HISTORICAL PERSPECTIVE* 222 (Martin, Mehrotra *et al.* eds., 2008).

deductions would also benefit men more than women. Considering that fewer women have disposable income for saving, even savings-related tax benefits will benefit women less than men. Again, women suffer relatively more from cuts in public expenditure on housing, education and welfare.<sup>5</sup>

Other notable issues come across when we begin to examine the dimension of gender in taxation. When we look at jurisdictions that carry out joint taxation on a system of calculating a couple's income as a single block, irrespective of marriage, it is important to consider the value of the unpaid work that the stay-at-home parent, in the majority of instances, the woman, carries out? How does the taxation system then, remain neutral? Further, it can be seen that there are major incentives across the board for the traditional male-breadwinner model, as opposed to the dual-working partner roles.

Our aim is to flag out various such issues relating to the intersectionality of gender and taxation. We begin with grounding our issues in a theoretical matrix. We next go on to examine the idea of neutrality when it comes to the issue of deciding choice of filing unit. From this discussion on general issues relating to the gendering of tax, the paper moves into the specific instance of the Indian scenario, starting with an analysis of the exemption granted to Sikkimese women which ceases to accrue if she marries a non-Sikkimese man. Locating this exception within the question of gender neutrality of the law, we look into the implications of non-inclusion of imputed income, such as basic household activities, from the tax code. We next examine how the non-deductibility of certain work-related expenses which are incurred by dual income couples has certain gender implications which favour the traditional male-breadwinner households. Thereafter, we look at how the Indian taxation system incorporates provisions, which positively discriminate in favour of women. Lastly, we explore a few alternative models from the gender analysis perspective. Our analysis for the purposes of this paper will be limited to looking at the traditional male-female family unit. To that extent we acknowledge that our analysis is limited to a heteronormative standpoint: we leave unchallenged the core understanding of gender, or the family unit.

Owing to the complexity of the subject matter, we have refrained from making direct suggestions relating to required change- instead we have taken the approach of problematizing the matter and hoping to engage in further debate on the same. As and where possible, however, alternate possibilities have been flagged out.

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<sup>5</sup> Miranda Stewart, *Reforming Tax for Social Justice; Women, Tax and Poverty*, 27 OTTOWA L.R. 99 (1995).

## II. LOCATING THE ANALYSIS IN A THEORETICAL FRAMEWORK

### A. GENDER NEUTRALITY

Many provisions of tax law appear *prima facie* gender neutral—they do not as such differentiate between men and women. And yet, it must be noted that this neutrality is essentially only consistent with the male experience. Women's experiences, to the extent that they differ from men, are often not accounted for within the tax framework.<sup>6</sup>

Gender neutrality by itself does not preclude bias in the system: in many cases, it in fact perpetuates such biases by not recognizing inherent differences or practical realities in the pursuit of one kind of legal rhetoric. Language alone cannot reveal bias— a proper gendered analysis of tax law will require dealing with neutral tax language and uncovering whatever bias exists beneath the cover of the neutral language.<sup>7</sup> Thus, very often, seemingly neutral tax principles consistently disadvantage women more than men, and therefore lack real neutrality.

### B. IMPLICIT AND EXPLICIT BIAS

Although gender bias may be present in any area of taxation, it is most commonly found in personal income tax because tax liability is established with respect to the income of an individual or household.<sup>8</sup> Since income tax is a form of direct taxation where tax is levied on the income earned by the assessee, there is a more direct relation between the individual or household and the tax system.

Explicit gender bias takes place when referring to the kind of language used in the tax code, and is relatively easier to identify.<sup>9</sup> It is manifested in provisions of the law or regulations that identify and treat men and women differently. This kind of bias may be present in the rules that govern the allocation of shared income, the allocation of exemptions, deductions and other tax preferences, and the setting of tax rates and legal responsibilities for paying the tax. Implicit biases are much harder to identify depending to a great degree upon value judgments about desirable social and economic behaviour. As we will go on to analyze, this kind of bias would be an outflow of increasing

<sup>6</sup> Amy C. Christian, *The Joint Return Rate Structure: Identifying and Addressing the Gendered Nature of Tax Law*, 13 J.L. & Pol. 241 (1997).

<sup>7</sup> Beverly Moran, *From Urinal to Manicure: Challenges to the Scholarship of Tax and Gender*, 15 Wis. WOMEN'S L.J. 221 (1996).

<sup>8</sup> Janet G. Stotsky, *Gender Bias in Tax Systems* (International Monetary Fund Working Paper Series, Paper No. WP/96/99, 1999).

<sup>9</sup> *Id.*

marginal tax rates, which may discourage secondary workers in a household (almost inevitably, the wife) from working. Indirect tax patterns will also often result in implicit bias.<sup>10</sup>

### C. HORIZONTAL AND VERTICAL EQUITY

Horizontal equity refers to the like treatment of like taxpayers. Vertical equity would refer to appropriate differentiation in the tax burden imposed on taxpayers with unequal incomes.<sup>11</sup>

The problem with this general understanding of equity in the tax system is that it is based on only one account of disparity: sameness or difference in income. In the case of a gendered analysis of the effects of individual and joint filing, at one level it might be as easily claimed as saying that equal-income marital units be required to pay equal taxes. Equating tax liabilities for a married and unmarried couples could, however, be seen as a problem in that the former would form a single tax unit while the latter would not: to that extent, they are not similarly situated.<sup>12</sup> Thus, a one-dimensional understanding of equity would result in blanket screening of issues relating to gender, amongst other grounds, from the ambit of tax policy.

## III. NEUTRALITY AND FILING

### A. INTRODUCING THE CONCEPTS

Any system of comprehensive individuated taxation must answer the question of attribution, or the appropriate filing unit – the question, in other words, of who pays taxes. In the first instance, this typically has meant deciding what to do about households with two adults living together.<sup>13</sup> The first option may be individual filing, where each person files independently of the other, while the second is joint filing, where the couple's income is taxed in a combined block. Based on the kind of filing system adopted, two ideas come into play here: marriage neutrality, and couples neutrality. While marriage neutrality holds that a couple's taxes should not be affected by marriage, couples neutrality holds that "equal-earning couples" should bear equal total tax burdens.<sup>14</sup>

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<sup>10</sup> One way implicit biases may result is from different consumption patterns by men and women on goods and services covered by tax resulting in different incidences of tax. See Janet Stotsky, *How Tax Systems treat Men and Women Differently*, March, 1997, available at [www.imf.org/external/pubs/ft/fandd/1997/03/pdf/stotsky.pdf](http://www.imf.org/external/pubs/ft/fandd/1997/03/pdf/stotsky.pdf) (Last visited on June 15, 2011).

<sup>11</sup> Anthony C. Infanti, *Tax Equity*, 55 BUFF. L. REV. 1191 (2008).

<sup>12</sup> Lawrence Zelenak, *Marriage and the Income Tax*, 67 S. CAL. L. REV. 339 (1994).

<sup>13</sup> McCaffery, *supra* note 4, 220.

<sup>14</sup> *Id.*

## B. THE IMPOSSIBILITY OF COEXISTENCE

The ideals of marriage neutrality and couples neutrality cannot co-exist, as demonstrated by this example:

Let us suppose we are at a basic imagined tax bracket of Rs. 0-20,000 going without taxation, and from Rs. 20,000 to 40,000 being taxed at 20 percent. Take couple A and B, a more traditional family, so to speak. A, the male is the sole breadwinner and brings home Rs. 40,000, while B is a housewife earning zero income. Then we have couple C and D, a two-earner family. Here, both are earning Rs. 20,000. The system that they are following is one of individual filing.

Essentially then, in a system of individual filing, the first couple will be at a loss as compared to the second couple. Since the rate structure applies to both unmarried and married individuals in their capacity as individuals, there is marriage neutrality. The first couple, between them, would pay an amount of tax, whether married or not, while the second couple would pay no taxes between them, whether married or not.

Thus in this scenario, marriage is irrelevant; however, this example can be seen to violate the idea of couples neutrality, where two couples who earn the same amount between them pay a different total rate of taxes. Depending on what ideal is deemed more important, a country proceeds with a particular system; in the United States, couples neutrality seems to be at a higher pedestal and the system of joint filing is thus followed,<sup>15</sup> the Indian fiscal policy favours marriage neutrality, and thus follows a system of individual filing.

## C. SECONDARY EARNER BIAS AND LABOUR MARKET IMPLICATIONS

The natural question that emerges is that of the effects of these systems, which leads us to the inference that they have a strong influence on female participation in the workforce.

Now, consider a system of joint filing in place: when taxed in an aggregate block as is the case with joint filing, the total income of both couples will come out to be Rs. 40,000, thus subjecting both of them to the tax of 20 percent where earlier it was only the single-earning couple. This is a system of

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<sup>15</sup> Pinaki Charabathy, Lekha Chakrabarty *et al.*, *Gender Equality and Taxation in India: An Unequal Burden?*, available at [http://www.idrc.ca/en/ev-156085-201-1-DO\\_TOPIC.html](http://www.idrc.ca/en/ev-156085-201-1-DO_TOPIC.html) (Last visited on October 8, 2010).

couples neutrality then, where both couples are earning equally as a block and paying the same total tax.

At this point, we have to open a basket of stereotypes, if only to be able to truthfully analyze the situation.<sup>16</sup> The first assumption we must make is that women, and not men, are considered the secondary earners in the family.<sup>17</sup> Having made that assumption, the next one to follow is that while tax planning, if one of the players is required to give up a job based on marginal tax rate problems, it would inevitably be the wife.

Taking these twin assumptions, we may embark on looking at what happens in the joint filing system: Taking the tax system used in the previous example into account, now, we add a third slab of say, Rs. 40,000 to 60,000 at which the tax rates may stand at 25 percent, and a fourth slab of Rs. 60,000 to 80,000 where the tax rates stand at 30 percent. We also assume here that the husband and wife are both working and earning a salary of Rs. 40,000 each. Now, when calculating total income, the first income considered will be that of the husband, and based on the fictional tax system we are using for the purposes of this example, he will be taxed 20 percent. With the wife's income in place as well, suddenly the tax jumps to the rate of 30 percent. There is a clear disincentive created here for working women in a family as opposed to the single filing method: a second-earner bias so to speak, that restricts their options and leaves them constantly asking whether it pays for them to work. To keep in mind in this equation is the value of childcare costs as well that will be borne out of the income if the mother is working, in the end it is often found in the joint filing system that it simply makes more economical sense for the woman to stay at home.<sup>18</sup>

Finally, it is evident that a system of joint filing in effect could potentially push a woman back to the household and out of the labour market, based on the pre-existing inequity.<sup>19</sup> A gender sensitive fiscal policy would thus necessarily be one that embraces individual filing;<sup>20</sup> in this regard, it is clear that India has the right system of filing in place.

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<sup>16</sup> Edward J. McCaffery highlights this point in his book *TAXING WOMEN*, when stressing on the fact that for any kind of relevant analysis of gender and taxation to take place, we can't be blind to existent stereotypes for the sake of political correctness, EDWARD J. McCAFFERY, *TAXING WOMEN* (1999).

<sup>17</sup> Tonya Major Gauff, *Eliminating the Secondary Earner Bias: Lessons from Malaysia, the United Kingdom and Ireland*, 4 N.W. J. L. & SOC. POLY. 424 (2009).

<sup>18</sup> Kristin Maschka, *Tax Law pushes Secondary Earners Out*, available at <http://www.womense-news.org/story/economyeconomic-policy/060412/tax-law-pushes-secondary-earners-drop-out> (Last visited on October 9, 2010).

<sup>19</sup> *Id.*

<sup>20</sup> Harvey S. Rosen, *Tax Illusion and the Labor Supply of Married Women*, 58 REV. ECON. & STAT. 167 (1976).

It is, however, important to understand that the individual filing policy by itself is not the be all and end all. For one, it does not create complete “decisional neutrality”<sup>21</sup> by way of the fact that married women, like other workers, would continue to face the distortion created by the taxation of market earnings and the exclusion of imputed income, a concept which will be further dealt with in the next section of the paper. Furthermore, one must take into account the fact that married women’s labour supply decisions are more elastic compared to other workers’, and it might be required to go beyond equal taxation to create even lower marginal tax rate schedules for married women than other groups.<sup>22</sup> Taking another perspective, if the goal of tax policy is seen from the viewpoint of assisting caregivers, then the policy of individual filing is positively counterproductive: while individual filing will cut average tax rates for some working women who are also caregivers, it will also cut rates for women who are not caregivers, provide no benefit whatsoever to homemakers, and clearly raise average tax rates on single earner couples.<sup>23</sup>

#### D. INDIVIDUALITY OF MARRIED WOMEN

Indian taxation law does not have a system of joint filing, and provides only for individual filing. A look at the Indian income tax law, however, shows that it does recognize the fact of a family as a unit and many tax provisions are influenced by family as a unit. This is most evident by the multiplicity of provisions where the Hindu undivided family (‘HUF’) is treated as a taxable unit and tax provisions are altered to accommodate them.<sup>24</sup> There are certain other provisions which recognize the existence of the family unit in other ways. For example, §64 provides certain instances where the income of the individual is deemed to include the income of spouses, minor children, etc. Another provision is the definition of “capital assets” which provides that personal effects falling within this definition include movable property held for personal use by assessee’s family members who are dependant on the assessee.<sup>25</sup>

While these provisions can be said to be merely giving legal recognition to the factum of marriage and accommodating the implications of marriage, what can be problematic is a provision where tax exemption is denied to a woman marrying a person of another region. The Finance Act, 2008<sup>26</sup>

<sup>21</sup> Anne Alstott, *Tax Policy and Feminism : Competing Goals and Institutional Choices*, 96 COLUMBIA L. REV. 8 (1996).

<sup>22</sup> Edward J. McCaffery, *Slouching Towards Equality: Gender Discrimination, Market Efficiency and Social Change*, 103 YALE LJ 595 (1993).

<sup>23</sup> Alstott, *supra* note 21.

<sup>24</sup> See, e.g., Income Tax Act, 1961, §10(2) which exempts for taxation any sum received by an individual as a member of a HUF, where such sum has been paid out of the income of the family; §47 which exempts capital gains which arise on the partition of HUF; §49 which gives a separate recognition to acquisition of capital assets by way of partition of HUF; etc.

<sup>25</sup> Income Tax Act, 1961, §2(14)(ii).

<sup>26</sup> Finance Act, 2008, §4.

inserted sub-section (26AAA) in §10 of the Income Tax Act, 1961 providing that any income which accrues or arises to a Sikkimese individual from any source in the state of Sikkim or by way of dividend or interest on securities would be exempt from taxation. This exemption, however, does not apply to a Sikkimese woman who marries to an individual who is not a Sikkimese. The provision further defines a Sikkimese as an individual whose name is recorded in the register of Sikkim subjects, or, if the name does not appear in the register, it is established beyond doubt that the name of such individual's father or husband or parental grandfather or brother has been recorded in the register.

The circular issued by the Ministry of Finance explaining the provisions of the Finance Act, 2008 states that this exemption provision has been inserted as “a measure to promote socio-economic development.”<sup>27</sup> The Circular, however, does not explain why the exemption has not been extended to Sikkimese women who marry non-Sikkimese. Evidently, this provision is based on a presumption, or rather, the stereotype, that the woman would “cease” to be a Sikkimese if she marries a non-Sikkimese. Although our taxation system is based on individual filing, this provision demonstrates the existence of the stereotype that the individuality of a woman is determined by her marital status. It is based on the ideology that a man and woman act as a single unit after marriage, and the woman's legal relations are to be governed by the status of her husband. This provision seems similar to the rule that exists in private international law where the wife is treated as dependant on her husband, and her domicile is deemed to be the same as her husband's,<sup>28</sup> even though she is otherwise capable of having her own domicile.

It may be argued that the legislature intended to give a certain benefit to Sikkimese people and extending this benefit to women who marry non-Sikkimese women would be ignoring the existing social reality where women usually move to the state to which their husbands belong. What is problematic, however, is that this provision is fuelling existing stereotypes, where it would have been easily possible to achieve the object of the provision without resorting to such stereotypes. The legislature could have relied on alternative criteria like, for example, residence, or the state where the married couple set up their matrimonial home, or where they habitually reside, etc. The provision, however, is based on the assumption that the wife would leave her state and reside in the state in which her non-Sikkimese husband resides. It denies her the benefit of tax exemption even if her non-Sikkimese husband is himself residing in the state of Sikkim, or even where the woman herself continues to reside in Sikkim irrespective of where her husband resides. It is also interesting to note that similar tax exemption provisions exist for members of Scheduled Tribes

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<sup>27</sup> Ministry of Finance of Government of India, *Explanatory Notes to the Provisions of the Finance Act, 2008*, Circular No. 1/2009, March 27, 2009, ¶6.

<sup>28</sup> Indian Succession Act, 1925, §§15-16.

belonging to certain North-Eastern states like Mizoram, Manipur, etc.,<sup>29</sup> and for people belonging to Ladakh,<sup>30</sup> without there being any denial of exemption to women marrying outsiders. Not only does this blanket rule deny any incentive to people who are leading lives different from what the traditional social rules prescribe; by denying tax exemption to Sikkimese women merely by reason of marriage, without taking into consideration any other factor, misses the objective of exempting Sikkimese people from taxation.

One of the reasons behind this provision has been stated to be an attempt by the Ministry of Finance to maintain the socio-cultural ethos of the North-Eastern state by discouraging Sikkimese women from marrying non-Sikkimese.<sup>31</sup> Thus, it is an attempt to influence a woman's choice of whom she should marry. Since the denial of tax exemption is applicable to women who marry non-Sikkimese on or after April 1, 2008, it may also have an influence on the choice *when* to marry.<sup>32</sup> Since the provision positively discriminates on the basis of region, it would have been more logical for the law to influence the choice of residence of individuals in a particular state by, say, deciding to set up their matrimonial home there, but not the choice of marriage. The provision, however, clearly influences the latter. The provision is clearly discriminatory towards women as it seeks to influence the choice of only women and not men, leaving untouched the status of Sikkimese men marrying non-Sikkimese women.

#### IV. NON INCLUSION OF IMPUTED INCOME

The main purpose of taxation law being to raise revenue,<sup>33</sup> the Indian Income Tax Act has a wide ambit covering income from five heads.<sup>34</sup> Like other taxation systems in the world, however, it completely ignores the *imputed income*. Imputed income is the value of the owner-supplied labour.<sup>35</sup> A number of activities are performed in a household like cooking, cleaning, childcare, etc. The market value of these services is called imputed income,

<sup>29</sup> Income Tax Act, 1961, §26.

<sup>30</sup> Income Tax Act, 1961, §26A.

<sup>31</sup> Shantanu Nandan Sharma, *Budget Sets Deadline for Sikkim Lovebirds*, THE ECONOMIC TIMES (New Delhi) March 9, 2008.

<sup>32</sup> See, e.g., *id.*, which mentions that "If you are a Sikkimese girl planning to marry a non-Sikkimese boy, you need to hurry up your wedding to get life-long tax exemption."

<sup>33</sup> See CIT v. Brindavan Beverages Ltd., (2010) 228 CTR (Kar) 1; Electro Optics Pvt. Ltd. v. State of Tamil Nadu, (2010) 30 VST 23 (Mad); Mohan Meakin Ltd. v. State of Himachal Pradesh, (2009) 3 SCC 157; CCE v. Fenoplast Pvt. Ltd., 1994 Supp (2) SCC 678.

<sup>34</sup> Income Tax Act, 1961, §14 as per which, taxable income is income from salaries; income from house property; profits and gains from business and profession; capital gains; and income from other sources.

<sup>35</sup> Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioural Gender Biases in the Code*, 40 UCLA L. REV. 983, 1002 (1993).

which assesses the money that one will have to pay to a third party to perform these services, instead of performing them oneself.<sup>36</sup>

Non-taxation of imputed income has gender implications by giving incentives to single-earner families. This is because while the value of services, if self-performed, goes untaxed; if the same service is purchased from the after-tax income (sum remaining after the payment of income tax), it is taxable. For example, a person may engage in washing clothes himself or herself or may hire the services of a drycleaner. If the person self-performs the service, then not only is no extra expenditure being incurred, but also no further tax has to be paid. If the services of a dry cleaner are hired, however, the person has to incur extra expenditure, and also pay further service tax.<sup>37</sup> Being an indirect tax, the burden is ultimately shifted on to the consumers. Therefore, while no expenditure and no further taxation takes place where the service provider and receiver is the same, this is not true when the two are separate entities.<sup>38</sup> Since two parties, namely a service provider and a service receiver, are required for the levy of service tax, no tax is charged where provider and receiver is the same person.

If both partners to the marriage are employed, they are more likely to hire the services of a third party. In a taxation system where imputed income is not taxable, the decision of the secondary earner to join the work force can have serious financial implications since such employment is likely to be accompanied by greater reliance on third party services which are taxable. On the other hand, there are clear incentives for one-earner households where one person can stay at home and perform these services “free of cost”. Since in Indian society, like most others, it is women who perform household activities, the stereotype of the homemaker-wife and the breadwinner-husband is furthered by such a tax system.<sup>39</sup> By performing these services herself, the wife obtains a tax benefit for the family.<sup>40</sup> The argument can be extended to further explain why many women leave workforce after childbirth. One of the factors is the increased expenses on hiring childcare services, which makes staying at home a more profitable option.<sup>41</sup>

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<sup>36</sup> McCaffery, *supra* note 4, 229.

<sup>37</sup> Note that in case of certain services like catering, where an element of sale of goods is also involved, the provisions of State VAT/sales tax may also come into picture. *See Sky Gourmet Pvt. Ltd. v. Commr. of Service Tax*, 2009 [14] STR 777. *See also* Constitution of India, Art.366(29A).

<sup>38</sup> *See* Michael A. Johnson, *A Gap in the Analysis: Income Tax and Gender-Based Wage Differentials*, 85 GEO. L.J. 2287, 2297 (1997).

<sup>39</sup> *See* McCaffery, *supra* note 35, 994.

<sup>40</sup> *See* Dorothy A. Brown, *Race, Class, and Gender Essentialism in Tax Literature: The Joint Return*, 54 WASH. & LEE L. REV. 1469, 1482 (1997).

<sup>41</sup> *See* McCaffery, *supra* note 35, 1003-4.

Under Indian law, the ambit of taxable services has widely increased. Some of these services which may have gender implications include services of planning, designing or beautifying spaces provided by interior decorators;<sup>42</sup> beauty treatment by beauty parlours;<sup>43</sup> dry cleaning;<sup>44</sup> commercial training or coaching;<sup>45</sup> outdoor catering;<sup>46</sup> and cleaning activity.<sup>47</sup> Service tax equivalent to 10 percent of the value of these taxable services is payable.<sup>48</sup> Inclusion of all these services under the ambit of service tax inevitably increases the tax burden on secondary earners.

## V. NON-DEDUCTIBILITY OF WORK RELATED EXPENSES NECESSARY FOR DUAL INCOME COUPLES

The taxation system allows for a number of exemptions and deductions. These mostly include expenses incurred for business purposes, and personal expenditure which is incurred by the family when the secondary earner enters the work force is not exempted or deducted. For example, §37 of the Income Tax Act, 1961 allows business and professional expenditure. These expenses include only those which have been wholly and exclusively for business purposes, and not personal expenses. The terms “wholly and exclusively” imply that if the expenditure is not entirely and only for business, and has a character of personal expenses, then it will not be allowed under §37.<sup>49</sup> Similarly, §36(1)(iii) of the Income Tax Act allows only the amount of interest paid only in respect of capital borrowed for the purposes of business of profession.<sup>50</sup>

<sup>42</sup> Finance Act, 1994, §65(105)(q) Tax introduced w.e.f. 16.10.1998.

<sup>43</sup> Finance Act, 1994, §65(105) (zq) introduced w.e.f. 16.08.2002. The scope of services included herein was widened w.e.f. 16.06.2005. As per §65(17), “beauty treatment” includes hair cutting, hair dyeing, hair dressing, face and beauty treatment, cosmetic treatment, manicure, pedicure or counselling services on beauty, face care or make-up or such other similar services.

<sup>44</sup> Finance Act, 1994, §65(105)(zt) introduced w.e.f. 16.08.2002.

<sup>45</sup> Finance Act, 1994, § 65(105) (zzc), introduced w.e.f. 1.7.2003. *See also* Art. 366(29A)(f), as per which catering contracts involving a supply of food or drink are a kind of composite contract, on which sales tax may also be attracted.

<sup>46</sup> Finance Act, 1994, § 65(105)(zzt) reintroduced w.e.f. 10.9.2004. As per §65(76a), “outdoor caterer” means a caterer engaged in providing services in connection with catering at a place other than his own. Introduced w.e.f. 16.06.2005, this includes a place provided by way of tenancy or otherwise by the person receiving such services.

<sup>47</sup> Finance Act, 1994, §65 (105)(zzzd) introduced w.e.f. 16.6.2005. However, as per § 65(24b), this does not include cleaning activity performed in residential buildings and premises.

<sup>48</sup> Finance Act, 1994, §66.

<sup>49</sup> *See* CIT v. T.S. Hajee Moosa & Co., (1986) 51 CTR (Mad.) 200; CIT v. Saravana Spinning Mills Pvt. Ltd., (2007) 7 SCC 298; Dy. Commissioner of Income Tax v. S.T.N. Textile Ltd., (2005) 12 SCC 714.

<sup>50</sup> *See also* Madhav Prasad Jantia v. CIT, (1979) 3 SCC 634; AIR 1979 SC 1291; S.A. Builders Ltd. v. CIT, (2007) 1 SCC 781; AIR 2007 SC 482.

Such provisions will not cover “personal” expenses incurred for hiring child care or other third party services by reason of entry into labour force. In the U.S. case *Smith v. Commissioner of Internal Revenue*,<sup>51</sup> it was held that the cost incurred in hiring nursemaid to take care of the infant child of a couple, both of whom were employed, was not an ordinary and necessary business expense of the wife. It is a personal expense, and therefore, is not deductible.

By not allowing such deductions, secondary earners are unfavourably burdened. The adverse impact of non-taxation of imputed income gets further accentuated due to the non-deductibility of certain expenses which are necessary for dual earner households. The primary earner can minimize expenses on various services by shifting the burden on the spouse who performs these services at home. The secondary earner, however, may not have anyone else to shift the burden to. Thus, the secondary earner has to purchase the services with her after-tax income. The taxation system does not offer any relief to the secondary earner by denying any exemption or deduction to subsidize these work-related expenditures, thus reducing the amount of monetary contribution that the secondary earner can make to the household. In case of single earner households, however, the primary earner gets subsidized by the imputed income of the spouse.<sup>52</sup>

To an extent, tax law does provide a number of child benefits. For example, in the United States, a credit to the extent of 1,000 per qualifying child can be claimed by the couple.<sup>53</sup> In the United Kingdom, tax free payments can be claimed by the parents in the form of child benefits.<sup>54</sup> A number of benefits are available in India as well. Children education allowance given by the employer is allowed to the extent of Rs. 100 per month per child up to a maximum of two children.<sup>55</sup> Further, allowance granted by the employer to meet the hostel expenditure of child is also allowed to the extent of Rs. 300 per child per month up to a maximum of two children.<sup>56</sup> The income of children is clubbed with that of the parent, except income which is earned by the child using his or her own skill and talent.<sup>57</sup> Income which is so clubbed is exempt up to Rs. 1,500 per child.<sup>58</sup> Further, tax benefits in the form of certain deductions or reliefs with respect to payments made on the life insurance of child,<sup>59</sup> contribution to the

<sup>51</sup> 40 BTA 1038 (1939). This is the gist of the case. I will not be able to provide the exact page no., but I have included the year.

<sup>52</sup> Johnson, *supra* note 38, 2301.

<sup>53</sup> US Code 26, §24.

<sup>54</sup> HM Revenue & Customs, *Child Benefit*, available at <http://www.hmrc.gov.uk/childbenefit/index.htm> (Last visited on October 8, 2010).

<sup>55</sup> Income Tax Act, 1961, §10(14)(ii) read with Income Tax Rules, 1962, Rule 2BB.

<sup>56</sup> Income Tax Act, 1961, §10(14)(ii) read with Income Tax Rules, 1962, Rule 2BB.

<sup>57</sup> Income Tax Act, 1961, §64(1A).

<sup>58</sup> Income Tax Act, 1961, §10(34).

<sup>59</sup> Income Tax Act, 1961, §80C(2)(i) and §88(2)(i).

provident fund in the name of a child<sup>60</sup>; contribution for participation, in the child's name in Unit-linked Insurance Plan<sup>61</sup> or in the unit-linked insurance plan of the LIC Mutual Fund;<sup>62</sup> payment with respect of health insurance for child<sup>63</sup> or medical treatment of child;<sup>64</sup> interest for loan taken for higher education of child;<sup>65</sup> payment towards tuition fee of children to university, college, school, etc. for full-time education;<sup>66</sup> etc. are also available under the Indian income tax law.

Providing childcare benefits is neither the same as, nor has similar implications to, providing child tax benefits or child tax credit. These child benefits are available to both single earner and dual earner families equally, regardless of whether they actually hire third party services. Hence, single earner families get an added benefit as compared to dual earner families who may be using these benefits to offset the amount spent on hiring third party services.<sup>67</sup> Hence, by not providing such deductions, an added burden is placed on secondary earners, thus favouring the one-earner household stereotype.

## VI. POSITIVE DISCRIMINATION IN INDIA

In 2008, the income tax threshold in India was increased from Rs. 1,10,000 to Rs. 1,50,000 and from Rs. 1,45,000 to Rs. 1,80,000 for women income earners. For both males and females over 65, it is even higher, at Rs. 2,25,000.<sup>68</sup> Further, Indian tax law does not provide for joint filing. It is important to note that India is one of the few countries, where the tax system provides such positive discrimination for women.<sup>69</sup>

While there does exist a level of positive discrimination in favour of women based on the higher tax threshold they enjoy, the benefits are limited, considering that women who fall under the income tax net form an extremely limited percentage of total number of income tax payers.<sup>70</sup> To give a figure to this statement: tax-paying women are only about 0.00001 percent of all women

<sup>60</sup> Income Tax Act, 1961, §80C(2)(v) and §88(2)(v).

<sup>61</sup> Income Tax Act, 1961, §80C(2)(x) and §88(2)(xii)1.

<sup>62</sup> Income Tax Act, 1961, §80C(2)(xi) and §88(2)(xiii).

<sup>63</sup> Income Tax Act, 1961, §80D.

<sup>64</sup> Income Tax Act, 1961, §80DD and §80.

<sup>65</sup> Income Tax Act, 1961, § 80E.

<sup>66</sup> Income Tax Act, 1961, §80C(2)(xvii).

<sup>67</sup> Johnson, *supra* note 38, 2307.

<sup>68</sup> Also note that under Section 88C, a rebate of Rs. 5000 was available to women taxpayers below the age of 65 years. This provision has been omitted by Finance Act, 2005, w.e.f. 1.4.2006.

<sup>69</sup> Pinaki Charabathy, Lekha Chakrabarty et al, *Gender Equality and Taxation in India: An Unequal Burden?*, available at [http://www.idrc.ca/en/ev-156085-201-1-DO\\_TOPIC.html](http://www.idrc.ca/en/ev-156085-201-1-DO_TOPIC.html) (Last visited on October 8, 2010).

<sup>70</sup> *Id.*

and 0.27 percent of working-age women. The use of income tax as a means to further gender equality thus seems limited to an extent.<sup>71</sup>

It is also unclear if that higher tax threshold itself really has had a positive impact on women's lives in India. Even considering there may have been a benefit in the case of property ownership being shifted from men to women to exploit the higher tax threshold, the impact would still be limited to that extremely small percentage of women within the tax net.<sup>72</sup>

Finally, the Direct Tax Code has provided for equalling the exemption limit for both men and women to the tune of Rs. 2 lakhs.<sup>73</sup> Whatever little relief which might have been available to women as a result of the higher exemption limit will now be lost. In this context, it is important to understand and appreciate just how tax incentives can transform gender power, at least amongst certain sections of society. For instance, Delhi now levies 6 percent stamp duty on properties registered in female names, against 8 percent for males. This small step may induce some males to gift sums to women to buy property.<sup>74</sup> To bring about changes in ownership patterns, India has also already brought in changes in succession laws.<sup>75</sup> Besides, §80C of the Income Tax Act, 1961 provides incentives for married couples to take joint housing loan. If both the husband and wife are working and take a joint housing loan, they can claim up to Rs. 3,00,000 on the interest paid on the loan, as opposed to a claim of Rs. 1,50,000 when the loan is taken only by an individual.<sup>76</sup>

Again, looking at the upper and middle sections of society, women and men currently pay the same upper rate of income tax, at 30 percent. Even at this level, a differential rate could be put in place to induce men to transfer wealth to female kin to reduce their tax liability. So, for instance, if the rate were raised to 31 percent for men, and lowered to 29 percent for women: in families with larger property and interest income, a 2 percent reduction would mean a substantial amount, enough to induce transfer of property, and in the process, transfer of power. It is small feats of social engineering like this that will have an impact in the long term.<sup>77</sup>

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> Times News Network, *New Tax Code takes away sops from Women*, available at <http://timesofindia.indiatimes.com/business/india-business/New-tax-code-takes-away-sop-from-women/articleshow/6465034.cms> (Last visited on October 8, 2010).

<sup>74</sup> S. Swaminathan, *Tax Men more than Women*, available at <http://timesofindia.indiatimes.com/home/sunday-toi/all-that-matters/Tax-men-more-than-women/articleshow/1049872.cms> (Last visited on October 8, 2010).

<sup>75</sup> See Hindu Succession Act, 1956.

<sup>76</sup> Income Tax Act, 1961, §80C.

<sup>77</sup> Swaminathan, *supra* note 74.

Thus, Indian tax law aims to increase the participation of women in work force and also offers other incentives to eliminate the bias against women holding and inheriting property.

## VII. ALTERNATIVE MODELS

Although Indian law presents a positive picture, there are possibilities of further reforms. The law at present ignores the negative effects caused by the non-taxation of imputed income.<sup>78</sup> Even though non-taxation of imputed income furthers the existing gender bias, a proposition to tax such income can have a number of difficulties. In self-performed activities, no market transaction is involved. Thus, no income is earned and no expenditure is incurred, which can be “taxed”. Hence, it will be difficult to assess the value of such a transaction.<sup>79</sup> While this hurdle is real, however, it is not that the concept of taxing imputed income is unfamiliar in taxation law. Some forms of imputed income are taxed. For example, if a person owns more than one house property, apart from one of them, the assessee has to pay income tax on each other house property, even if no income is actually earned.<sup>80</sup> Thus, the argument regarding the difficulty in assessing imputed income may not have many takers. The proposition of taxing imputed income of self-performed services, however, involves a number of other administrative and privacy concerns. Besides, some persons may prefer to perform certain services like cooking or cleaning merely as leisure or hobby, rather than due to fiscal concerns.<sup>81</sup> Further, if imputed income is sought to be taxed, the burden on tax payers may increase unreasonably. Hence, taxation of imputed income is not a viable option.

As an alternative, tax laws can provide exemptions and deductions for work-related expenses which can reduce the extra tax burden presently being imposed on secondary earners. For example, deductions can be provided for hiring childcare services. By providing such deduction, even though imputed income will still be exempt from taxation, this will provide some relief to dual earner families as compared to single earner families by taking away the extra burden imposed by taxes. Such a model can incorporate changes both in the direct and indirect laws. Thus, there can be provisions similar to the existing §37 giving deductions for personal expenditure made to hire certain services necessary in the household. At the same time, relevant amendments can also be made in the indirect tax laws. For example, under §65(105)(zzzd) of the Finance Act, 1994, even though service tax is imposed on cleaning activity, no tax is levied if the activity is performed in residential buildings and premises.

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<sup>78</sup> For an analysis of different jurisdictions featuring taxation of imputed income, see Sally Wallace, *Imputed and Presumptive Taxes: International Experiences and Lessons for Russia* (Andrew Young School of Policy Studies, Working Paper 02-03, 2002).

<sup>79</sup> See Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571, 1619-27 (1996).

<sup>80</sup> Income Tax Act, 1961, §22.

<sup>81</sup> Johnson, *supra* note 38, 2298.

By incorporating such amendments, service tax can be made friendlier to dual earner households.

While this is a better model than the proposition to tax imputed income, it has difficulties of its own. Most importantly, it will be a tedious task to enumerate what work-related expenses should be allowed.<sup>82</sup> An alternative to this is that a credit can be provided which is equal to a certain percentage of the secondary earner's wages.<sup>83</sup> In fact, this was implemented in the US for a brief period of time. In 1981, the US law was amended and it allowed a deduction of 10 percent of the earned income of the lower earning spouse, with the deduction not to exceed \$3,000.<sup>84</sup> This was, however, repealed in 1986.

Till now all substantive equality provisions under the Indian tax law and all the alternative models have been aimed at changing the entrenched gender patterns by giving incentives to women to participate in the labour force. There has, however, been a silence on how to change the reverse stereotype, that is, how to encourage men to share household duties. A lack of effort on the latter has led to a situation where women have a choice between two alternatives: either to work at home as homemakers, or to participate in the labour force but along with the additional burden of performing household activities (the effect of which they may try to offset by hiring third party services, again where existing tax law does not provide any relief), men have no incentive to share these responsibilities.

In fact, one of the tax schemes in the UK which was apparently aimed at reducing the tax burden of low-paid earners with children, in effect incentivized the tradition division of labour between men and women. The Working Families Tax Credit (WFTC) was introduced in 1999 in the UK, to provide an income supplement to families if one parent was employed for more than 30 hours per week. This supplement, however, could not be claimed if the parents were employed for 30 hours between them, so that each did some paid work and some unpaid child-care work. Therefore, it encouraged a status quo by creating a disincentive for the partners to share paid and unpaid work equally. In 2003, this was rectified, and the supplement for 30 hours employment now applies however these hours are divided between a couple.<sup>85</sup>

Edward J. McCaffery offers an alternative model which can affect gendered patterns both ways. He suggests that a higher tax rate imposed on primary earners, with a subsidy to secondary earners, can remedy the adverse gender implications of not taxing imputed income. This will imply that

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<sup>82</sup> Boris I. Bittker, *Federal Income Taxation and the Family*, 27 *STAN. L. REV.* 1389, 1433-34 (1975).

<sup>83</sup> See Lawrence Zelenak, *Marriage and the Income Tax*, 67 *S. CAL. L. REV.* 339, 360 (1994).

<sup>84</sup> US Code 26, §221 (repealed 1986).

<sup>85</sup> *TAXATION AND GENDER EQUITY 10* (Carren Gowen and Imran Valodia eds., 2010).

a stay-at-home wife will effectively be taxed, in the sense that she would forgo the subsidy that she could otherwise have got had she been working. At the same time, the husband may respond to the increased tax rates and may cut on his labour market hours, and help with the housework and the children, he will receive a full imputed income bonus. This kind of a taxation system holds strong potential for altering deeply entrenched gendered patterns in society.<sup>86</sup>

## VIII. CONCLUSION

Not only is it a constitutional aim<sup>87</sup> to provide for substantive equality, the first canon of taxation propounded by Adam Smith is that of equality.<sup>88</sup> Hence, it is required that individuals who are located at different positions economically, should be taxed differently. One point observed repeatedly by us in the course of our research was how there was a general absence of the conception of gender based rights and fairness from the domain of taxation policy on the surface level. Such analysis is particularly worthwhile when we look at how policies can reinforce or counter systemic patterns of discrimination and social biases.

A number of provisions, like the system of joint filing, non-inclusion of imputed income and non-deductibility of work-related expenses appear to be gender-neutral. Yet, they have adverse gender implications and operate in a manner that perpetuates the gendered division of labour within families.

It has also been noted that in recent times countries have responded to the changes in the society. India, in particular, has incorporated a number of provisions aimed towards securing substantive equality. Most of the reforms have, however, been uni-directional. While they aim at trying to increase labour-force participation of women, they do not provide any incentives for men to share household responsibilities.

Like other laws, a reform of the taxation system can bring in positive changes in the Indian society. Taxation laws have the power not only to influence the economy, but also the entrenched gender patterns which exist in the society.

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<sup>86</sup> McCaffery, *supra* note 35, 2005.

<sup>87</sup> See Constitution of India, 1950, Art.14.

<sup>88</sup> THE THEORY OF MORAL SENTIMENTS, Vol.1 (D.D. Raphael and A.L. MacFie eds. 1976).

