

## Legal Realism and the Dowry Problem

—Werner Menski\*

### I

In the current debates about dowry-related violence, we can identify two strands of activism, which seem to contradict each other at times and yet run together, if only we think a bit more carefully about what we are doing. The attempt, through academic conferences and discussions, to come to grips with the dowry problem so that women may be saved, now and in the future, is being criticised as idle talk of people in some sort of ivory tower or castle in the air, who have nothing to lose and seem to have spare time. On the other hand, the attempt to push the agenda forward in an activist and outrightly practical way also appears to some of us like building castles in the air. While we all agree that dowry-related violence is something that is immensely complex and demands concerted action, and that it should be rooted out, the strategies of tackling the problem differ, and the danger is that we lose sight of the common objective and waste precious time quibbling over details.

I do not believe that wonderfully built structures that might help dowry victims find shelter can be a feasible solution to the dowry

problem in the long run. Whatever we try to construct, certainly this alone would never lead to a permanent solution. In the same way that “Dowry Prohibition Officers cannot guard every kitchen in town” (Thakur, 1998: 214), we do not need hotels for dowry victims, but we need, as Himendra Thakur will tell us again and again, sheltering provisions that do not further denigrate women in trouble

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over dowry. But that, almost everyone agrees, is not enough.

Together with such undoubtedly important efforts, which directly seek to assist victims, we must continue to work towards understanding better how and why dowry-related violence rears its head in so many cases. Nipping the problem in the bud, as it were, seems still preferable to nursing burning wounds once it is too late. While both strategies can go together, I am warning here, above all, against the academic tendency to build castles in the air and to talk around the hot topic for ever without coming to the core of the

most troubling issues that seem to concern us all. Too many semi-hidden agenda criss-cross here, and too many people seem to want to say their bit without seeing the bigger picture. But what is this bigger picture? In a conference paper of this kind, which has to be short, the bigger picture must be left to everybody's imagination, and it seems more useful to hove in on a particular aspects of the problem.

### II

In this paper, I am trying to show that when it comes to the legal sphere, our simmering doubts about the usefulness of law as a reform mechanism with regard to dowry must unfortunately be confirmed. I shall argue that state law is indeed almost totally useless as a protective mechanism for the victims of dowry-related violence. The position of legal realism yields a perspective to the effect that social reforms, not more legal intervention, must drive remedy-centred strategies. Hence we must not address the government or the Prime Minister, i.e. the state, but the people of India. This is a tough task indeed, and this is surely not the last Dowry Conference to be

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## The Dowry Menace

held in India, because the problem will not go away just like that.

For six years now, since 1995, the dowry-related, activist research project inspired by Mr. Himendra Thakur of ISADABB and the enthusiasm of several dedicated people has identified four major problems regarding dowry when it comes to the laws. However, the discussions regarding the legal scope for controlling dowry-related violence have become struck in a vicious circle of repetition and dismayed helplessness. There is near universal agreement that the Indian anti-dowry laws have been a failure and do not effectively rescue Indian brides from being burnt or otherwise killed or maimed. In the meantime, every twenty minutes or so, a woman will die in India on account of dowry-related violence. So even while we are talking here, more women will get thrown away in this horrible way, and we simply stand accused of holding conferences and doing too little else. But what, in practical terms, can be done, and what can the law do in this regard? Let us stop bemoaning our own helplessness. Surely, doing nothing would be worse than what we are trying to do here.

Among the legal problems we have identified so far, firstly, is the fact that the giving, demanding and taking of dowry have all been prohibited by the state's law but people continue to indulge in all

of this, almost as though the law in the form of the Dowry Prohibition Act, 1961 (as amended from time to time) did not exist. So dowry practices continue in society and the state's law, we all seem to say, is largely ineffective in controlling and curbing the practice. It has been suggested by Manjaree Chowdhary (1998: 153) that the giving of dowry should be de-criminalised, but whether this alone will make any difference needs to be analysed further.

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Secondly, the Indian courts, if a prosecution for dowry-related violence is brought at all, are tough and do not shy away from awarding maximum penalties, certainly at the highest level, with many reported Supreme Court cases in the last few years (see Menski, 1998). But by that time the courts are not a useful forum for teaching people in India that killing a woman for dowry is a bad thing. Quite clearly, they come into the picture far too late to prevent such violence and their attempts to wield the punishing rod (*danda*) as a symbolic tool of deterrence seem to be largely futile. Not surprisingly, the judges of the Supreme Court are sick of dowry

cases, as expressed by Mr. Justice Hansaria in *State of Himachal Pradesh v. Nikku Ram*, AIR 1996 SC 67, at p. 67, who started his judgement by exclaiming: "Dowry, dowry and dowry. This is the painful repetition which confronts, and at times haunts, many parents of a girl child in this holy land of ours...". So we cannot rely on the judges to do more than a little educational work, they are otherwise very limited.

Thirdly, we have found that women in India are given dowry as movable property, so that the men can keep their control of immovable property. Whether changes to succession law will make any difference, as some people still claim, is increasingly questionable. We have known all along that if dowry were non-existent, men would go for the women who bring most property, so what difference does that make?

Fourthly, we have found that the real problem may perhaps not be dowry itself, but the ease with which women are killed or treated with immense cruelty. The supposedly deterrent forces of modern criminal laws have simply not had their effect in this regard, as dowry murders continue to be have as though the law did not exist. Here a lot of feminist writers have come in and blame tradition, often Hindu tradition, burn books like the *Manusmriti* and blame mythological ancient



so-called law-givers.

But Madhu Kishwar is not alone in saying that something is fundamentally wrong with such arguments. Thousands of women are dying in the name of dowry today, and they are dying and suffering because people today inflict such cruelty on them, not because of some tradition. All this talk about tradition distracts in reality from the fact that our present society indulges in crimes against women on some pretext or the other. So, rather than blaming tradition, it seems that we must turn to blame ourselves and our own modernity, whatever that means, but at any rate the present as it manifests itself in front of our eyes, with fire and 'bloodbaths for dowry', as the recent German article in *Der Spiegel* of 15th January 2001 screams. It is an incontrovertible fact that dowry deaths are happening now, all over the place, despite the law, and despite revulsion among us about the kind of violence that people inflict on women in the name of dowry.

Finally, a lot of people claim that dowry-related violence continues to exist simply because of society's biases against women. Here we see that all those people might be right who argue and claim that Indian women, as women, are simply treated with contempt and that their lives count for little. In other words, it is all down to misogyny, as my colleague Dr. Julia

Leslie emphasised in a pre-Conference seminar at SOAS in December 2000. I agree in principle, but that model of explaining dowry-related violence, is too general because such violence does not hit every women, it only occurs in certain situations, and we cannot be sure that it is only or mainly because of misogyny.

### III

So, the problem of dowry-related violence is firmly entrenched in today's society, it is a social evil or illness that demands a response at the level of society, not of law. But what do we mean by law in our context? I am refusing to throw up my hands and simply

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agree that the law has miserably failed and can do nothing more. In this paper, I argue that the law continues to be relevant, but that it has not done enough to curb the dowry problem and needs to try different tactics, which involve society in a more targeted way. But if threatening murders with lifelong jail and even with death does not work, then what would do the trick? I suggest here that to find an answer, we need to think about law more generally and need to consider its functions vis-a-vis society.

The prevailing model of law in Western thinking, copied by modern Indians, is of the law as state

law, in the form of legislation, the government doing something about a problem and the courts enforcing this law. This is the positivist, top-down model of legal regulation, where we as subjects of the law are told what to do, and the expectation is simply that we follow the law because the state says so. The issue of dowry-related violence in India shows that this model of law is another dream castle in the air. Laws, not just in India, are not simply effective by themselves. In our present case, we all seem to know that the Dowry Prohibition Act of 1961 and its amendments have not been able to curb the dowry problem. Is there another way to look at law, then, to get us out of this depressing hole?

Fortunately, the answer is yes. There are actually many different views about what law is and how it functions, and the positivist top-down model is not the only understanding of law that exists in the world. Not only lawyers are having problems with this, and with their own understanding of law. Lawyers love positivism because it gives them power, and so do politicians as law-makers. In short, they tend to treat themselves as a class apart, people who work with law as an identifiable separate system of rules and thus have special powers. All of this cultivates the images of law as codes, policemen and judges. But this means that lawyers, in reality, behave like plumbers who can sim-

## The Dowry Menace

ply fix a problem through the appliance of science - and that is perhaps why their failure rate is so high when it comes to complex socio-legal problems like dowry-related violence.

Social scientists, on the other hand, have their own problems with law, and with understanding law. Social scientists love to treat law as a separate field, away from their own patch. They don't want lawyers to analyse their work, as though they are afraid of the powerful claims that lawyers make all the time. This self-protective approach becomes clearer if we consider to what large extent the understanding of law as a social phenomenon is actually closely interlinked with the understanding of society as a legal player. Any form of socio-legal approach shows us that legal and social approaches are competing over who has the better right and qualifications to explain the rules of the social field, or to analyse, as in our case, dowry-related violence.

Both the historical school of jurisprudence and the sociological school treat law as an element of society, so that norms growing among people would be not only a social phenomenon, but also legally relevant norms and issues. Legal rules become social rules, and vice versa, and so we fight over ownership, in that sense. Within the historical school of jurisprudence, we find various theories that help us understand

dowry-related violence better. For example, the 'living law' theory of the Austrian scholar Eugen Ehrlich (1913) says that societies will turn any official state law into what he calls 'living law', the real law by which people live, which is not quite the same as the law that the state laid down.

Let us look at our dowry problem from this angle, and what do we find? Indian society has got used to a 'living law' law in which openly demanding dowry has gradually been replaced by covered practices. As you cannot

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openly demand dowry without causing some social criticism, and also according to the law, you must not mention this directly in negotiations or in a newspaper advertisement. So people have turned to new language, new phrases to hide their expectations. But the underlying expectations themselves have not been modified, and the state's law somehow does not touch those. So one can still expect dowry and create a firm understanding that a certain type of dowry will be given insisting that it is not only desirable, but a must. So newspaper adverts and people themselves now use covert language, but the law has not achieved its stated aim of abol-

ishing dowry, it has only given rise to different social practices in this field.

Similarly, when it comes to the killing of women for dowry, the law clearly says it is murder, and shall be duly punished, but people in Indian society have learnt that if you go about your business carefully enough, then you are virtually immune from prosecution. So again, society underwrites dowry-related violence and the killing of women in the name of dowry. And we here are just holding one conference after the other and are being told that we achieve nothing or, even worse, that we legitimise dowry by saying that women should not be expected to get nothing from their families.

What we must learn from Indian society today, therefore, is that society as a whole underwrites dowry and treats it as a socially useful mechanism. However, that is not the same as saying that Indian society underwrites extortion of dowry and murder for dowry. Here we continue to have problems about our definitions of dowry, and get distracted by different interpretations. Surely, the key point is that dowry payments that are demanded and extracted should be caught by the law and by social ostracism, but not dowry that is given voluntarily? Here we are back in the hotbed of discussions over whether we oppose all forms of dowry, or simply the deadly dowry, the one that causes



## The Dowry Menace

women to be killed or to be driven to suicide.

For my present discussion, the key point is that any law which seeks to outlaw all forms of dowry must fail. Indeed, and we should be quite clear about this, the Indian anti-dowry law has not really outlawed dowry, the Dowry Prohibition Act of 1961 prohibits excesses like exorbitant demands and the related violence but recognises, albeit very subtly, that there is a place for economic exchanges at the time of marriage. This has been criticised by various writers (see Chowdhary, 1998: 152-153) as a convenient loophole for all parties because it allows social practices of financial exchanges between families on marriage. But could any law seriously outlaw all kinds of financial transactions on marriage? Confirmation that the law-makers were not blindly trusting in the power of the law is found in section 6 of the Act, which is to the effect that any dowry given or taken, despite the letter of the law should be the property of the woman. Here the law recognises, in the clearest possible way, that the provisions of the Act would be undercut by social practices. Significantly, the 1961 Act is not called the Dowry Abolition Act, but the Dowry Prohibition Act, a subtle difference perhaps, or are we just playing with words? Think of the Bonded Labour Abolition Act, I think Swami Agnivesh

would agree that that Act has not in social reality abolished bonded labour, although legally it is abolished.

So, what are we saying here about law and society and their interaction when it comes to dowry? Our observation must necessarily be that the source of dowry-related violence lies in society, and hence I argue that any meaningful legal intervention must reach into society. But state law alone does not do that! Dowry-related violence will only

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abate if people in society feel that it is wrong to act in such a violent manner. Changes of opinion on this will not come about because of the law, but as a result of social norm changes. In jurisprudential language, the law will not be effective if it merely seeks to introduce 'secondary rules', such as rules about punishment and evidence. The law should seek to modify 'primary rules', the social norms of interaction between people. But the trouble is that it is in the very nature of state-made law that it cannot do that - society makes this kind of law, not the state. The state can try, but the 'living law' theory demonstrates that any law seeking to prescribe

to society directly what people should be doing will fail miserably. So we reach the same conclusion as social observation: Legal reform by itself is not sufficient to abolish the problems of dowry-related violence.

### IV

However, as I have emphasised all along in my work on dowry-related violence, not all women are targeted in this way, and not all marriages with dowry lead to dowry-related violence. So either the very general misogyny model is imperfect, in that not all Indians are misogynists, thank God, or we should find other explanatory models for why dowry-related violence hits only certain types of women.

It is significant that we have some claims about this issue to date, but no proper research, and here we need progress with the help of Indians who can do fieldwork. This is not something one can research from London or the USA and we need the help of South Asian field researchers in this. There are already many obvious questions: Is it true that certain types of North Indians are more violent towards their women than, say, people from Assam or Kerala? If so, why? Are the official figures that we have not only vastly understanding the problems, but are they also perhaps collected on the basis of different types of methods? How

## The Dowry Menace

should we come to know that a woman somewhere was killed or maimed for dowry? All the figures we have are dreadfully inadequate, but at least we have something to go by and we know that there is a huge problem.

What needs to be researched in more depth, however, is in what circumstances Indian women are subjected to dowry-related violence, and in what situations this is not the case. In a sense, we need research on cases where dowry was given successfully, where everyone is happy and there is no dead body or scarred woman at the end of the day. The somewhat distasteful suggestion to celebrate the success of dowry arrangements is miles away from the blanket prohibition of all forms of dowry that the Dowry Prohibition Act of 1961 seems to contemplate and that many researchers seem to underwrite. I found in a recent analysis of modern Indian family law (Menski, 2000) that many researchers persisted in writing what they thought to be right, not what the courts or society expressed as their norms. There seems to be a so-called activist tradition of social science research in India which is singularly and purposefully blind to the realities of the daily lives of people and builds another set of dream castles in the air, of modernity without family ties and a rosy cloud seven image of independent, autonomous individuals. This is something for

people who have the money and the courage to feel freed from all earthly ties, it is not something that the common Indian woman can afford mentally as well as economically.

If dowry-related violence does indeed depend on individual circumstances, and is not simply a systemic, automatic consequence of marriage, then what are those particular circumstances that lead to disaster? We simply do not know enough about that aspect of the problem. I have written about this issue before and we need not repeat this in detail here (see Menski, 1998: 18-19). In essence, there appear to be two scenarios in which dowry-related violence will be unleashed on the woman:

- (a) where *her* family promised too much before the marriage and then cannot deliver
- (b) where *his* family agreed to certain suggestions and then reneged on that silent or explicit contract or customary understanding by demanding more and more

Why do such breakdowns in the marriage negotiations and the interspousal relationships happen? It appears that the fault is often with the girls's side, who were all too keen to entrap a particular groom, and now have to produce all the required or expected elements of the dowry package. If they do not do so, as

one sees in many cases, the girl is in trouble and likely to be killed. In *Pawan Kumar v. State of Haryana*, AIR 1998 SC 958, we read of demands for a scooter and a fridge, as in many other cases (on the judgement, see Menski, 1998: 142-146) but the woman is dead. In *Godabarish Mishra v. Kuntala Mishra*, AIR 1997 SC 286, the sum of Rs 8,000 had been demanded from the bride's father, but only Rs. 6000 had been paid over and a little later this young wife was dead, too.

Such scenarios do not have to lead to death. In a comparable case from my ongoing fieldwork in Kerala, a low-caste family had promised 10 tolas of gold to the groom's family, but then gave only 8 tolas. Three days after the marriage, the girl was back home, as expected by her family, with the instruction that she would only be accepted back if the missing two tolas were delivered. In this case, I have a suspicion that the parents arranged this dowry deficiency on purpose to be able to have their formally married daughter back home with them. They knew that she would not be killed as a result of such games over dowry and, of course, at home she is safer than with her in-laws. It seems that such strategies would only work in South India, not in the more violent North, where more women pay with their lives for any hiccups in the customary arrangements and where the families of



## The Dowry Menace

girls are manifestly more reluctant to accept their daughter back home.

While the woman's side may play its own games, risking the life of their daughter, the husband's side is often engaged in an all too obvious game of greed, or perhaps simply a power game. I have seen several cases of ritualised abuse of the young woman in the new home, just to make her feel who is the boss and to whose tune she now has to dance. How bad for her if she answers back the wrong way and responds to such ritualised torture by overreacting. One could cite many extremely instructive cases here and I am sure we will hear during the Conference that dowry is clearly not the only factor in such struggles. Again, do we then blame dowry, is this in fact a dowry-related death? Are we barking up the wrong tree if we blame the dowry system for everything that is bad in Indian marriage arrangements?

This kind of 'marital trouble', linked to dowry demands or expectations, frequently begins during the negotiations and in the marriage ceremony. Himendra Thakur (1998: 210) is not alone to warn parents of girls that, in such a situation, the only sensible way out is to terminate the negotiations or to half the marriage ceremony, even to nullify the marriage. If nothing that the bride's side offers is ever good enough, such a family should be shown the

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door as fast as possible. Unfortunately, such behaviour often only occurs after the preliminaries for the wedding have been completed, and then it becomes more, and more shameful and *be-izzat* for the girl's side to pull out of a marriage arrangement. Such attitudes in society need to be changed, for the *be-izzat* of the husband's family should become the real focus of attention.

The critical point for my paper here is that the law will not, and cannot, directly regulate all of this. These are social processes that have to develop within society and which the law, thereafter, may underwrite to assist women, but it can do little else. Indeed there is evidence that the courts, particularly in South India, will help such women to free themselves from an unwanted marriage and will class the husband's behaviour as cruelty, as confirmed in the very recent case of *Jésy Antony v. Sonyson*, 2000 (3) KLT 697.

There is no need, for women to die of dowry-related violence, but they have to learn to defend themselves against the onslaught

of dowry-related greed in its various forms. The idea, so buzzing in India at present, that one can become a *crorepati* through marriage, must be resisted in society itself, but of course this is easier said than done. The media, glamourising richness and status symbols of all kinds, in this purportedly ascetically-inclined society, do not help at all in combating the idea that marriage is about more than status and easy wealth.

### V

The main point for my presentation here was, then, that dowry-related violence involves many primarily social issues that are unregulated by law and will remain outside the legal sphere, because the law has definite limits when it comes to the social field and its norm-making powers. We would not expect to see legal regulations about how a daughter-in-law should respond to taunts about deficiencies in her dowry. We cannot imagine regulating the relationship of mother-in-law and daughter-in-law by laws. By looking mainly at the financial transactions, the state's law ignores the critical sphere of interpersonal relationships, which it has to do of necessity, and thus fails to be socially effective in social reality. Social conflicts, however, are the ones that are primarily responsible for dowry-related violence where it occurs.

## The Dowry Menace

So the law tackles only the surface phenomenon, the demanding, taking and giving of dowry, but does not have the ability to reach and influence the underlying social processes.

If we see a need to reach those, how can this be done? We seem to assume that societies will not have rules that people don't like. The self-healing power of society may manifest itself in several ways:

- (a) in marriage negotiations, families will find who demands and who not, and what is acceptable or not in certain family traditions;
- (b) families will and should 'get out' of the negotiation process if unreasonable or unrealistic demands are being made, so that a silent social process to check dowry abuses goes on

all the time;

- (c) there is a need to strengthen such processes, and to highlight the fact that families who refuse to worship greed in the context of marriage are the real reformers, without going as far as renouncing dowry altogether;

- (d) dowry-related violence against women needs to be made socially unacceptable, while balancing this with awareness that brides are not always innocent victims either.

All of this can happen without the slightest input from the official law of the state, but it continues to be helpful that the state's law seeks to punish violence against women in the name of dowry. That is where the real focus needs to be put, not the total

legal abolition of dowry transactions.

Thus, the dichotomy between academic debate and activist approaches to the problems of dowry-related violence does not really exist. Neither branch of activism should build castles in the air, together we should continue to focus on the social sphere, which is the arena within which all dowry-related problems manifest themselves and need to be solved. Let the law stay out of this, let society heal itself. If that basic position of legal realism means that there is no real role for the law, then so be it. We are not here to protect the place and the inflated global claims of law (Menski, 2000), but the lives and the rights of women who are victimised by dowry-related problems.

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