

WOMEN'S HUMAN RIGHTS AND THE PRACTICE OF DOWRY IN INDIA ADAPTING A GLOBAL DISCOURSE TO LOCAL DEMANDS¹

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'Human Rights'² is a western concept originating from the specific historical and cultural circumstances of the western world.³ Increasing sensitivity towards this contention can be considered as one of the significant contributions of the more than half a century long, but so far abstract, debate on 'universality versus cultural relativism.'⁴ Yet, certain important questions that entail this contention

¹ I am thankful to Gordon Woodman for his very useful and critical comments on an early draft of this paper

² 'Human Rights' in this paper implies the human rights concept as incorporated in the Universal Declaration of Human Rights or the International Bill of Rights promulgated by the United Nations in the aftermath of the second world war.

³ Such assertions have accompanied human rights discourse since its inception: see AAA (1947). The categorical assertion about the western nature of human rights was made by Raimon Panikkar in his oft quoted article (1982). Since then there has been a significant amount of literature discussing the western nature of human rights.

⁴ The consequences of this were evident in the United Nations World Conference on Human Rights in Vienna in 1993 (hereinafter the Vienna Conference), where, while emphasising the universality of the human rights, special attention was paid

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about the western nature of human rights are still unanswered. What does this contention about the origin of human rights signify? Is it merely of academic interest considering the fact that most of the nations of the world endorse the human rights discourse and have incorporated it in their national legal systems? Are the governmental endorsements another instance of the imposition of western values on the rest of the world or does this discourse actually carry relevance for non-western countries too? Is this concept absolutely incompatible with non-western cultures or can there be a possibility of an adequate adaptation of this discourse to cultural diversity of the world? How far is it possible to maintain the global nature of the discourse if we accept the possibility of this adaptation? Last but not least, what does it mean in concrete terms to adapt this global discourse to local circumstances keeping in view cultural specificities?

In this paper I intend to discuss these questions, which seem to be the perpetual companions of contemporary human rights discourse, considering that it is necessary to find answers to such questions for the future of this discourse. I will be dealing with each of the above-mentioned questions with specific reference to India and Hindu philosophy.⁵ Part 1 of the paper begins with a brief explanation of the basic assertion about the western nature of the concept of human rights, that is, I consider what it means to call it a western concept and what are its main characteristics as a western concept. Subsequently, I try to explain its western nature with reference to Hindu Philosophy. In the last section of this part I discuss whether the acceptance of the human rights discourse in India can be considered an imposition of western values and to what extent it is relevant for India where the Hindu way of life carries a strong influence on the daily lives of the majority of the population and prescribes methods other than that of human rights for ensuring human dignity and human worth.

In the second part I discuss the question of how far it is possible to maintain the global nature of the discourse, with a focus on women's rights, considering the fact that cultural factors are strongest in the case of women's rights. To address

to the prevalent cultural diversity in different parts of the world which limit the application of contemporary human rights discourse. For a comprehensive review and comment on this debate see Steiner and Alston 2000: 366-511.

⁵ It is important to note that India is not synonymous with Hinduism. India is a multi-religious country where 80% of the population are Hindus, with Muslims as the biggest minority followed by Christians, Parsis and other religious groups. In this paper I am focussing specifically on Hinduism for the sake of clarity and keeping in view constraints of space.

the last question, that is, what does it mean, in concrete terms, to adapt this global discourse to local circumstances, I shall take the example of the commonly known practice of dowry⁶, which is often the target of attack, to highlight manifest violation of women's rights in India. Through this example I shall discuss the issues of how far traditions and culture can be considered as antagonistic to human rights, and specifically to women's human rights, and how we can deal with them.

1. Human Rights: Nature and Relevance for India

1.1. Human Rights: A Western Concept

The concept of human rights incorporates three basic tenets: individualism, which implies that the individual is the basic unit of society; rights, which implies that the basic organising principle of society is rights; and legalism, which means that the primary method of securing these rights is through recourse to formal law, where rights are claimed and adjudicated upon, mainly in an adversarial manner (Sinha 1981).

Human rights discourse and its underlying tenet of individualism is based on the assumption of a universal human nature, where each individual is assumed to be an autonomous, independent, self-sufficient and rational being (Panikkar 1982: 81-82). Further, it assumes the separation of the individual and society, the individual being in need of protection from the latter. Thus, the perceived aim of this discourse is to protect this being from any kind of external intervention, be it from the society or the state. Society or the state in this discourse is not seen as a protection, but as something which can easily abuse the power conferred on it (Panikkar 1982: 82). Since each individual is seen as equally important the main aim here is to enable him or her to lead a life unhindered by others as long as that is compatible with others doing the same (Rosenbaum 1981).

It is through the granting of rights that the pursuit of self-interest and the protection of each individual against the society or the state or against each other

⁶ Dowry means gifts, money or other assets that are given to the daughter by her parents or family at the time of marriage. According to Webster's dictionary the word dowry means, "money, goods or estate that a woman brings to her husband at marriage"

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are ensured.⁷ The endowment of rights is a way of achieving social harmony. Rights are seen as tools in the hands of each individual to maintain his dignity and worth. Apparently the assumption here is that the individual in society needs to be respected and treated in a certain way since he or she is the possessor of the right and is empowered to raise a claim.⁸ 'Law' is the principal mode for realisation or enforcement of these rights. This 'legal' enforcement of rights is also something specific to the western world, where 'law' is assumed to be something man made, a product of reason (Santos 1995). This concept is associated with the specific nature of the origin of civil society, through an assumed agreement between those who left the pre-social state of nature, complemented by an agreement between the rulers and the subjects (Sinha 1995; Rosenbaum 1981). The main characteristics associated with 'legalism' in the modern sense is that each case of conflict between two opposing parties is viewed as one where an individual's right or entitlement has been breached and can be corrected through 'legal' resolution, by means of written official law, and where one party will emerge as a winner and the other as a loser (Shklar 1964).

1.2 Hindu Philosophy and Human Rights

Hindu philosophy does not adhere to any of the three tenets just shown to be inherent in the formulation of human rights. The basic tenets of Hindu thought for the organisation of society can be discerned as collectivism, that is, the view that

⁷ In its initial phases the human rights discourse was focussed only on the relationship between the state and the individual. It is by way of gradual extension that now violations of human rights can also be claimed against the acts of private or non-state actors. This is especially significant in respect of women's rights, as women's rights were explicitly recognised as Human Rights to hold states accountable for violations of human rights by private actors too in the Vienna Conference 1993. In continuity with this in 1994, the United Nations' General Assembly adopted a Declaration on the Elimination of Violence Against Women. In the same year, the UN Commission on Human Rights condemned gender based violence and appointed a Special Rapporteur. The 1995 Platform for Action of the Fourth World Conference on Women in Beijing included a section on gender based violence. These instruments assert that states are responsible for failures to protect women from violence, protection from violence being an officially recognised human right. (Steiner and Alston 2000: 211-220)

⁸ "Rights are socially established ways of acting or ways of being treated" (Martin 1998).

the family or group is the fundamental unit of society,⁹ duties as the primary basis for securing human existence in society, and reconciliation and repentance as the primary method for dealing with violation of duties (Sinha 1981: 87-88).

Just as the three tenets associated with western philosophy are the result of a particular cosmo-vision and specific historical and cultural developments, similarly these tenets of Hinduism are the result of a specific Hindu cosmo-vision. The starting point here is not the individual, but the whole complex connotation of the 'Real'. According to this Worldview the human being or the individual does not stand in a privileged position *vis-à-vis* other creatures, but is part of a big harmonious whole. An important axiom of Hinduism is that God is omnipresent and immanent in all that exists in the universe. It is not the well-being of an isolated individual but universal harmony that ultimately counts (Pannikar: 181-186). Under this cosmo-vision an individual is not perceived as an autonomous, independent being, but on the contrary each individual subject is perceived to be embedded in a reality, which exists prior to the individual. The individual is not somebody in need of protection from society or the State. On the other hand the society is considered as essential for the existence of the individual. The Hindu cosmo-vision is based on the hierarchical conception of the Universe, and thus, unlike western belief, rhetoric about the equality of each individual is not part of it. There is explicit recognition of the fact that each individual is not born equal (Nanda and Sinha 1996; also Sharma 1977). Here the belief is that each individual's capacities and limitations are determined to a large extent according to his or her surroundings (Aurbindo 1992).

In continuation of this belief about the relationship of each individual with the 'Whole' the emphasis here is on duties and not on rights. *Dharma*, not rights,

⁹ It is important to note that Article 16(3) of the Universal Declaration of Human Rights specifies that the family is the natural and fundamental group unit of society, and is entitled to protection by society and the State. But, it is rightly noted by Renteln,

it is not clear if the fundamental unit is the nuclear family or whether the article might allow for the kinship group instead. The phraseology suggests that only the immediate family can be understood to be the basic unit, which would appear to be sensitive to the many societies which have different patterns of social organisation. (Renteln 1990: 52)

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produces a general and all-pervasive way of life as an organisational principle of existence.¹⁰ It guides the way one ought to act.

Dharma, then is, the way in which one ought to hold, bear, carry, or maintain. On a cosmic level, *dharma* is the way in which one maintains everything, the way in which the cosmos or the balance in the cosmos, is maintained. At the micro level, *dharma* is the way in which every constituent element of the cosmos contributes its share to maintaining the overall balance. Each element has its own *dharma*, its *svadharma*. As long as each element of the cosmos performs its specific *svadharma*, the overall balance does not suffer. As soon as an element, however, deviates from its own *dharma*, that is, commits, *adharma*, the balance is disturbed. (Rocher 1996)

The concept of *dharma* defies attempts at translation into English. It is a concept which embraces the whole life of the human being.¹¹ Thus, the purpose of rights is served by *svadharma*. The human being has a 'right' to survive only in so far as it performs the duty of maintaining the world.

The method of dispute resolution or the concept of law under the Hindu cosmology is also different from that of the western one. *Dharma* embraces moral opposites, the conflict and the resolution, both ought and ought not. According to *dharma*, right not only opposes wrong but right can also oppose right (Saraswati 2001: 33-35). In conformity with this view the aim of dispute or conflict resolution is not the articulation or distribution of individual rights or freedoms but guidance for all the activities of all individuals. Thus, in conflict resolution, which is based more on the basis of customs or the 'living law', there is no

¹⁰ Thus "*Dharma* is perhaps the most fundamental word in the Indian tradition which could lead us to the discovery of a possible homeomorphic symbol corresponding to the Western notion of 'Human Rights'" (Pannikar 1982: 95).

¹¹ *Dharma* is multi-vocal: besides element, data, quality and origination, it means law, norm of conduct, character of things, right, truth, ritual, morality, justice, righteousness, religion, destiny, and many other things. It would not lead us anywhere to try to find an English common denominator for all these names, but perhaps etymology can, show us the root metaphor underlying the many meanings of the world. (Nanda 1996: 237; see also Sinha 1981: 87-88)

situation of one party winning a claim against another but that of reaching reconciliation between the two conflicting parties to guide their conduct (Nanda and Sinha 1996: 237).

1.3 The Hindu Cosmo-Vision and the Concept of 'Human Rights': Are They Incompatible?

The above description establishes that the concept of human rights cannot be traced in the classic Hindu cosmo-vision. This leads us to the exploration of the questions raised at the beginning: what does this situation signify, that is, does this lead to incompatibility between human rights and Hindu cosmo-vision? Does the absence of this concept make this cosmo-vision inferior in some manner or render it anachronistic? Is the endorsement of human rights treaties and their incorporation by the Indian government a mistake, or simply an imposition of western values as part of the colonial legacy?

The answers to all these questions are negative. Time and again philosophers have asserted that Hinduism can be seen as neither incompatible with the concept of human rights nor anachronistic for the modern world, since the concerns for human dignity and worth underlying the human rights discourse have also been the central concerns of Hinduism, even though emphasis on rights as the central means for pursuing these concerns has not been part of it. Though there is no stress on the rights of the individual in Hinduism, philosophers do not find it incompatible with the rights philosophy. Nanda asserts: "in light of the tenets of Hinduism..., it would be a fair assessment that Hinduism would not find fault with the international Bill of Rights" (Nanda 1996: 240. Many other authors have expressed the similar opinions in respect of the Chinese, Islamic, African, Japanese and other non-western civilisations. See: Peerenboom 1993; Woo 1981: 238; An-Na'im 1990). Ramajois explains in this context:

the entire concept of rule of law is incorporated in *Dharma*. The meaning it conveys is that an orderly society would be in existence if everyone acts according to *Dharma* and thereby protects *Dharma*, and such an orderly society which would be an incarnation of the *Dharma*, in turn, protects the rights of individuals. Rules of *Dharma* were meant to regulate the individual conduct, in such a way as to restrict the rights, liberty, interest and desires of an individual as regards all matters to the extent necessary in the interests of the other individuals, i.e. the society, and at the same time making it obligatory for the society to safeguard and protect the individual

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in all respects through its political and social institutions.
(Ramajois 1984: 8)

Freedom of the individual, the central concern of human rights discourse, has also been a prominent one of Hinduism even though there are differences between the concept of freedom as understood in Hindu philosophy and that underlying western philosophy. Under Hinduism, each individual is considered as an end in his or herself and is believed to be endowed with the capacities for self-realisation. Thus everyone, irrespective of race, caste, class, or sex, is perceived to possess equal potential to become '*Brahmin*' and is free to choose their own way of attaining the *Brahmin* status. This freedom is an inherent endowment of each person, something inevitable in the existence of the universe. Here freedom is not something that anybody has to demand or claim, or if willing can waive (R. Pannikar 1982).¹² Each individual as well as the ruler is supposed to ensure the situations of self-realisation irrespective of the claim. The right conduct expected from each person is not only to enrich his individuality by free development from within, but also to respect and to aid and be aided by the same free development in others (Sharma 1988). Thus, every individual is to understand freedom not in separation from society but in connection with society, while performing his or her responsibilities according to their station in life. Accordingly freedom is not understood as a basis for self-interest but for self-discipline or self-sacrifice.¹³

¹² Panikkar has raised an important point in respect of the absence of 'rights' in the modern sense from the non-western philosophies:

[T]he very powerful Declaration of Human Rights also shows its weakness from another point of view. Something has been lost when it has to be explicitly declared.... When Human Rights are declared, this is a sign that the very foundation on which they rest has already been weakened. The Declaration only postpones the collapse. In traditional words, when the tabu of the sacred disappears, sacredness fades away. If you have to teach a mother to love her child, something is amiss with motherhood. (Pannikar 1982: 88-89)

¹³ A lawless impulsion of desire and interest and propensity cannot be allowed to lead human conduct; even in the frankest following of desire and interest and propensity there must be a governing and restraining and directing line, a guidance (Aurbindo 1992: 104-5).

Further, contrary to common belief, acceptance of inequality in Hinduism did not lay down privileges for a particular group at the cost of sacrificing the dignity of the other. Intimately linked with the conception of *Karma* (which can roughly be translated as action and its result) is a belief in each individual's responsibility for his or her behaviour (Sharma 1977: 52). The basis of the *varna* (signifying caste or class group) and *asrama* (indicating station in life) is psycho-physiological according to the *gunatrya* (qualities) which are inherent in different proportions in members of the different *varnas*. It was recognised that change can be effected in *gunas* (qualities) through effort. It has been recognised that by effort there may be a change in the caste and therefore *varna* is not necessarily by birth, but conforms to the principle of evolution (Sharma 1977: 54; see also Saraswati 2001: 68-76).

In spite of these basic conceptual differences between Hindu philosophy and human rights discourse, they are not incompatible with each other and this is the reason why Indian endorsement of human rights discourse is neither a mistake nor a result of the imposition of western values. It is indeed a part of the colonial legacy but the incorporation of human rights into Indian legal culture is more a result of historical development than a mere imposition of foreign values. In fact it was adopted voluntarily in the Indian system as a welcome concept, on the initiative of reformers and philosophers well versed in Hindu philosophy, for two reasons (de Bary 1972). Firstly, on the political level, the adoption of human rights was a means of struggle against the colonial powers, conducted in their very own language which they had been proclaiming and propagating in the other parts of the world.¹⁴ Secondly, on the social level it was perceived as another useful means to re-emphasise the principles underlying classical Indian thought, which seemed to have lost relevance over the years.

While talking about the acceptance of the concept of human rights at the social level it is important to emphasise that in India it has never been adopted or propagated as the sole organising principle of the society. It has always been perceived only as a supplementary means to ensure human dignity, human welfare and human emancipation, in addition to those available under classical Indian thought. Sri Aurobindo emphasised:

¹⁴ In 1925 the Indian leaders had proposed a bill of rights to the colonial Government, which advocated so-called individualistic rights. During the whole freedom movement for India Mahatma Gandhi advocated the necessity of rights to fight against political absolutism. He introduced and propagated the notion of the importance of civil disobedience and consistently stressed the right of self-determination for people. India had also played an active role in the formulation of the Universal Declaration of Human Rights. (Parashar 1998)

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Affected she [India] has been, but not yet overcome. Her surface mind rather than her deeper intelligence has been obliged to admit many Western ideas - liberty, equality, democracy and others - and to reconcile them with her Vedantic truth; but she has not been altogether at ease with them in the Western form and she seeks about already in her thought to give to them an Indian which cannot fail to be a spiritualised turn. (Aurobindo 1992: 11)

This adoption was, thus, also based on the changes in circumstances which had already formed the context in which the western style legal system had been introduced and continued to develop its roots in Indian society during nearly two centuries of colonial rule.

These changed situations along with the understanding that the adoption of a foreign belief does not imply the replacement of the existing traditional one was the underlying force for the incorporation of human rights in Indian structure by various social reformers. This incorporation was fuelled by a strong belief in the possibility of the complementarity between western and eastern ways of thought (Aurobindo 1992: 14-24).

1.4 Universalism v. Cultural Relativism: An Academic Debate?

Amidst assertions about the possibility of the complementary co-existence of two ways of thought, one can also contend that, considering the prevalent political and economic situation, the 'universalism versus cultural relativism' controversy is of nothing more than academic interest. It is often argued that the centuries-long foreign rule, colonisation and gradual modernisation have carried substantial western influence into almost all non-western countries. It is often contended by the advocates of the universality of human rights that these rights and the associated mechanisms, like industrialisation, modernisation and capitalism, are the results of cultural evolution, which have been pioneered by the west with the rest of societies following the same course. Even in western society rights emerged during the evolution of society from ancient regimes to modernity. The universalist thesis is reinforced by the overt adhesion of most countries to the human rights discourse and recently a grand reinforcement came from the declaration of the American Anthropological Association (AAA).¹⁵

¹⁵ As mentioned earlier, the AAA statement stressing the cultural specificity of the human rights is one of the oft-quoted assertions of cultural specificity. However,

These evolutionist contentions, the endorsement by most of the countries of the world of the human rights discourse, and developments like that of the changed position of the AAA do appear to make the ‘universalism-cultural relativism’ debate redundant. Yet, in spite of all these developments, this debate is certainly of more than academic importance for various reasons.

One important fact to be taken into account is that, though there may be a partial truth in the contention that the evolutionary pattern of non-western countries is in line with that of western countries, at the same time one cannot overlook that in the other societies the nature of evolution has been different. Contrary to the western world evolution in non-western countries has not been spontaneous. In these societies it is shaped by imperialism, colonialism, and consumerism (Santos 1995). Thus, the conditions indeed have changed but they have not been reversed. In India the basic beliefs underlying the classical Hindu system such as the importance of the harmonious mutual relationship of the individual and society, emphasis on *Svadharma*, and belief in the theory of *Karma* still carry great influence.

This recognition of the different nature of the evolutionary process in non-western countries, while it reinforces the concept of human rights, also underlines the necessity of reorientation of the human rights discourse. It underscores the necessity of taking different worldviews and cultural diversity into account. As argued by many authors, who have asserted the cultural specificity of the contemporary discourse, this reorientation is not done with the aim of replacing this discourse with another (Pannikar 1982; Surya 1981). Rather it implies enriching the existing one, making it adaptable and responsive to ways of life different from that of the west. Certainly this task cannot be realised within the abstract bounds of the two extremes of ‘universality’ and ‘cultural relativism’ (Eberhard 2002; see also Dembour 2001).

Universality, in its abstract, essentialised sense, where it implies uniformity of approaches, is certainly out of place for this world. Similarly, cultures as essentialised, homogenous, static, monolithic entities are nothing more than mere imagination. But human dignity and worth are the necessary conditions associated with any human being irrespective of culture or religion. No culture or religion or nation challenges this basic assertion and this is the reason that human rights

the AAA has changed its position with the declaration endorsing human rights (AAA 1999). For a critical analysis of the change of stance by the AAA see Engle (2001).

discourse is widely accepted. This acceptance is also due to the fact that at implementation level countries usually do not confuse universality of this assertion with the uniformity of approaches. Similarly it is a mistake to understand stress on the importance of culture as complete indifference (Eberhard and Gupta 2001). This leads us to understand that the concept of human rights and culture are not antagonistic, contrary to the common misunderstanding that the 'universality versus cultural relativism' debate has encouraged (Engle 2001).

The increasing visibility of the evolving nature of rights and culture has made it easier to overcome this misunderstanding (Merry 2001). This evolution is evident from the fact that now it is possible to employ this concept of rights, both for the protection of culture and for protection against culture. In the changed situation, the universal discourse has indeed assumed a global nature but this is a kind of 'globality' which may let differences flourish. The evolving nature of both rights and culture has made possible the acceptance of the minimal nature of 'universality' in the global discourse of human rights, which can now be responsive to these differences.

In the next part I will discuss the nature of this global discourse, and what it means, in concrete terms, to adapt the global discourse to local circumstances while taking into account the cultural specificities. My discussion focuses on women's human rights in India, with specific reference to the practice of dowry.

2. Human Rights of Women: A Global Discourse

2.1 Women's Human Rights: Between Acceptance and Resistance

A strange paradox surrounds the universal discourse of human rights. It is for women that it sounds most promising but at the same time it is in the area of women's rights that it faces the maximum resistance from different countries.¹⁶ But almost all the contractual parties to the Convention for the Elimination of Discrimination Against Women (CEDAW) have entered reservations for the

¹⁶ The Convention on the Elimination of Discrimination Against Women is the most highly acceded to Convention of the United Nations. As of April 2003, 173 countries - ninety percent of the members of the United Nations - are party to the Convention and an additional 3 have signed the treaty, binding themselves to do nothing in contravention of its terms:

<http://www.un.org/womenwatch/daw/cedaw/states.htm>

application of the treaty in their countries (Merry 2001: 36; Clark 1991; Cook 1990).

Notwithstanding the limitations or contestability of the human rights discourse one cannot overlook the fact that it has served an important purpose of drawing global attention towards the worth of women as human beings (Fraser 1999). It has enabled women to reveal underlying structures of domination hidden behind the apparently natural reality. It has helped to uncover the hypocritical claims made in the name of cultural protection, it has provided women with a platform to voice their concerns and the possibility to create space for themselves. It is this visible, though for the moment limited potential of rights discourse, which makes the embracing of rights discourse an attractive option for women's movements in all parts of the world (Merry 2001: 36).¹⁷

In such a situation where the discourse has contributed to the well-being and progress of women resistance to it is rather surprising. Yet, since this discourse often comes into conflict with cultural understandings about the role of women in society, with the prevalent gender equations, it is often resisted, as it appears to be attacking age-old understandings. At first instance this resistance seems to be the result of nothing more than mere fundamentalism or sheer intransigence on the part of the patriarchal powers engaged in maintaining the status quo and thus perpetuating patriarchal power structures.

Although the power oriented reasons for resistance to this discourse cannot be sidelined, it is also to be noted that not all the resistance to human rights discourse in the name of culture can be solely attributed to them. There are other more profound reasons that account for this resistance. It is the threat of extinction that solidifies intransigence and generates resistance. Most people see this discourse not simply as supplementary to the existing traditional one, as another means for remedying or correcting the weaknesses in their belief structures, but as the one which seeks to deal with the aberrations or weaknesses by replacing the existing culture with a new, alien one.

¹⁷ On the basis of her case study of women in Hawai'i, where she studied feminist programmes, Merry notes: "The adoption of rights-based approaches in a multicultural town in Hawai'i today provides a fruitful place to address questions of gender violence" (Merry 2001: 47). A rights-based approach is also widely adopted in all governmental and non-governmental schemes and efforts in India to deal with discrimination against women in different spheres of life.

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On a philosophical level the alien character of the three basic tenets of human rights mentioned above and their unsuitability to the nature and expectations of 'traditional' non-western societies generates antagonism towards them. Human rights discourse's emphasis on the self-interested, alienated individual, on her rights or claims, and on their enforcement through adversarial, formal legal systems threatens to disrupt the fabric of traditional societies where the emphasis is on self-giving or self-sacrifice of the embedded and relational person, on her duties and responsibilities towards society and on the solution of conflicts through mutual adjustment, give and take, reconciliation or repentance.

In western societies, which in the present context are considered to be the locus of women's freedom, where the women's movement has been able to displace more collectivist religious, customary principles in favour of individualistic human rights principles, the societal fabric woven of harmony and mutual understanding is perceived to have been disrupted altogether. As a result western society is presented as one struggling with horrible consequences like high divorce rates, broken families, single parent families, high rates of juvenile crime, teenage pregnancies, domestic violence, high suicide rates, and problems of the aged. Unfortunately it is women's freedom which is often held responsible for these societal problems. Besides, it is not wrong to say that, whatever may be the reasons for these problems, in the end, even in the west, women seem to be suffering more than men from this 'new generation epidemic'. Resistance to individualistic human rights is used as one of the strategies for containing the spread of this 'new generation epidemic' to non-western countries.

Even though we cannot overlook the many new problems that may have crept into modern societies as a result of changed gender equations, this state of affairs raises many complex questions: Is it really women's freedom that has been responsible for higher incidences of 'new generation problems' or do the reasons lie elsewhere? Even if one concedes that women's freedom is responsible for these problems to a certain extent, can solutions be found by 'subordinating' the interests of women to those of the family and/or the society? For cultures where the concept of rights is not viewed favourably especially in respect of women, should the rights discourse be dropped to respect the culture? Certainly none of these questions lend themselves to simple answers.

Before dealing with any of these questions it is necessary to highlight that in most traditional societies there is a tendency to over-emphasise these undesirable changes that may have crept into western societies while neglecting the many positive ones that rights discourse has made possible. Undue emphasis on these aspects probably serves the purpose of idealising traditional structures at the cost of diverting attention from the malaises that need to be addressed if one doesn't

want the ultimate replacement of these traditional societal structures. It blinds us to the positive aspects of the rights discourse, which may be useful and in certain situations necessary for preventing the wear and tear of the traditional fabric of the societies.

One cannot deny that with the increasing freedom and public role of women, there is a change in family structures. The roles, attitudes, and expectations of spouses, children and family members have changed considerably. Some of these changes can be considered undesirable but it is certainly a misrepresentation to say that the responsibility for undesirable changes lies solely in women's freedom. In fact it is not the acceptance of freedom but the abandoning of responsibility, by both men as well as women, towards the society and the family that can be held responsible for this state of affairs. Earlier women bore that responsibility even at the cost of their basic survival needs but once they decided to give priority to these needs the hitherto existing stable structures started crumbling. In such a situation one way to save these crumbling structures may be to adjust the freedom and interests of both men and women to the interests of the family and society. It is not by 'subordinating' anybody's interest to the other individual or the group, but by the voluntary balancing of freedom and responsibilities by each individual with understanding of one's social, economic and cultural circumstances that there can be a possibility of the much required harmony within society.

2.2 Global Discourse of Women's Human Rights

The above discussion brings home the point that even though resistance to women's human rights cannot be completely ignored it can also not be allowed to overshadow the justified claims of the women's movement against mistreatment in different parts of the world. Notwithstanding widespread religious and cultural differences it cannot be denied that there are certain basic propensities, namely to survive, to self realise and to participate socially (Nayar 1996: 172),¹⁸ that all human beings share and which provide strength to the global discourse of human rights (Nayar 1996: 176. Fulfilment of these propensities is as much a requirement for women as it is for men whatever the cultural context may be.

¹⁸ Nayar has defined the basic human propensities as the lowest common denominators which unite human existence, being the basic inclinations or tendencies (Nayar 1996: 176).

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These human propensities give rise to certain basic needs for every woman and man although no person can be abstracted from the social environment,¹⁹ nor can a universally applicable fixed hierarchy of needs be prepared (Nayar 1996).²⁰ The hierarchy of needs and accordingly the prioritisation of the basic human propensities are contingent upon the cosmo-visions (i.e., the prevalent understanding within different cultures about the relationship between human being and the universe), and this is where the difference in worldviews affects the operation of the discourse of human rights. It is always dependent upon the subjectivity of the individual, her role, as she perceives it, conditioned by the general beliefs prevailing in the society. Thus, human rights discourse in general and specifically for women can be said to be universal in its objective of creating and maintaining the conditions for the exercise of the freedom to decide on one's own hierarchy of needs.

This position on the global relevance of these needs that make possible the fulfilment of basic human propensities is not an imposition of the values of one culture over the other, for it is the one which no culture denies, as no culture authorises derogation from human life. As discussed with specific reference to Hinduism in the first part, the underlying philosophy here lays stress on creating conditions for self-realisation for every individual irrespective of sex, race, class, or status. Certainly one of the methods of fulfilment of these basic propensities is the acceptance of the mutual responsibility of each 'individual' to aid the other(s) in this process. But considering the prevalent social, economic and political circumstances in many countries it has also become necessary to endow every individual with a 'claim' for their realisation while endorsing the necessity for mutual responsibility. This 'claim' may be of the utmost necessity in situations where any one group of the society is made or forced to bear an inequitable burden of these responsibilities. Moreover, the use of this claim by any aggrieved 'individual' can always provide an opportune occasion for emphasising the mutual responsibility.

¹⁹ Nayar has used 'whole individual' as a subject of these propensities. He says that this whole individual, the subject of basic human propensities, can be conceived of through the interrelationships between the concepts of the human being, self and person (Nayar 1996: 171-176).

²⁰ Nayar has discerned certain needs for all the three categories. Under survival needs he has covered need for sustenance, shelter, physical and mental integrity, self-realisation needs are cultural identity and expression, while in social participation he includes the need for education, association, and work (Nayar 1996: 179-186).

Again while the concrete realisation of these claims will have to be responsive to the relevant social and economic circumstances, still there are certain categories of rights or claims which need to find place, as a means for ensuring the fulfilment of the basic human propensities of each woman, in the legal regimes of all societies and nations irrespective of the cultural context.

For the sake of convenience, I divide such rights of women into three groups, i.e. the human rights of women, and their rights in family law and in criminal law. (All three categories can be included in the category of human rights for women. I have made the differentiation in order to list the specific rights relating to different areas that may require differential focus.) Women need to be ensured certain basic rights in all the three areas, to deal with certain discriminatory and derogatory practices, which are in derogation of the basic needs. These very basic, essential rights against certain practices can be considered as a step towards ensuring the conditions for fulfilling the basic need of survival. As far as human rights of women are concerned, every woman needs to be ensured the right to life. Thus, traditional practices like female foeticide, female infanticide and bride burning, cannot be justified in any situation. Similarly, no discrimination against girl children in respect of health care and food can be acceptable. In the area concerning family law constraints on the requirement of free consent for marriage, discriminatory and derogatory grounds of divorce, denial of a right to maintenance, or to custody or guardianship of children or to inheritance need to be done away with. In the domain of criminal law no kind of violence in the form of witchcraft, female circumcision, dowry deaths, honour killings, domestic violence, or sexual abuse can be excused. Thus, women need to be given the right to raise their voice where such practices are implemented and endanger their bare survival.

Along with ensuring the rights for fulfilling the need for survival, a further objective of human rights discourse is to empower women with freedom to hierarchise their needs of self realisation and social participation themselves. For the purpose of ensuring the two latter categories of basic human propensities, certain rights have to be assured to women unconditionally. These may include access of girls and women to education, availability of opportunities for employment or participation in the public sphere, and protection against discrimination on the basis of sex or biological roles in the society. These basic rights can create the conditions enabling women to prioritise their needs in conformity with their cultural context.

This assertion of the need to ensure the 'basic needs' of woman seems to be reinforcing the universality thesis and to make stress on the importance of culture

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appear futile. In the next section, by using the example of the practice of dowry as prevalent amongst Hindu communities in India²¹, I will explain that this assertion of the basic needs of woman does not threaten cultural diversity and that on the other hand it is necessary to protect that. I will discuss what it may mean to support the global nature of human rights discourse based on the premise that no justification for derogation from the basic human needs either of man or of woman can be acceptable in any culture or religion, while supporting cultural diversity. I will also highlight why it is necessary to adopt approaches which are in conformity with the basic values of the society.

2.3 Adapting global discourse to local demands: Women's human rights and traditional practice of dowry in India

Considering the prevalence of cultural diversity in our world it may seem futile to try to discover or formulate abstract or general principles for ensuring a balance between global and local. What this balance signifies and what are the measures required for sustaining it can be determined only within a particular cultural framework. I have been arguing that the main aim of human rights discourse for women has to be the restoration of an equitable balance of responsibilities between women and men. Although, in principle, most traditional religious and customary societies tend to ensure an equitable distribution of the responsibilities for maintaining the basic tenets of such societies, in practice, the weight of maintaining these tenets tilts towards women.

Presently in most societies it is women who carry the main responsibility of protecting, perpetuating and transmitting culture and values from generation to generation. Usually any challenge to traditional practices, even those which manifestly violate the basic right to life, is perceived as an attack on culture and values. In such circumstances the most effective remedy for the women's movement seems to be the blanket challenge to culture and advocacy of the replacement of the traditional discourses with modernistic ones based on the universal human rights principle. The assertion made above about not subjecting women to derogatory traditional practices as a means of fulfilling their basic propensities appears to support the approach of the blanket challenge to culture.

²¹ Even though Dowry is most commonly associated with Hinduism it is prevalent amongst other religious communities too under different customary practices (Government of India 1974: 71-77).

In the following part, by taking the example of the commonly known practice of dowry,²² I shall try to explain that, while making this global claim against subjecting women to excesses in the name of traditional practices, the approaches to be adopted for realising this claim need to be sensitive to the local circumstances amidst which the target practice prevails. The two preconditions for localising this global claim are: an insight into the whole social, economic, cultural and religious framework within which the concerned practice prevails, and finding the means to deal with such excesses within the cultural framework in conformity with the basic values.

2.3.1 The practice of dowry in India: from support to the subjugation of women

The custom of dowry as prevalent in India presents a typical dilemma for the ‘universalism and cultural relativism’ debate. Dowry is considered to be an ancient practice associated with the institution of marriage in India, which in very broad terms involves the giving of gifts from the bride’s side to the groom’s side at the time of marriage. In present circumstances, a large number of marriage transactions in India seem to be hard-core business deals, where the girl herself appears to be the least valued consideration. Although this custom has become a source of serious threat even to the right to life for women in many cases,²³ it also carries significant advantages for women in the Indian socio-economic context. Thus, while dowry needs to be strongly condemned for reinforcing the inferior status of women, paradoxically it receives support not only from society but also from women themselves (Kishwar 1999: 11-19; Government of India 1974: 74²⁴).

²² Dowry is a complex customary practice most pronounced in South Asian societies. I do not intend here to reflect comprehensively on the practice. My aim is to reflect on the relevance and limitations of typical human rights discourse to deal with customary practices by using the example of dowry.

²³ There is no dearth of literature highlighting the increasing menace of abuses of dowry in the form of dowry deaths, bride burning, and the killing and torture of young brides for bringing in insufficient dowry. Dowry can be considered directly or indirectly responsible for other derogatory practices against women, such as female foeticide, girl infanticide, neglect of the girl child, malnutrition of girls and women, a high mortality rate amongst women, and a high illiteracy rate.

²⁴ It is a disturbing trend that girls themselves aspire to have their household set up in a grand style by the parents and to have clothes, jewellery, furniture and vehicle, etc. (Government of India, 1974: 74)

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There is evidence to support the view that many women actually expect, want and more or less demand dowry.

In such a situation, where a significant section of the population appear to be involved in financial and material transactions around marriage, and claim cultural and religious justification for these, attempts towards eradication of this custom on the basis of human rights principles can be considered as interference with the right to cultural freedom of Indian society. But, as discussed in the previous section, respect for cultural freedom cannot entail complete indifference towards manifest violations of women's human rights. Thus, notwithstanding the cultural background, dowry related violence cannot be ignored or condoned. The basic human need, that is, the right to survival, being in danger, women need to be protected. However, once we take this stand the next immediate issue is how to do this, especially considering the support that the custom of dowry enjoys in Indian society.

Admittedly, this is not a recent problem, and a longstanding legal and social campaign has been conducted in India for many decades now to deal with the 'dowry problem'. The Government promulgated the Dowry Prohibition Act in 1961 to deal with the practice of dowry. Various amendments have been introduced in the Act to widen its net and to make it tough. This Act, as well as the penal statutes - the Indian Penal Code, the Criminal Procedure Code and the Indian Evidence Act - has been amended on more than one occasion to deal with dowry-related violence.²⁵ The executive has also been active with its specific focus

²⁵ Section 498-A of the Indian Penal Code deals with all cases of cruelty and harassment to women. This section made cruelty to married women punishable with imprisonment for a term, which may extend to three years and with fine. Through the Amendment Act of 1983, Sec 174 of the Criminal Procedure Code was amended empowering a magistrate to hold an inquiry and making the postmortem essential when a woman dies in suspicious circumstances within seven years of her marriage. A new section 113-A was inserted in the Indian Evidence Act reversing the presumption of innocence against the accused in the case of suicide by a married woman. Two new sections 304-B in the Indian Penal Code and 113-B in the Indian Evidence Act were added by the Dowry Prohibition (Amendment) Act 1986. Sec. 304-B in the Indian Penal Code created a new offence of 'dowry death', which is defined thus:

Where death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband

on dowry and other traditional practices in its various women's empowerment schemes. There are many non-governmental forums that raise their voices against this customary practice and take up the issue on different opportune moments. There is an immense literature both old and recent that has raised the issue and has put forward suggestions to deal with it. In short there were sufficient steps taken in India to conform to global human rights principles even before India accepted the treaty obligations under the Convention for the Elimination of Discrimination Against Women for the protection of women's rights.²⁶ However, in spite of all these efforts the practice of dowry is thriving with full vigour in Indian society, implying the failure of various governmental and non-governmental measures. Not only this, dowry, which was originally considered to be a high caste upper middle class Hindu phenomenon, today knows no barriers of caste, class or religion.

Here it can be suggested with conviction that the most important reason for the very limited success of these efforts to combat this social evil is a lack of understanding about it. The efforts made so far are based on simplistic and partial explanations of this practice. The women's movement is mainly characterised by its attack on Hindu tradition by its tracing the prevalence of this practice linearly to the classical Hindu conceptual structure and value system. Amidst much rhetoric there is little clarity about what we are fighting against. There is no agreement about what actually is that 'evil' that needs to be eradicated.

In the following sections I will try to demonstrate, through this example of dowry, the complex understanding that many traditional practices call for. I will argue that, since a large number of such practices is indeed an integral part of the culture concerned, it may not be useful to try to eradicate them altogether. The best strategy to move ahead on the path of protection of women's rights may be to try to focus on the negative consequences of these practices within the cultural framework of the society. Lastly, I will try to argue that human rights discourse with its emphasis on individualism, rights and legalism in their strict form is not

or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called 'dowry death' and such husband or relative shall be deemed to have caused her death.

Punishment for a person guilty of dowry death is a term of imprisonment which shall not be less than seven years but which may extend to imprisonment for life.

²⁶ India became a party to the Convention in 1993

appropriate to deal with the Hindu practice of dowry. While this discourse is not out of place, it needs to be sufficiently indigenised and supplemented by other means which are responsive to Indian society.

2.3.2 Understanding dowry and the dowry problem

There is no general agreement or certainty about the definition or origin of 'dowry'. In strict terms, 'dowry' is what a bride's parents give to the groom or to his family *on demand* either in cash or in kind. It can be looked as *a settlement* that is normally constituted of: (1) what is given to the bride, and often settled beforehand and announced openly or discreetly; (2) what is given to the bridegroom before and at marriage; and (3) what is presented to the in-laws of the girl. The settlement often includes the enormous expenditure incurred on travel and entertainment of the bridegroom's party (Government of India 1974: 71). This definition can be extended to include also the giving of gifts or cash from the bride's parents to her husband, his family or to herself after marriage, either towards fulfilment of the pre-nuptial settlement or on the basis of further expectations of the groom and his family.

There is a common belief that dowry is an ancient Hindu practice, but there is no authoritative opinion available that tell us that 'dowry', as defined above can be traced to the ancient Hindus. According to Altekar the dowry system was generally unknown in early societies and also with ancient Hindus. He specifically mentions that: "there are no references either in *Smritis* or in dramas to the dowry, i.e. to the pre-nuptial contract of payment made by bride's father with the bridegroom or his guardian" (Altekar 1962: 69-72). However, there is general agreement that, while the Hindu belief system and practices cannot be held responsible for the custom of 'dowry' as such, there are some elements of the tradition that feed the roots of the dowry problem (Menski 1999a). Altekar says there was indeed a tradition of giving gifts to a son-in-law at the time of marriage but this was restricted to rich and royal families. He asserts that these gifts can hardly be called dowry for they were voluntarily made out of affection (Altekar 1962: 70). In respect of its elements he further clarifies:

The dowry system²⁷ is connected with the conception of marriage as a *dana* or gift. A religious gift in kind is usually

²⁷ Altekar gives no clear indication about what he means by 'dowry system' here but it can be assumed that he implies it to mean voluntary transfer of property in any form to the bride, groom and groom's family from the bride's family at the time of marriage.

accompanied by a gift in cash or gold. So the gift of the bride was also accompanied by a formal and small gift in cash or ornaments. (Altekar 1962: 71. See also Government of India 1974: 72-73)

He traces initiation of this custom to medieval times and to Rajputana but always wrapped in love and affection, with no element of coercion.

Another commonly accepted explanation, which traces elements of dowry to the ancient Hindu belief structure, views it as a kind of pre-mortem inheritance of the daughter, who has to leave her natal family to join another (Government of India 1974: 71). Many authors have put forward the claim that giving of cash or gifts, mainly moveable property, to the daughter at the time of marriage was a kind of compensation for the absence of inheritance rights in their father's property for daughters. Dowry, thus, stresses the notion of female property and a female right to property, it being viewed as an important ingredient of *streedhan*. It has been claimed that the custom had its origin in agricultural societies where the family's survival was dependent on its holding land. Since women joined the husband's family after marriage, they were not given a formal share in the land, mainly to avoid the fragmentation of land Das 1962: 43-99). Ram Mohan Das states:

We find that Manu has made a very practical approach to the problem. He recommends one-fourth share and thereby provides for the marriage expenses of the daughter. At the same time by allotting one-fourth share he clearly indicates that the brothers should not unnecessarily waste money over the marriage of their sisters. (Das 1962: 80-81)

He explains that sons were given a specific one-fourth share of the ancestral property to meet the marriage expenses of their sisters. This share on the one hand was meant to ensure financial security for her and on the other to put a limit on unnecessary marriage expenses. Given the nature of the evidence that is available for knowing and understanding ancient Hindu practices, it is true that there is no certainty whether dowry can really be connected to *streedhan* or not. There are conflicting views about this, and some authors have argued that women were merely vehicles for the transfer of property from one family to another, and had no right over property transferred in the name of dowry (Kishwar 1986: 2-13; Stone and James 1997). But for our purposes, it is important to note that this explanation also lays stress on the discretion that the bride's family enjoyed in respect of the worth of the dowry and on the element of natural love and affection. As is evident none of the available explanations which try to trace the

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origin of 'dowry' correspond to the understanding of 'dowry' in the modern sense.

These opinions underscore the view that, except for some of its elements, and even in respect of those with many variations, it is wrong to consider 'dowry' as an ancient Hindu practice. On this basis it is not wrong to assert that 'dowry' - a custom that involves pre-nuptial financial settlement between bride and groom's family; transfer of property as a consideration for marriage; continuing extortion from the bride's family even after marriage; torture or killings of young brides either for breach of marriage settlements or with an intention to benefit further from them - has nothing to do with the ancient Hindu belief system. Menski rightly points out:

Killing a woman, and certainly killing a bride at the point of entry to that phase of life where she was supposed to be most productive, would become viewed as the most heinous of the violations of the eternal Order (*rita*) that the Hindu worldview revolves around (Menski 1999a: 6).

The 'dowry', a custom that is strongly condemned today, is a modern phenomenon - 'a modern custom'. Consequently both the approaches, that is, one that puts the blame squarely on the tradition for perpetuating oppression of women in name of customary practices, and another that defends the practice on the basis of ancient traditional origin, are misplaced. Yet, the complexity of the whole issue arises from the fact that, though 'dowry' as such cannot be traced to Hindu tradition, certain elements of the Hindu belief system and practices feed it. Given this connection with the ancient Hindu belief structure it is necessary to redefine what exactly can be considered the dowry problem and how to deal with it on the basis of these elements.

In spite of great variations in the understanding of dowry, one can say that the predominant understandings especially the one that is sensitive towards cultural diversity, suggest that only 'dowry', that is, those financial and material transactions around marriage that have elements of demand in them, should be considered problematic. There is no clarity about how to view other kinds of financial and material transactions associated with marriage in India, which cannot be considered per se objectionable but which are directly and indirectly responsible for 'dowry' and the dowry problem.

Thus, the issue before us is, how would we categorise the transactions that are not based on explicit demand but on the subtle expectations of the bridegroom's family? In these cases, there are usually no express negotiations undertaken or

settlement reached between the bride's and bridegroom's family, yet, on the basis of social norms, bride-takers nurture certain expectations. These expectations may vary according to the groom's physical appearance, his educational status, his social status and his earning capacities. The bride may have to bear harassment in her marital home if the expenditure incurred by her parents in terms of giving cash and other things or in arranging for 'entertainment' of the bridegroom's party does not meet the latter's expectations. This harassment may, in some cases, also lead the bride to commit suicide. Should this kind of financial and material transaction be categorised as dowry, and should the resulting problems be treated as dowry problems?

Further, where can we place the huge expenditure that the bride's parents incur voluntarily, as performance of their duty towards their offspring with an aim to ensure a secure future for her? In such cases there is usually no element of demand or duress involved, but, considering the societal norms, parents may incur heavy expenditure (which may be beyond their capacity) as a way of showing their affection towards their daughter; as fulfilment of their duty towards offspring; as a mark of respect and fulfilment of their duty towards the bridegroom's family; and also as a means to gain social status. This kind of expenditure may not be contingent upon any specific, desirable characteristics of the bride or the bridegroom or the social and economic status of the bridegroom's family. Should this type of expenditure and financial transactions be considered objectionable?

In the available literature dealing with the dowry problem, there is no clarity as to whether these types of transactions and expenditure should be included in the definition of dowry and be typically considered as dowry problems. In case of transactions made with an aim of meeting societal expectations there is still some kind of harassment involved bringing it within the ambit of the dowry problem, especially where the subtle harassment leads to some kind of fatality. Cases where there is no element of demand or duress involved cannot be stretched to the common understanding of the dowry problem, as there does not seem to be anything objectionable if parents want to give something to their offspring out of natural love and affection. But can we simply ignore such societal norms and the transactions based on them, especially considering the fact that they do have a bearing on the typical preference for the male child in India?

My contention is that in the present context dowry should be seen as including any kind of financial and material transaction in connection with marriage, whether made before, at or after marriage by the bride's parents to the bride, groom and his family. This is in conformity with the widened definition of dowry

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incorporated in Dowry Prohibition Act, 1961 after amendment in 1984. This states that dowry is

any property or valuable security given or agreed to be given either directly or indirectly – (a) by one party to a marriage to the other party to the marriage, or (b) by parents of either party to a marriage or by any other person, to either party to the marriage or to any other person, at or before or at any time after marriage in connection with the marriage of said parties but does not include dower or mahr in the case of person to whom the Muslim personal law (*shariat*) applies. (Dowry Prohibition Act, 1961, section 2)

Dowry should include expenditure incurred by the bride's family on the entertainment of the bridegroom's party. The dowry problem is constituted not only of those cases where marriages become a bed of violence or death for women or where money has been extorted from the bride's parents. The dowry problem should be understood to include any kind of harassment, torture or killing of women for bringing in insufficient dowry as well as any actual or psychological burden on girls' parents to undertake financial expenditure for their daughter's marriage.

This definition of dowry may appear to be confusingly linking two aspects of dowry, one involving the transfer of any form of property from parents to a child and the other involving the extortion of any form of property from the parents of a girl child (Menski 1999b). I would argue that it is necessary to somehow link the two aspects to deal with the dowry problem given the present situation in India, where general expenditure and transfer of wealth in marriage, even though voluntary, has generated rather unhealthy competitive tendencies to gain social status. These so-called voluntary expenditure and transactions play a significant role in shaping general societal expectations around marriage and ultimately feed the dowry problem. Further, these apparently 'innocent voluntary transactions' are far from the original Hindu principle of bestowing wealth upon a daughter as a part of the performance of a societal duty. Far from the original belief concerning the duty of parents towards child and society, such transactions have become a means of aggrandisement for many Indian families and certainly such tendencies cannot be defended on the basis of the Hindu worldview²⁸.

²⁸ Black money and unaccounted earnings have given an impetus to dowry during the post-independence era. A new class of nouveau rich has emerged that buys a daughter's future with dowry, to raise its own social status by entering into marriage

To deal with the dowry problem it is necessary to address these various kinds of transactions associated with marriage in India, that is, those having an explicit extortionist element, those made under implicit social and psychological pressure, and also those that can be considered to be actually based on natural love and affection. However, addressing all the three kinds of transactions mentioned above does not mean attacking all of them, and trying to eradicate all kinds of financial transactions around marriage. Addressing them would mean understanding and analysing all the possible elements of dowry to be clear about what needs to be eradicated, what can be subtly challenged for its underlying assumptions, and what is to be supported in this customary practice. It also means accordingly devising strategies by understanding the limitations of state-based legal measures or rights-based social action for these purposes. Thus, while vehemently attacking 'dowry' - a pre-nuptial settlement as a consideration for a marriage contract - and various forms of 'dowry'-related violence through explicit legal and social measures, it is also necessary to address the specific underlying assumptions about the status of man and woman in society, in all these apparently 'innocent transactions' that contribute to the dowry problem. Indeed assumptions concerning male supremacy or unequal relations between men and women are not specific to the Hindu belief system. Such assumptions are universal and so far no legal and social system has been able to do away with them (Menski 1999b: 43). It cannot be asserted with certainty whether such assumptions can ever be taken care of but this should not deter us from addressing them. Undeniably, in an Indian context it is of the utmost importance that such subtle challenges should not result in a sidelining of the more urgent issues like saving the lives of women and protecting them from harassment. What is required is sensitive strategic planning about which particular aspect of the problem is to be highlighted, through what means and in what manner.

Inclusion of all kinds of financial and material transactions concerning marriage in our understanding of the dowry problem underscores the complexity of this custom of dowry and brings home the point that addressing it as a 'standardised' women's rights issue on the basis of a linear explanation will not help the cause. It

alliances with families of high status. These people are keen to get rid of the black money, so they spend it lavishly during weddings. In this process the level of expectations in marriage market has changed altogether. Men of honest means and moderate income find it extremely difficult to remain honest in order to compete with this class with a free flow of black money. (Government of India, 1974: 76)

highlights the point that the human rights or women's rights discourse alone cannot show us the appropriate path. Various elements of the dowry problem will have to be dealt with through different approaches, and the modernist women's rights approach can be only one of them.

2.3.3 Fighting the dowry problem

Human rights discourse, with its basic tenets of individualism, rights and legalism and the remedies that may be suggested by it, is not appropriate on its own to deal with rather complex traditional practices, like dowry and many others, which are usually embedded in a different worldview. For this specific case of the dowry problem, this discourse may encourage 'love marriages,' which underscore the importance of individual consent, and campaigns emphasising proprietary and other rights for women and recourse to law to protect and ensure these rights. I shall argue that these remedies cannot take care of other culture-related elements that contribute, even though indirectly, to the dowry problem, and that they have limited relevance even for the cases where there is manifest violation of women's rights.

It was mentioned at the beginning that the practice of dowry receives widespread support as a cultural practice in India, even from women themselves, for whom it is considered to be oppressive. It is associated with a culture which lays great emphasis on the responsibility of every individual towards each other and towards every constituent element in the Cosmos, a culture that sets certain prescribed norms of behaviour and responsibilities for people within different relationships, familial or otherwise. Associated with this worldview is the belief that the marriage of a daughter is an important religious and moral obligation of parents, as a means for ensuring a secure future for her and also as a contribution to the universal Order by providing a way for her procreative powers to be utilised for the continuation of progeny.

In my view it is this sense of religious and moral duty that has come to be exploited in the present circumstances by bride takers. Usually a girl's parents succumb to the pressures and demands of the contemporary materialistic world to fulfil their responsibility. One can say that presently the practice of dowry in India to a large extent is associated with this heightened sense of responsibility towards their offspring within the Indian socio-economic context.

Large numbers of girls in India lack economic independence because they lack either education or sufficient employment opportunities. There is no state social security system which might extend financial assistance, even for bare survival, to

those in need. Marriage seems to be the only means to ensure financial and social security for girls. Large expenditure is also a kind of investment to ensure a good status for the girl in her new home. Admittedly, it does indeed serve, to a certain extent, the purpose of bringing psychological and financial security. That is why dowry receives support from all sections of the population, and the anti-dowry law, which seeks to put a financial ceiling on or to prohibit financial and material transactions in connection with marriage, has not met with much success so far. On the other hand, some critics have rightly pointed out that it is not appropriate to defend dowry as a means of transferring property to girls, since in many cases brides have no control over the movable or immovable property which has been transferred as dowry.

There is a general perception that arranged marriages are a primary vehicle for the exchange of dowry. Consequently it is believed that their replacement with 'love marriages', where two individuals decide to form their alliance with no or minimal family involvement, may be a remedy to the problem. It is true that under the system of arranged marriages, as prevalent in India, the financial and social status of both parties is a predominant deciding factor, increasing the possibilities of pre-nuptial negotiations. It also follows that parents may dislike their sons contracting 'love marriages' as that takes away a good opportunity for them to enhance their financial or social status.

Nevertheless, even if we accept these considerations as arguments against arranged marriages, it is necessary to realise that in the Indian context advocacy for the replacement of arranged marriages with 'love marriages' does not present a realistic option. In practice, with modernisation Indian society has developed an indigenous variety of 'love-cum-arranged marriages', where 'dowry' in the strict sense may be ruled out but transactions occur that are within our definition of dowry. In Indian culture and in Hindu philosophy, where the family, usually the extended family, instead of the individual is the basic unit of society, marriage is not simply a union between two individuals. It is not only seen as a means of extending kin relationships, but also, and primarily, as a means of procreation for the continuation of the family lineage and humanity. Further, in India the beliefs that 'marriages are made in heaven' and that marriage is a sacramental union with the objective of many births, have not been displaced by modernisation. Thus Milton Singer has stated:

While modernizing influences are undoubtedly changing many aspects of Indian society and culture, they have not destroyed its basic structure and pattern. They have given Indians new alternatives, new choices of life-style, but the structure is so flexible and rich that many Indians have accepted many modern

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innovations without loss of their Indianness. They have, in other words, been able to combine choices that affirm some aspects of their cultural tradition with innovative choices. (Singer 1972: 269)

Thus individual consent, as understood in the western context, does not seem to play a predominant role in the formation of the marriage alliance. We may speculate about future developments, but presently, the system of arranged marriages in India being associated with a specific worldview of Indian society, it seems that its abolition is not a practicable remedy for the dowry problem.

The granting of inheritance rights to women is also advocated as a real remedy to the problem (Kishwar 1986: 76). While this remains a different and important issue in itself, past experience shows that it is not likely to go far towards dealing with the 'dowry problem'. The Hindu Succession Act, 1956, in sections 6 and 14, has considerably changed the formal rules of inheritance for women by granting daughters rights with sons in their father's property. Yet large numbers of women prefer not to claim their rights. Especially where the father has left just one dwelling house or some other rather small portion of property, most women waive their share for reasons like love and concern for their brother(s), the desire to avoid conflict with their near and dear ones, the desire to avoid becoming involved in legal problems and expense, and the wish to escape social criticism.

Further, for practical as well as conceptual reasons stress on creating awareness of legal rights in respect of dowry, on claiming proprietary rights to dowry, and on facilitating recourse to the formal legal system for seeking gender justice, may be only partially successful in India. Practical insufficiency of resources hinders the operation of the formal legal system. While we may emphasise the necessity of such rights and a legal system to enforce them, we should not forget that recourse to the formal legal system for the protection of rights in India is not a function of awareness. Even people who are well aware of the availability of all these legalistic mechanisms, and who have access to them are hesitant in making use of them. We have much evidence to prove that even very affluent and highly educated girls and their families bring a case for dowry only in extreme circumstances. This attitude again is related to the specific worldview of Hindu society, according to which people prefer to perform their duty to others irrespective of the others' behaviour and without laying emphasis on the rights that correspond to those duties.

These complex situations tell us that the dowry problem has to be dealt with through equally complex measures, by adopting different strategies for the elements associated with different forms of dowry. These may include various

social and economic measures, like focussing on the education of girls, better employment opportunities, social ostracism of the people involved in 'dowry' exchanges, and social denunciation of people using marriage as occasions for vulgar displays of wealth. Undeniably there is also an immediate need to tackle the violence related to dowry, and heinous crimes like physical violence, bride burning and killings must be dealt with strictly. Rights discourse can be particularly helpful in this regard by raising awareness amongst women about the operation of the formal legal system, about their right to seek a remedy through law. We need to advocate incessantly enhanced operation of the criminal justice system in India. The express violations of the law relating to dowry prohibition, and an application of human rights discourse based on legalism calls for penalisation of cases involving harassment.

However, in view of socio-economic circumstances in India, it may not be advisable to advocate a uniform method of legal penalisation in all cases involving dowry and dowry harassment. Even in cases which may involve proven giving and taking of dowry and subsequent conflicts or harassment, legal penalisation, or legal separation of spouses, may not always be the best solution. In the Indian context the particular circumstances of some such cases may require solutions through mutual settlement and counselling. Some writers have undetrandably expressed scepticism about the utility of soft methods like negotiation, counselling or mutual settlement. Manjaree Chowdhary points out that Crime Against Women Cells, established for dealing with atrocities against women have assumed a mediatory role, seeking to effect reconciliation rather than pursuing the matter under prescribed criminal law. She asserts that

a woman who is trying to make a complaint about dowry harassment often finds herself dragged into a process of negotiations which she neither wants nor understands, receiving virtually no information or advice different from what her family or society would have given her (Chowdhary 1999: 154).

Such scepticism is not ill-founded, yet in my view, considering the socio-economic conditions in which the Indian criminal justice system is embedded and operates, one should not disparage the utility of negotiation and settlement procedures. Any formal or informal body dealing with complaints concerning the practice of dowry needs to be sensitive to the demands of these local circumstances and may have to condone or ignore an express violation. Contrary to the expectations of discourse based on legalism, here the legislative prohibition of dowry may have more of a symbolic nature, and its implementation may have to fluctuate between explicit condemnation and appropriate tolerance.

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It is interesting to note that the Dowry Prohibition Act, which is often denounced as an ineffective, paper tiger, can be considered to be sensitive to the demands of Indian social reality. Menski has pointed out:

It is recognised in the countries of South Asia that the state's law serves different purposes to much of western law. Thus, it is equally typical that the state law considers the consequences of its own rejection and violation, and even provides for it in explicit terms. (Menski 1999c: 110. See also Surya 1995)

Following this pattern the Dowry Prohibition Act, while prohibiting dowry, recognises that it cannot be outlawed completely. Thus section 6 of the Act lays down that any dowry shall be for the benefit of the wife or heirs, thus anticipating that dowries will continue to be given (Menski 1999c: 110). Further, the lawmakers being aware of the cultural association of dowry, the anti-dowry law does not prohibit voluntary financial transactions. Section 3(2) of the Act excludes presents of a customary nature from the definition of dowry. Thus it aims to deal only with the abuses of the dowry system, and targets only those transactions with an extortionist element. The rationale seems to be that it is not objectionable to give gifts, in cash or in kind, to mark one of the most important events of life, especially when such gifts are made out of love and affection.

Nevertheless this aspect of the anti-dowry law is widely criticised by anti-dowry campaigners. Both sides are right to a certain extent. While there is no rationale for prohibiting the voluntary transfer of property from parents to child, the critics are also right because such voluntary transactions underwrite objectionable assumptions about the status of man and woman. It has been rightly pointed out:

The complex mechanisms of bride-giving and wife-taking in South Asia's mainly patriarchal cultures are premised on the concepts of male supremacy, so that girl's father is automatically treated as inferior to boy's father and the wife-givers have to 'serve', as it were, the wife-takers (Thakur 1999: xvi).²⁹

²⁹ So also:

The bridegroom and his kin group are believed to have done a favour by accepting the girl in their fold, for marriage with an appropriate person is the path of honour for a girl. They, therefore, deserve to be honoured with gifts. They are higher in status by virtue of their being bride-takers. (Government of India 1974: 73)

I would argue that it is necessary to remain clear that in such cases the evil that needs to be fought is not the financial and material transactions around marriage, but the notion of male supremacy that underlies these transactions. It is also necessary to be clear that formal legal measures for the protection and enforcement of the rights of women cannot effectively deal with this aspect.

Yet legal discourse is not redundant in challenging such assumptions. It can be helpful, but, as argued by Kapur and Cossman (1996), only in a redefined role, beyond its understanding as an instrument of reform or of oppression. Law needs to be reconceptualised as a site of discursive struggle, where competing visions of the world, and of women's place therein, have been and continue to be fought out (Kapur and Cossman 1996: 12). While legal discourse reinforces deeply gendered assumptions, relations and roles, it also has the potential to help create new identities. Perceiving law as a process or as a discourse may allow us to use law in multifarious ways. Thus, while legal results can be responsive to the immediate demand of the situation, each occasion can provide an opportunity to challenge underlying assumptions and values, can provide a platform for social activists and activist judges to voice their concerns.

This reconceptualisation of law as a site of discursive struggle may also allow a more useful and interactive role for law in relation to tradition. This interactive role can go a long way in bridging the much-criticised gap between socio-economic realities and formal legal rules. From tradition one can find instructive measures to deal with customary practices like dowry. Reliance on tradition can also help invoke the element of 'self-restraint', an absolute requirement for dealing with abuses of customary practices, which surely cannot be tackled with law as an external mechanism (Menski 1999b: 55-60). Our example of the custom of dowry exemplifies these arguments. We have seen that 'dowry' arises typically as a problem in the form of an abuse of a customary practice, and that this is a modern phenomenon. Hindu conceptual thought does not authorise or prescribe pre-nuptial negotiations, though there is evidence that it allows for the transfer of movable property. Further, as discussed before, with its underlying concepts of universal harmony and *svadharma*, it cannot sanction any kind of violence or harassment of women, especially of newly wed brides.

Admittedly, a reliance on tradition may be challenged especially on the ground of its underlying notions of male supremacy. But it may be replied that despite this notion, we have no Hindu scriptural evidence that justifies any kind of disrespect or mistreatment towards the lower status of bride givers. Further, this kind of behaviour may also be excluded on the ground that marriage relations are reciprocal, in the sense that bride givers are also bride takers. *Svadharma* in the

Hindu belief structure might be interpreted as meaning for bride givers that they would perform their duty at best by adorning the bride with gifts according to their ability, and for bride takers that they would accept the bride without any consideration, as the most precious asset on which all ritual and social attention is focussed. Oppression of the individual within or by a family is antithetical to the underlying idea of the necessity of freedom for self-realisation.

3. Conclusion

The above discussion stresses that the global demand for ensuring and protecting rights against excesses committed in the name of culture and tradition cannot be met without sensitivity towards tradition and local circumstances. The diversity, complexity and fluidity of every culture exclude uniform solutions. They call for multilateral approaches and multifarious roles for the actors involved.

The task necessitates an insight into cultural values to make any proposed changes acceptable. In many cases the justification for fighting against deep-rooted traditional practices, which may have turned oppressive under changed circumstances, can be derived from the same culture on which the practices are alleged to be based. Reliance on tradition will raise the legitimacy of and understanding for reforms in the eyes of the people. However, reliance on traditions which do not account explicitly for rights does not render the rights discourse irrelevant. It may be used to attract attention towards the basic foundations of traditional systems. It is required to reveal the degeneration of those systems, and to show that the oppression which is grounded today in a particular culture, is in fact groundless.

In traditional societies the point of focus is the family and not the individual. However, that does not mean that these societies do not value an individual as an individual for his or her own ends. Their characteristic view sees everybody's ends associated with those of others. Thus, even when one seeks the meaning of one's own life as an autonomous individual, it is seen that in many circumstances decisions about one's own life need to be sensitive towards their effect on the whole matrix of the family or the society. While most non-western cultures perceive freedom as an essential condition, not for pursuing self-interest, but for exercising self-discipline and self-sacrifice, they at the same time caution against self-negation and provide remedies to deal with the imposition of self-negation on an individual.

While emphasising the necessity of reliance on cultural frameworks it is necessary to observe that almost all religions and cultures have certain underlying

stereotypical aspects, which discriminate against women. Thus, rights discourse is universally required to enable challenges to these aspects, which perhaps may have been justified at the time of their origin but need to be removed in the wake of technological advances or changed social and economic circumstances. But then, having accepted the relevance of rights discourse it is important to repeat once again that its universality does not imply uniformity. In fact, one cannot expect uniform approaches even within a single society, and to expect the same at the global level is simply naïve.

I have tried to argue that, while we need to be aware of the differing cosmologies, that does not mean falling into absolute relativism, by either glorifying each system in its originality or developing indifference towards manifest violations of human dignity. One needs to remain sensitive towards the possibility of adopting different approaches for different situations, trying to judge rationally the cultural system in its different aspects.

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