

EXPLORING THE BOUNDARIES OF LAW,
GENDER AND SOCIAL REFORM

by

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Women's engagement with the law in India has been instrumental in introducing legal regulation of customary practices and legal intervention within the family. While the special laws have helped establish an alternative normative order for social and private behaviour, the legal discourse has often reinforced the very customary practices and gender inequality that the law was enacted to resist. This article explores the relationship between the law, gender and social reform.¹ It explores these issues through the legal discourse on dowry and domestic violence, to examine the ways in which the law has disqualified the sociological and feminist constructions of these issues. In its construction of the social problem, the law mediates through the traditional gendered notion of women and social customs, thereby (re)producing within the "objective" legal order, norms that closely parallel the social structure. This may seem ironical, given that it was the feminist and sociological discourses on these issues that compelled legislative interventions in these areas. Once enacted, the law has appropriated unto itself, the right to

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The following law reports are referred to in this article:

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| Cri LJ | Criminal Law Journal (includes judgements from the High and the Supreme Courts of India) |
| AIR | All India Reporter (includes judgements from the High and the Supreme Courts of India) |
| SCC | Supreme Court Cases |

1 This article partially draws upon L. Sarkar, U. Ramanathan and M. Mehra, *Gender Bias in the Law* (New Delhi: Karmika, 1994), as well as an article on dowry and domestic violence contributed towards the report, *Gender and the Judges: A Judicial Perspective* (New Delhi: Sakshi, 1996), 33-39, 68-75. Thanks are due to Mahesh Daga, Usha Ramanathan and Dr. Amita Dhanda for their helpful comments on the first draft of this article.

construct the social problem; In the course of defining the boundaries of the "offence", it has excluded (and thereby disqualified) other definitions of what constitutes offence in relation to dowry and domestic violence.

The scope of the social problem or the meaning of terms such as dowry or domestic violence are not self evident. The need to construct the problem and define its boundaries is as integral to law as to any other discipline, including feminism. However, unlike other disciplines, law is complex and is vested with state power and the authority to pronounce with finality upon an issue. The process of defining in law is not limited to its black letter exterior of statutes and judicial pronouncements. It is much more complex, and includes within its scope the judgements formed and (in)actions taken in pursuance thereof by each of the participants in the legal process, such as the police, the lawyers, and the judges. It therefore encompasses the preliminary police complaints, the medico legal reports, the investigation, the evidence (or lack of it), the arguments presented in the courts, all of which contribute to the construction of the "social problem".² The legal agents draw upon their socialised knowledge of both gender relations and the social phenomenon (or problem, depending on how they view it) from their individual perspective. The legal discourse is therefore complex, inter-textual and discursive in nature, drawing selectively upon other disciplines. However, even in doing so, the law retains its exclusivity and "objectivity" derived from state power, which enables it to override and discredit other versions, disciplines and experiences. Feminist engagements with the law therefore must be aware of abdicating to the law, the power to define the very problem for which it seeks legal redressal, because of the inherent power and ability of law to arrogate that right to itself.³

The article further suggests that although the legal discourse on dowry and domestic violence treats women as a category separate from men, it does not treat all women uniformly. In addition to a gendered construction, the law constructs different types of women, treating them

2 The influence of many of these aspects is discernible in the case law covered by this article. However the focus and the scope of this article does not permit a discussion on the ways each of these aspects have a bearing in the process of law making and the final outcome of the case.

3 For a detailed argument on the power of the law to arrogate to itself the right to define the truth of things, see C. Smart, *Feminism and the Power of Law* (London: Routledge, 1989).

differentially⁴ according to variables of class, caste, motherhood and so on, which may exist in addition to gender in a given case. Even the limited liberatory potential of law (to the extent of setting alternative norms for a social problem and facilitating individual redressal), it can never be uniformly responsive to all women; It would only be liberatory or beneficial for certain types of women, as is borne out by the legal discourse on domestic violence. In its heterogeneity of treatment of different types of women, law operates both to resist and to reinforce the gendered social structure in which it operates. It is therefore suggested that although law will continue to be an important arena for facilitating social reform, its capacity and potential for reform will invariably be influenced by both its inherent limitations and more crucially, by its differential treatment of different types of women.

The Politics of Defining

(i) Dowry

Dowry is a pattern of marriage payments settled openly or discreetly before the wedding. The payments comprise of gifts and cash presentations given to the bride, the groom, his family as well as the expenditure on feasting and hospitality. A significant feature of dowry is that it constitutes of an elaborate series of payments extending over a long period of time. The first set of giving commences with the engagement and concludes with the departure of the bride to her husband's home. Although the presentations at the time of marriage may seem most conspicuous, the term dowry covers the total "transfer of wealth" from the bride's family to the groom's, a mandatory obligation that the bride-giver's must fulfil. The second series of payments are those which persist long after marriage in the form of gifts at festivals, birth of grandchildren and also by the mother's brother to the sister's children, usually concluding with the marriage of these children.⁵ The giving of dowry marks a unilateral relationship between the bride-givers

4 C Smart, "The Woman of Legal Discourse", *Social & Legal Studies* 1 (1992), 29-44.

5 S.J. Tambiah, "Dowry and Bridewealth, and the Property Rights of Women in South Asia", in J. Goody and S.J. Tambiah eds., *Cambridge Papers in Social Anthropology* 7 (Cambridge: Cambridge University Press, 1973), 92.

and the bride-takers as it does not impose any obligation upon the recipient to reciprocate the gesture.

The Dowry Prohibition Act, 1961 (referred to as the DPA) defines the offence of giving and taking of dowry. Although this special legislation was enacted with the objective of eradicating the "giving and taking of dowry",⁶ its provisions only frown upon selective kinds of giving.⁷ As originally enacted in 1961, it prohibited only those presents which were given "as consideration for marriage".⁸ Of all the gifts, cash and expenditure occasioned before, upon and after marriage, the statute restricted the definition of dowry, to gifts/ cash given or agreed to be given as consideration for marriage either before⁹ or at the time of the marriage. Applying this definition of dowry, the Delhi High Court elucidated thus: "property that may pass hands subsequent to marriage, even months or years after it, merely to save the marriage from being broken ... or to save the wife from harassment, humiliation or taunts, on the ground that she did not bring enough at the time of marriage is NOT dowry" (emphasis mine).¹⁰

The inadequacy of the 1961 law in responding to the phenomenon of dowry, the increasing violence and harassment inflicted on young brides caused the women's movement to campaign for law reform.¹¹ Subsequently, in 1985, the term "as consideration" was substituted by

- 6 "The object of the bill is to prohibit the evil practice of giving and taking dowry ...". The Dowry Prohibition Act 1961, Statement of Objects and Reasons.
- 7 I do not wish to suggest that criminalisation of all kinds of "giving" in relation to marriage is either desirable or necessary for successfully eradicating dowry. This statement, as indeed the purpose of the whole section on the "politics of defining", is to draw attention to the different levels of inconsistencies within law — between the statutory objective, the statute and the surrounding jurisprudence.
- 8 Dowry Prohibition Act 1961, unamended s.2.
- 9 Before marriage includes during marriage negotiations, especially if the non-fulfilment leads to the cancellation of marriage. *S. Gopal Reddy v. State of Andhra Pradesh* 1996 Cri LJ 3237.
- 10 *Madan Lal & Ors v. Amar Nath*, 1985 Cri LJ (N.O.C) 118 Delhi.
- 11 The contemporary women's movement began its campaign against dowry only in the late 1970's in response to the growing number of dowry deaths. R. Kumar, *The History of Doing: An Illustrated Account of Movements for Women's Rights and Feminism in India, 1800-1900* (New Delhi: Kali for Women, 1993), 115-126.

"in connection with the marriage".¹² In 1986, it was further broadened, to include presents given "any time after the marriage" within the definition of dowry.¹³ Even as the definition was liberalised, the statute retained the exemption originally granted to presents given *without any demand*, provided they were of *customary nature* and *not excessive in value* in relation to the financial status of the giver.¹⁴ Nonetheless, the amended definition allowed greater room for the exercise of judicial discretion, if so inclined, to declare a larger range of "giving" as dowry.

Despite the successive legislative interventions to make the legal definition of dowry more responsive to the social reality of dowry, the courts remained hesitant in labelling the ubiquitous system of giving as an offence. The legal discourse on dowry taboos only the open display of greed, and consequently draws into the net of criminalisation, the extortion and extortionary tactics (such as violence/ cruelty) that accompany dowry. It is, however, comfortable with the ubiquitous system of giving based on expectations and subtle negotiations. Accordingly, there are only some kinds of "giving" that have been termed as dowry. A whole range of "giving" that is part of the customary obligation of the bride-givers has been excluded from the construction of dowry, partly as a result of statutory design and largely because of the jurisprudence on the subject. The legal order has thereby contributed towards sustaining the unilateral system of giving based on expectations.

The criminal sanctions against dowry divested the term of its legitimacy derived from culture and tradition. Consequently, it became necessary to define dowry in a way that would criminalise the grossness but keep outside the purview of the law, the traditional system and status quo it preserves. The jurisprudence reflects a struggle to exclude certain kinds of "giving" from the definition of dowry, to rescue it from the taint of criminalisation. The technique most frequently deployed in this struggle is the shifting emphasis on the indicators required in law to constitute dowry. The test for determining what constitutes dowry seems to vary according to the judicial perspective on the dowry problem. Hence, the *absence of a clear* demand in one case may disqualify the "giving" from the offence of dowry in law; In another case

12 By the Dowry Prohibition Amendment Act 63 of 1984.

13 By the Dowry Prohibition Amendment Act 43 of 1986.

14 Dowry Prohibition Act 1961, s.3(2).

where a cogent evidence of demand exists, the clinching ingredient for dowry may shift to proof of an *agreement to meet the demand*.

The need to prove demand to establish the existence of dowry has been frequently used to invalidate complaints of dowry. In a case¹⁵ where the groom had agreed to accept Rs.10,000 towards meeting his marriage expenses, when the bride's father offered the sum, it was held to not constitute dowry in law. In the court's opinion, "the accused merely accepted Rs.10,000 when the said amount was voluntarily offered". The absence proof of a specific demand for the said amount led to the rejection of it being treated as dowry in law.

In the case of Sunita¹⁶ who committed suicide in less than 2 years of marriage, the trial court convicted her husband for harassment amounting to abatement of suicide. The case was that dowry in the form of cash was demanded on two occasions; the failure to meet the second demand led to Sunita's harassment in the matrimonial home, forcing her to resort to suicide. On appeal the High Court examined the two demands to determine if they, in fact, constituted dowry in law. The first demand of Rs. 20,000 had been met, the subsequent demand for Rs. 10,000 could not be met by Sunita's parents. The first payment according to the High Court "was under mutual arrangement and with *free consent* of the parties concerned *without any element of force or duress*". In the absence of an explicit demand, the payment could not be termed as dowry. The proof of harassment for the subsequent demand, according to the Court, not "convincingly shown" and was therefore "a myth and concoction". The case of dowry harassment and abatement of Sunita's suicide failed.

In Mina's case,¹⁷ her father had paid Rs. 5000 one occasion. He was however unable to meet the second demand for the same amount, as a result of which she was subjected to cruel treatment leading to her suicide. Again the High Court was of the view that the first payment was "*gratuitous* and not a forced one", and therefore could not constitute a dowry demand in law. The demand for the second, in the Court's view, was "obviously ... concocted" as the groom had financed his own foreign travel in the past and therefore was *of sound financial status*.

Where the demand is clearly established, the absence of an explicit

15 *Nilakantha Pati v. State of Orissa*, 1995 Cri LJ 2472.

16 *Smt. Padmabai v. State of Madhya Pradesh*, 1987 Cri LJ 1573.

17 *Harishchandra & Anr v. State of Madhya Pradesh*, 1987 Cri LJ 1724.

agreement to meet the demand, has been used to reject a dowry complaint. In one case,¹⁸ the bride's father refused to accede to pay the Rs.50,000 demanded by the groom's father. As a result the bride was not allowed to join her husband, residing in the US, for a year after the wedding. The complaint of dowry demand was rejected by the Bombay High Court on the ground that a unilateral demand, although established, could not amount to a "dowry demand" in law. An *agreement to pay* was required in law, in the Court's view, to convert such a demand into an offence.

Uma Shaw's complaint of dowry demand was similarly rejected by the Calcutta High Court.¹⁹ The case against the husband's family was regarding their continuous demands for cash, gold and costly electronic goods. In the court's view, although in "common parlance" dowry demand is used where property or valuable security is asked of the bride's family, the law required *proof of an agreement* in addition to the demand; An explicit compliance or an assurance to comply with such a demand. As the dowry demanded in Uma's case was neither "given" nor "agreed to be given", the law could not recognise it as constituting dowry.

The shifting emphasis on the word "demand" and "agreement" to meet that demand have been instrumental in divorcing the legal provisions from the intent of the statute, and in developing an uneven and often contradictory legal discourse. On the one hand, absence of an agreement to pay invalidates the demand from the legal definition of dowry, while on the other hand an agreement to pay, when accompanied by such a payment is read as a gratuitous offer not amounting to dowry. The terms like "without force or duress", "mutual arrangement", "free consent", "gratuitous offer", have been used interchangeably to exempt gifts given without coercion, from the purview of dowry. The unilinear flow of cash and gifts is explained as "free consent", thereby dissociating it from expectations, which if unfulfilled manifest into demands. It displays blindness towards the inequitable social structure and the

18 *Shankarrao Abasaheb & Anr. v. L.V. Jadhav & Anr*, 1983 Cri LJ 269. This view of was subsequently rejected by the Supreme Court in the final appeal on the ground that even a unilateral demand for dowry did constitute an offence under s.4 of the DPA., in *L.V. Jadhav v. S. Abasaheb & Ors*, 1983 Cri LJ 1501. See also *Reguri Sampath Reddy & etc. v. State of Andhra Pradesh & Ors*, 1996 Cri LJ 1528.

19 *Shankar Prasad Shaw v. State & Anr*, 1991 Cri LJ 639.

imperative of the institution of marriage for women, both of which provide the justification for dowry. When women can only expect to attain social status upon marriage, any condition, stated or unstated, necessary for the attainment of that status will be fulfilled. The thin dividing line between expectations, demand and “gratuitous” offer in contemporary Indian society remains unexplored and unquestioned.

The definition of dowry that emerges from the legal discourse draws upon, and in doing so, reinforces, the unequal social structure that supports dowry, even as it aims to resist, or at the very least regulate it. The boundaries of dowry drawn in the law, co-relate little with the reality of unilinear flow of payments, of articulated and unarticulated expectations and often fatal violence arising out of unfulfilled expectations. In yet another example exemplifying this trend, judicial approval was extended to a husband’s letter demanding financial support from his wife’s parents.²⁰ Justifying this demand, the trial court observed: “Though one would not justify demands for money, it has to be viewed in this perspective the respondent is a young upcoming doctor. There is nothing strange in his asking his wife to give him money when he is in need of it.” The Andhra Pradesh High Court also agreed that there was “nothing wrong or unusual” in asking a “rich wife to spare some money”. Fortunate for being rich, this wife was able to access the Supreme Court which differed from the courts below and reversed their finding.

Interestingly, the legal discourse does not construct a coherent definition of dowry. The succeeding amendments to liberalise the definition, the shifting emphasis on demand and agreement, and the frequent reversals of judgements reflect a competing sense of both, disquiet towards the exacerbation of dowry as well as a complacency about the inequitable social structure which underlies dowry. The competing sensibilities have been reconciled to some extent with the criminalising of extortion and extortionary tactics for dowry. The difference in the positions that appear, hinge largely on the degree of extortion required to satisfy a particular adjudicating body about the existence of the offence of dowry.

20 *Shobha Rani v. Madhukar Reddy*, AIR 1988 SC 121.

(ii) *Domestic Violence*

Abuse and violence against women within the matrimonial home has been legitimised to a large extent in law. Legal redressal for domestic violence, referred to as "cruelty" in the law, was earlier only available under civil law as a ground for divorce. Criminal sanction until 1983 could only be invoked if the nature of violence was physical and grievous enough to be covered by the general penal provisions on simple and grievous hurt.²¹ 1983 and 1986, a package of criminal law amendments were introduced in response to the increasing incidence of dowry related suicides and murders. Consequently, they cover domestic violence within the matrimonial home, only to the extent it is connected with dowry, or if it is life threatening or fatal in nature. There is however, an unclear distinction within the legislative framework, between cruelty in the civil and the criminal law. The judicial test evolved to distinguish between the two kinds of domestic violence has been to require a higher degree of cruelty and proof thereof under Criminal Law, than in matrimonial cases under Civil Law.²²

Cruelty in matrimonial cases under civil law, falling within the jurisdiction of the Family Courts, is essentially treated as a domestic "dispute".²³ With its statutory objective of "promoting conciliation ... of disputes relating to marriage" and its statutory powers of employing marriage counsellors,²⁴ refusing the litigant the right to be represented by a lawyer,²⁵ to adjourn proceedings²⁶ to facilitate protection and preservation of the institution of marriage and welfare of the family, the civil law through the Family Courts Act validates a certain amount of abuse and cruelty in the family. The preservation of the family is the

21 Indian Penal Code 1860, ss.319 and 320. Given the absence of recognition of domestic violence, it would have been nearly impossible to register a case of simple hurt inflicted within the matrimonial home. On the other hand, section 320 on grievous hurt is available only for hurt resulting in permanent loss of limb, sight, hearing or disfiguration of the head/face, or fracture, or hurt which endangers life.

22 *C. Veerudu and Anr. v. State of Andhra Pradesh*, 1989 Cri LJ (NOC) 52 Andhra Pradesh.

23 The Family Courts Act 1984.

24 Family Courts Act 1984, ss. 5 and 6. This Act has yet to be adopted and implemented by all the federal states in India.

25 *Supra* n.24, at s.13.

26 *Supra* n.24, at s.9.

express statutory reason for validating cruelty within civil law, in addition to the adjudicating authority's socialised understanding of dispute and cruelty. The cognizance of cruelty in criminal law is severely limited by the restricted legal provisions, and additionally in the course of adjudication, by the dominant notion of gendered roles and responsibilities within marriage and the preservation of marriage itself.

Prior to 1983, criminal sanctions could be invoked for domestic violence only if it resulted in grievous bodily injury, or abetted suicide or was homicidal in nature.²⁷ The special provisions on "Cruelty by Husband or Relatives of Husband"²⁸ and on "Dowry Death"²⁹ were not intended to cover "every harassment or every type of cruelty" inflicted upon a woman within her matrimonial home. It was intended to bring within the fold of criminalisation only cruelty inflicted upon a woman "with a view to force her to commit suicide or to fulfil the illegal demands" of dowry.³⁰

A range of domestic violence has been repeatedly legitimised as natural to the institution of marriage and culturally specific to Indian society in the legal discourse, to justify the denial of legal redressal.³¹ Incidents of "taunting or beating" and "abuses" against women in the matrimonial home have been affirmed as "a common experience of all irrespective of caste, creed and religion" and therefore not amounting to cruelty. "The stray domestic quarrels, perfunctory abuses by mother-in-law in Indian society, crude and uncultured behaviour by the in-laws or the husband towards his wife being mundane matters of normal occurrence in the traditional joint Hindu Families" have consequently

27 Ss.320, 306 and 300 of the Indian Penal Code 1860, respectively.

28 The first set of changes in 1983 introduced s.498-A on "cruelty" in the Indian Penal Code 1908, accompanied by a new s.113A in the Evidence Act 1892, which introduced a presumption of abatement of suicide in the case of any suicide by a woman within 7 years of marriage, only if the existence of "cruelty" as defined in s.498-A could be proved.

29 In 1986, with the second set of changes, s.304-B defining Dowry Death was introduced. This was accompanied by s.113B in the Evidence Act 1872, introducing a presumption that a death of a woman within 7 years of marriage would amount to dowry death, if the existence of cruelty in connection with dowry demand can be proved.

30 *Sarla Prabhakar Waghmare v. State of Maharashtra & Ors*, 1990 Cri LJ 407, at para. 6.

31 This section of the article draws upon and is limited to the legal discourse on cruelty under criminal law only.

been held to not constitute cruelty capable of abetting suicide, unless the acts of cruelty complained of, whether "singly or cumulatively are found to be of (such) formidable and compelling natures",³² in the opinion of the law enforcement agencies and the Courts.

The subjectivity in assessing whether the acts complained of are "formidable and compelling" enough to invite criminal sanction is indicated by the frequent reversals of judgements, and more tellingly, by the number of acquittals in cases where death of married women were preceded by violence.

In the case of Saila,³³ her suicide according to the trial court was brought upon by the dowry demands and the accompanying cruelty inflicted upon her by her husband. Accordingly, he was convicted for both cruelty and dowry death. The appeal court, however, felt that Saila "failed to adjust after marriage, being of unadjustable nature" and possibly committed suicide as a result. The evidence pointing to domestic violence was explained away as domestic quarrels having no bearing on her suicide. Justifying the husband's acquittal, the Court explained, that "after a mild beating by the accused for some domestic quarrel in the morning in question, the possibility of the deceased putting an end to her life ... being possessed of a temperament diametrically opposite to that of the accused cannot altogether be ruled out".³⁴

It is therefore not surprising that in the case of Sanal Kumari³⁵ who jumped into a well after 3 years of a violent marriage and sustained harassment for dowry, the trial court held thus: "the squabbles between the parties over allotment of the dowry could have caused mental pain" leading to suicide, but would still not amount to cruelty as contemplated under the special provision for the purpose.

There exists a wide gap between what women experience as cruelty, often of the intensity that makes suicide a more compelling option, and what the law comprehends as cruelty. Yet, it was women's rights advocacy on domestic violence, defining the term in response to the

32 *Punjab Sakharam Raut v. State of Maharashtra*, 1995 Cri LJ 4021 at para. 22. See also *Smt. Padmabai v. State of Madhya Pradesh*, 1987 Cri LJ 1573, at para. 14

33 *Nilakantha Pati v. State of Orissa*, 1995 Cri LJ 2472.

34 *Nilakantha Pati*, *supra* n.33, at para. 29.

35 *State of Kerala v. Rajayyan & Ors*, 1995 Cri LJ 989. This Trial Court judgement was reversed by the High Court in appeal.

multiplicity of women's experiences, that was instrumental in the insertion of the special provisions on the subject. The growing phenomenon of unnatural deaths of young women within the first few years of marriage compelled legislative action and legal intervention; In practice, however, it appeared difficult to bring all such cases within the fold of criminalisation. The legal discourse therefore has resorted to re-defining the problem. In setting the boundaries of the offence of "cruelty", the legal discourse makes allowance for a range of violence within the matrimonial home, thereby legitimising it. In the course of doing so, the law has undermined, if not displaced altogether the feminist construction of violence against women within the matrimonial home. The legal discourse on domestic violence, as with dowry, displays the power usurped by law, to re-define the problem for which it was enacted.

The validation of a certain degree of domestic violence has been built into criminal jurisprudence by repeatedly invoking the sanctity of the institution of marriage and by incorporating into the law the gendered roles and responsibilities on which marriage is premised. The law reinforces that a degree of cruelty is commensurate with the status of a wife/ daughter-in-law, by dismissing it as routine "wear and tear of wedded life". Such dismissals have been justified by exalting marriage as being in the interest of "not only of the couple but everyone in the country whether an individual or an organisation", ³⁶and therefore a responsibility of everyone including the courts, to protect this institution.³⁷ Individual complaints of cruelty, sometimes resulting in suicide, when measured against this larger social responsibility of preserving the "very foundation of civilisation" merit little attention. A broad spectrum of cruelty therefore is explained away as "minor frictions which get distorted into disruption" and spouses (read wife/daughter in law) are advised to "forgive and forget" their differences as the stability of marriage is "in the interest of individuals, family, and society".³⁸

36 *Suresh Nathmal Rathi v. State of Maharashtra*, 1992 Cri LJ 2106 at para. 15.

37 "It is my considered opinion that this court has the obligation ... to generate the proper social order and hold the community ..." Suresh Nathmal Rathi, *supra* n.36.

38 "It is our common experience that minor frictions which get distorted into disruption are really wear and tear of the wedded life. Stability of marriage, being in the interest of individuals, family and society, the spouses be

The responsibility of forgiving and forgetting differences has been largely, even wholly, placed on women in the legal discourse. Analogies of newly married women to a "transplanted seedling" are used to emphasise a wife's responsibility to "get into a new mold; the mold which would last her a lifetime".³⁹ In addition to casting the burden of "molding" or "adjusting" upon the woman alone, the analogy reinforces the popular notion of severance of all ties of a woman with her natal family upon marriage. The case law on the subject reveals the extent to which this popular notion contributes to parental apathy towards a daughter's call for help⁴⁰ and towards miscarriage of justice.

The underlying premise for legitimising a certain degree of matrimonial cruelty is variously derived: sometimes from the culture-tradition-religion combine, sometimes the larger collective interest of the "civilised" society, and by ascribing to women certain innate qualities and a greater biological capacity to tolerate adversity (discussed in the section below). The special laws have challenged, although largely theoretically, the privacy and silence shrouding domestic violence. While facilitating legal intervention within the family, the law on domestic violence has spawned jurisprudence that discredits both feminist definitions of violence as well as the experiences of individual women who seek legal redressal. The legal interventions within the family often reinforce rather than challenge the sanctity of the family and the gender inequality on which it is premised.

This uneven/ shifting definition in law is not particular to dowry or domestic violence alone; it is woven into the legal discourse on the gendered woman, discussed in the section below. Nonetheless, law appears coherent, a quality which renders it superior to the other disciplines. This unity or coherence is derived from its black letter form, its power of intervention, regulation and adjudication, supported by the combined strength of the legislative, the executive and the judicial arms

allowed to forgive and forget their differences and to lead the marital bliss". Suresh Nathimal Rathi, *supra* n.36, at para. 19.

39 *Supra* n.36, at para. 13. See also *State v. Laxman Kumar & Ors*, (1985) 4SCC 476 at para. 56.

40 See for instance *Sharad Birdhichand Sarda v. State of Maharashtra*, 1984 Cri LJ 1738; *Jaspal Singh v. State of Punjab*, 1987 Cri LJ 1127; *Padmabai v. State of M.P.*, 1987 Cri LJ 1573; *State of Maharashtra v. V.S. Mhasane*, 1993 Cri LJ 1134; *Tapan Mukherjee v. State of W.B.*, 1995 Cri LJ 1985; *Gordhan Ram v. State of Rajasthan*, 1995 Cri LJ 173.

of the state. This appearance of coherence and state power that law commands, makes it the final arbiter on an issue. In doing so, it inevitably disqualifies the realities constructed by other disciplines and also disqualifies other voices and experiences on the issue. This feature of the law, makes it both a compelling and contentious arena of engagement for women's rights activism; however often without the consciousness of the inevitable abdication to the law that accompanies such engagement, of the power to define the final truth on that issue.

The Gendered Woman and the Heterogeneity Within

The delineation of gendered roles and responsibilities forms the ideological basis for legitimising the unequal burden cast upon women to bear a certain degree of cruelty within the matrimonial home. Culture and religion have been selectively used to pronounce different qualities as innate and natural to women and men. The law enforcers apply this socialised knowledge of gendered roles while adjudicating upon cases of domestic violence, dowry and spousal conduct in relation to both. The legal discourse constructs marriage as an institution based on "compromise and adjustment" of the parties, and while doing so casts an unequal, even the whole burden of adjusting and compromise on the woman.

The gendered qualities ascribed to women, endow them with a superior capacity for tolerance, on which hinges the survival of marriages. This mandate of tolerance and adjustment flows out of qualities that are described in jurisprudence as innate, ahistoric, and natural. To quote: "Women must rise and on account of certain virtues which nature has endowed than that to the exclusion of the man, due credit must be given to woman as desired of these exclusive qualities. Thus, woman who is capable of playing more effective role in the preservation of society and, therefore, she has to be respected. She has greater dose of divinity in her and by her granted qualities she can protect the society against the evil. To that extent, woman has special quality to serve society in due discharge of social responsibility".⁴¹

Men, remain the providers and guardians within marriage — a role bestowed upon by society and protected by law. Their long absence

41 Suresh Nathmal Rathi, *supra* n.36, at para. 14. See also *State v. Laxman Kumar*, (1985) 4 SCC 476, at para. 57.

from home, lack of communication with the wife and her emotional neglect has on occasions been justified by the courts as an inevitable outcome of their primary and serious pursuit of providing. In one such case, the Supreme Court dismissed the charge of cruelty on all counts described above, which had led to the wife's death in a few months of marriage. They observed that it was a "hard fact of life" that some men, like the accused, including the judges, lawyers and others found "little time for the family", in view of their occupation.⁴²

The construction of rigid gendered roles for men and women has played a critical role in extending legal sanction to gender inequality, thereby making an allowance for cruelty within marriage. It is therefore not surprising to find that women who bear the pressures of marriage with silent grace are lauded even in legal discourse,⁴³ while those who fail to withstand this pressure are faulted. However, even in a seemingly clear cut and homogenous gendered construction in the law, all women are not treated uniformly.

Even as the legal discourse uniformly affirms this gendered category of woman, it constructs and treats different types of women differentially. It is therefore argued that neither progressive special laws nor a sensitisation to gender issues alone can bring justice for all women. The knowledge of men and women in positions of adjudicating, is drawn from their social, cultural and class context. Men as sons (privileged from birth), as husbands, fathers and fathers-in-law operate within the same cultural environment as women, but from a socially superior position. Their social roles and status shape their experience and knowledge of social issues, and explain their separate gendered understandings. This knowledge is equally informed and influenced by their class, caste and other background from which a majority of the judiciary is drawn. Given the complexities of identities that compose the adjudicators and the litigating parties, there is no homogeneous category or outcome that is either reflected or can be expected with special laws and gender awareness alone.

Legal discourse on domestic violence shows how the qualities of the gendered woman are invoked to construct different types of women and with different outcomes. The categories of different types of women identified within the legal discourse on domestic violence are not fixed

42 *Sharad Birdichand Sarda v. State of Maharashtra*, 1984 Cri LJ 1738.

43 See for instance the observations of the Court in *Sharad Birdhichand Sarda*, *supra* n.42, and in *Rakesh Kr. v. State of Punjab*, 1992 Cri LJ 1815.

or definite. They do tend to overlap and vary with the facts of each case and the orientation of the adjudicator. Nonetheless, certain dominant categories can be identified within the 'gendered' legal discourse to illustrate the differential treatment of different types of women in law.

The Weak Woman

The legal discourse has "naturalised" a higher capacity of endurance and divinity in women, and simultaneously legitimised a certain degree of ill-treatment and harassment against the wife within the matrimonial home. The gendered role and qualities assumed as innate to women, the gendered responsibilities of "adjusting" and "compromise" that flow from these qualities, as well as the sanctity of marriage all combine to form the reasonable and objective standards by which a complaint of cruelty and the behaviour of the parties involved is judged. The conduct of women inconsistent with these standards is likely to, and indeed has been, dismissed or even deprecated.

Instances of judicial rejection of cruelty accompanied by faulting the less-than-womanly conduct of the victim-wife are common. Manju died of poisoning within 4 months of marriage.⁴⁴ Her letters disclose that her husband barely acknowledged her presence or spent any time at home. The High Court convicted her husband of murder. In appeal however, the Supreme Court held that Manju was morose because she was "not getting the proper attention she thought she would get". Describing her as an "extremely sentimental and sensitive" woman who took "even minor things to heart", the Court felt that this revealed a "psychotic nature" inclined towards suicide. The conviction for murder was set aside, and her husband was acquitted.

Similarly, when Savitri Devi⁴⁵ died of 100% burns, her husband was charged with "dowry death" and in the alternative, abatement to suicide. Cruelty is the common factor to establish both the offences; accordingly evidence towards support of her husband's alcoholism, returning home late at night and "using hot words" was produced. This conduct, the court held, did not amount to cruelty, sufficient in law, to abet Savitri's suicide. Instead the Court felt that Savitri "was probably a sentimental woman and she did not like the drinking habits of the appellant who

⁴⁴ *Supra* n.42.

⁴⁵ *Jagdish Chander v. State of Haryana*, 1988 Cri LJ 1048.

cannot be held responsible for her suicide”.

In another case⁴⁶ where the trial court held that the woman “might have committed suicide due to strained domestic quarrels in a joint family due to her own extreme sensitiveness sentimentalism”, the High Court differed, holding that there existed sufficient cruelty to establish the offence of dowry death. The frequent reversals of judgement, reveal the extent to which the individual orientation of the adjudicating authority influences the reading of the evidence on record. Experiences of cruelty leading to murder or suicide have been slighted by faulting the wife’s sensitiveness, orthodox, unadjusting nature, her high and unrealistic expectations from marriage, and so on.

Women do pay a high price for their divinity, both in marriage and in the law. The pedestal of divinity has served as a device to deny to women normal human responses to pain, indignity and cruelty. In the case following Sunita’s death by burning, the High Court reversed the lower court’s conviction of abatement to suicide. Slighting the documentary evidence of harassment on record, the Court held that “stray domestic quarrels, perfunctory abuses by mother-in-law to daughter-in-law in the Indian society ... or the husband towards the wife being mundane matters of normal occurrence in the traditional joint Hindu families, will not form and constitute ‘abatement’”.⁴⁷ Concluding that the behaviour of the mother-in-law and the husband failed to meet Sunita’s expectations the Court pronounced that, “she might have come to have frustration and pessimism due to her own extreme sensitiveness and sentimentalism. The appellant accused cannot be blamed for the deceased’s psychotic and emotional disorders of a weak mind”.⁴⁸ Women are frequently deprecated for their intolerance towards a certain degree of domestic friction, inviting speculations about their emotional and psychological condition. Observations about the woman’s “unstable personality with a low threshold of tolerance for even domestic frictions ...”⁴⁹ are common in cases where the suicide was committed in the absence of what the court perceives as “formidable”

46 *Public Prosecutor v. Tota Basava Punnaiah*, 1989 Cri LJ 2330.

47 *Smt. Padmabai v. State of Madhya Pradesh*, 1987 Cri LJ 1573, at para. 14. This view is reiterated in *Punjab Sakham Raut v. State of Maharashtra*, 1995 Cri LJ 4021 at para. 22.

48 *Smt. Padmabai v. State of Madhya Pradesh*, *supra* n.47, at para. 21.

49 *Sunkara Suri Babu v. State of A.P.*, 1996 Cri LJ 1480; see also *State of Karnataka v. Dr. H.A Ramaswamy*, 1996 Cri LJ 2628.

degree of cruelty.

Taking a lighter view of the existence of “mild beatings”, and instead placing greater weight on the “different temperaments” of the parties, the Orissa High Court⁵⁰ preferred to acquit the husband while blaming the wife for “failing to adjust, being of unadjustable character”. The Court observed that, the husband “had been born and brought up in an orthodox Brahmin family ... whereas the deceased was born and brought up in a middle class Brahmin family without having orthodox outlook. The accused was a complete vegetarian whereas the deceased was fond of non-vegetarian diets. From all these facts it can be legitimately inferred that the deceased was unable to adjust herself in the family of the accused”.

The Mother

Motherhood as constructed in the legal discourse, imbues women with greater fortitude and forbearance. An unnatural death of a mother or a to-be mother therefore, is more likely to be read as amounting to murder or an abetted suicide. Motherhood itself, has been treated as a strong circumstantial evidence supporting the presumption of homicide or alternatively an abetted suicide. The very condition is seen to lend women with greater credibility and forbearance such that a suicide is likely to be construed as a fallout of no less than “formidable and compelling” dose of cruelty. An unnatural death of a mother is not likely to invite speculations of “sensitiveness, sentimentalism and inability to adjust” that are often cited to explain away the unnatural deaths of young married women.

In *Gowar Chand v. S.P. Chingleput*,⁵¹ the Court observed that the presence of a suckling child made the suicide theory hard to believe. The unspoken assumption reflected here is that the maternal capacity of a mother would have enabled her to undergo any degree of discomfort in the interest of the child. The abandoning of a child upon suicide, by a mother, being inconsistent with the “natural” prioritisation of the child to herself, was therefore perceived as an improbable, if not altogether impossible version.

A more explicit articulation of this sentiment is visible in the Sudha

50 *Nilakantha Pati v. State of Orissa*, 1995 Cri LJ 2472.

51 *Gowar Chand v. S.P. Chingleput Distt & Ors*, 1988 Cri LJ 1399.

Goel case where the Supreme Court observed as follows: "Nature, it is said, processes the instincts of the mother to be in such a way that by the time she is about to deliver the child, a total transformation comes about ... we are led to hold that *like every expectant mother* (emphasis mine) she was looking to see the fruits of the long waiting ... suicide as a reason of death, therefore, (has) rightly not been pressed ...".⁵²

In the case of *Harbans Lal v. State of Haryana*,⁵³ a young woman and her nine month old daughter died of burns within two years of marriage. The Court was faced with two competing versions: murder according to the prosecution and suicide simpliciter by the defence. The verdict at each stage of the appeal remained murder. One of the critical factors that influenced the verdict was the death of the nine month old baby with the mother. Accordingly the Court noted that "if the deceased Santosh Rani was committing suicide, she, as a mother, would be the last person not to save her daughter of tender age. The fact that the child also received burns and died would positively go to show that both of them were burnt to death at the hands of some others ... This is a very telling circumstance and it completely rules out the theory of suicide".

Similarly, circumstantial evidence was held sufficient by the Court to convict the husband and the father-in-law for the murder of the four month pregnant Sangita by burning her with kerosene.⁵⁴ Although burning is a common mode adopted both for wife murders and suicide, in this case, Sangita's pregnancy was considered by the Supreme Court to be "not in tune with the act of commission of suicide".

In the case concerning Mangadevi, the Court accepted her dying declaration implicating her husband for murder.⁵⁵ Mangadevi had two sons and died of burns after 11 years of marriage. In the Court's opinion, "No domestic lady having children and living with husband will falsely implicate her husband ...".

Conversely, where suicide is evident, the presence of a child does contribute to establishing that the cruelty was severe enough to compel the mother to opt for suicide. Velumani bore ill-treatment, battering and dowry demands consistently in her three year old marriage.⁵⁶

52 *State v. Laxman Kumar*, (1985) 4 SCC 476.

53 *Harbans Lal & Anr v. State of Haryana*, 1993 Cri LJ 75, see para. 10.

54 *Prabhu Dayal v. State of Maharashtra*, AIR 1993 SC 2164.

55 *Satyannarayana v. State of A.P.*, 1995 Cri LJ 689.

56 *Dr. G.M Natarajan v. State & Ors*, 1995 Cri LJ 2728.

Eventually she jumped into the well with her six month old child and died. The child however was rescued and survived. According to the trial court this was a clear case of suicide simpliciter. The Madras High Court however felt that, she “jumped into the well not only to end her life but also not to allow her child to live in this world. Only on account of such a frustration in her life or with a feeling that she should not live anymore time and also not to leave her child in her absence, she seems to have jumped into the well with her child.” The act of wanting to bring her child’s life to an end, lent credibility and seriousness to the evidence of dowry harassment and cruelty, thereby contributing to the reversal of the earlier verdict of suicide, to that of the offence of dowry death.

The Urban Educated Woman

Suicide has been seen as an implausible option for women with higher education from an urban middle class background. There is a presumption that in the event of an unhappy marriage, other equally legitimate options are available to women who have achieved well in academics. There is a sterner view reflected in jurisprudence, towards dowry demands, ill-treatment and unnatural deaths of such women within the matrimonial home. It is presumed that academically well qualified women are likely, and indeed should, dissolve a bad and degrading marriage to start life afresh. In the cases where suicide has been contended as a strong possibility to resist a charge of murder or abatement, it is presumed that such women would not resort to suicide lightly or on emotional impulse. Therefore the scrutiny of evidence is much greater to rebut a conclusion of suicide simpliciter. In fact the legal discourse that emerges in this category, is marked by an expression of greater outrage and condemnation of “dowry” along with a presumption of murder in such cases.

Gurinder Kaur was a beautiful young woman who had passed the Senior Cambridge Examination in First Division, and had graduated in B. Sc (Home Science) from the prestigious Lady Irwin College in Delhi.⁵⁷ Within a few months of marriage she was subjected to ill-treatment because of the inadequacy of the dowry given to her, and within 10 months she was found dead in the bathroom with third degree

⁵⁷ *Shri. Bhagwant Singh v. Commr. of Police, Delhi*, 1983 Cri LJ 1081, at para. 18.

burns from kerosene. After a lax investigation which irreversibly damaged any prospects of evidentiary support to prove murder, the police registered a mere case of suicide simpliciter. In protest her father sought the intervention of the Supreme Court, which observed in anguish that "young women of education, intelligence and character do not set fire to themselves to welcome the embrace of death unless provoked and compelled to take that desperate step by the intolerance of their misery". It was further held that "it is impossible to escape the conclusion that, in a case such as this, the death of a young wife must be attributed either to the commission of a crime or to the fact that, mentally tortured by the suffocating circumstances surrounding her, she committed suicide".

The appeal of Subedar Tewari⁵⁸ against the acquittal of the accused husband and sister-in-law for the murder of his daughter Veena, was similarly treated. After a short unhappy marriage of seven months, Veena's body was found burnt by kerosene in her husband's flat. The Supreme Court observed as follows, and convicted the husband for murder:

In the first place, deceased Veena was a person with high academic qualifications. She stood first in first class in M.Sc Examination in Botany. And in fact, a Reader in Botany, has deposed that her application for admission had already been granted though Veena could not be informed of this fact until her death. It is extremely unlikely that an educated woman of this academic distinction who was prepared to face her problems and was optimistically looking forward to the future beyond her marital home would be inclined to commit suicide. She was not cowed down by her marital problem ... she had resolved to break with her husband and pursue further studies in Patna"

In the few reported cases in this category, there seems to be no evidence of measuring the conduct of such women against the gendered standards of forbearance and "adjustment" constructed for women in the legal discourse. It is assumed that the option of suicide, if proved, would itself be indicative of the gravity of cruelty that such a woman was living under. The legal discourse on the violence against academically well qualified women refrains from speculating about their weak psychological condition, as is commonly done in suicide-murder cases of ordinary housewives.

58 *Subedar Tewari v. State of Uttar Pradesh & Ors*, 1989 Cri LJ 923, at para. 19.

The case regarding Krishna Kumari's death by burning reflects the same trend.⁵⁹ She was found dead in the kitchen within two months and seven days of her marriage. The accused husband and members of his family appealed against their conviction for her murder, contending that Krishna Kumari was unhappy and committed suicide. Emphasising her qualifications, the Supreme Court noted, that she "was highly qualified lady having Post Graduate degree in English". The Court further elaborated upon the attributes that (the Court assumes), flow from such qualifications, stating thus: "It must firstly be kept in view that deceased Krishna Kumari was ... highly qualified and was serving as a teacher in a school. She was earning Rs.600 per month which was more than that her husband ... was earning. If she was out to commit suicide it would be natural that she would leave any Suicide Note. No such note was found ...". Not surprisingly, the appeal by the husband failed.

Conclusion

Both dowry and domestic violence are manifestations of the socially subordinate position of women in India, in particular of women in relation to and within the institution of marriage. Studies reveal how the socio economic changes ushered in by modernisation have interacted with traditional norms to sustain these practices and through them, the subordination of women. The women's movement began addressing these social problems through law, and has through the years continued to critique the law for its failure to deliver. The critiques and debates arising from this concern have periodically generated recommendations for law reform, higher sentencing, widening the net of criminalisation, creation of special women's police stations and courts in addition to strategies for raising gender awareness amongst the judiciary and the police. This article attempts to suggest that the shortcomings of the decades of women's engagement with the law is not merely because of flaws and gender bias within the law, but more importantly, because of the expectations from the law and the centrality placed on its role in social transformation.

While law is an important site for feminist engagement, it is not

59 *Mulak Raj & Ors. v. State of Haryana*, 1996 Cri.LJ 1358, at paras. 14 and 16.

uniform or coherent in its formulation or practice. As borne out of the legal discourse on dowry and domestic violence, law is often contradictory and uneven. It is therefore not uniformly anti-women nor potentially liberatory for all women, and for that reason cannot be the central player in facilitating social transformation. Through the criminalisation of dowry and domestic violence, the law has censured and brought within state purview hitherto private conduct — this must be viewed as a strategic achievement of feminist engagement with the law. However, as law is very complex, the matter does not rest here. In the course of intervening in the private sphere, the law has re-drawn and reinforced the very public — private divide that the women's movement had hoped it would break down. This is evident in the re-defining of dowry and domestic violence by the law in a way that disqualifies feminist definitions, as exemplified by the condoning of a range of giving and taking of dowry and cruelty within marriage.

The option of acceptance (as opposed to selective appropriation) of sociological and feminist definitions of dowry and domestic violence, and within that attaching penal consequences to a few defined acts, is not available to law. Such an option, would amount to an admission of other definitions thereby undermining the finality of law, and the validity of criminalisation as a primary tool of social reform. As a result, law tends to label the social problem as an offence, and then inevitably re-constructs the problem narrowly and selectively, excluding several of its dimensions and versions. This is particularly so when the law offers criminalisation as the primary legal remedy, without exploring other imaginative options.⁶⁰ The legal discourse has therefore resorted to legitimising a wide spectrum of "giving" and cruelty, so as to exclude it from the boundaries of the legally defined offences. This logic also makes it compelling for the law to deprecate the conduct of women (read wives) who invoke the law, or on whose behalf the law is invoked, to challenge the boundaries of the offences of dowry or cruelty. Hence, the parallel and competing constructions of the ideal woman with "divine" qualities alongside the flawed and psychologically weak one.

60 The women's movement has been campaigning for changes in succession laws which disentitle women from equal rights to parental property and for the introduction of equal rights to matrimonial property. Despite the linkages of property rights to the dowry problem and the subordination of women in the family, these recommendations have been ignored by the state.

This article further explores how the special legal provisions for women have generated a process of producing the category of the gendered woman in the law, upon which the legal discourse has further constructed categories of different types of women, some embodying the ideal womanly qualities and others failing to measure up to the standards of this ideal. The attributes of the gendered woman are invoked selectively to create and extol the ideal woman and flaw those who fail to meet the set standards. Each of these categories are built upon myths and assumptions attributed to certain aspects of women's identities that may get highlighted in a given case. The assumption that motherhood embodies forbearance is as much a product of social construction as the assumption about the psychotic condition and unadjusting nature of the academically unaccomplished housewife who embraces suicide even in the absence of severe cruelty. That neither of these categories are fixed or uniformly beneficial or detrimental to all women, is borne out by the frequent reversals of the judgement at the trial and the appellate levels.

Although the law produces a gendered category of woman, it affects different types of women differentially, based upon the construction of different types of women through the legal discourse. Neither is the construction of the good woman beneficial to all women, nor is the weak woman detrimental to the interest of all women. The reason for outlining the differential treatment of the different types of women in law is merely to emphasise that the special laws (regardless of its deficiencies), do not, and indeed cannot, affect all women uniformly. Feminist legal scholarship is increasingly inclined towards treating the law as a site of discursive struggle, where competing visions of the world are fought⁶¹ In the context of the women and the law, it is a contest between the culture, tradition and dominant gender relations combine, versus a feminist legal vision of equality and non-discrimination. While endorsing this proposition, it must be emphasised that such competing visions and constructions will persist at all times. One can at best hope for a dominant vision that is responsive to women in their multiplicity of identities and contexts, and is capable of substantially addressing issues of inequality and discrimination arising therefrom. However, such a dominant vision that seems responsive to women is also likely to not affect all women similarly, or be able to substantively address inequality and discrimination arising out of issues in addition to gender.

61 R. Kapur & B. Cossman, *Subversive Sites: Feminist Engagements with Law in India* (New Delhi: Sage, 1996).

The purpose of this article is not to undermine the importance of engaging with the law, but to draw attention to inherent limitations that are built into such an engagement. Indeed, law is an important site for feminist struggles towards social reform because of the state power it embodies and its ability to establish an alternative normative order. However law cannot be a central site for such struggles, because of the limitations arising from the nature of law itself. The continuing feminist engagement with the law needs to therefore confront and re-examine the objectives of such engagement as well as its perspective and critiques of the role of law and its future strategies.