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# NOTES

## THE TRAGEDY OF BRIDE BURNING IN INDIA: HOW SHOULD THE LAW ADDRESS IT?

### I. INTRODUCTION

Within a week of marriage, Savita Sharma's in-laws made demands for a refrigerator, scooter, television set, and cash.<sup>1</sup> Her mother-in-law verbally abused her, did not give her enough food to eat or soap to bathe with, and locked up all her clothes.<sup>2</sup> Both her mother-in-law and her husband beat her.<sup>3</sup> On one occasion, she overheard her mother-in-law tell a tenant, "I will burn her and then give money to the police to hush up the case."<sup>4</sup> Savita Sharma's emotional and physical suffering at the hands of her husband and in-laws is typical of what many young married women experience in India if their husband and in-laws are dissatisfied with the amount of dowry<sup>5</sup> that the women bring to the marriage.

Frequently, the violence escalates and results in either the young bride's murder or in her suicide.<sup>6</sup> Sudha Jain's case is

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1. See Raka Sinha, *Seven Dowry Victims Go to the Supreme Court*, *EVE'S WEEKLY*, Nov. 26-Dec. 2, 1983, at 16.

2. See *id.*

3. See *id.*

4. *Id.*

5. Dowry usually refers to gifts given during the marriage to the son-in-law or his parents in cash or kind. See RANJANA KUMARI, *BRIDES ARE NOT FOR BURNING* 1 (1989). However, from the point of view of women's status, dowry has to be looked at as constituting: 1) gifts given to the bride but usually not considered her exclusive property; often the content and value of these gifts are settled before the marriage and announced openly or discreetly; 2) gifts given to the bridegroom before and at marriage; 3) gifts presented to the bride's in-laws. See *id.* "The settlement often includes the enormous expenses incurred on travel and entertainment of the bridegroom's party. The gift-giving often continues through the first few years of marriage . . ." *Id.* (footnote omitted).

6. See S.C. Sahu, *Marriage—Why Dowryless?—A Medicologist's Considerations*,

typical; her husband, her mother-in-law, and her brother-in-law caught hold of her, poured kerosene on her body, and set her on fire.<sup>7</sup>

The National Crimes Record Bureau of India recorded in 1995 that an average of seventeen dowry deaths take place every day in India.<sup>8</sup> In 1994, the official number of recorded dowry deaths totaled 4935, and in 1993 the figures reached almost 6000.<sup>9</sup> Unless India aggressively addresses the problem of dowry and dowry violence, innocent young women will continue to die in alarming numbers.

This Note proposes that the focus of India's dowry legislation be on ensuring that women have control over the property that passes to their husbands and in-laws in the form of dowry. Gift-giving by the bride's parents to the bridegroom's family is so deeply entrenched that simply prohibiting dowry does not allow the conclusion that it will not be practiced. Ensuring that the woman benefits from the dowry property, however, will effectively raise her financial and social status in the home of the in-laws. It may also be the only economic security for non-working women.

India's current dowry prohibition and dowry violence laws have been largely ineffective in curbing either the dowry practice or the violence because the laws are too vague and do not adequately address socio-cultural constraints. Therefore, Part II of this Note addresses the socio-cultural constraints that perpetuate the practice of dowry and result in the violence

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in DOWRY: DIAGNOSIS & CURE 1, 2 (Bibekananda Das ed., 1989).

7. See V. Kumar, *Death for Bride-Killers*, EVE'S WEEKLY, July 30-Aug. 5, 1983, at 14. Sudha Jain was found dead in her in-laws' home. When the police reached the scene of the crime, they found a stove with a pot of milk on it, a match-box, and some burnt, wet pieces of cloth which smelt of kerosene. See *id.* The in-laws claimed that Sudha had accidentally caught fire while heating milk on the stove. See *id.* In dowry-related murders, pouring kerosene over the woman and setting her alight is the most common method of killing her because kerosene is readily available in almost every household. See Sahu, *supra* note 6, at 2. Furthermore, the murder can easily be made to look like a kitchen accident since burning the woman is the surest way of destroying evidence of foul play. See *id.*

8. See Rani Jethmalani, *Introduction to KALI'S YUG: EMPOWERMENT, LAW AND DOWRY DEATHS* 13, 14 (Rani Jethmalani ed., 1995). The National Crimes Record Bureau is a division of the Ministry of Home Affairs of the Government of India. It maintains data on national crime and publishes it in its annual publication, *Crime in India*. See, e.g. NATIONAL CRIMES RECORDS BUREAU, CRIME IN INDIA 1994 (1996) [hereinafter CRIME IN INDIA 1994].

9. See CRIME IN INDIA 1994, *supra* note 8, at 212.

against women. It traces the socio-cultural history of the dowry practice in order to show that voluntary gift-giving creates incentives for violence against women. India cannot realistically address this concern by prohibiting voluntary gift-giving altogether; such a prohibition has potentially adverse consequences to non-working women, for whom the gifts provide the sole source of economic security. Nevertheless, the legislation could be drafted carefully to place a cap on voluntary gift-giving to prevent extortion from the woman's parents and to punish stringently the misappropriation of the woman's property.

Part III of this Note examines India's legislative response to the practice of dowry and dowry violence. Part IV analyzes the strengths and weaknesses of India's legislation, and examines the responses of courts and law enforcement agencies towards it. Finally, this Note makes recommendations to strengthen the enforcement of India's legislation in light of socio-cultural constraints.

## II. THE DEFINITION OF DOWRY: ITS HISTORICAL AND CULTURAL ROOTS AND ITS MANIFESTATION IN THE TWENTIETH CENTURY

"Dowry" is movable or immovable property that the bride's father or guardian gives to the bridegroom, his parents, or his relatives as a condition to the marriage, and under duress, coercion or pressure.<sup>10</sup> In the past few decades, dowry has become a means of attaining quick money and consumer goods that provide luxuries.<sup>11</sup> The bridegroom's family expects an exorbitant dowry which has no relation to the bride's father's income and wealth.<sup>12</sup>

Frequently, the bride's parents are financially unable to pay the amount that the bridegroom's family expects from them.<sup>13</sup> Since insufficient dowries usually result in the physi-

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10. See Rani Jethmalani & P.K. Dey, *Dowry Deaths and Access to Justice*, in KALI'S YUG, *supra* note 8, at 36, 38; see also KUMARI, *supra* note 5, at 43-46; B. DEVI PRASAD & B. VIJAYALAKSHMI, DOWRY RELATED VIOLENCE TOWARD WOMEN 1 (1988).

11. See KUMARI, *supra* note 5, at 1-2; PRASAD & VIJAYALAKSHMI, *supra* note 10, at 1-2.

12. See KUMARI, *supra* note 5, at 1-2; Vijayendra Rao, *Wife-beating in a Rural South Indian Community*, in SOUVENIR OF THE FIRST INTERNATIONAL CONFERENCE ON DOWRY AND BRIDE-BURNING IN INDIA 14-1, 14-2 (1995) [hereinafter DOWRY CONFERENCE SOUVENIR].

13. See Rao, *supra* note 12, at 14-2; see also PRASAD & VIJAYALAKSHMI, *supra*

cal and emotional abuse of the daughter by the husband and in-laws, parents attempt to preserve the marriage by struggling, "often desperately, to find ways and means of raising money . . . to please"<sup>14</sup> the husband and in-laws.

*A. The Ancient Custom of Voluntary and Affectionate Gift-Giving to the Bride, Bridegroom, and Bridegroom's Family*

"Dowry" is frequently misconceived as a concept rooted in Hindu Law and as a custom that originated in ancient times through the practices of *varadakshina*<sup>15</sup> and *kanyadaan*.<sup>16</sup> *Varadakshina* and *kanyadaan* were essentially presents that the father of the bride gave to the bridegroom and his father voluntarily, and not as consideration for the marriage.<sup>17</sup> These presents were given and received in the context of marriage as a sacrament and not as a contract under Hindu Law.<sup>18</sup>

In addition to giving presents to the bridegroom and his father at the time of marriage, the relatives and friends of the bride also gave presents to the bride. The father voluntarily bestowed his daughter with ornaments and cash within his financial capacity at the time of marriage.<sup>19</sup> He gave these to her in lieu of a share in the immovable, ancestral property.<sup>20</sup> These gifts were meant to assist the newlywed couple in starting a new life.<sup>21</sup> Moreover, these gifts constituted the bride's *strīdhan*, which is defined in the Hindu scriptures (the *Dharmshastras*) as the bride's exclusive property.<sup>22</sup>

*Strīdhan* itself is neither good nor bad, since gifts to the bride are given and accepted in every society as a token of

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note 10, at 2.

14. KUMARI, *supra* note 5, at 55.

15. "Varadakshina" is a token or gift given to the bridegroom by the bride's father. Jethmalani & Dey, *supra* note 10, at 77 n.5.

16. "Kanyadaan" is a gift made by the father of the bride to the father of the bridegroom. *See id.* at 77 n.6.

17. *See id.* at 38-39.

18. *See id.*

19. *See* N.S.J. Rao, *Dowry—An Inevitable Evil to Society and an Unavoidable Curse to Indian Women*, in DOWRY: DIAGNOSIS & CURE, *supra* note 6, at 5, 6.

20. *See id.*

21. *See* Manoj Manjari Patnaik, *Uprooting the Dowry System*, in DOWRY: DIAGNOSIS & CURE, *supra* note 6, at 29, 29.

22. *See* Enrica Garzilli, *Strīdhanam: A Millenary Problem*, in DOWRY CONFERENCE SOUVENIR, *supra* note 12, at 7-1, 7-3 to 7-4.

love. However, *strīdhan* is distinguishable from dowry, which consists of material goods given to the bridegroom and his relatives. As Enrica Garzilli states, "It makes a great difference to receive the dowry as a personal gift given to the bride, which only she has the right to decide its use, and the dowry given to the bridegroom or to his family."<sup>23</sup> If the bride receives the property as a personal gift, that personal gift gives her a certain degree of economic security and power over the control of resources in the functioning of the home. However, the direct transfer of the property as a gift to the bridegroom and his family in the form of dowry restricts the woman's access to it.

### B. *The Emergence of Dowry*

Today, the customary practice of *strīdhan* has given way to the contemporary practice of dowry. Although a woman still brings cash, ornaments, and other material goods with her to the marriage, "most of the dowry payments are not given in the name and control of the brides."<sup>24</sup> Instead, they are "handed over to the groom or his parents."<sup>25</sup> Many women assert that in the early years of marriage, their husbands and in-laws even denied them free access to their own clothing and provided them with a set each morning.<sup>26</sup> Women often do not exercise any rights over this property, apart from those granted to them by their in-laws. The transfer of wealth to the woman in the form of dowry not only denies her a share in the ancestral property, but also effectively deprives her of her *strīdhan*.<sup>27</sup> Since a woman's *strīdhan* may be the only source of economic security for non-working women, its transformation into dowry may make her completely dependent on her husband and in-laws, and as a result, more vulnerable to cruelty and abuse.

The modern practice of dowry did not originate from the ancient Hindu customs of *varadakshina* and *strīdhan*, since dowry and bride burning do not exist all over India.<sup>28</sup> For in-

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23. *Id.* at 7-3.

24. PRASAD & VIJAYALAKSHMI, *supra* note 10, at 2.

25. *Id.*

26. See KUMARI, *supra* note 5, at 51.

27. See *id.* at 50.

28. See Ram Narayan Tripathi, *Hindu Marriage System, Hindu Scriptures and Dowry and Bride-Burning in India*, in DOWRY CONFERENCE SOUVENIR, *supra* note

stance, the Hindu community native to the Indian state of Assam does not engage in the practices of dowry and bride burning, and they are "no less Hindu than the so called Hindus of North India where thousands of brides are killed every year for dowry."<sup>29</sup> Furthermore, statistics provided by the National Crime Records Bureau indicate that the practices of dowry and bride burning are concentrated in the urban areas of North India, including Delhi, Punjab, Uttar Pradesh, Bihar, and West Bengal.<sup>30</sup> Dowry deaths also occur among North Indian families who settled in but are not native to the states of Assam, Nagaland, and Maharashtra.<sup>31</sup> However, some states, such as Arunachal, Goa, Manipur, Meghalaya, Mizoram, Sikkim, Daman & Diu, Dadra, and Lakshadweep, are untouched by dowry deaths.<sup>32</sup>

### 1. Historical Explanation for Dowry

One explanation for the emergence of dowry is that it arose in the thirteenth or fourteenth century in response to Muslim invasions and the spread of Muslim rule that threatened the Hindu religion and worsened the economic conditions of Hindu society.<sup>33</sup> To protect their religion, Hindus became more rigid in their caste<sup>34</sup> and religious observances and sought to marry within their castes and sub-castes.<sup>35</sup> Since the downturn in economic conditions increased the difficulty of finding a bridegroom of sound economic and social standing, parents of daughters found themselves bidding on the bridegroom to avoid the risk of an unsuitable match.<sup>36</sup> Consequent-

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12, at 17-1, 17-6.

29. *Id.*

30. See Himendra B. Thakur, *Practical Steps Towards Saving the Lives of 25,000 Potential Victims of Dowry and Bride-Burning in India in the Next Four Years*, in DOWRY CONFERENCE SOUVENIR, *supra* note 12, at 16-1, 16-2, 16-6 tbl.1.

31. See *id.* at 16-2.

32. See *id.*

33. See KUMARI, *supra* note 5, at 18.

34. Caste is "a system of social stratification more rigid than a class and characterized by hereditary status, endogamy, and social barriers rigidly sanctioned by custom, law, or religion." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 348 (17th ed. 1976). In India, the caste system essentially determined an individual's social status. Arranged from highest to lowest in the social order, the five primary castes are *Brahman*, *Kshatriya*, *Sudra*, *Vaisya*, and *Varna*. See *id.*

35. See KUMARI, *supra* note 5, at 18.

36. See *id.*

ly, dowry became the most dominant factor in the settlement of marriage as it came to be demanded instead of being voluntarily offered.<sup>37</sup> In the medieval period, dowry was prevalent only among certain upper castes, especially among the Rajput kings,<sup>38</sup> but by the eighteenth century, lower castes and classes began to practice dowry as well.<sup>39</sup>

Marriage began to lose its sanctity and became commercially contractual as "Hindu traditions suffered a period of at least 333 years of continuous anarchy during which survival was the top priority . . . ."<sup>40</sup> Consequently, dowry was the manifestation

[of the] overall decadence during which individuals survived by sacrificing many values, which resulted in degeneration of all dimensions of life, including corruption of some scriptures. The period of degeneration continued for such a long time that it became a second nature of the people, and they forgot how the customs started in the first place.<sup>41</sup>

Consequently, the contractual nature of marriage, which arose from a perceived necessity to maintain cultural traditions, established a firm foundation for the commercialization of marriage upon which the dowry practice thrives.

## 2. Dowry in the Twentieth Century: A Manifestation of Consumer Greed and Its Various Forms

The decline in moral values and the greed for consumer goods partly explains why dowry in the twentieth century has assumed such alarming proportions and has permeated even those communities and classes that traditionally did not accept the practice. Dowry has spread to all religious communities, including Christians and Muslims in India, as a means of achieving upward social mobility.<sup>42</sup> Dowry giving and taking

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37. *See id.*

38. *See id.* The Rajput kings, who ruled ancient and medieval India before the spread of Muslim rule in the 13th and 14th centuries, belonged to the upper castes. *See id.* The practice of dowry began with them, as they were forced to give their daughters in marriage, along with numerous costly gifts in order to avoid humiliating defeats. *See id.*

39. *See id.* at 18-19.

40. Tripathi, *supra* note 28, at 17-6.

41. *Id.* at 17-8.

42. *See* Jethmalani & Dey, *supra* note 10, at 39; KUMARI, *supra* note 5, at 35-



bears "little relation to class, caste, educational level or working status" and the "single underlying factor is the desire to 'keep up with the Jonases [sic].'"<sup>43</sup> In other words, the financial value of the dowry given or taken symbolizes the social status of both families, and dowry becomes the mechanism through which the two families exhibit their wealth in order to maintain their status with families living next door or in the same social circle or strata.

This link between dowry and financial and social status helps to explain why dowry is more prevalent in urban areas and among educated families. Urban and educated families are more likely to be conscious about their financial and social status, and to seek to maintain the status quo. Consequently, they view dowry wealth as a method of financing their sons' education or repaying debts already incurred for the education of sons.<sup>44</sup>

Although both the givers and takers of dowry view it as a symbol of social status and custom, the takers, the bridegroom's family, usually set the dowry rates. The bridegroom's family has greater bargaining power to set these rates because the bridegroom's economic value is associated with his education and earning potential, whereas the bride's level of education and earning potential are relevant only insofar as they make her a potentially better wife and mother.<sup>45</sup> Since Indian society views marriage as the ultimate goal for women, and since the social status of her natal family is associated with the social status of the family that she marries into, the bridegroom's family can increase the dowry rate in proportion to the level of education and employment of the bridegroom.<sup>46</sup>

Furthermore, the bridegroom and the in-laws can extract further dowry in indirect and underhanded ways.<sup>47</sup> For instance, they may change and increase the dowry rate well above the agreed amount after the bride is married.<sup>48</sup> The

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43. KUMARI, *supra* note 5, at 37.

44. See Patnaik, *supra* note 21, at 30; Sahu, *supra* note 6, at 1-2; see also *infra* note 80.

45. See Jethmalani & Dey, *supra* note 10, at 39.

46. See Rao, *supra* note 19, at 6.

47. See KUMARI, *supra* note 5, at 43.

48. See *id.* at 37.

woman becomes a continuous source of unearned surplus as the husband and in-laws extort more and more money and goods from the woman's parents over the course of many years by starving her, beating her, and ultimately by threatening to desert the woman upon failure to comply with their demands.<sup>49</sup>

Sometimes, the bridegroom and his family do not demand dowry at all prior to marriage, and the demands come later.<sup>50</sup> One Delhi study<sup>51</sup> showed that in sixty percent of the cases, dowry was not demanded until after marriage.<sup>52</sup> After marriage, dowry was demanded by the husband as a payment for not deserting the "highly dispensable" and "easily disposable" wife.<sup>53</sup> In eighty-five percent of these cases, the woman's parents voluntarily agreed to these demands.<sup>54</sup> They did so as most parents of daughters attempt to do in India, because they associate marrying their daughters and giving dowry as part of their duties as parents.<sup>55</sup>

Essentially, the husband and in-laws are able to extort dowry from the woman's parents because they are aware of the stigma that attaches to a woman and her natal family when a married woman "has been thrown out of the house."<sup>56</sup> Thus, the husband's family uses this social reality as a bargaining tool to meet its material demands.

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49. *See id.* at 55-56.

50. *See id.* at 44-45.

51. The study was conducted by Ranjana Kumari, who has been the Director of New Delhi's Centre for Social Research and the Vice-President of the all-India women's organization *Mahila Dakshata Samiti*. *See generally id.* at 23-28. The geographic scope of the 1986 study focused on Delhi because it had the highest number of registered dowry cases. *See id.* at 25. Data was collected through formal structured interviews of dowry victims, their parents, and husbands for quantitative information regarding the problems of dowry and dowry victims and through informal interviews for qualitative information. *See id.* at 27-28. The study was limited to dowry victims who had reported for help or legal actions during the calendar year 1985, with the police, the Anti-Dowry cell, women's organizations, or the press. *See id.* at 25. "Dowry victim" refers to anyone harassed, mentally or physically, upon failing to bring in marriage the demanded amount of dowry in cash or in kind or both. *See id.* It also includes those who committed suicide or were murdered or deserted by husbands for failure to bring the demanded dowry. *See id.*

52. *See id.* at 44.

53. *Id.* at 45.

54. *See id.*

55. *See id.* at 44.

56. *Id.* at 37.

Even when the husband and in-laws do not explicitly demand cash and goods after the initial giving of dowry at the time of marriage, they implicitly expect it as a community tradition—as a token of respect, affirming the higher social status of the husband and his family over the inferior status of the wife and her natal family.<sup>57</sup> What was once a casual custom of giving gifts to the bride has become mandatory as the husband's family expects a renewed flow of gifts

when a child is born; when the child is named; when the new baby's face is shown to the maternal grandparents; when the baby first eats solid food; when his head is shaved off, etc. After the second child is born the whole unending cycle repeats itself with a renewed momentum.<sup>58</sup>

The husband, in-laws, and Indian society generally interpret the non-compliance of the woman's family with traditions as a sign of disrespect.<sup>59</sup> Therefore, the woman's parents attempt to meet the expectations of the husband and in-laws because they view gift-giving to in-laws as part of their duty to their daughters.<sup>60</sup> However, the decline in moral values and the greed for material objects only partly explains the emergence of dowry and the associated rise in the murders of young brides.

### 3. The Resilience of Dowry as a Reflection of Deeply Embedded Patriarchal Values

The emergence of dowry also reflects the views of a deeply rooted patriarchal society that the daughter is a special gift to be given away at the time of marriage.<sup>61</sup> The gift of the daughter does not necessarily reflect her subjugation in a patriarchal society, but rather reflects the family's sacred duty to society to give the girl-child to another family for whom she will bear the valuable gift of a new generation.<sup>62</sup>

Nevertheless, the premium placed on marriage as the

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57. *See id.* at 43-44.

58. *Id.* at 43.

59. *See id.*

60. *See id.* at 44, 46.

61. *See* Werner Menski, *Dowry: A Survey of the Issues and the Literature*, in DOWRY CONFERENCE SOUVENIR, *supra* note 12, at 11-1, 11-6.

62. *See id.*

ultimate goal for the daughter perpetuates the societal view of women as economically and emotionally dependent beings who need to be protected and sheltered so that they can assume their reproductive functions. Within this context, dowry reflects the price that the bride's parents must pay to the bridegroom's family to maintain the woman. The giving and taking of dowry reflect patriarchal values and subjugates women.

These patriarchal values are deeply entrenched in Indian society, as they are passed down through generations in the form of myths.<sup>63</sup> Indian mythology portrays women as economically and emotionally dependent on men as wives, mothers, sisters, and daughters.<sup>64</sup> Myths that portray women with intelligence, vision, and wisdom simultaneously exhibit the desire of women to be protected and sheltered.<sup>65</sup> Men expect women to embody this definition of womanhood, and women attempt to meet these standards.<sup>66</sup> Thus, dowry is

[the] manifestation of the political, economic and cultural insignificance of women both in her natal family and in the family in which she enters in marriage. Having always been considered an economic liability within her natal home, she is considered a temporary visitor until she departs in marriage to her husband's home. Dowry has to be given so as to compensate this non-productive being, even when the woman is educated and has her own job and is not economically dependent on her husband.<sup>67</sup>

This explanation for the emergence of dowry and its persistence in the late twentieth century holds great weight since a woman's acquisition of higher education and earning potential does not necessarily lower or eliminate the dowry rate demanded by the in-laws. As one Delhi study<sup>68</sup> indicates, husbands have little respect for the education of their wives, who can also contribute to family income.<sup>69</sup> Moreover, the husband and in-laws might still expect and demand dowry despite the

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63. See Jethmalani, *supra* note 8, at 14.

64. See *id.*

65. See *id.*

66. See *id.*

67. Jethmalani & Dey, *supra* note 10, at 39.

68. See *supra* note 51 and accompanying text.

69. See KUMARI, *supra* note 5, at 34.

woman's education and working status.<sup>70</sup>

In fact, a woman's education may actually increase the dowry rate instead of reducing or eliminating it, because a higher level of education implies that the woman has been kept unmarried for a longer period of time.<sup>71</sup> Advanced age and education may reduce her desirability in the marriage market because they may be perceived as making her less physically attractive or less likely to be fair, shy, chaste, or obedient—qualities that are viewed as desirable in a woman.<sup>72</sup>

The social undesirability of postponing marriage for a woman beyond her late teens or early twenties reinforces the low value accorded to the education and economic self-sufficiency of women in Indian society. Frequently, a woman is encouraged to pursue an education only to the extent that it places her "in the social strata of men who may be likely candidates for marriage."<sup>73</sup> A woman who acquires an education with the goal of becoming economically self-sufficient is generally viewed as being either licentious or arrogant.<sup>74</sup> Thus, she is still discouraged, and often prohibited, by her family and in-laws from earning an independent income.<sup>75</sup>

When the husband and in-laws allow the woman to work, they usually expect her to give her salary to them.<sup>76</sup> Essentially, her salary acts as a method of compensation for the insufficient or inadequate dowry that she brings with her to the marriage. Thus, the woman's economic dependence on men is part of the social definition of womanhood, and the system of dowry thrives despite the increase in the education of women.<sup>77</sup>

70. *See id.* at 33.

71. *See* Rani Jethmalani & Shally Prasad, *Internalizing Patriarchy*, in KALI'S YUG, *supra* note 8, at 138, 142.

72. *See id.*

73. *Id.*

74. This conclusion was drawn by the Delhi-based Women's Action Research and Legal Action for Women (WARLAW) based on recent studies that it conducted. *See id.* at 143. WARLAW was founded in 1992 by Rani Jethmalani who argues cases at the Indian Supreme Court level. WARLAW has conducted cases referred to it by several women's organizations, and is currently handling 85 such cases in the District Court, High Court, and Supreme Court. *See id.*

75. *See id.* at 142. Recent gender statistics disclosed by the Union Department of Statistics show that the literacy rate among women in India is 39.42%. *See id.* The female work participation rate is 22.69%. *See id.*

76. *See id.*

77. *See id.* at 142-43.

*C. The Nature of Dowry Violence and the Urgency of Effective Legislation Prohibiting Dowry and Dowry-Related Violence*

Dowry violence occurs when the husband and in-laws are dissatisfied with the amount of cash, ornaments, and consumer goods that the woman's family presents to them during the first few years of marriage.<sup>78</sup> Usually, it comes to light only

when there is a violation of the customary arrangements and expectations concerning a particular marriage. We only come to know of dowry problems when one side refuses to honour its part in the arrangements or when the other side exploits its assumed position of strength and superiority by demanding more and more.<sup>79</sup>

This is because dowry is socially acceptable, and the woman's parents themselves concede to the demands that fall within their capacities.<sup>80</sup>

Ordinarily, the woman endures the violence and remains in the in-laws' home in order to live up to the "respectable position of wife or daughter-in-law in society" and upon the urging of her parents.<sup>81</sup> The woman's parents usually encourage her to endure the violence with "silent courage" and advise her to adjust to her new family,<sup>82</sup> primarily because they fear the stigma of a married daughter leaving the home and returning to her parents.<sup>83</sup> Their way of protecting her from abuse is to succumb to the demands of the husband and in-laws be-

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78. See *supra* text accompanying notes 1-5; PRASAD & VIJAYALAKSHMI, *supra* note 10, at 3. Dowry-related problems usually arise when: 1) a bride's parents fail to meet dowry demands over and above what had been agreed upon at the time of marriage; 2) the remaining portion of a promised dowry is left unpaid; 3) the husband and in-laws are dissatisfied with the items given; 4) the bride's parents make false promises out of fear that their daughter might remain unmarried; or 5) the parents of the bride are unable to meet the expectations of the husband and in-laws, which may change over time. See *id.* at 3-4.

79. Menski, *supra* note 61, at 11-8.

80. See Jethmalani & Dey, *supra* note 10, at 39; KUMARI, *supra* note 5, at 2. Proponents of dowry justify the practice as a way of providing a girl with a share of the family property. Kumari notes: "Parents who demand dowry justify it on several grounds. Firstly, since they have to pay dowry for their daughter, why not take it for their sons? Secondly, fathers of educated boys want to get back the money spent on the son's education." *Id.*

81. KUMARI, *supra* note 5, at 61.

82. See *id.* at 62.

83. See *id.*

cause they measure her well-being in terms of remaining married.<sup>84</sup> The daughter feels duty-bound to preserve the marriage because of the huge expenditures incurred by her parents.<sup>85</sup>

Because there is a socio-cultural emphasis on marriage as the ultimate goal for women, a woman's education and her ability to earn an independent income do not make her less susceptible to dowry-related violence and murder. In fact, her economic independence may become another vehicle through which the husband and in-laws can extract money from her. Any defiance on her part may heighten the abuse. For instance, Tripta Sharma was physically and mentally harassed and tortured by her husband and in-laws for not giving her full salary to them until one day she was burned to death in the house of her in-laws under mysterious circumstances.<sup>86</sup>

Even when the woman gives her earnings to her husband or her in-laws or both, they may still physically and emotionally abuse her for not bringing sufficient dowry to the marriage.<sup>87</sup> Despite her economic self-sufficiency, she may choose to live with the violence until her husband or in-laws murder her as did the in-laws of twenty-seven-year old Usha.<sup>88</sup> In a letter to a friend, she wrote: "When I go back from work no-one speaks to me. They don't offer me tiffin or coffee. My husband is a coward and I am giving all my earnings to him."<sup>89</sup> Within one year of marriage, Usha was dead.<sup>90</sup>

Other times, educated and economically self-sufficient women falsely believe that they can control the abuse by using their own salaries to buy things the in-laws want, as did Ph.D. graduate of physics Sangeeta Goel.<sup>91</sup> Sangeeta was acting like a "dutiful" daughter when she told her parents that they should not worry about her and that she would win the hearts

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84. *See id.*

85. *See id.*

86. *See* Jethmalani & Dey, *supra* note 10, at 60-63.

87. *See* Daksha Hathi, *Bride Burning and After: Making a Farce of Tragedy*, DECCAN HERALD (Bangalore, India), Sept. 24, 1994, Society sec., at 7.

88. *See id.*

89. *Id.*

90. *See id.*

91. *See* Satya Agarwal, Speech at the First International Conference on Dowry and Bride-Burning in India, Harvard Law School (Sept. 30-Oct. 2, 1995) (uncle of Sangeeta Goel, speaking about dowry violence and his niece's case) (videotaped copy of conference on file with author).

of her in-laws. But her salary did not meet the demands of her in-laws and five months into the marriage, on April 14, 1994, she was found poisoned in the house of her in-laws under mysterious circumstances.<sup>92</sup> These tragic deaths support the conclusion that the woman usually perceives two options: living with the abuse until her husband or in-laws kill her; or committing suicide when the abuse becomes unbearable.

*D. Why Prohibit Dowry? Why Education and Inheritance Rights Will Not Dismantle the Dowry System and Dowry Violence*

The social acceptance of violence against women in connection with dowry, and the loyalty of women and their families to the institution of marriage, suggest that simply expanding the educational and economic opportunities for women will not dismantle the system of dowry and dowry-related violence. Women are likely to stay in violent marriages despite their educational and employment status, as the cases of Usha, Tripta Sharma, and Sangeeta Goel indicate.<sup>93</sup> Their assertions of economic independence threaten the stability of the power structure in the in-laws' home and makes them vulnerable to death by murder or suicide.

Similarly, giving inheritance rights to women in place of dowry does not necessarily suggest the conclusion that the practice of dowry and dowry-related violence will disappear. While giving inheritance rights to women is desirable because such rights provide women with economic security, a woman's assertion of these rights may also pose a threat to the stability of the power structure in the in-laws' home and make the woman vulnerable to violence in the absence of social support from her parents and brothers.

Furthermore, a woman's inheritance may only disguise the practice of dowry since the bridegroom and his family may then seek the bride who inherits the greatest amount of property.<sup>94</sup> Consequently, the bride's life may still be in danger if her husband or in-laws decide at some point during the marriage that the value of the property or income derived from the

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92. *See id.*

93. *See supra* text accompanying notes 86, 88-92.

94. *See* Menski, *supra* note 61, at 11-2.



property is insufficient. Or, if the husband or in-laws find the income potential of the property to be insufficient, they may still demand dowry to compensate for the shortfall; if the woman's parents refuse or are unable to meet the demand, the woman would remain vulnerable to cruelty, harassment, and murder by her husband and in-laws. Thus, giving inheritance rights to women might transform the nature of dowry without eliminating it and without offering real protection to women.

In addition, if the woman is the sole benefactor of the inherited property, the husband and in-laws might still demand dowry because they would not reap the benefits of the property.<sup>95</sup> Although the woman may acquire financial security through her share of inherited property, she may be reluctant to fight for her inheritance rights at the cost of alienating her brothers who customarily inherit all of the parents' property.<sup>96</sup>

Thus, the only real and practical solution to reducing and eliminating the practice of dowry and dowry-related violence is to create a social environment for women in which they can enjoy the expansion of educational and economic opportunities and the inheritance rights that should be given to them as equal members of society. To create this social environment, the legal system should aggressively condemn the practice of dowry and dowry-related violence, since the violence against women is intimately related to property and the rights of women over their personal property.

### III. INDIA'S LEGISLATIVE RESPONSE TO THE DOWRY PRACTICE AND TO DOWRY-RELATED VIOLENCE

India has taken steps to penalize violence against women and to acknowledge the intimate relationship between violence and property. In 1961, India passed the Dowry Prohibition Act,<sup>97</sup> the first systematic law to prohibit dowry<sup>98</sup> and the

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95. See Ved Kumari, *State's Response to the Problem of Rape and Dowry*, in *WOMEN & LAW: CONTEMPORARY PROBLEMS* 104, 124 (Lotika Sarkar & B. Sivaramayya eds., 1994).

96. See *id.*

97. Dowry Prohibition Act, No. 28, 6 INDIA CODE 40E (1961).

98. The original Dowry Act defined dowry as:

[A]ny 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;

demand for dowry. India amended this Act twice, once in 1984 and again in 1986, in order to rectify several inherent weaknesses and loopholes in the Act.<sup>99</sup> Nevertheless, the ambiguity in the definitions of "dowry" and "demand for dowry," along with weak enforcement mechanisms, continue to limit the Act's effectiveness in curbing the practice of dowry.<sup>100</sup>

In 1986, an amendment to the Dowry Prohibition Act introduced the offense of dowry death into the Indian Penal Code.<sup>101</sup> This offense deems the husband or his relatives to have caused the woman's death in cases where the woman dies of burns or bodily injury under unnatural circumstances within seven years of marriage and where there is evidence that she suffered cruelty and harassment in connection with dowry.<sup>102</sup> Nevertheless, the ambiguity in the definitions of "dowry" and "cruelty," and the requirement of proof of the link between the two, pose an onerous evidentiary burden for the prosecution.<sup>103</sup>

To address the problem of proof in dowry murders, the Dowry Prohibition (Amendment) Act of 1986 introduced section 113B into the Indian Evidence Act.<sup>104</sup> Section 113B creates

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or

(b) by the 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 after the marriage as consideration for the marriage . . . .

*Id.* § 2(a)-(b).

99. In 1984, the Act was amended to replace "as consideration of the marriage" with "in connection with the marriage." Dowry Prohibition (Amendment) Act, No. 63, § 2(a)-(b) (1984). In 1986, the definition of dowry was further amended to include any property given "any time after the marriage." Dowry Prohibition (Amendment) Act, No. 43, § 2, 1986 A.I.R. 73 (Nag.) 188. *See infra* notes 116-17 and accompanying text.

100. *See* discussion *infra* Part IV.A.1-5, 7-8.

101. INDIA PEN. CODE § 304B, *as amended* by Dowry Prohibition (Amendment) Act, No. 43, § 10, 1986 A.I.R. 73 (Nag.) 188. The dowry death offense under § 304B reads:

Where the 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 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.

*Id.*

102. *See id.*

103. *See* discussion *infra* Part IV.A.6.

104. Indian Evidence Act, No. 1, § 113B, 4 INDIA CODE 11 (1872), *as amended*

the presumption that the husband and in-laws committed the dowry death if the woman was subjected to harassment in connection with dowry before her death.<sup>105</sup> Nevertheless, the seven-year limitation imposed under the dowry death offense provision enables perpetrators to wait to murder their wives until the seven-year limitation has expired.

The Criminal Law (Second Amendment) Act of 1983 introduced section 113A into the Indian Evidence Act.<sup>106</sup> Section 113A creates a presumption of abetting suicide by a married woman if the suicide occurs within seven years from the date of her marriage and if the husband or his relatives had subjected her to cruelty.<sup>107</sup> This provision is desirable because it recognizes the social reality of the cruelty and the abuse of married women that drives them to suicide and the active role of the husband and in-laws in assisting the woman's suicide. However, the seven-year limitation allows offenders to escape penalty for the crime of the abetment of suicide when the seven-year limitation has expired.

Furthermore, the Criminal Law (Second Amendment) Act of 1983 addresses dowry violence short of murder or suicide through the insertion of section 498A into the Indian Penal Code.<sup>108</sup> Section 498A makes physical and mental cruelty to the woman by her husband and in-laws an offense.<sup>109</sup> The in-

by Dowry Prohibition (Amendment) Act, No. 43, § 12, 1986 A.I.R. 73 (Nag.) 191.

105. Section 113B reads as follows:

When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman had been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death.

*Id.*

106. Indian Evidence Act, No. 1, § 113A, 4 INDIA CODE 11 (1872), *as amended* by Criminal Law (Second Amendment) Act, No. 46, § 7, 1984 A.I.R. 71 (Nag.) 70.

107. Section 113A states:

When the question is whether the commission of suicide by a woman had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband had subjected her to cruelty, the court may presume, having regard to all other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband.

*Id.*

108. INDIA PEN. CODE § 498A, *as amended* by Criminal Law (Second Amendment) Act, No. 46, § 2, 1984 A.I.R. 71 (Nag.) 68.

109. Section 498A defines cruelty as follows:

tent of this legislation was to bring domestic violence, which was largely considered a private affair, under public scrutiny and state action.<sup>110</sup> However, the ambiguity in the definition of cruelty, and the immense burden of proof required to prove cruelty, make this provision of limited value to victims.<sup>111</sup>

In addition to the above legislation, which attempts to reduce the practice of dowry and dowry-related violence, a provision of the Indian Penal Code<sup>112</sup> enables a woman to make a case of criminal breach of trust.<sup>113</sup> It offers women a criminal remedy for the misappropriation of their personal property, or *stridhan*, by their husbands or in-laws.<sup>114</sup> Nevertheless, the general nature of the provision and the "trust" terminology have made lower courts reluctant to apply it to the marital relationship.<sup>115</sup> Consequently, the effectiveness of this provision to protect women's access to property is very limited.

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(a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

*Id.*

110. See D.N. Sandanshiv & Jolly Mathew, *Legal Reform in Dowry Laws*, in KALI'S YUG, *supra* note 8, at 79, 79.

111. See discussion *infra* Part IV.B.1.

112. INDIA PEN. CODE § 405.

113. Section 405 defines criminal breach of trust as follows:

Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust."

*Id.*

114. See *id.*

115. See discussion *infra* Part IV.B.2.

#### IV. ANALYSIS OF INDIA'S LEGISLATIVE RESPONSE TO DOWRY AND DOWRY-RELATED VIOLENCE

##### A. *The Dowry Prohibition Act*

##### 1. The Definition of Dowry

The current version of the Dowry Prohibition Act defines "dowry" as:

[A]ny 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 the parents of either party to a marriage or by any other person to either party to the marriage to any other person,

At or before or any time after the marriage in connection with the marriage . . . .<sup>116</sup>

The words "in connection with the marriage," added in 1984, replace the words "as consideration for the marriage,"<sup>117</sup> which appeared in the original Dowry Prohibition Act of 1961.

On its face, this definition is comprehensive because dowry includes not only what the bridegroom and his family demand or take, or agree to take, but also includes that which the bride and her family demand or take, or agree to take.<sup>118</sup> The words "in connection with the marriage" further suggest that dowry includes any transfer of property or consumer goods that flows from one side to the other in order to complete the marriage transaction or to sustain the marriage arrangement. As such, the definition of dowry suggests that anything given before, after, or at the time of marriage may constitute dowry.<sup>119</sup>

Consequently, the words "in connection with the marriage" are an improvement over the original Dowry Prohibition Act of 1961, which required property or valuable security to be given

116. Dowry Prohibition Act, No. 28, § 2, 6 INDIA CODE 40E (1961), *as amended* by Dowry Prohibition (Amendment) Act, No. 63, § 2 (1984) and Dowry Prohibition (Amendment) Act, No. 43, § 2, 1986 A.I.R. 73 (Nag.) 188.

117. Dowry Prohibition (Amendment) Act, No. 63, § 2(a) (1984).

118. *See* PARAS DIWAN & PEEYUSHI DIWAN, WOMEN AND LEGAL PROTECTION 161 (1995).

119. *See id.* at 150.

or agreed to be given "in consideration of the marriage." To meet the statutory requirement, "in consideration of the marriage," the woman and her relatives had to prove that the husband promised to marry the woman only on the condition that dowry was given, or that dowry was the price paid for the husband's agreement to marry the woman.<sup>120</sup>

Although the words "in consideration of the marriage" sought to distinguish dowry given under compulsion from voluntary gifts given out of love and affection,<sup>121</sup> this provision, in actual practice, operated in favor of the defendant husband and in-laws. Earlier judicial rulings show that the husband and in-laws easily argued that the dowry was given out of natural love and affection and not in return for the promise to marry. For instance, the Supreme Court dismissed Satya Rani Chadha's case, in which the woman's in-laws demanded a scooter two days before the bride was burned to death, on the ground that the demand pertained to a gift on the occasion of the birth of the child and was not in "consideration of the marriage."<sup>122</sup> Despite the insertion of "in connection with the marriage" into the definition of dowry, section 2 remains a major stumbling block in the implementation of anti-dowry laws because the woman and her relatives still bear an immense burden to prove that the gifts were extorted by the in-laws and not voluntarily given.<sup>123</sup> Regardless of the comprehensive definition of dowry under section 2, dowry does not include voluntary and affectionate presents made from one side of the marriage to the other.<sup>124</sup>

Furthermore, the requirement that gifts be given or taken "in connection with the marriage" fails to take into account that marriage transactions are covert in a majority of the cases

120. See KUMARI, *supra* note 5, at 74.

121. See *id.* at 75.

122. PUDD v. Union of India, [1982] 2 S.C.C. 253; see Jethmalani & Dey, *supra* note 10, at 46-49.

123. See KUMARI, *supra* note 5, at 75.

124. See Dowry Prohibition Act, No. 28, § 3, 6 INDIA CODE 40E (1961), as amended by Dowry Prohibition (Amendment) Act, No. 63, § 3(2)(a)-(b) (1984). Section 3(2) states that dowry does not apply to:

(a) presents which are given at the time of a marriage to the bride (without any demand having been made in that behalf) . . . [or]

(b) presents which are given at the time of a marriage to the bridegroom (without any demand having been made in that behalf) . . .

*Id.*

and that the parties have an unwritten understanding not to record such transactions.<sup>125</sup> In the absence of any written record of such transactions, it is difficult to prove that gifts given constitute dowry because they were given or taken "in connection with the marriage." Consequently, dowry takers can easily maneuver around this technicality and extort unlimited amounts of gifts through unrecorded transactions.

The "in connection with the marriage" requirement also overlooks the fact that gifts are likely to be given as a result of subtle community pressures or fear that their daughters may remain unmarried.<sup>126</sup> For instance, gifts may be voluntarily given to the extent that the woman's parents feel that they have an obligation to do so in order to ensure that the marriage takes place smoothly.<sup>127</sup> Or, they may be given after the marriage to ensure the preservation of the marriage or to control or halt the abuse of daughters by the husband or in-laws.<sup>128</sup>

Consequently, the words "in connection with the marriage" serve as an incentive merely for offenders to change the way in which they make their demands for dowry. Instead of explicitly demanding property or valuable security in the form of cash and consumer goods as a condition to the marriage, the husband and in-laws may wait until the marriage takes place before making their demands. The Delhi study supports this view, as it indicates that in sixty percent of the cases, the husband and in-laws made no demands for dowry until after the marriage.<sup>129</sup>

The consequences of maneuvering around the "in connection with the marriage" requirement are significant since educated families, particularly those living in urban areas, are the most likely to know that both dowry and the demand for dowry are criminal offenses under the Dowry Prohibition Act.<sup>130</sup> Therefore, they are the most able to structure their transactions to avoid criminal penalties. The law needs to specifically address this socio-economic group in order to curb the practice,

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125. See KUMARI, *supra* note 5, at 75.

126. See *id.*

127. See discussion *supra* Parts II.B.2-3.

128. See *supra* text accompanying notes 50-56.

129. See *supra* note 51 and accompanying text.

130. See *supra* text accompanying note 44.

since this group widely practices exorbitant forms of dowry.<sup>131</sup>

Another problem posed by the "in connection with the marriage" requirement is that offenders can maneuver around this technicality without even making an explicit demand for cash, property or consumer goods before or after the marriage. The husband and in-laws implicitly expect that the woman's parents will continually supply them with presents throughout the course of the marriage as a matter of custom.<sup>132</sup> Further, since these gifts are expected on every special occasion that occurs during the course of the marriage, they may not necessarily fit the legal requirement of being made "in connection with the marriage."

Another difficulty with the present definition of dowry is that it allows the bridegroom and his parents to take an unlimited amount of gifts from the bride's family on the ground that the gifts were voluntarily given. The bridegroom's family can easily prevail on this argument because the definition of dowry does not take into account the social reality of dowry as a series of payments made by the bride's family to the bridegroom and his family over a course of many years.<sup>133</sup> Nor does the definition of dowry take into account the fact that dowry rates change once the marriage takes place and that the husband's family has greater bargaining power in adjusting the terms of the explicit or implicit marriage contract.<sup>134</sup>

Consequently, the dowry rates charged or expected by the husband and in-laws may be exorbitant, and the bride's family may incur huge financial liabilities and suffer severe financial hardship.<sup>135</sup> Under such circumstances, gift-giving can hardly be called voluntary. Nevertheless, such gift-giving escapes the legal definition of dowry because the Act neglects to put a ceiling on the money spent by the bride's parents on marriage expenses and on presents to the bride, bridegroom, and in-laws.

Therefore, the definition of dowry should be further amended to put a ceiling on the presents voluntarily given to the bride and bridegroom, and on marriage expenses incurred

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131. See Patnaik, *supra* note 21, at 30.

132. See *supra* text accompanying note 57.

133. See *supra* text accompanying note 58.

134. See *supra* text accompanying notes 49-50.

135. See *supra* text accompanying notes 13-14, 60.



by the bride's parents. This recommendation is consistent with the one that the Joint Committee of both Houses in the legislature<sup>136</sup> had made in 1980 after studying the weaknesses of the Dowry Prohibition Act of 1961. The Joint Committee recommended that:

In order to ensure that there is no element of compulsion from the side of the bridegroom for dowry and to curb the evil practice of ostentation in the marriage ceremonies, . . . there is no remedy except to prescribe a ceiling on the presents to be made to the bridegroom or his family members and the total marriage expenses likely to be incurred on different occasions.<sup>137</sup>

However, the legislature elected not to introduce this recommendation into the Dowry Prohibition Act through the 1984 and 1986 amendments.<sup>138</sup> Therefore, the effectiveness of the Act depends greatly on the ability of courts to distinguish between voluntary and forced gift-giving.

Practically, this distinction is very difficult to make unless gift-making is carefully analyzed in the context of the societal and community pressures; there also must be an analysis of the individual dynamics of the husband's and in-laws' home in which the woman lives and the parents' home that she left behind. Therefore, the definition of dowry should be clarified to include gifts given before, during, or after the marriage to the other married party or to that party's relatives in response to explicit or implicit demands or expectations. Putting a ceiling on voluntary gift-giving to in-laws would offer additional protection to the woman's family because it would make it more difficult for the husband's family to extort exorbitant amounts of property under the rubric of voluntary gifts.

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136. On December 19, 1980, the Parliament of India appointed a joint committee of the Houses (the two houses are Lok Sabha and the Rajya Sabha) to examine the effectiveness of the Dowry Prohibition Act of 1961 and to suggest amendments accordingly. *Report of the Joint Committee of the Houses to Examine the Question of the Working of the Dowry Prohibition Act, 1961*, Aug. 6, 1982 [hereinafter *Dowry Report*], reprinted in DIWAN & DIWAN, *supra* note 118, at 435-73.

137. *Id.* § 3.7, reprinted in DIWAN & DIWAN, *supra* note 118, at 462.

138. See DIWAN & DIWAN, *supra* note 118, at 163.

## 2. The Offense of Giving and Taking Dowry and Abetting the Giving and Taking of Dowry

The giving, taking, and the abetting of the giving and taking of dowry is a criminal offense under section 3 of the Dowry Prohibition Act.<sup>139</sup> It is punishable by both imprisonment and a fine.<sup>140</sup> The 1986 amendment to section 3 increased the penalty of the offense from the six-month imprisonment term stipulated in the 1961 document to a five-year minimum with a fine of 15,000 rupees.<sup>141</sup> Despite the stricter penalty under the amended section 3, the Act has been ineffective in reducing the practice of dowry because it limits the broad language of the definition of dowry in section 2, equally penalizes the taker and the giver of dowry, and gives the courts great discretion in reducing the minimum penalty set forth in section 3.<sup>142</sup>

### a. Limiting the Definition of Dowry

Section 3 limits the broad definition of dowry under section 2 by explicitly excluding from the purview of dowry "presents" which are given at the time of marriage to the "bride" or "bridegroom" without any demand having been made for them.<sup>143</sup> It requires the bride to maintain a list of presents that she receives at the time of marriage, and the bridegroom to keep a similar list of his own to record the presents that he receives.<sup>144</sup>

These lists must conform with the Dowry Prohibition (Maintenance of List of Presents to the Bride and Bridegroom) Rules, 1985.<sup>145</sup> These Rules require the bride and bridegroom to include specific information in their respective lists about

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139. Dowry Prohibition Act, No. 28, § 3, 6 INDIA CODE 40E (1961).

140. *See id.*

141. *Id.*, as amended by Dowry Prohibition (Amendment) Act, No. 43, § 3(1)(a)-(b), 1986 A.I.R. 73 (Nag.) 189. A rupee is Indian currency; a fine of 15,000 rupees is roughly equivalent to US\$420.

142. *See discussion infra* Part IV.A.2.a.-c.

143. Dowry Prohibition Act, No. 28, § 3, 6 INDIA CODE 40E (1961), as amended by Dowry Prohibition (Amendment) Act, No. 63, § 3(2)(a)-(b) (1984).

144. *Id.*, as amended by Dowry Prohibition (Amendment) Act, No. 63, § 3(2) (1984).

145. Dowry Prohibition (Maintenance of List of Presents to the Bride and Bridegroom) Rules, 1985, at 9 (1995) (unofficial pamphlet on file with the *Brooklyn Journal of International Law*).

the description and approximate value of the presents given to them and their relationship to the giver.<sup>146</sup> Each must sign his or her respective list.<sup>147</sup>

To constitute "presents" under section 3, gifts must not only appear on the legally required lists, but also must be of a "customary nature" and "not excessive . . . with regard to the financial status" of the giver.<sup>148</sup> However, the terms "customary nature" and "not excessive" are left undefined.<sup>149</sup>

Generally, the section 3 list requirement is desirable from the perspective of the woman's welfare because it facilitates her ability to prove that presents given to her at the time of marriage by her relatives and friends constitute her exclusive personal property or *strīdhan*. In the absence of any such written record, the woman is likely to lose her claim for the recovery of her *strīdhan* because of the almost impossible task of proving which items were given to her as presents at the time of marriage.

Nevertheless, the list is of limited value to the woman because section 3 and the related Rules on the Maintenance of the List do not require both parties to sign and register the lists. The absence of a signature and registration requirement enables both the wife and the husband to back-date and manipulate their respective lists to support their individual claims that the items given to each at the time of marriage constitute "presents" under section 3. The list's amenability to manipulation by both parties weakens the woman's claim for the recovery of her *strīdhan* by reducing the reliability of the list in court.

Consequently, section 3 of the Act should be amended to require both parties to the marriage to register these lists with special courts, which should be designed to handle marital disputes. Provisions should also be made to allow the parties to incorporate into the list any gifts made after the time of marriage. This would protect each of them from the contradictory claims of the other upon the dissolution of the marriage. It would also facilitate control by both the wife and the husband

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146. *See id.* § 2(3)(c)(i)-(iv).

147. *See id.* § 2(3)(d).

148. Dowry Prohibition Act, No. 28, § 3, 6 INDIA CODE 40E (1961), as amended by Dowry Prohibition (Amendment) Act, No. 63, § 3(2) (1984).

149. *See id.*

over their respective personal property. Furthermore, the registration requirement would enable parents to give presents directly to the daughter in her name and for her benefit. Since marriage transactions would be recorded, the woman's property rights would be more secure under this scheme, and husbands and in-laws would have less maneuverability to compel the woman's parents to hand over presents directly to them.

To a certain extent, the registration requirement would restore the practice of *strīdhan* in place of dowry. Since *strīdhan* is often the only source of economic security for women, the conversion of dowry into *strīdhan* would offer the woman more control over the resources in the functioning of her new home and, along with such control, greater social status within the family structure. The woman then will not be compelled to complain, as many women currently are, that her husband and in-laws control her and deny her free access to food, clothing, cash, and ornaments.<sup>150</sup>

The Joint Committee of Parliament also acknowledged that listing and registering presents in the bride's name would help to ensure that the cash, clothes, and ornaments given to her are for her exclusive benefit.<sup>151</sup> The Joint Committee went further and recommended that:

[I]n order to make the position of the bride more secure and to see that her presents are not misappropriated by her husband or her in-laws on one pretext or the other, such presents should neither be allowed to be transferred nor disposed of for a minimum period of five years from the date of marriage without the prior permission of the Family Court (by whatever name called) on an application made by her.<sup>152</sup>

Incorporating such a requirement on the use and disposal of the bride's personal property into section 3 would offer the bride additional legal protection over the control and use of her

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150. See *supra* text accompanying notes 24-26.

151. See *Dowry Report*, *supra* note 136, § 3.6, reprinted in DIWAN & DIWAN, *supra* note 118, at 461. The Joint Committee stated in its Report that:

[I]n order to make . . . sure that the presents, in the form of cash, ornaments, clothes or other articles made to the bride at or before or after the marriage, are exclusively for the bride's benefit, they should be listed and registered in her name.

*Id.*

152. *Id.*, reprinted in DIWAN & DIWAN, *supra* note 118, at 461-62.

property. This legal control could give the bride greater bargaining power over its use in the context of her relationship with her husband and in-laws.

Despite the desirability of provisions that require the registration of lists and that control the husband's and in-laws' access to the woman's property, these provisions may only nominally affect the woman's control over her personal property. The list might not serve its function of facilitating the distinction between presents and dowry because the woman has social and cultural incentives to keep many items off the list. She has the intense pressure of adjusting to a new lifestyle in a new home as she tries to win the hearts of in-laws who judge her more by the amount of material goods that she brings with her than by her personal qualities.<sup>153</sup> She also bears the societal burden of making the marriage work and fears the social stigma associated with divorce or her husband's and in-laws' desertion of her.<sup>154</sup> Furthermore, the huge financial investment that the woman's parents make in her marriage deters the woman from doing anything in the marriage that could upset her husband and in-laws,<sup>155</sup> including keeping a list.

Aside from socio-cultural constraints, the list requirement is a limited vehicle for protecting the woman's property because it is antagonistic to the concept of marriage. Marriage implies unity and creates the expectation that the presents they each receive at the time of marriage are for their joint ownership and enjoyment. Any attempt by the bride to make a technical distinction between the presents made to her and those made to her husband is likely to instigate family disharmony. Her in-laws are more likely than not to interpret her actions as a reflection of her poor moral character—her greed, arrogance, and licentiousness.<sup>156</sup> And, she is unlikely to begin her marriage with a fight over property that would make her difficult transition even more difficult. She has greater incentives to postpone making any claims over her property until she has greater footing in the marriage.

Even where the bride may want to register certain presents in her own name for her protection, her husband and in-

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153. See discussion *supra* Part II.B.2.

154. See KUMARI, *supra* note 5, at 61-62.

155. See *id.* at 62.

156. See *supra* note 74 and accompanying text.

laws may compel her not to do so. They can still use the list requirement as a tool to manipulate her and to reinforce her low position in the family structure. If she refuses to comply with their wishes, they can threaten to desert her or kill her, and to bring a new bride into the family.<sup>157</sup> The husband and in-laws can easily justify their actions by placing the blame on the woman for her alleged incapacity to adjust to the new family setting. Moreover, her parents may urge her to adjust to the new family setting.<sup>158</sup> Against these socio-cultural pressures, the woman is likely to yield to the demands of her husband, in-laws, and parents. Nevertheless, the registration requirement, along with provisions intended to control the husband's and in-laws' access to her property, should be legislated in order to make it more difficult for the husband and in-laws to extort all of her property.

Furthermore, section 3 should remove the requirement for gifts made at the time of marriage to be of a "customary nature" and "not excessive with regard to the financial status of the giver." The terms "customary nature" and "not excessive" are too ambiguous to effectively deter the husband and in-laws from extorting unlimited gifts from the woman's parents under the guise of voluntary gift-giving. Instead, putting a ceiling on the value of transferable, voluntary gifts would more effectively control the amount of wealth that passes between the families.

#### b. Penalizing the Giver and Taker of Dowry

Putting the giver and taker of dowry in the same category for punishment penalizes the victims of the dowry practice along with the perpetrators. It discourages women and their parents from reporting the extortion of cash, ornaments, and consumer goods by the husband and in-laws because they are equally culpable under the law for giving in to the explicit and implicit demands and expectations of the husband and in-laws. The woman is unlikely to report her husband and in-laws to the authorities if doing so will implicate her parents, or if it will diminish her husband's and in-laws' social or financial support. Otherwise, she may end up alienating both her

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157. See KUMARI, *supra* note 5, at 23.

158. See *id.* at 61-62.

husband's family and her own.

The Joint Committee of the Parliament correctly recognized that the woman's parents should not be equated with the takers of dowry because they "do not give dowry out of their free will but are compelled to do so. Further, when both the giver and the taker are punishable, no giver can be expected to come forward to make a complaint."<sup>159</sup> The Committee concluded that only those who take or abet the taking of dowry should be punished to deter the practice of dowry.<sup>160</sup> However, the Parliament elected not to incorporate this recommendation into the Act. In doing so, it failed to acknowledge that the dowry takers are more blameworthy and morally reprehensible than the dowry givers because they consciously extort goods from the socially vulnerable bride's family.

In contrast, the bride and her parents respond to the exorbitant material demands of the bridegroom and in-laws as a result of deeply embedded patriarchal values that link the institution of marriage and its preservation to the woman's happiness.<sup>161</sup> Essentially, they tend to comply with the in-laws' demands out of what they perceive to be love for their daughters, even though in actual practice, the marriage leads to the physical and emotional abuse of their daughters.

Since their motives for giving are good, the woman's parents are less blameworthy for their actions even though those actions produce undesirable results. Therefore, the law should not place the woman's parents on the same footing as the husband and in-laws, since the latter parties manipulate their superior bargaining position, and since they are motivated primarily by greed.

The legal system is potentially more effective than education in deterring immoral behavior, such as greed, through enhancing criminal punishment. In contrast, education offers a more effective means for breaking down the socially embedded patriarchal values reinforced by the woman's parents who prefer compliance with the demands for dowry and allow their daughters to tolerate spousal and in-law abuse over divorce or

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159. *Dowry Report*, *supra* note 136, § 3.11, reprinted in DIWAN & DIWAN, *supra* note 118, at 463.

160. *See id.* § 3.12.

161. *See discussion supra* Part II.B.3.

economic self-sufficiency.<sup>162</sup> Therefore, in order to protect the woman effectively, section 3 should be amended to penalize only the taker or the abettor of the taking of dowry.

c. Punishment for the Offense of Taking, Giving, and Abetting the Giving and Taking of Dowry

Despite the stricter penalty increasing the penalty under the 1986 Amendment Act to a five-year minimum with a fine of 15,000 rupees from the six-month jail term stipulated in the 1961 Act, the practice of dowry has not been reduced. The ineffectiveness of this penalty as a deterrent is largely due to language in section 3 that gives the court wide discretionary powers to reduce the sentence or to impose a monetary fine as an alternative to imprisonment. Section 3(1) states that "the Court may, for adequate and special reasons to be recorded in the judgment, impose a sentence of imprisonment for a term of less than five years."<sup>163</sup> The effect of this language is to treat the taking of dowry as a crime that warrants less serious punishment according to the circumstances of each case.

For instance, the determinations of the judge are vulnerable to factors such as the biases of the judge and the social and economic status of the husband and his family. Since the practice of dowry is so prevalent and socially acceptable, section 3(1) should be amended to remove the discretion of judges in reducing the punishment. Furthermore, penalties imposed on offenders should increase with the amount of dowry extorted from the woman's family and proportionately to the amount of annual income of the woman's family.

### 3. The Offense of the Demand for Dowry

Demanding dowry is an offense under section 4 of the current Dowry Prohibition Act. Section 4 states:

If any person demands, directly or indirectly, from the parents or other relatives or guardian of a bride or bridegroom, as the case may be, any dowry, he shall be punishable with

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162. See KUMARI, *supra* note 5, at 61-62.

163. Dowry Prohibition Act, No. 28, § 3(1), 6 INDIA CODE 40E (1961), as amended by Dowry Prohibition (Amendment) Act, No. 63, § 3(a) (1984) and Dowry Prohibition (Amendment) Act, No. 43, § 3(a)-(b), 1986 A.I.R. 73 (Nag.) 189.



imprisonment for a term which shall not be less than six months, but which may extend to two years and with fine which may extend to ten thousand rupees.<sup>164</sup>

In acknowledging the demand for dowry as a separate crime from the offense of the taking or abetting the taking of dowry, section 4 is a move in the right direction towards disapproving the activity that rises to and feeds the social evil of dowry.

However, a weakness in section 4, while it recognizes that the demand for dowry can be direct and indirect, is that it never defines the term "indirect." With the term left undefined, victims and their families have an enormously difficult time proving that dowry was demanded in the absence of any explicit or tangible demand. Also, courts have tremendous discretion in determining whether an implicit demand can be derived from the facts of a particular case. These determinations are likely to be based on the disposition and knowledge of the judge about the characteristics of the dowry problem. Consequently, inconsistent determinations are likely at both the horizontal level, across trial courts, and the vertical level, by appellate courts.

In order to rectify this inconsistency in court determinations, section 4 should be strengthened to give guidelines to courts as to what can constitute an indirect or implicit demand. Giving explicit guidelines is especially critical because the demand for dowry can take subtle forms, and frequently takes the form of expectations of the bridegroom's family over the course of the marriage. Unless courts are sensitive to the various forms, offenders can easily escape penalty by arguing that gifts were given voluntarily in the absence of an explicit demand. Indirect demand should be defined to include expectations of the bridegroom's family for continuous gifts from the bride's family over the course of the marriage. These expectations should be assessed by the actions and treatment of the husband and in-laws towards the woman in the marital home.

For instance, the husband's and in-laws' control over the woman's access to food and clothing, and their physical and emotional abuse of the woman, constitute an implicit demand for dowry when the level of abuse and violence varies with the

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164. *Id.* § 4, 6 INDIA CODE 40E (1961) (as amended 1984).

supply of presents that her parents bestow on her husband and in-laws. The expectation is that the woman's parents will give gifts to the husband and in-laws in order to control or halt the abuse of their daughter. Although the demand is not explicit, it is implicit in the blackmail tactics used by the husband and in-laws.

In addition, the husband's and in-laws' control over the woman's salary should also constitute an implicit demand for dowry. Here, the expectation of the in-laws is that they have an absolute right to the woman's salary. Essentially, the woman's salary takes the form of dowry since it makes up for an alleged deficiency in the initial giving of the dowry.<sup>165</sup> Nevertheless, the woman's salary is unlikely to fit into the technical definition of dowry or the demand for dowry because it comes from the woman herself and is likely to be considered a nominal bonus.

The interpretation of indirect demand depends heavily on the legal definition of dowry under the Dowry Prohibition Act. Therefore, the definition of dowry under section 2 of the Act should be clarified as discussed earlier, to incorporate the subtle forms that dowry takes and the circumstances under which it occurs. A more specific and explicit definition of dowry could support a consistent, liberal construction of demand for the purposes of penalizing the perpetrators of the offense for the demand for dowry.

#### 4. Failure to Transfer Dowry to the Bride

Section 6 provides that if any dowry is received in violation of section 3 of the Dowry Prohibition Act, the recipient must transfer the dowry to the woman.<sup>166</sup> It states:

Where any dowry is received by any person other than the woman in connection with whose marriage it is given, that person shall transfer it to the woman—

- (a) if the dowry was received before marriage, within three months after the date of marriage; or
- (b) if the dowry was received at the time of or after the

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165. See *supra* text accompanying notes 76-77.

166. Dowry Prohibition Act, No. 28, § 6, 6 INDIA CODE 40F (1961), as amended by Dowry Prohibition (Amendment) Act, No. 63, § 5 (1984) and Dowry Prohibition (Amendment) Act, No. 43, § 5, 1986 A.I.R. 73 (Nag.) 189.

marriage, within three months after the date of its receipt; or

(c) if the dowry was received when the woman was a minor, within three months after she has attained the age of eighteen years and pending such transfer, shall hold it in trust for the benefit of the woman.<sup>167</sup>

The failure to transfer the dowry to the woman within the stipulated period is punishable by imprisonment for a term between six months and two years or with a fine not less than five thousand rupees, but which can extend up to ten thousand rupees, or both.<sup>168</sup>

In the event that the woman dies before her husband or in-laws transfer the dowry to her, her rights to the dowry pass to her heirs.<sup>169</sup> Furthermore, if she dies of unnatural causes within seven years of marriage, the dowry must be transferred to her children or held in trust for them.<sup>170</sup> In the absence of children, the dowry must revert to the woman's parents.<sup>171</sup>

To implement and enforce the offense of failure to transfer the dowry to the bride, section 6(3A) requires the court to order the recipient of the dowry to make the transfer to the woman, or to her heirs, parents or children if she is dead.<sup>172</sup> If the offender fails to comply with the order, section 6(3A) requires the court to order the offender to pay to the woman or to her heirs an amount equal to the value of the dowry.<sup>173</sup>

Section 6, in creating the offense of the failure to transfer dowry, addresses the social reality that dowry is widely practiced despite the prohibition of dowry and the demand for dowry under sections 3 and 4 of the Act, respectively. The Joint Committee of the Parliament stated that one of the goals of section 6 is "to ensure that the dowry, which is essentially for the benefit of the girl, is not misappropriated by the person who is holding it for the time being . . ."<sup>174</sup> Consequently, section 6 attempts to convert dowry into *strīdhan* by requiring

167. *Id.* § 6(1)(a)-(c) (as amended 1984).

168. *See id.* § 6(2) (as amended 1984 and 1986).

169. *See id.* § 6(3).

170. *Id.* § 6(3)(b) (as amended 1986).

171. *See id.* § 6(3)(a) (as amended 1986).

172. *Id.* § 6(3A) (as amended 1984 and 1986).

173. *Id.*

174. *Dowry Report*, *supra* note 136, § 3.22, reprinted in *DIWAN & DIWAN*, *supra* note 118, at 465.

the husband and in-laws to transfer the extorted wealth to the woman.

Converting dowry into *strīdhan* is desirable as a short-term solution to providing women with economic security in a patriarchal society, at least until they are provided with greater educational and career opportunities. Since most women do not earn an independent income, they rely on the cash and equity given to them by their parents, husband, or in-laws for economic security. The amount of wealth women possess gives them a certain degree of social and economic status and independence in the family structure. In this context, abolishing gift-giving altogether would economically harm women. However, ensuring that women have control over the use and disposal of property that passes to their husbands and in-laws in dowry transactions would give women some economic security. Section 6 of the Dowry Prohibition Act attempts to do just this, by providing for the transfer of dowry to the woman where it is illegally given.

Providing for the effective transfer of dowry to the woman would make a dramatic difference in giving economic security to women. First, gifts given by the bride's family for the woman's welfare and protection rarely go to her.<sup>175</sup> The bride often does not even have control over her own clothing or ornaments because gifts are often handed directly to the husband and his family. Second, the husband and in-laws can compel the bride's family to give gifts to them directly rather than to the bride because they have greater bargaining power in the marriage transaction.<sup>176</sup> They can use threats of desertion, divorce, or violence in order to force compliance by the bride's family. Against these socio-cultural pressures that direct gift-giving to the husband and in-laws, section 6(3A) specifically provides a potentially strong implementation and enforcement mechanism. It requires the court to order the transfer of the dowry or its monetary equivalent to the bride or her heirs even after the conviction of the husband and in-laws for the failure to transfer dowry under section 6.<sup>177</sup> Consequently, it allows for the usual criminal remedy of imprisonment or a fine or

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175. See *supra* text accompanying notes 24-26.

176. See *supra* text accompanying note 45.

177. Dowry Prohibition Act, No. 28, § 6(3A), 6 INDIA CODE 40F (1961) (as amended 1984 and 1986).

both, and additionally mandates the return of the woman's dowry to her without her having to institute a separate action for a civil remedy.

Furthermore, section 6(3) complements section 6(3A) by preventing the husband and the in-laws from becoming unjustly enriched by the woman's dowry in the event of her death. It requires the woman's dowry to be passed upon her death to her children, and in their absence, to her parents rather than to her husband. Thus, section 6(3) attempts to transfer wealth back to the family from which the dowry was forcefully extracted; in doing so, it induces the husband and in-laws to take into account the possible financial loss that they may incur if they actively participate in the woman's murder or in her suicide. Therefore, the intended effect of section 6 is to protect the woman by raising her financial status in the family structure of her in-laws' home.

Despite the potentially strong enforcement mechanisms in sections 6(3A) and 6(3), the three-month limit in section 6(1) within which dowry has to be transferred effectively weakens the complaints of many women, particularly those who seek the transfer of dowry months or even years later. The assumption behind the three-month limit is that the husband and in-laws will comply with this requirement in order to avoid criminal liability, and that the woman and her natal family will bring a criminal complaint for non-compliance. Consequently, a woman's claim against her husband or in-laws for the failure to transfer dowry appears to be less credible when it is made months or even years after the marriage. Instead, it appears to be a vengeful act to take back voluntary presents from the husband and in-laws because the marriage failed.

Hence, the three-month limit effectively disregards the social reality in which the husband and his family enjoy a greater bargaining position in the continuation of the marriage with their credible threats of abuse, desertion, or murder of the woman. The woman and her family are likely to be reluctant to bring a criminal action against the husband and in-laws for the failure to transfer dowry soon after marriage. Within the first few months of the marriage, the bride is reasonably concerned more about adjusting to her new family and new home than about quarreling over her property rights.

Accordingly, section 6(3) should be amended to reflect the reality that women may seek the transfer of dowry once they

settle into the marriage or upon the breakdown of the marriage. It should not require a time limit in which the dowry has to be transferred. Instead, it should create incentives for the husband and in-laws to transfer the dowry to the bride as soon as possible, preferably within the stipulated three-month limit. This can be done by imposing stricter penalties for the failure to transfer dowry in proportion to the time that has elapsed since the time of marriage or the giving of dowry.

The current punishment provision is inadequate as a deterrent for several reasons. First, the low imprisonment term of six months to two years for failing to transfer dowry is a nominal price to pay for the huge amount of wealth that the dowry brings into the bridegroom's family. Second, the perpetrators may be able to escape imprisonment altogether because the court has the discretion to punish the perpetrators with a fine instead of imprisonment. Finally, a fine ranging anywhere from five thousand to ten thousand rupees is insufficient as a deterrent in cases where the wealth transferred to the bridegroom's family exceeds this level. This is a particular concern because the dowry practice is most prevalent among educated and upper-middle-class families who demand exorbitant amounts of cash and goods from the bride's family.

Moreover, for the sake of social status or prestige, the bride's family is likely to find any means possible to meet the demands of the husband and in-laws. Furthermore, most of this wealth is likely to be transferred to the bridegroom's family secretly and with "black money."<sup>178</sup> Consequently, the woman and her family may have a difficult time proving the amount and form of wealth that was given to the bridegroom's family as dowry.

Thus, even if the woman wins a case against her husband and in-laws for the failure to transfer dowry, she may actually receive only a small proportion of the dowry that was given to them, resulting in their unjust enrichment. Therefore, the

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178. Black money is money which is not shown as income and is not taxed. See AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 197 (3d ed. 1992). Since business persons and other upper middle class persons hold large sums of money in black, they are likely to spend this money lavishly on consumer goods and other luxury items, marriage ceremonies, and the like. Since black money is unrecorded, it poses special problems in the calculation of the amount of dowry that is given and received over the course of the marriage. See KUMARI, *supra* note 5, at 75.

penalties under section 6 need to be strengthened to take into account that a large amount of wealth is secretly transferred to the bridegroom's family.

#### 5. The Burden of Proof in the Offenses under the Dowry Prohibition Act

The Dowry Prohibition (Amendment) Act of 1986 introduced section 8A, which states:

Where any person is prosecuted for taking or abetting the taking of any dowry under [section] 3, or the demanding of dowry under [section] 4, the burden of proving that he had not committed an offence under those sections shall be on him.<sup>179</sup>

Essentially, this provision creates a presumption that the husband and in-laws committed the offense of the taking of dowry, the abetting of the taking of dowry, or the demand for dowry when they are charged for those crimes. The burden of proof shifts to the husband and in-laws to show that they have not committed those crimes.

This provision is an aggressive move towards condemning the practice of taking dowry and the demand for dowry because it directly addresses the difficulty of proof that women and their families encounter in their claims. These difficulties in proof arise as a result of the thin distinction between voluntary presents given to the bridegroom's family and gifts extorted by them in the form of dowry. This distinction is partly qualitative because dowry introduces the element of coercion. It is also partly quantitative because the amount of dowry demanded or given is likely to be exorbitant and excessive relative to the financial status of the giver.

The distinction between whether the gifts are voluntary or coerced often depends on the private transactions agreed to by the families of both parties to the marriage, and upon the treatment of the woman in her new home after marriage.<sup>180</sup> This distinction is very difficult to make because these events

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179. Dowry Prohibition (Amendment) Act, No. 43, § 8A, 1986 A.I.R. 73 (Nag.) 189-90.

180. See *supra* text accompanying notes 17-21 (voluntary gift-giving), 10-14 (forced gift-giving).

usually occur in the privacy of the home of the husband and in-laws and there are rarely any disinterested witnesses to the transaction.

Even the quantitative element of dowry is very difficult to prove because most of the wealth transferred to the bridegroom's family is unrecorded and financed with black money. Here again, the only witnesses to the secret transactions are the two families themselves.

The section 8A presumption eases the burden on the woman's family to produce evidence to which the husband's family has greater access. Underlying this presumption is an acknowledgement that dowry givers are the victims, and consequently, less culpable for engaging in the practice.

Nevertheless, this provision should be further strengthened to protect women's property rights more directly by extending its reach to the section 6 offense of the failure to transfer dowry. The failure to transfer dowry is also an offense where the woman faces the obstacle of difficulty of proof for essentially the same reasons. Further, the consequences for the woman would be more substantial because it would facilitate a criminal remedy that entitles the woman to the rightful return of property that her family gave for her alleged well-being.

## 6. The Dowry Death Offense

The Dowry Prohibition (Amendment) Act of 1986 introduced section 304B into the Indian Penal Code, which defines and punishes perpetrators for the crime of dowry death:

Where the 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 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.<sup>181</sup>

If all the above conditions are present, then there is a presumption that the accused has committed the crime of dowry

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181. Dowry Prohibition (Amendment) Act, No. 43, § 10, 1986 A.I.R. 73 (Nag.) 190 (amending INDIA PEN. CODE § 304B).



death; the operative part of section 113B of the Indian Evidence Act inserted by the Dowry Prohibition (Amendment) Act of 1986 states that the "Court shall presume that such person had caused the dowry death."<sup>182</sup> If the individual is unable to meet the burden of proof that he or she did not commit the dowry death offense, that individual is convicted and subject to "imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life."<sup>183</sup>

The most important aspect of section 304B is section 113B of the Evidence Act because the accused is presumed to have committed the dowry death, regardless of whether the accused has any direct connection with it.<sup>184</sup> The prosecution need only provide direct evidence of cruelty and harassment for or in connection with the demand for dowry in order for the presumption to apply.<sup>185</sup>

This presumption is especially critical because the death normally occurs in the in-laws' home and the woman is frequently burned to death. By burning the woman to death, the husband and in-laws usually destroy the evidence connecting them to the crime.<sup>186</sup> Moreover, they can easily manipulate the evidence in their favor by claiming that the woman died as a result of a kitchen accident. Consequently, shifting the burden to the husband and in-laws to prove that they did not murder the woman or assist in her suicide strengthens the prosecution for dowry death offenses.

Nevertheless, section 304B is problematic because before any presumption of dowry death can be made, the prosecution has to overcome the hurdle of establishing that the husband and in-laws subjected the woman to cruelty. Cruelty to a married woman means:

(a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman where such harassment is

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182. *Id.* § 12, 1986 A.I.R. 73 (Nag.) 191 (amending Indian Evidence Act, No. 1, § 113B, 4 INDIA CODE 11 (1872)).

183. *Id.* § 10, 1986 A.I.R. 73 (Nag.) 190 (amending INDIA PEN. CODE § 301B(2)).

184. *See* Sandanshiv & Mathew, *supra* note 110, at 86.

185. *See id.*

186. *See supra* note 7 and accompanying text.

with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.<sup>187</sup>

The definition of cruelty is very broad and includes both physical and mental cruelty. It recognizes that the physical and the emotional abuse of the woman is intimately related to the dowry demands of the husband and in-laws.

Despite this expansive definition of cruelty, the prosecution bears a heavy burden to prove that the husband and in-laws subjected the woman to cruelty before death. Cruelty takes subtle forms, and generally the only witnesses to the abuse are the husband and in-laws.<sup>188</sup> The husband and in-laws have control over the evidence and can easily manipulate it in their favor. Consequently, the prosecution encounters similar problems in procuring physical evidence to establish cruelty as it does in establishing murder or assisted suicide.

Another problem with section 304B is that charges for the dowry death offense can be brought against the husband and in-laws only where the woman died under unnatural circumstances "within seven years of her marriage."<sup>189</sup> The seven-year limitation enables offenders to escape penalty under the dowry death provision by postponing the woman's murder until the limitation has expired. For instance, on March 8, 1995, Babulal burned his twenty-two year old wife Vimala Devi to death after having waited for seven years to realize his plan.<sup>190</sup> He had told Vimala Devi that he would kill her when the seven years were up.<sup>191</sup> Nevertheless, the police refused

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187. INDIA PEN. CODE § 498A, as amended by Criminal Law (Second Amendment) Act of 1983, No. 46, § 2, 1984 A.I.R. 71 (Nag.) 68. Although no explanation for cruelty is given under § 304B, the Supreme Court of India has held that "cruelty" under § 304B has the same meaning as "cruelty" under INDIA PEN. CODE § 498A, under which cruelty, by itself, is a punishable offense. See *Shanti v. State of Haryana*, [1991] 1 S.C.C. 271; Sandanshiv & Mathew, *supra* note 110, at 84.

188. See *DIWAN & DIWAN*, *supra* note 118, at 119 (noting the difficulty in proving events which take place "within the four walls of the home"); Sandanshiv & Mathew, *supra* note 110, at 80.

189. INDIA PEN. CODE § 304B(1), as amended by Dowry Prohibition (Amendment) Act, No. 43, § 10, 1986 A.I.R. 73 (Nag.) 190.

190. See *Police Refuse to Register Dowry Death Case Against Husband*, INDIAN EXPRESS (Del.), Mar. 13, 1995, Metro sec., at 2 [hereinafter *Police Refuse*].

191. See *id.*

to register a case against him because the seven-year limitation had expired.<sup>192</sup>

Vimala Devi's murder calls for a reassessment of the seven-year limitation. The assumption behind the seven-year limitation is that it is "believed to be ample time to manage and ascertain a potentially abusive relationship. Dowry abuse is thought to be lessened with the arrival of children and time for the marriage to stabilize."<sup>193</sup> However, this assumption disregards the social reality that some families will go to great lengths to secure more dowry.<sup>194</sup> Babulal was willing to sustain a marriage and terrorize his wife for seven years in order to satisfy his greed for more money.<sup>195</sup> The seven-year limitation did not protect Vimala Devi and it will not protect other women, because "[i]t is cheaper for a man to kill his spouse and obtain a new one with another dowry than [it is] to divorce his wife and pay her maintenance."<sup>196</sup> For this reason, section 304B should be amended to eliminate the seven-year limitation.

Furthermore, the presumption of dowry death should be applied to any death that "occurs otherwise than under normal circumstances."<sup>197</sup> In other words, if a woman is found burned to death under suspicious circumstances in the privacy of her husband's or in-laws' home, the presumption should be that the husband and the in-laws murdered her or caused her to commit suicide. The current burden on the prosecution to prove that the husband and in-laws subjected the woman to cruelty before the woman's death should be removed. It is an onerous requirement and poses a practical obstacle to the conviction of offenders.

## 7. Cognizance of Offenses

Section 7(1)(b) of the current Dowry Prohibition Act states:

[N]o court shall take cognizance of an offence under this Act

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192. *See id.*

193. Ritu Banerjee, *Bride-Burning and the Law: Vimala Devi's Tragedy*, in DOWRY CONFERENCE SOUVENIR, *supra* note 12, at 4-1, 4-4.

194. *See id.*

195. *See id.*

196. *Id.*

197. INDIA PEN. CODE § 304B(1), *as amended by Dowry Prohibition (Amendment) Act, No. 43, § 10, 1986 A.I.R. 73 (Nag.)* 190.

except upon—

(i) its own knowledge or a police report of the facts which constitute such offence, or

(ii) a complaint by the person aggrieved by the offence or a parent or other relative of such person, or *by any recognized welfare institution or organisation*.<sup>198</sup>

The strength of this provision lies in the court's competence to hear a case that comes to it based on a complaint made to the court or to the police by women's organizations that are knowledgeable about the victim's plight.

The role of women's organizations in bringing to the court's attention offenses committed in relation to the taking of or demand for dowry is especially critical to the enforcement of the Act, because women's organizations work directly with victims. Women's organizations provide women with counseling, legal advice, and placement in shelters,<sup>199</sup> and therefore the organizations are likely to be most knowledgeable when violations of the Act occur.

Furthermore, giving women's organizations the authority to make complaints on behalf of victims enables the court to hear cases that otherwise would not come before it because women and their parents are unlikely to report violations of the Act out of social pressures and fear.<sup>200</sup> First, they are generally interested in preserving the marriage, and not in punishing offenders despite excessive and unlawful demands for dowry.<sup>201</sup> Second, the woman and her parents view dowry as a necessary price to pay for a married life, which they equate with the woman's happiness.<sup>202</sup> Once the woman gets married, the decision to complain against dowry becomes much more difficult since compliance with the demand controls the

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198. Dowry Prohibition Act, No. 23, § 7(1)(b)(i)-(ii), 6 INDIA CODE 40F (1961), as amended by Dowry Prohibition (Amendment) Act, No. 63, § 6 (1984) (emphasis added).

199. See *Police Refuse*, *supra* note 190, at 2; KUMARI, *supra* note 5, at 86. See generally D.N. Sandanshiv, *Bride Burning: Perspective of Interveners*, in KALI'S YUG, *supra* note 8, at 94, 94-104.

200. See *supra* text accompanying notes 81-85; see also KUMARI, *supra* note 5, at 86-87 (noting the "significant role" that women's organizations play in the anti-dowry movement, and their ability to change prevailing social norms).

201. See *supra* text accompanying notes 81-85; Kumari, *supra* note 95, at 119.

202. See KUMARI, *supra* note 5, at 15.

maintenance of the marriage.<sup>203</sup> As a result, the woman or her relatives file a complaint "only when harassment for dowry increases beyond endurance."<sup>204</sup>

Despite the legal authority of women's organizations to make complaints about violations under the Dowry Prohibition Act, the major weakness to the effectiveness of this provision is the discretion given to courts to hear dowry cases. Since judges vary in the sensitivity and the seriousness with which they regard the dowry problem, they may dismiss cases with or without serious investigation, depending on their dispositions and views. Therefore, section 7 should be amended to reduce the discretion of judges in taking cognizance of offenses under the Act and to mandate serious investigation of all dowry complaints. Perhaps, separate family courts should be established to handle all dowry cases so that they can be resolved justly, efficiently, and expeditiously.

#### 8. Discipline for Offenses Under the Act

Section 8 of the Dowry Prohibition Act<sup>205</sup> makes all offenses non-bailable<sup>206</sup> and non-compoundable.<sup>207</sup> This sec-

203. See Kumari, *supra* note 95, at 120.

204. *Id.* at 119.

205. Dowry Prohibition Act, No. 28, § 8, 6 INDIA CODE 40G (1961), as amended by Dowry Prohibition (Amendment) Act, No. 63, § 7 (1984) and Dowry Prohibition (Amendment) Act, No. 43, § 7, 1986 A.I.R. 73 (Nag.) 189.

206. *Id.* § 8(2) (as amended 1986). A non-bailable offense is one that prohibits a convicted individual from posting bail as a matter of right. The defendant must petition the court for bail, and give reasons why bail is appropriate in his case. For instance, a defendant could argue that his release on bail would not in any way contaminate evidence. Generally, the court has exercised great discretion in granting bail and has awarded it in many cases. See Sandanshiv & Mathew, *supra* note 110, at 90-91. In *Amarnath Gupta v. State of Madhya Pradesh*, 1990 Crim. L.J. 2163 (India), the High Court issued an order granting bail "on the ground that the victim's diary contained a letter written by her stating that nobody was to be blamed for her suicide." Sandanshiv & Mathew, *supra* note 110, at 90. The High Court rationalized the decision by noting that nothing in the record indicated that the defendants would misuse the liberty granted to them. See *id.* The Supreme Court reversed the High Court decision, but in doing so noted that "sentimentalism has no place in the judicial process." *Id.* at 90-91. Despite the Supreme Court's stance in exercising caution in the grant of bail, both the high courts and courts of sessions continue to grant bail in dowry death cases. See *id.* at 90.

207. Under Indian law, a non-compoundable offense is one that does not allow the parties to compromise once the case goes to court. See Letter from Subhadra Chaturvedi, Advocate, Supreme Court and High Courts, New Delhi, to author (Dec.

tion is desirable because convicted offenders are not entitled to bail as a matter of right, and they must petition the court in order to be considered for bail. Unfortunately, this provision has not been effective in deterring the grant of bail in dowry death cases because the Sessions Courts and the High Courts continually grant bail in cases of domestic violence and dowry deaths despite the Supreme Court's repeated pleas of caution.<sup>208</sup>

Since courts are liberal in granting bail to offenders, offenders are free to tamper with and hamper investigations, and to influence witnesses.<sup>209</sup> For this provision to be more effective as a deterrent to dowry crimes and as a method of ensuring unhampered investigation, courts will have to take dowry crimes more seriously and to restrict bail to exceptional cases.

Currently, the liberal grant of bail by courts only serves as an incentive for the husbands and in-laws to commit dowry crimes and then to cover up the evidence. Furthermore, the non-compoundability of offenses under the Act does not deter families from taking dowry, demanding dowry, or killing for dowry. Preventing parties from compromising once the case goes to court does not necessarily allow the conclusion that husbands and in-laws will think twice before committing the crime for fear of a long-drawn-out battle in court. Husbands and in-laws can easily avoid this provision by compromising with the woman's family before the case goes to court. According to Public Prosecutor Renuka: "Seventy per cent of dowry death cases are ending in acquittals due to compromises between the in-laws and the victim's parents. Sometimes, for as small a sum as 5,000 Rupees, the dowry victim's parents are withdrawing the complaint. And such compromises are increasing alarmingly."<sup>210</sup> Consequently, the penal provisions under the Act are not a deterrent to dowry crimes because the husband and in-laws know that they can escape penalty by paying off the victim's parents with a nominal sum of money.

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7, 1996) (on file with the *Brooklyn Journal of International Law*).

208. See Sandanshiv & Mathew, *supra* note 110, at 90. Courts of Sessions are trial courts; high courts are the intermediate appellate courts. The Supreme Court is the highest court and its determination is final.

209. See Hathi, *supra* note 87, at 8.

210. *Id.*

In this context, parents are playing an active role in perpetuating dowry crimes against their daughters. Therefore, to protect women and to ensure that offenders are punished for their crimes, section 8 of the Act should be amended to take away the discretion of the woman's parents and relatives to withdraw the complaint.

## *B. Complementary Provisions in the Indian Penal Code*

### 1. Protection Against Cruelty

The Criminal Law (Second Amendment) Act of 1983 inserted section 498A into the Indian Penal Code, which criminalizes physical and emotional abuse by the husband or his relatives, and specifically characterizes the wife's harassment for the unlawful demand for dowry as an offense of cruelty.<sup>211</sup> The legislature introduced this section in response to the "increasing number of dowry deaths."<sup>212</sup> It recognized that cruelty by the husband and his relatives "culminate[s] in suicide by, or murder of, the hapless woman concerned,"<sup>213</sup> and that these cases "constitute only a small fraction of the cases involving such cruelty."<sup>214</sup> Section 498A defines the offense of cruelty as follows:

(a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.<sup>215</sup>

Cruelty is punishable with a term of imprisonment which may

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211. INDIA PEN. CODE § 498A, *as amended by Criminal Law (Second Amendment) Act of 1983, No. 46, § 2, 1984 A.I.R. 71 (Nag.) 68.*

212. R. DAYAL, *LAW RELATING TO DOWRY* 1157 (1995) (citing legislative history of the Criminal Law (Second Amendment) Act of 1983, No. 46, 1984 A.I.R. 71 (Nag.) 68).

213. *Id.*

214. *Id.*

215. INDIA PEN. CODE § 498A(a)-(b), *as amended by Criminal Law (Second Amendment) Act of 1983, No. 46, § 2, 1984 A.I.R. 71 (Nag.) 68.*

extend to three years and a fine.<sup>216</sup>

The strength of section 498A is that it specifically deals with the situation where the husband and in-laws demand dowry from the woman after the marriage and where the dowry falls short of the expectations of the husband and in-laws. Section 498A links this unlawful demand with the social reality of the harassment that many women face when the dowry falls short of the demand or expectation. This provision can be used for criminal redress by women against their husbands or in-laws for depriving them of food and clothing, for locking them up in dingy rooms, or for beating them.

Furthermore, section 498A makes the husband and in-laws liable for cruelty any time after the marriage. There is no requirement that the harassment occur within seven years of marriage like the one found in the dowry death offense created by the Dowry Prohibition Act.<sup>217</sup> This is beneficial for women because they may tolerate years of abuse before they decide to leave the violent home.

Section 498A also recognizes that the level of abuse may be so intense that it may endanger the woman's life or drive her to suicide. Nevertheless, the level of punishment this section imposes on the offender does not reflect that greater levels of abuse should warrant stricter penalties. Therefore, section 498A should be amended to remove the three-year maximum imprisonment term and to allow for stricter penalties that coincide with the level of abuse.

Section 498A presents the same problems of burden and proof as does section 304B. This problem of evidence and proof should be addressed by creating a presumption of cruelty whenever any form of wealth is transferred from the woman's family to the husband and in-laws. The burden of proof would then be on those who have control over the evidence—the husband and in-laws—to prove that they did not physically or emotionally harass the woman or her family for dowry.

Since cruelty in the marriage is normally intimately linked with the demand for dowry, section 498A should also be amended to allow the return of the woman's dowry to her or her heirs when cruelty is established and the husband and in-

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216. *See id.*

217. *See supra* notes 101-02 and accompanying text.



laws are convicted. This provision should be amended along the lines of section 6(3A) of the Dowry Prohibition Act, which requires the court to transfer the dowry to the woman even after the conviction of the husband and in-laws for the failure to transfer dowry.<sup>218</sup> Such a provision would allow for the usual criminal remedy of imprisonment, and additionally would mandate the return of the woman's dowry to her without her having to institute a separate civil action for a civil remedy. It would, in effect, increase the cost of punishment to the husband and in-laws for inflicting physical and emotional abuse on the woman.

Furthermore, such a provision would protect the woman because she often encounters great difficulties in a civil suit for the return of her personal property or *strīdhan*. *Kamini Sahuami v. Purna Chandra Sahoo*<sup>219</sup> illustrates this difficulty. In *Kamini Sahuami*, the husband thrashed his wife, burned her with a hot rod, and threw her out of the house because her parents were unable to meet additional demands for dowry.<sup>220</sup> The wife instituted a civil suit for the return of the property that she left behind in the husband's home.<sup>221</sup> But the trial court ignored the wife's averment that she gave her ornaments to her husband; it held that the woman took her ornaments with her when she left her husband's home.<sup>222</sup>

The trial court's judgment ignored the social reality that a wife may allow her husband to hold on to her valuable possessions since the continuation of a dowry-based marriage depends on the amount of wealth that the husband and in-laws can extract from the wife and her parents.<sup>223</sup> The court also did not consider the fact that a wife who was beaten could not reasonably be expected to take or be allowed to take her gold ornaments with her.<sup>224</sup>

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218. Dowry Prohibition Act, No. 28, § 6(3A), 6 INDIA CODE 40F (1961) (as amended 1984 and 1986).

219. 1987 A.I.R. 74 (Ori.) 134.

220. *Id.* at 135.

221. *See id.*

222. *See id.* at 137.

223. *See supra* text accompanying notes 10, 24-26.

224. On appeal in *Kamini Sahuami*, the High Court of Orissa did consider this fact and overturned the trial court's ruling because it recognized the validity of the wife's claim. *See Kamini Sahuami*, 1987 A.I.R. at 137-38. The High Court also recognized that it would be impossible for the wife to prove that she was severely beaten up and thrown out of the home in light of the fact that her in-laws were

The wife experiences severe constraints on her ability to prove her averments because the court must weigh her statements against those of her husband. Frequently, the only witnesses to her statements and the violent circumstances that force her out of the home are the husband and in-laws. Amending section 498A to order the return of the woman's dowry to her would remove the discretion of judges to decide whether the level of cruelty in the marriage is sufficient to make it impossible for the woman to exercise control over her property. Under the scheme of a presumption of cruelty, the husband and in-laws would have the burden of proving that the physical and emotional abuse of the woman is not linked to the demand for dowry. If they are unable to meet this burden of proof, the court would convict the husband for the physical and emotional abuse as well as order the return of the woman's dowry to her.

After such an amendment, the woman would not have to bear the burden of proof to establish cruelty as she would have to in the civil suit in order to prevail on her dowry claim. If amended as suggested, section 498A could offer her protection not only from physical and mental cruelty, but also from the extortion and misappropriation of her personal property by the husband and in-laws.

## 2. Criminal Breach of Trust

Section 405 of the Indian Penal Code states that:

Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust."<sup>225</sup>

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the only witnesses. *See id.* A realistic evaluation of the wife's plight enabled the High Court to accept the wife's averment that her husband held her gold ornaments. Consequently, the court ordered the husband to return her gold ornaments or their monetary equivalent. *See id.*

225. INDIA PEN. CODE § 405.

Section 406 provides for punishment of imprisonment of up to three years, a fine, or both for any person who commits criminal breach of trust.<sup>226</sup>

The Supreme Court precedents on the criminal breach of trust indicate that in order to establish "entrustment of dominion" over property to an accused person, it must be shown that the person's dominion over the property was the result of entrustment.<sup>227</sup> The requirements of entrustment are: (a) that the person handing over any property or on whose behalf that property is handed over to another, continues to be its owner; and (b) the person handing over the property must have confidence in the person taking the property to create a fiduciary relationship between them.<sup>228</sup> Moreover, the accused must hold the property for the benefit of its owner.<sup>229</sup>

Nevertheless, section 405 does not require the creation of trust with all the technicalities of the law of trust, such as a special agreement between the parties.<sup>230</sup> It contemplates that a relationship of trust is created by the transfer of the owner's property to a third party for the purpose of retaining it until a certain contingency arises or disposing it on the happening of a certain event.<sup>231</sup>

Thus, the Supreme Court has interpreted the term "trust" creatively and broadly, in order to give a criminal remedy to dowry victims against their husbands and in-laws for misappropriating their personal property.<sup>232</sup> In *Pratibha Rani v. Suraj Kumar*, the Supreme Court approved the Calcutta High Court's holding that a woman does not lose ownership of her ornaments in handing them over to her husband and in-laws; but rather, she trusts them to return her property to her after using it for the purpose for which she handed it over.<sup>233</sup>

Despite the Supreme Court's extension of trust to include the relationship of husband and wife, many lower courts are

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226. *Id.* § 406.

227. *See Velji Raghavji v. State of Maharashtra*, A.I.R. 1965 S.C. 1433, 1435.

228. *See Pratibha Rani v. Suraj Kumar*, A.I.R. 1985 S.C. 628, 640 (citing *State of Gujarat v. Jaswantlal Nathalal*, (1968) 2 S.C.R. 408).

229. *See Narayan Ittiravi v. State of Tra.-Co.*, A.I.R. 1953 S.C. 478, 484.

230. *See Harihar Prasad v. Tulsi Das Mundhra*, A.I.R. 1981 S.C. 81, 82 (citing *Jaswantrai Manilal v. State of Bombay*, (1956) S.C.R. 483).

231. *See id.*

232. *See Pratibha Rani*, A.I.R. 1985 S.C. at 640 (citing *Sushil Kumar Gupta v. Joy Shanker Bhattacharjee* A.I.R. 1971 S.C. 1543).

233. *See id.* (citing *Basudeb Patra v. Kanai Lal Haldar*, A.I.R. 1949 (Cal.) 207).

reluctant to find a husband guilty under section 405. In the Supreme Court opinion of *Pratibha Rani*, Justice Ali Fazl stated: "[E]ven when clear and specific allegations are made in the complaint that [*strīdhan*] properties were entrusted to the husband, [lower courts] refuse to believe these hard facts and brush them aside on the ground[s] that they are vague."<sup>234</sup>

In *Pratibha Rani*, Pratibha Rani's husband threw her out of the house because her parents failed to meet the additional dowry demands of the husband and in-laws.<sup>235</sup> They also refused to return her *strīdhan* or personal property, including her clothes and jewelry.<sup>236</sup> The High Court concluded that the husband and her in-laws did not violate section 405 because Pratibha Rani did not entrust her *strīdhan* to her husband.<sup>237</sup> The High Court's conclusion rested on the premise that *strīdhan* of the wife is joint property, and consequently that spouses do not stand in formal relationship to one another in such a way that each possesses exclusive property and entrusts the other with that property or with dominion over that property.<sup>238</sup> Marriage, the High Court reasoned, is a union between two people and implies joint ownership over even movable properties exclusively owned by each.<sup>239</sup>

On appeal, the Supreme Court rejected these arguments because the High Court built its conclusion on the incorrect premise that *strīdhan* is joint property rather than the woman's absolute property.<sup>240</sup> The husband's or in-laws' possession of the *strīdhan* does not in and of itself indicate that the woman owns it with them jointly or that she transferred

234. *Id.* at 643.

235. *Id.* at 630, 632.

236. *See id.* at 630.

237. *See id.* at 632, 634.

238. *See id.* at 634.

239. *See id.*

240. *See id.* The Supreme Court chided the High Court in no uncertain terms, and was shocked that the lower court could:

permit the husband to cast his covetous eyes on the absolute and personal property of his wife merely because it is kept in his custody, thereby reducing the custody to a legal farce. . . . [I]t seems to us that even if the personal property of the wife is jointly kept, it would be deemed to be expressly or impliedly kept in the custody of the husband and if he dishonestly misappropriates or refuses to return the same, he is certainly guilty of criminal breach of trust, and there can be no escape from this legal consequence.

*Id.* at 634-35.

her rights of ownership to them.<sup>241</sup> The Court stated that:

[S]o far as the jewellery and clothes, blouses, nighties and gowns are concerned they could be used only by the wife and were her *stridhan*. By no stretch of imagination could it be said that the ornaments and sarees and other articles mentioned above could also be used by the husband. If, therefore, despite demands these articles were refused to be returned to the wife by the husband and his parents, it amounted to an offence of criminal breach of trust.<sup>242</sup>

The Court reasoned that the realities of married life in India indicate that the wife entrusts her husband and her in-laws with her personal property.<sup>243</sup> A newly married woman is unlikely to "keep her personal property or belongings like jewellery, clothing, etc., under her own lock and key, thus showing a spirit of distrust to the husband at the very behest."<sup>244</sup>

*Pratibha Rani* reflects the aggressive stand that the Supreme Court has taken to ensure that women have a criminal remedy in addition to a civil remedy for the misappropriation of their personal property by their husband and in-laws. Underlying the *Pratibha Rani* decision is the recognition that most of the dowry wealth is handed directly to the husband and in-laws and that women have little or no access to it. The Court displays an understanding of dowry as property given by the woman's parents to the husband and in-laws for the benefit of the bride, regardless of whether in actual practice the woman possesses it. Even clothes and jewelry that, in ancient times, were given directly to the bride in the form of *strīdhan*, are more likely today to be given to the husband and in-laws. Even if they are given directly to the woman, the husband and in-laws are more likely than not to take her clothes and jewelry from her.

This assumption that the Court makes is critical to its

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241. See *id.*

242. *Id.* at 633. The Court left open in its list of articles the status of furniture and utensils, which could possibly be characterized as joint property as opposed to the woman's *strīdhan*—her absolute property. The Court reasoned that an argument could be made that the husband and wife held these items in joint possession since they were meant for the joint use of husband and wife. See *id.*

243. See *id.* at 633, 635.

244. *Id.* at 634.

conclusion that the husband misappropriated the woman's jewelry and clothes in criminal breach of trust. Since dowry is given by the woman's parents for her benefit, the husband and in-laws do not rightfully own it. If they do not own this property, then they can only hold it in trust for the bride. Thus, the conclusion follows that any time the husband and in-laws use or dispose the property without the woman's permission or refuse to return it to her upon her request, they have misappropriated her property.

This interpretation of criminal breach of trust in the context of the marital relationship is in line with the use of the term "trust" in section 6 of the Dowry Prohibition Act.<sup>245</sup> Section 6 of the Act states that: "Where any dowry is received by any person other than the woman in connection with whose marriage it is given, that person shall transfer it to the woman . . . and pending such transfer, shall hold it in trust for the benefit of the woman."<sup>246</sup>

The use of the term "trust" here indicates that the legislature understood the meaning of "trust" to encompass the relationship between the husband or in-laws and the wife. Any dowry that passes to the husband or in-laws is the woman's property and can only be held in trust until it is transferred to the woman.

If this definition of "trust" is imported into section 405, then it invites the conclusion that the husband and in-laws violate this trust when they refuse the woman access to property that was given for her benefit. This conclusion is consistent with the legislative intent of the Parliament to protect the woman's control over her property, when it created the offense of the failure to transfer dowry under the Dowry Prohibition Act.<sup>247</sup> Therefore, the Supreme Court furthered the legislative intent of Parliament in construing the general provisions of sections 405 and 406 to afford a criminal remedy to dowry victims for the misappropriation of their property by their husbands or in-laws.

Nevertheless, lower courts remain an obstacle to dowry victims who seek a criminal remedy under section 405. The

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245. See *supra* text accompanying notes 166-67, 172-74.

246. Dowry Prohibition Act, No. 28, § 6(1), 6 INDIA CODE 40F (1961).

247. See discussion *supra* Part IV.A.4.

legislature should respond to the judicial reluctance at the lower levels by clarifying that section 405 extends to women who seek a criminal remedy for the misappropriation of their personal property by their husbands and in-laws.

*C. The Role of Law Enforcement Agencies in Hampering the Effectiveness of Dowry and Dowry Violence Legislation*

Law enforcement agencies disregard the complaints of many dowry victims, their families, and women's organizations about the unlawful demands for dowry by husbands and in-laws and dowry-related violence and death.<sup>248</sup> They frequently fail to register offenses and carelessly or dishonestly investigate and prosecute cases. As a result, in many cases, the guilty go free.

The Supreme Court decision of *Lichhamadevi v. State of Rajasthan*<sup>249</sup> is one such case. In *Lichhamadevi*, a bride's brother-in-law escaped punishment for burning the young bride to death because the police failed to prosecute him, despite the mother-in-law's statement that the brother-in-law might have burned the bride and despite the neighbors' claims that they saw the brother-in-law behind the kitchen and running down the stairs while the bride was in flames inside.<sup>250</sup>

In the same case, the police also failed to charge the husband for abetting in the murder even though there was sufficient evidence to support the charge.<sup>251</sup> The husband silently watched his wife as she was aflame, made no effort to take her to the hospital, and took no action to secure blood for her.<sup>252</sup> The police's failure to take initial action against the brother-in-law and husband allowed two of the three participants in the dowry murder to go free; only the mother-in-law was convicted.<sup>253</sup>

The police have also been guilty of delaying and hindering justice by manipulating crucial evidence in the case against perpetrators. *Sudha Goel's* case<sup>254</sup> illustrates the difficulty

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248. See KUMARI, *supra* note 5, at 81-85; Jethmalani & Dey, *supra* note 10, at 49-50.

249. A.I.R. 1988 S.C. 1785.

250. *Id.* at 1787.

251. See *id.*

252. See *id.*

253. See *id.* at 1788.

254. State (Delhi Admin.) v. Kumar, A.I.R. 1986 S.C. 250; see Jethmalani &

that courts face in resolving contradictions in the evidence when the police tamper with a dying declaration,<sup>255</sup> often the most crucial evidence leading to the conviction of the perpetrator. Sudha's oral dying declaration to the neighbor-witnesses who saw her in flames when she was brought out of the house differed from the written, unsigned version recorded by the Investigation Officer at the hospital.<sup>256</sup> The oral declaration reflected that the mother-in-law burned the wife, while the written version portrayed the incident as an accident.<sup>257</sup> Since written declarations are normally more reliable than oral declarations by virtue of their form, inconsistency in the oral and written declarations is problematic for courts, as it was in this case. The trial court and the high court reached different conclusions, depending on the weight they each attributed to the oral and written declarations.<sup>258</sup>

In addition to revealing dishonest investigations by police, the *Sudha Goel* case also shows how police collusion can delay justice even after the Supreme Court's conviction of the husband. The police did not promptly arrest the husband upon conviction as proper procedure required.<sup>259</sup> When the police finally arrested the husband to complete a term for life, the husband (during his time out on bail) had married a second

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Dey, *supra* note 10, at 51-60 (discussing *Kumar*). Twenty-year-old Sudha Goel was subjected to ill-treatment by her husband, his mother, and his brother within the first month of marriage for bringing in insufficient dowry. *See* Jethmalani & Dey, *supra* note 10, at 52. She was pregnant, and a week before her delivery she was murdered. *See id.*

255. Under Indian law, a dying declaration is a statement made by a person who is under a sense of impending death and who, after making the statement, dies. *See* Sandanshiv & Mathew, *supra* note 110, at 87. Such a statement is an exception to the general rule that hearsay evidence is not admissible, unless such evidence is tested by cross-examination. *See id.* The rationale for the dying declaration exception to the hearsay rule is that a person on the verge of death is most unlikely to make an untrue statement. *See id.*

256. *See* Jethmalani & Dey, *supra* note 10, at 53-55.

257. *See id.*

258. *See Kumar*, A.I.R. 1986 S.C. at 253-254. The trial court accepted the oral declaration and convicted the husband. *See id.* at 253. The high court reversed the conviction, as it accepted the written declaration of the investigating officer. *See id.* at 258. On appeal, the Supreme Court convicted the husband. *See id.* at 266. It accepted Sudha Goel's oral declaration on the ground that it was corroborated by the reliable testimony of neighbors who witnessed the statement. *See id.* at 259.

259. *See* Jethmalani & Dey, *supra* note 10, at 60.



time and had two children as well.<sup>260</sup>

Since police misconduct is pervasive at all stages, from the filing of the complaint to investigation of the case and acquisition of evidence to arrest of the offender, the law should take a heavy-handed approach against law enforcement agencies. It should classify such a crime as an obstruction of justice and impose strict penalties. Specifically, the role of the police in the manipulation of evidence in collusion with the husband's family or the doctor should be condemned as a crime for the suppression of evidence. With strict penalties in place, law enforcement agents would take dowry cases more seriously and have greater incentives to follow proper procedure. With more exigent enforcement, bribes by husbands and their families may look less attractive. Further, dowry and dowry violence legislation could be more effectively enforced.

## V. CONCLUSION

India must strengthen its dowry and dowry violence legislation to take into account the social acceptance of dowry at all levels of society, including the acceptance by the woman's parents, the woman herself, the husband and his family, law enforcement agents, and lower courts. Dowry and dowry violence are as much an outgrowth of consumer greed and a decline in moral values as they are a reflection of a patriarchal society that discourages the education and economic self-sufficiency of women. Within this context, the bridegroom's family has the superior position in the marriage transaction and can structure it in ways to avoid criminal penalties under the legislation. In addition, it has the social support of law enforcement agents who are reluctant to enforce violations of dowry and dowry violence provisions. The bridegroom's family also has the social support of lower courts that are reluctant to give a woman property rights over the dowry, and to acknowledge the role of the violence of husbands and in-laws in denying these rights to her.

The legislation must be strengthened to increase the cost to the husband and in-laws of taking dowry and abusing the woman. It should ensure that the woman has property rights over the wealth that passes from her parents to the

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260. *See id.*

bridegroom's family. Stricter penalties need to be in force to punish the misappropriation of property by the husband and in-laws, and any violence perpetrated with the intent to do so.

Moreover, a presumption of cruelty should be legislated in cases where there is evidence that dowry passed to the husband or in-laws. This would make it easier for women and their families to seek a criminal remedy for abuse at all levels of severity, not just in cases where it leads to the death of the woman. Such legislation could protect women and essentially could increase the cost to husbands and in-laws for engaging in this conduct.

For legislation in these areas to be effective, however, the police must be held accountable for their misconduct, and must actively enforce the law. Therefore, strict penalties should be imposed on the police for failure to follow proper procedure.

And, finally, the legislature should clear ambiguities in the legislation in order to guide courts in interpreting and applying the law to reach just results in dowry and dowry violence cases. Fortunately, the Supreme Court's realistic and innovative approach toward recognizing the rights of women over their property provides a glimmer of hope.

*Anshu Nangia*

