

Wanting a Perspective on Legal Regulation of Violence Against Women

Madhu Mehra

Law Relating to Dowry, Dowry Deaths, Bride Burning, Rape and Related Offences
By Dr. Paras Diwan and Peeyushi Diwan
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The increase in the writings on women and the law in the last decade in India have contributed significantly to the development of jurisprudence in the area. A large section of this writing has emerged from within the women's movement, drawing upon women's experiences of engaging with the law to highlight the barriers to gender justice within the structure and the ideology of the law. These debates have entered courtroom challenges, fed law reform campaigns, and even influenced judicial pronouncements, posing critical challenges to the traditional schools of jurisprudence. This growing body of knowledge has created a legitimate expectation of every law book, particularly those pertaining to women's issues, to incorporate and address the contemporary debates on women and the law.

Dr. Paras Diwan is a prolific writer of legal commentaries, and has to his credit several publications on the family laws. He has co-authored this book with his daughter Peeyushi Diwan, whose name is curiously absent from the book jacket, although mentioned in the inside page. The book, 'Law relating to Dowry, Dowry Deaths, Bride Burning, Rape and Related Offences', covers a selection of criminal laws on issues concerning women. In addition to the laws mentioned in the title, the book covers Adultery and Indecent Representation of Women. The question that first arises is about the thematic commonality guiding the selection of laws in this compilation. If the guiding theme was on crimes against women, then the book ought to have necessarily included sexual offences apart from rape, which it does not; Adultery, being inconsistent with such a theme would not be part of the compilation. On the other hand, if the compilation was pertaining to criminal regulation of matrimonial offences, then thematically, adultery would stay, as would rape, albeit to a limited extent, but Indecent Representation of Women would be an aberration. In addition the book would have to include the range of provisions in the Penal Code on 'Offences relating to Marriage' which presently find no mention. The selection of laws for this book seems to be random rather than guided by a coherent

theme or perspective that binding the issues covered.

Although in the preface, the authors acknowledge the increasing assertion of rights by women, the book does not include any of the debates on women and the law. As a result, the perspective on issues covered lacks an analysis enriched by the emerging jurisprudence in the area. This is reflected in the treatment of the issues, such as of dowry and rape, both of which have been abstracted from the socio cultural and historical context that condones and sanctions abuse of women. Instead these have been presented as aberrations rather than as visibly violent manifestations of gender inequality integral to and culturally sanctioned in patriarchal societies. Although in recent times, most legal systems have begun to respond to violence against women by introducing piecemeal amendments and special laws, their over-all legal framework continues to reinforce both class and gender inequality. If the linkage between women's subordinate socio legal status and the continuum of violence arising out of such subordination is not made, then laws will continue to treat violence against women as aberrations rather than holistically examining and linking all issues of women's status in and access to law.

In the chapter on dowry, the Diwans critique the definition of dowry in the Dowry Prohibition Act, 1961, for being too "wide and unmanageable" (p.20), as it criminalises the 'normal' giving and taking of presents, that is given without coercion or extortionary demands during marriage. The Act labels all giving and taking *in connection with* marriage, unless it is given without any demand and the lists of the items are maintained, or if such presents that are of customary nature, so long as they are not incompatible with the financial capacity of the giver (Section 3). Disagreeing with this, the authors assert that "dowry consists of those 'presents' which are extorted or extracted from the bride's parents by making a demand and by *saying that marriage would take place only if those demands were fulfilled* (emphasis mine), thereby taking advantage of the weaker position of the bride as who are obliged to give the girl in marriage as part of their moral and spiritual obligation. This coercive element is an essential element in dowry, and it is this which distinguishes dowry from presents"(p.19).

This proposition by the authors abstracts dowry from the inequitable social structure that subordinates women and mandates their social survival only within the framework of marriage. By identifying dowry with extortionary demands only, the authors ignore the reality of *unilinear flow of payments in relation to marriage*, of *articulated and unarticulated expectations* and often fatal violence arising out of unfulfilled expectations. It ignores the unequal status of the bride givers and the

bride takers which underpins this unilinear flow of seemingly *voluntary* payments and gifts even in the absence of articulated demands, let alone extortionary demands. Further, in restricting the definition to demands on which marriage is made conditional, the authors ignore that dowry is *not a one time payment but covers a total 'transfer of wealth'* that commences with the engagement and continues through the course of the marriage, at festivals, the birth of the grandchildren and concludes with the marriage of the grandchildren, even though the most conspicuous transfer is evidenced at the time of the marriage.

The discomfort of the authors is not merely restricted to what they perceive as an unwieldy definition of dowry in law, but extends to tracing the roots of dowry to the Vedic practice of kanyadan and vardarkshina. They rebut the linkage made by the Joint Parliamentary Committee to the said Hindu practices, on the ground that vardakshina essentially comprised of presents given out of affection and were not procured through extortionary demands. The only equation to dowry in Vedic times according to the authors, was the practice of *sulka* or bride price described by Manu as the *asura* form of marriage, which they assert was even condemned at the time. Thus, the authors establish that dowry was unsanctioned in traditional Hindu culture, and any similar practice in existence was always disapproved of. They further assert that dowry cannot be specifically attributed to any one culture because “traditional gifts made at or about the time of marriage is an accepted practice not merely among the Hindus but also among non-Hindus. They have been made by Hindus from ancient times. Such presents have been prevalent among other people also. Thus, in our submission, voluntary and affectionate presents are not caught in the definition of dowry...”(p.17). By de-linking dowry from kanyadan and vardakshina and simultaneously universalising the practice of giving gifts during marriage, the authors project dowry as an ahistoric, culturally unsanctioned, and therefore inexplicable social evil of modern times.

The chapter on Rape deals with the two critical issues of corroboration and consent in some detail, though not comprehensively. Corroboration has been dealt within the sections on ‘consent’ and not separately. Consent, a significant section in itself, has been fragmented into separate headings, namely, ‘Raping a Prostitute’ and ‘Consent of rape victim’. The proving and the disproving of consent is material to establishing the offence of rape. The existing jurisprudence allows the previous sexual history to be allowed as a circumstance establishing consent, or alternatively as a mitigating factor in reducing the sentence where rape has been proved. In the circumstances, the topic ‘raping a prostitute’ should have been included as an example under the section on ‘consent’, as it symbolic of a kind of situation where

previous sexual history can be argued to defend a rape charge. Clearly, it does not warrant a distinct heading in itself, as this only sensationalises the example without concretely linking it to the issue of consent. In fact, even as it stands, this heading ought to have followed the discussion on 'Consent of the rape victim' rather than preceding it, as it does in the book.

This incoherent sequencing of headings is again evident in the three distinct sub-headings on custodial rape: one called 'custodial rape and consent', the second called 'sexual intercourse *not* amounting to rape' (incorrectly titled so, when it refers to circumstances where sexual intercourse *amounts* to rape), and the third called 'consensual sexual intercourse by a man with a woman when she is in his custody or under his influence'. The sequence of these sub-headings fail to establish the thematic linkage between them, and only enhance confusion by sandwiching completely different topics such as 'gang rape' between them.

One would have hoped for the discussion on rape law to address the limitations of the existing definition of rape in dealing with child rape and a range of other penetrative sexual assaults amounting to rape. While the chapter does cover some cases of child rape, it is integrated within the general discussion rather than addressing it specifically. This is significant in view of the contemporary discussions on rape law reform both within the women's rights movement in India as well as the global movement. In fact some of the commonwealth jurisdictions such as Australia and Canada have already amended the definition of rape in their penal laws to include other forms of sexual assaults in addition to the penile penetration of the vagina. They have adopted a gender neutral definition that covers a range of non-consensual penetrative sexual contact such as insertion of penis into the mouth, genitalia or anus of another person and insertion of an object or any part of the body into the genitalia or anus of another person.

These developments over the last few years in common law jurisdictions have been an outcome of feminist legal debates which must find a place in any comprehensive discussion on the rape law. In addition, the absence of any discussion on Section 354 of the Penal Code which offers the alternative and lesser charge of outraging the modesty of a woman, makes for the inadequacy of the chapter on rape. This is particularly so in view of judicial cognisance given to this issue by the Delhi High Court in a case of child sexual abuse wherein the Court made the following observation: "The seriousness of the offence with respect to oral intercourse or vaginal penetration otherwise than with penis is not realised though it involves an act of sadism which is likely to cause the victim far grater pain and physical damage

than rape itself and yet it would not be rape as defined in Section 375. Admittedly it would also be not an offence under Section 377 of the Code. It would thus be an offence punishable under section 354 of the Code which provides maximum sentence of only two years. Does it not display a “voluptuous unconcern” of the ground realities?” [Jhaku vs. K.C.J & Ors, 1996 III AD (Delhi) 749]. Mindful of the need to broaden the definition of rape, the court further observed that: “The concept of crime undoubtedly keeps changing with the change in political, economic and social set up of the country. The Constitution, therefore, confers powers both on Central and State legislatures to make laws in this regard Let the legislature intervene and go into the soul of the matter”.

Legal commentaries on women’s issues which integrate within it the analysis of feminist legal studies would contribute immensely by mainstreaming these debates amongst legal practitioners. Unfortunately this book fails to accomplish such a task despite pertaining to women’s issues. The book seems to have been hastily put together as evident in the many errors that escaped proof reading, such as incorrect headings, inconsistent sequencing of headings and references without footnoted details. This pattern of oversight begins at the title which superfluously mentions both ‘dowry deaths’ and ‘bride burning’, when the former is inclusive of the latter, and in the omission of the second authors name on the book cover. One would hoped for greater diligence and rigor from the authors, particularly since Dr. Diwan is well known for his series of works in family laws.

* Madhu Mehra is a lawyer and researcher based in New Delhi. She is also a Steering Committee member of the Asia Pacific Forum on Women, Law and Development.