

SOCIAL INCENTIVES AND THE ENFORCEMENT OF LAW: SOME REFLECTIONSV. Santhakumar¹**ABSTRACT**

This short essay looks at the ineffectiveness of laws to control dowry in India from a law and economics perspective. This starts with an understanding of the economic and social incentives to provide dowry. Ensuring the welfare of daughters through marriage (and not much through employment), and the struggle to get the 'best possible bridegroom' play an important role in the increase in the dowry. This encouraged even communities that were not following this practice in the past to follow it currently. Hence there are private incentives for both givers and takers to continue with the practice and these work against the enforcement of the dowry prohibition act.

Moreover, dowry is a private transaction. At the time of the transaction, both parties expect gains from it. However, these expected gains may not be realised after the transaction or there could be severe losses to one of the parties (mainly to the girl and her family). Parents may have an incentive to bring severe dowry harassment cases to the court, but givers and takers have little incentive to stop the practice or provide adequate information to law enforcement agencies if such a severe harassment is not taking place. This also works against the enforcement of the dowry prohibition act.

Though the payment of dowry can be seen as part of an informal contract, there are limitations in using the contract law also against dowry. If the dowry prohibition act is somewhat ineffective in reducing, the paper highlights its possible benefits. These may include creating ideas of a desirable norm in society, and this role of law needs to be understood in detail especially in countries like India.

Keywords: Dowry Prohibition Act, Law and Economics, India

1. INTRODUCTION

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There are cases where the majority of people in a country like India do not want to follow a law. For example, even though dowry is illegal in India², majority of families pay and accept dowry³. Another case is the laws against corruption. There are many situations where the giver and receiver of bribe benefit from corruption,⁴ and hence both may not have an incentive to reveal the information on the (corrupt) transaction. The enforcement of anti-corruption laws becomes difficult in such transactions.

In general, law enforcement is difficult when the act which is considered illegal is a private transaction from which both the parties benefit. Law enforcement in such cases may require an intrusion into the privacy of individuals which may not only enhance the cost of enforcement, but also may be disliked by the society. There are two implications here. If we take the law against dowry or corruption on their face value, these are ineffective (since there are social incentives to continue with the targeted practices). However, there could be other indirect benefits of such legal interventions - such as the creation of a desirable norm or ideal which may have some benefits in terms of long-run social change.

There is a need to understand the functioning of law in such cases. This short essay is a modest attempt in this direction. This is important because of the higher demand for law (and the tendency to provide/supply it) as an instrument to deal with difficult social issues.⁵ Though the law against dowry is discussed here, this article is not a commentary of Dowry Prohibition Act.⁶ This article is also not much about the unavoidable connection between the effectiveness of law and cultural practices.⁷ Instead, the essay analyses the purpose of a law and its performance when the majority of people have an interest/incentive not to follow it. Though the dowry prohibition act is taken up as a case, the

² It is banned under Dowry Prohibition Act, 1961, No. 28, Acts of Parliament, 1961 (India). Some of the later amendments, as in 1984, were based on the understanding of the ineffectiveness of prohibition. Even though these amendments allowed certain presents to be exchanged at the time of marriage, the related provisions are not followed by most people.

³ The ineffectiveness of dowry act in controlling the payment of dowry is noted in the literature: For example, Shobhit Srivastava et al., *Banned by the law, practiced by the society: The study of factors associated with dowry payments among adolescent girls in Uttar Pradesh and Bihar, India* 16(10): e0258656 PLOS ONE (2021).

⁴ How do social incentives and norms lead to the persistence of corruption is discussed in the literature. For example, refer Ajit Mishra, *Incentives, norms and the persistence of corruption*, 161 DUNDEE DISCUSSION PAPERS IN ECONOMICS (2004).

⁵ When there was a movement against corruption led by Anna Hazare, the demand was to create a legal mechanism such as Lokpal. Will people have the incentive to use such a mechanism was not a major concern then.

⁶ There are such commentaries. For example, Paramjit S. Jaswal and Nishtha Jaswal, *Anti-Dowry Legislation in India: An Appraisal*, 3(1) J. IND. L. INSTT. 78 (2020). There are critical analyses such as B. Pramila, *A Critique on Dowry Prohibition Act, 1961*, 76 PROCEEDINGS OF THE INDIAN HISTORY CONGRESS 844 (2015).

⁷ Such a connection in the case of dowry is discussed in Tara S. Kaushik, *The Essential Nexus Between Transformative Laws and Culture: The Ineffectiveness of Dowry Prohibition Laws of India*, 1(1) Santa Clara J. Int'l. L. 74 (2003).

arguments in this essay are relevant in a number of issues, especially in a developing country like India.

2. DOWRY - SOCIAL INCENTIVES

It is true that dowry is a social issue in India warranting legal or social intervention. There are cases of dowry-related harassment, and the victims or their families may want an intervention by the law. However, there is no incentive for the majority of parents who pay the dowry to take the issue to the court. They may not even reveal the information on the payment of dowry. The payment and acceptance of dowry may remain as a private transaction. However, when there is a dowry-related harassment of intolerable level, and/or when the girl's family does not want the marital relationship to continue, the case may reach the court.

These are private incentives to pay (and obviously to receive) dowry. In the Indian context, parents want to ensure girls' social, financial and personal security through marriage. This is true even if they are educated and employed. Hence dowry is partly a one-time transfer to the bridegroom so that the girl has a claim on the wealth/incomes of her husband. Moreover, when many families are after a 'desirable' bride groom, his bidding price goes up.⁸ Hence the amount of dowry is increasing, and it is becoming an acceptable practice even among communities which have not been practicing it in the past.⁹ When the dowry transaction happens, it is in the interest of both parties based on their expectations. However, harassment case is an instance when one feels let down after the transaction. Or that party's expectations at the time of giving dowry are not met. This encourages that party (the giver) to go to the court.

The cases of harassment related to dowry may have encouraged the governments to make dowry illegal. However, there is no social incentive to declare dowry as illegal (as evident from the fact that the majority of Indian citizens pay and accept dowry). Hence the illegality of dowry can be taken as an outcome of two possible responses. First, it is a response towards dowry harassment. In order to

⁸ Such rationale for dowry is noted in the literature: For example, see Praveena Kodoth, *Producing a Rationale for Dowry? Gender in the Negotiation of Exchange at Marriage in Kerala, South India*, ASIA RESEARCH CENTRE, WORKING PAPER NO. 16, LONDON SCHOOL OF ECONOMICS AND POLITICS (2006).

⁹ For example, the practice of dowry has become widespread and the amount of dowry has gone up even among erstwhile matrilineal communities like Nairs in Kerala

reduce dowry-related harassments, dowry is made illegal. Second is due to the view (of an influential minority) that dowry is an undesirable practice.

If the law against dowry is a response to the cases of dowry harassment, there is a lot more matching between the expectations from the law and the reality of law enforcement. Let us take up this interpretation in the following section.

3. FIRST INTERPRETATION OF THE ILLEGALITY OF DOWRY

In a normal dowry transaction, the expected private benefits are higher than the private costs for those who give dowry. (They may be seeing their daughters co-owning marital property and receiving a fair share of family welfare). Hence, they don't see dowry as an issue. When something goes wrong, it means that (a) actual benefit of dowry becomes lesser than the expected one when the husband is not providing the expected welfare; and (b) when the private costs go up when the husband demands more dowry (after the marriage through different forms of harassment), people may approach the court and reveal information on the payment of dowry.

Though the law which bans dowry is in place, society/governments want to take action only when there is some harassment. Then the ban can be taken as a particular institutional mechanism that is adopted to address the real problem, i.e., harassment related to dowry. One should not be taking the illegality of dowry 'seriously' then. One can ask a different question. What about a law just to intervene in the cases of dowry harassment instead of a law that bans dowry?

One can see that dowry harassment has similarities with the issues handled through the contract law.¹⁰ In a contract, both parties expect to benefit ex-ante, but in certain cases, one may suffer losses ex-post, and this party may approach the court.¹¹ The purpose of court intervention based on contract law is to mitigate the genuine losses of this party. In that sense, a dowry transaction can be taken as a part of a contract (though it is informal), and there can be penalties if one of the parties fail to stick to the agreement. (Of course, there can be aspects of a criminal act as part of dowry harassment, and these can be treated within the framework of laws against crime.) If dowry harassment is treated like

¹⁰ Dowry is visualised as a contract in the literature. See Soumyanetra Munshi, 'Arranged' marriage, education, and dowry: A contract-theoretic perspective, 42(1) J. Econ. Dev 35 (2017).

¹¹ This is discussed in the literature on law and economics. Refer, the chapter on contracts in S. GANGOPADHYAY AND V. SANTHAKUMAR, LAW AND ECONOMICS: THEORY AND PRACTICE (TWO VOLUMES: VOL I AUTHORED AND VOL II EDITED) (Sage Law 2013).

a breach of contract, then judicial mechanism similar to those used for adjudicating the dissolution of marriage (family courts) should be adequate.

Of course, there are issues in using a contract-like legal framework to deal with dowry harassment cases. First, there is no formal contract as part of a dowry transaction. Secondly, there could be diverse expectations (which are not agreed upon by both parties and documented). What is reckoned as a 'breach' by one party need not be viewed so by the other party. However, the fundamental difference between the breach of a contract and dowry harassment is the following: Contract law is formed with the objective of facilitating more and more contracts, since these are socially (and economically) useful. Contracts are surplus enhancing exchanges carried out voluntarily by parties, and hence the enforcement of contracts by the courts is primarily aimed at enhancing the confidence in contracts. However, it is not clear whether dowry is a transaction that is socially beneficial. (One may argue that marriages could be mutually beneficial or surplus enhancing and hence contracts which ensure marriage including dowry exchange have to be facilitated. However, this proposition can be questioned since dowry leads to the cementing of the subsidiary/secondary role of women in marital relationships, and is against gender equality. Its negative implications on economic and social justice are also recognized.)¹²

What about treating dowry harassment as a normal harassment which can be dealt with criminal laws rather than by making dowry illegal? Probably some details would be lost by not considering dowry as a special transaction. The demand for more money/wealth, and the intangible suffering associated with it may be overlooked if the possible impact of dowry is not taken cognizant in such harassment cases.

There is yet another way to see the illegality of dowry. There could be difficulties in acting against harassment since it happens within private spaces, and also because of the socioeconomic conditions in India. Many people are poor, and the majority of women may not be willing to reveal the oppression that they encounter within the marriage due to their dependency and unequal position in marital relationships. These institutional features or weaknesses in India may make the action against dowry harassment difficult, without making dowry illegal. There could be similar issues in other domains.

¹² JEAN DREZE AND AMARTYA SEN, INDIA: ECONOMIC DEVELOPMENT AND SOCIAL OPPORTUNITY (Oxford University Press, 1995).

For example, wildlife hunting is illegal in India whereas it is legal in a number of developed countries. There could be an implied moral basis for the ban on wildlife hunting. However, there could be practical/institutional reasons too. Taking actions against illegal hunting may become more difficult when legal hunting is allowed due to different institutional deficiencies.¹³

4. SECOND INTERPRETATION OF THE ILLEGALITY OF DOWRY

There may be another justification for banning dowry. There could be a view of the minority - let us call them agents of social change - who consider that the payment of dowry itself is undesirable, and hence it should be banned. This position is legitimate since dowry transactions imply a subsidiary or secondary role for women in marriages, and this is against women empowerment and gender equality.¹⁴ This normative position or the demand from those who hold such a position encourages the government to make dowry illegal. However, it is not enforced in the majority of dowry transactions. It is very difficult to enforce, since there would be very little information on the actual transaction of dowry. The majority of those who pay dowry may not take it to the law enforcement agencies. In this case, the law remains unenforced due to the lack of social incentives.

One can interpret that the approach here is to make a law but it is enforced only when there is a demand from affected parties. There are other such examples in India. Environmental laws in India are well written but these are not adequately enforced. Even the enforcement agencies like the Pollution Control Board may not take adequate action against the cases of pollution on their own. The government and its enforcement agencies are often compelled to act only when there is a public interest litigation (“PIL”).¹⁵ Such a PIL can be filed by the parties directly affected or others (and they can be called indirectly affected parties since environmental pollution may affect the society as a whole). Hence the situation in this case is that the laws are in place but these are enforced only when there is a social demand. That is the reason why one may see a greater number of or frequent environment-related PILs in certain states (like Kerala) where the social demand for pollution control

¹³ This is discussed in V. Santhakumar, *ECONOMIC ANALYSIS OF INSTITUTIONS: A PRACTICAL GUIDE* (Sage Publishers 2011).

¹⁴ The connection between dowry and gender inequality is discussed in the literature. For example, Rajeev Kumar, *Dowry System: Unequalizing Gender Equality*, in *GENDER EQUALITY* 170 (Walter Leal Filho et al. eds. 2020).

¹⁵ V. Santhakumar, *Citizens- Action for Protecting the Environment in Developing Countries: An economic analysis of the outcome with empirical cases from India*, 8 *Env. Dev. Econ.* 505 (2003).

is also higher. What is the purpose of the law then? It can be to empower the people who are willing to use it.

Aren't all laws meant to empower those people who want to use it? One may argue that the law enforcement happens only when the affected party seeks legal remedy. Of course, this is legally valid only in the case of civil law. In criminal law, there is an action against those who commit the crime even if the victim does not demand action. If we define dowry (and harassments related to dowry which do not encourage the victim to approach the court) as a civil case, then the non-demand of enforcement may not be a serious issue. On the other hand, if we treat dowry as a crime, then the non-enforcement of the ban on dowry is to be recognized as an institutional failure. This could be partly due to its nature as a private transaction. It has similarities with aspects of domestic violence which may also not reach law enforcement agencies. However, the continued interest to provide dowry on the part of bride's parents (even if there are possible cases of dowry related harassments) is somewhat different from the reasons which prevent people from taking instances of domestic violence to the court.

The law can serve as a desirable norm even if it is not used currently. Usually, the enforcement of such a norm is demanded by a minority of educated/informed section of the society (like the way in which such a section may demand stringent regulations to control pollution.) However, the share of people who demand this enforcement may go up as part of educational and social change. There can be a virtuous cycle linking the law and social change then.

The difference between these cases and those for which the cost of enforcement is higher

When we think about the issues like dowry, where the law is not enforced due to the lack of social incentives, there are other similar issues wherein law is not enforced or used. For example, money lenders (in states like Punjab) may not go to courts in the event of non-repayment of loans, even if there is a signed contract.¹⁶ Instead, they may use informal community norms and private persuasion to get back the money. These cases are different from the ones which we have mentioned in the essay. In the former set of cases (such as money lending), the consideration is the higher cost of formal

¹⁶ Indervir Singh, *Imperfect Information and Contract Enforcement in Informal Credit Market in Rural Punjab*, in *ECONOMIC TRANSFORMATION OF A DEVELOPING ECONOMY: THE EXPERIENCE OF PUNJAB, INDIA* 183 (Lakhwinder Singh and Nirvikar Singh eds. 2016).

enforcement (which may be impacted by the possible delay in courts). Or the affected parties may perceive that the informal enforcement (through community connections and private persuasion) is cheaper than the enforcement through courts. Some may be considering the long-term gains through the continuation in business (even if they have to forego some money for using community connections). All these instances are due to the costs of enforcing, and not due to the incentives related to the underlying social phenomenon. Hence, policy measures which are required to make formal law enforcement much more common in these cases have to be different.

5. CONCLUSION

If those people who demand to make dowry illegal expect that such a legal action would lead to its disappearance, the law becomes ineffective. It is not unusual to see sections of people (especially activists) demanding legal interventions to address social issues. This demand, without understanding the underlying social incentives, may lead to ineffective legal interventions. However, there can be two uses for these laws which are apparently ineffective. First is to use it in those cases where the damage to some people is very high so that they don't mind to get out of the equilibrium shaped by social incentives. Second is the scope of such laws as desirable norms or as guiding principles for long-run social change.