PART III: VIOLENCE RELATED TO TRADITION OR CUSTOM

Introduction

In a number of Commonwealth countries women are subjected to violent or harmful conduct because of practices which are regarded as traditional, customary or prescribed by religion. This section describes four such instances: violence related to dowry, widowhood rites, sati and female circumcision.

Any adverse treatment of women which has a traditional, customary or religious basis is controversial and raises deep contradictions. This is because criticism of the results of such traditional, customary or religious practices is frequently construed to be criticism or of traditions, customs and religion or even castigation and condemnation of an entire cultural or societal system. This is often complicated by the fact that criticism of adverse treatment of women arising out of tradition, custom or religion is frequently made by individuals who do not share, or even purport to understand the particular culture or society.

In the case of the four practices which are considered in this chapter, criticism, in some cases resulting in legal strategies, of their consequences has come from "inside" and "outside" the groups who subscribe to the traditions and customs. Nevertheless, there are many women and men prepared to defend continued practise of these customs despite the fact that they have patently harmful consequences for women.

In the four instances which are considered here, specific legal strategies have been introduced to criminalise the particular custom in the hope that this will result in the eradication of the practices. Here, however, more than in any other issue concerning women, law alone cannot be relied on to change practices which are rooted deeply in culture and society. They will be changed only when there is fundamental societal change which will occur with attitudinal change at all levels. This can be achieved by a combination of short term and long term measures which aim to place women on an equal plane with men in all respects. These measures include education, both formal and informal, effective use of media and clear commitment from government, which is prepared not only to condemn such practices legislatively but also ensure that such legislation is implemented in good faith. It is crucial, further, that clear, comprehensive and simple legal protection is available for women and that they are afforded maintenance rights. These legal rights, moreover, must be accompanied by social services, such as short term accommodation, so that there is no gap between women's legal rights and their practical options.

Violence Related to Dowry

a) The nature of the problem

Women, particularly in Commonwealth South Asia, have been shown to be at increasing risk of violence because of the custom of dowry.[1] Evidence exists, moreover, that Asian women living in countries outside Asia are also at risk of abuse because of dowry.[2]

Dowry is an essential part of some marriage arrangements[3], but many marriages in South Asia are governed by customs which do not include dowry. For example, the custom of dowry is foreign to Muslim marriages. For various reasons, however, South Asian parents, irrespective of their religion or the traditions which govern marriages, have come to accept that if they wish their daughters to be married, they must provide a dowry. They accept, further, that it is their parental duty to find appropriate husbands for their daughters and that the amount of dowry available will be a crucial factor in attracting a husband of suitable quality.

In an alarming number of instances, dowry and its adequacy have proved to be a life and death matter for women, reports of brutal maltreatment of brides by their husbands and their husbands' families appearing regularly in the Indian and Bangladeshi press.[4] Women are physically and mentally maltreated in the hope that their parents will be induced to part with more money and possessions, even though the original dowry has been paid. Many women are driven to suicide, while others are actually murdered by the husband or his family, thus freeing him to remarry and thereby acquire another dowry. These deaths are usually explained as "cooking accidents", a convincing excuse given the use of kerosene stoves and flowing sarees in the kitchen. It is for this reason that deaths by suicide or murder arising out of dowry demands are frequently called "bride burning". It must be remembered, however, that although most of these deaths do occur by burning, victims of dowry violence also die in other ways.

b) Legal strategies

In India and Bangladesh, the payment of dowry has been outlawed. In India, the Dowry Prohibition Act was passed by the Central Government in 1961, but it had little effect in reducing the practice of offering and accepting dowry. The Report of the Committee on the Status of Women in India described it as "signally" failing to achieve its purpose,[5] as by 1984 there had been only eleven prosecutions[6] and no convictions [7] under its provisions.

There were three main factors which led to the failure of the 1961 legislation. First, the definition of dowry: "any property or valuable security given or agreed to be given either directly or indirectly by one party to a marriage to the other at or before or after the marriage as consideration for the marriage", effectively excluded gifts given or demanded after the marriage without any agreement prior to the marriage[8], while the explanation appended to the definition also excluded gifts not made in consideration of the marriage given at the time of the marriage. Second, the Act punished equally not only those who demanded or took dowry, but also those who gave dowry, even though payment of dowry occurred primarily because of fear or force.[9] Finally, the enforcement mechanism of the Act, requiring the complaint to be made within one year of the offence and rendering all offences under the Act non-cognizable, bailable and non-compoundable, thereby limiting those prosecuted to cases sanctioned by the state government[10], was defective.

Evidence of the increase in dowry related violence and the patent failure of the 1961 Act resulted in the passage of amendments to its provisions in 1984 and 1986. The 1984 Act amended the definition of dowry to include property or valuable security given in "connection" with, rather than "as consideration for" the marriage, omitting the explanation which had

excluded gifts given at the time of, but not in consideration for, the marriage, while the 1986 Act explicitly condemned continued demand for dowry by defining the relevant time frame to include "at any time after the marriage". Certain types of presents given under certain conditions are excluded from the definition of dowry. They are presents given, in the absence of any demand to the bride at the time of the marriage, presents entered in a list maintained in accordance with prescribed rules and presents of a customary nature made by or on behalf of the bride, the value of which are not excessive having regard to the financial status of the person by or on whose behalf they are given.

The Amendments also increased the penalties in the 1961 Act, imposing a minimum of five years imprisonment and a fine of Rs. 15,000 for the giving or taking of dowry, while demanding dowry, liability which ensues when the demand is made, is punishable by imprisonment from six months to two years and with a fine of Rs. 10,000. Those who advertise or circulate advertisements offering property or money as consideration for marriage are liable to imprisonment of not less than six months and a fine of up to Rs. 15,000.

In order to facilitate the enforcement of the legislation, the dowry offence is made cognizable on a police report, the complaint of a person aggrieved and also on the complaint of a recognised welfare institution or organisation. Complainants who give dowry are immune from prosecution under the Act and the burden of proving that an offence has not been committed under the Act lies on the person prosecuted for taking or abetting the taking of dowry. Enforcement is also encouraged by the introduction of Dowry Prohibition Officers to ensure compliance with the Act, prevent dowry related offences and collect evidence for prosecutions and the establishment of advisory boards consisting of five social welfare officers, two of whom must be women.

The Amendments of 1984 and 1986 testify to the seriousness with which dowry related violence has come to be viewed in India. This is echoed in the related amendments to the Indian Penal Code 1860, the Criminal Procedure Code 1973 and the Indian Evidence Act 1872 made by the Criminal Law (Amendment) Act 1983 which sets out in its statement of objects and reasons that the increasing number of dowry deaths is a matter of serious concern. Accordingly, the Criminal Law (Amendment) Act inserts two new offences in the 1860 Penal Code. The first, the offence of dowry death, punishable by between seven years and life imprisonment, is defined to occur where a woman, subject to cruelty or harassment by her husband or his relatives in connection with any demand for dowry, dies within seven years of marriage.[11] The second offence, cruelty to a woman by her husband or the relatives of her husband, which is punishable by imprisonment of up to three years and a fine, is defined as any wilful conduct which is of such a nature to be likely to drive the woman to commit suicide or to cause her grave injury to life, limb or her physical or mental health. Cruelty also includes any harassment of the woman where this is intended to coerce her or any of her relatives into parting with any property or valuable security or any harassment which occurs because of her failure or the failure of her relatives to meet such a demand.[12] The prosecution of both offences is facilitated by accompanying amendments which, in the case of the offence of dowry death, presume that if the ingredients of it are made out, the husband or her relatives caused her death[13], a presumption reinforced by a further presumption which assumes that a person who harassed or was cruel to a woman before her death in connection with dowry, caused her death.[14]

Where the offence of cruelty to a woman by her husband or relatives is concerned the complaint must be made by the woman who has been subjected to the cruelty or by a person related to her by blood, marriage, adoption or, where she does not have such a relative, by any public servant belonging to such class or category as may be notified by the state government as having this capacity.[15] It is presumed where the woman has committed suicide within seven years of her marriage that her husband and his relatives subjected her to cruelty and aided and abetted her suicide.[16]

The powers of the police in cases of deaths of women which occur in unusual or suspicious circumstances have also been strengthened. Thus, where a woman commits suicide within seven years of her marriage, dies within that time in suspicious circumstances or where there is doubt as to the cause of her death or where she dies within the seven year period and a relative requests an investigation, the police must arrange for a post-mortem examination.[17] In these circumstances, furthermore, magistrates have the power to order an inquiry into the woman's death in addition to, or instead of, the police investigation.

These comprehensive, substantive and procedural provisions aiming to facilitate the punishment of those involved in dowry related violence exist at the federal level. In addition, several states, such as Himachel Pradesh and Punjab, have introduced provisions, such as those banning displays of presents given at the time of marriage to discourage dowry even further.[18]

Bangladesh, like India, plagued by the problem of dowry related violence, has introduced legislation on the pattern of the 1961 Indian Act which provides substantial penalties for the giving or taking of dowry. Its legislation, the Dowry Prohibition Act No XXV of 1980, came into force on 1 October 1986 and was modified in 1982 and 1986.

c) Other strategies

The enactment of legislation has not been the only strategy used to counter dowry related violence. In India, a number of special police units, usually headed by women officers, have been established, public lawyers have been appointed to assist women in the prosecution of dowry related matters[19] and many women's organisations, such as Manushi, have actively campaigned on the issue.[20] The Government has also instituted a television and cinema advertising campaign which relies on uncomprising commercials to discourage the practice.[21]

d) The strategies assessed

Legislation introduced to outlaw dowry and facilitate the prosecution of those who demand it has not met with outstanding success. In both India and Bangladesh there have been very few prosecutions under the Acts and those that have been pursued have been unsuccessful or have attracted light penalties. Certainly, some blame for this in India must be laid at the door of the defectively drafted 1961 Act and it is expected that prosecutions will be more successful under the amended legislation.[22] Recent cases have shown the judges at the Supreme Court level to be more aware, but judges at lower levels have yet to show similar enlightenment.[23] The provision of special police units to deal with dowry cases - dowry cells - legal aid and special prosecutors has helped, as has the support and campaigning strategies of women's groups, but again, the impact of these measures has been limited.

The major obstacle facing the strategies introduced to deal with dowry and its related evils is that they address the symptoms of the problem, not its causes. Although dowry has proven to be a greater threat to women recently because of consumerism and materialism, fundamentally, the root of the problem lies in the subordinate position of South Asian women, contributed to by the joint family system, the values of a male dominated society and the traditional economic dependence of women upon men. Historically, dowry was the only way a Hindu woman acquired any part of her family's property, as family property could only be inherited by her brothers alone, if she had any. Although the current law does provide that a daughter may inherit even if she has brothers and, indeed, has a right to such inheritance, very few women do inherit, nor do they enforce their rights. Furthermore, the provision of a substantial dowry is seen by many women as the only means by which they can better their social positions and ensure respectful treatment by the families of their husbands.

Ultimately, the success of any measure to combat dowry depends on fundamental change of public attitude. When dowry is no longer perceived as functional, customary or traditional and is viewed as unacceptable, serious eradication will eventuate. This will only occur when women achieve social and economic independence. In the short term, a number of measures may be effective.

Evidence exists which indicates that, in general, the public is ignorant of the fact that dowry is illegal. Moreover, it appears that the public does not have a proper appreciation of the extent and measure of dowry demands and the violence associated with them. This ignorance is particularly problematic where it is shared by the police and the judiciary and it appears that the police are sometimes unwilling to investigate cases of domestic maltreatment or too willing to treat suspicious cases as suicide, particularly where the husband's family is wealthy and influential.

Research and its dissemination are priorities and must be sponsored at the highest levels. Specialised training for the police and the judiciary is essential. Here it is crucial that the illegality of dowry be stressed and the important role of the media as a disseminator appreciated. As the role of the media is critical, it also must be sensitised and educated. Further, while Governments are to be applauded for establishing specialised units or cells to deal with dowry associated violence, they must do more. More policewomen are needed for such work and as the report desk is the first place that a woman will have contact with the police and this may be staffed by a junior male officer, it is important that male officers, too, are sensitised to the problems, particularly those associated with dowry, that women face.

Finally, legal, provisions allowing women protective orders and the right to claim maintenance from their husbands must be simplified, made accessible and published, while, at the same time, it is essential that women at risk have a safe place to go. Thus, a place of refuge which is adequately funded, staffed and which can provide some legal and medical help is a central tool in the protection of women.

Widowhood Rites

In some Commonwealth countries, it is customary for a woman to undergo some form of ordeal or perform a traditional ceremony of purification on the death of her husband. These rites of widowhood differ from group to group. Some involve innocuous practices such as remaining in a room with the body of

the deceased spouse for an extended period of time or the shaving of the widow's hair, but others are oppressive and even violent.

These practices have attracted little attention beyond that of anthropologists. In Ghana, however, the legislature, in an attempt to discourage more unpleasant rites, has specifically addressed them in the Criminal Code. Thus, any person who compels a bereaved spouse to undergo any custom or practice which is cruel, in that it falls into the definition of assault within the Code, or immoral or grossly indecent is guilty of a misdemeanour.[24] In 1965, the Zambian High Court considered the widowhood customs of the lala, known as akamutwe, which involve a purification ritual and payment to the natal family of the deceased husband. The Court, while not commenting directly on the ritual, was unprepared to enforce the payment, concluding that an obligation of payment in such circumstances was repugnant to natural justice, equity and good conscience.[25]

Sati

Historically, in some parts of Northern India, it was customary for a widow to immolate herself upon the funeral pyre of her dead husband.[26] This practice, called sati, resulted in glorification of the immolated woman and came to occupy an important part in Indian mythology.[27]

The practice was outlawed by the British colonial government in 1829, but it persisted, so that since 1947 there have been twenty-two reported cases of sati and it is certain that there have been a larger number that have gone unreported.

Until 1987, only women's groups paid much attention to sati. In that year a young, well educated woman, who had been married for three weeks immolated herself on her husband's pyre in front of a large audience. The voluntariness or otherwise of her actions was matter for debate and the incident provoked national and international controversy. Indian opinion was divided. Women's groups were outraged by the event and pressurised the state and federal governments to act to criminalise sati further and to prevent activities geared to the glorification of the immolated woman. A writ was filed in the state high court which resulted in a ban of the thirteenth day celebration of sati and, indirectly, caused the Chief Minister of State to appear on television to condemn the incident. At the same time, other pressure groups justified sati in the name of religion or custom and demonstrations occurred during which the government and others condemning the practice were accused of interfering in religious freedom which is guaranteed by the Indian Constitution.

Despite significant pressure against interference in the custom, Parliament assented to The Commission of Sati (Prevention) Act 1987 in early January 1988. This Act, which in its preambular section asserts that sati, defined as the burning or burying alive of widows, is revolting to the feelings of human nature and is nowhere prescribed by any of the religions of India as an imperative duty, seeks to introduce more effective measures to prevent the commission of sati and its glorification. Thus penalties are introduced which punish the would be sati or anyone who abets her directly or indirectly, abetment being defined to include offering inducements, making her believe that the commission of sati will result in some spiritual benefit to

her or her deceased husband or the general well-being of her family, encouraging her to remain fixed in her resolve to commit sati, participating in any ceremony connected with sati at the place where the act is to be committed, participating in any procession or taking her as sati to the burial or cremation grounds in the company of her husband's body, preventing her from saving herself and interfering with the police where they seek to prevent sati. Penalties have also been introduced for those who do anything to glorify the practice or any particular sati and powers have been introduced to authorise removal of any place of worship where sati or a particular sati is venerated.[28]

Passage of this legislation indicates that the Indian Central Government views sati seriously and with disapproval, but there remain vociferous groups prepared to defend the custom. These groups frame their objections in terms of tradition, custom and religion, but closer examination of the modern practice of sati reveals that certain advantages accrue to the deceased husband's family if the widow is also dead and that the organisational structure surrounding the worship of sati depends on its continuance to support a lucrative cult. As in the case of dowry, it may well be that modern forces of consumerism are combining with tradition to justify a customary practice which is patently harmful to women.

It would seem that all legal strategies available to the government have been deployed by the government. Legal strategies alone will fail to eradicate the custom. They must be accompanied by fundamental change i social attitude which can be encouraged by education, both formal and informal, at all levels.

The Circumcision of Women

The circumcision of women and young girls, which takes various forms, including excision and infibulation[29], is widely practised in a number of the Commonwealth countries of Africa and South East Asia. Evidence exists, moreover, which indicates that immigrant groups in other Commonwealth countries, such as the United Kingdom, also subscribe to the practice.[30]

Continuation of the custom is justified on various grounds, including religion, but it is clear that the practice is not confined to any religious group.[31] The issue has been the focus of controversy, some commentators arguing that it is a practice that can be understood only within the context of rituals and traditions that play an important role in the lives of women of certain cultural groups[32] and as such a practice which should be maintained, while others advocate the introduction of any measure, no matter how stringent, to discourage the custom.[33]

Although discussion of the issue of female circumcision has been controversial, the health risks to girls and women resulting from the practice are undisputed. They include haemorrhage, septicaemia, keliod scarring, adverse sexual, gynaecological and obstetrical consequences and increased vulnerability to contraction of the acquired immunity deficiency syndrome (AIDS).[34]

A number of strategies have been introduced in Commonwealth countries to discourage female circumcision. Most of these have taken the form of education, information and consciousness raising campaigns, aimed at the transformation of the social, religious and cultural bases of the practice.[35] Although some suggest that ultimate eradication of the practice will be achieved only by legislation which criminalises it, imposing severe penalties on those who perform such operations or arrange for their female children to be circumcised, most commentators in countries where the practice is endemic and rooted in culture and tradition consider that strategies of this nature are, at best, unhelpful, as they fail to confront the traditions justifying the custom and, at worst, counter-productive, as they drive the practice underground.

Nevertheless, some countries, particularly those where female circumcision is not traditional, but rather, the practice of immigrant groups, have introduced specific criminal legislation to prohibit it. In the United Kingdom, for example, it is a criminal offence, punishable by fine or imprisonment or both, to excise the whole or any part of the labia majora or labia minora or clitoris of another person or to aid, abet, counsel or procure another to perform such an act. An offence will not be committed where it is proven that the operation was necessary for the physical or mental health of the person on whom it was performed and where it is carried out by a medical professional. In establishing this defence it is not open to the defendant to allege that the operation was necessary for the mental health of the circumcised woman because of the effect on that person of any belief she, or anyone else, may have, that the operation is required as a matter of custom or ritual.[36]

Like the issue of female circumcision itself, this legislative measure has proven to be the subject of intense debate. Some argue that its introduction was an essential tool to discourage the practice, others suggesting that it was too heavyhanded.[37] Certainly, there have been no prosecutions under its provisions and evidence exists which reveals that young women are still circumcised in the United Kingdom, while substantial numbers of women resident in the country are circumcised outside the country and then return.[38]

The questions of the value and appropriateness of legal strategies to confront customs such as female circumcision, are the same as the questions surrounding the value and appropriateness of legal measures in the management of customs which confront women generally. Certainly, stringent legal measures may have the effect of driving the practice underground or, indeed, encouraging it. Clearly, moreover, legal measures alone cannot eradicate deeply rooted cultural and traditional norms. Legislation may, however, indicate minimum standards to which a country aims and provide protection in extreme cases. Legislation may, further, prove to be an essential tool in education programs which aim to discourage the practice because of its undeniable health consequences. In this context, it is of interest to consider the prosecution of Dalla Fofana Traore, a Malian woman in Paris in 1988. Traore was charged with complicity in the mutilation of a minor, an action which arose out of the excision of her newborn daughter, Assa, in 1984, which left the child with residual disabilities. While Traore received a suspended sentence only, she did state that she did not have her four younger daughters circumcised because had come to learn of the illegality of female circumcision in France.[39] This admission suggests that a combination of legislation and well designed information and education measures may go a long way in the eradication of the practice.

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2. Readers Digest, September 1988, "Dowry: Our National Shame"; Sunday Observer, 13 December 1987

3. S. Kothari, "The Social, Economic and Legal context of Dowry in Modern India", Unpublished Thesis (SOAS, London, 1988) 24-35.

4. See, for example, M. Karkal, "How the Other Half Dies in Bombay" Economic and Political Weekly, August 24, 1985

5. Towards Equality, Report by the Committee on the Status of Women (New Delhi, 1974) p. 115

6. R. Palriwala, "Suicides under Scrutiny", Inside Asia, 15 April 1984, p. 16.

7. India Today, 15 April 1984, p. 16

8. Inder Sain v State 1981 Criminal Law Journal p. 116

9. Joint Parliamentary Committee on the Working of the Dowry Prohibition Act, August 1982, states: "The giver of dowry is more a victim than a criminal. The parents do not give dowry out of their free will but are compelled to do so".

10. Except in West Bengal: Dowry Prohibition (West Bengal Amendment) Act 1975

11. Penal Code 1860, s. 304B

12. Penal Code 1860, s. 498A

13. Penal Code 1860, s. 304B

14. Evidence Act s. 113B

15. Code of Criminal Procedure s. 198A

16. Indian Evidence Act s. 113A

17. Code of Criminal Procedure s. 174

18. N.R.M. Menon, "The Dowry Prohibition Act 1961" in Social Audit of Dowry Legislation, Delhi, 1988, Chapter 3, pp. 19-20.

19. A. Malhotra, "Public Interest Litigation - My Own Perception and Solution" Punjab University Law Review, XXXV, 1983-84, 83 at 89.

20. Manushi, January 1979; Nos 7 and 8 of 1981 and No 3 of 1983

21. C. Bowen-Jones, "Burning Brides", Marie Clarie Magazine, London, December 1988.

22. State (Delhi Administration) v Laxman AIR 1986 (SC) 250

23. S. Kothari, op. cit. p. 76ff.

24. Criminal Code (Ghana) 1960, s. 88A and 278A

25. Kaniki v Jairus [1967] ZR 71

26. M. Anderson, "Law as knowledge, law as control: sati in colonial India, c. 1770-1840" (1988, unpublished)

27. L. Das, "Violence against women: an Indian view" in Report of International Women's Aid Conference (Welsh Women's Aid, Cardiff, Wales, 1988) p. 8

28. Legislation on acts concerned with sati has also been introduced at the state level in Rajasthan.

29. O. Koso-Thomas, The Circumcision of Women: A Strategy for Eradication (Zed Press, London, 1987) p. 15ff.

30. Sunday Observer, London, 5 March, 1989.

31. S. Maclean (ed), Female Circumcision and Infibulation (London, Minority Rights Group, 1980)

32. K. Mansaray, "Female Circumcision, Fertility control, women's roles and patrilineage in modern Siera Leone: a functional analysis", International Journal of Sierra Leone Studies, No 1, 1988, p. 114; A. D. Renteln, 'Relativism and human rights", Human Rights Quarterly, vol 7, 1985, p. 515 at 531 ff.

33. Recommendation to Seventh Session of the Committee on the Elimination of Discrimination Against Women, New York, February-March, 1988. Note, General Recommendation 14 from the Ninth Session of the Committee on Elimination of Discrimination Against Women (1990) recommends that States Parties to the Convention report on measures to eradicate the practice of female circumcision in their periodic reports under the Convention.

34. Effects of the Acquired Immunodeficiency Syndrome (AIDS) on the Advancement of Women, United Nations, Commission on the Status of Women E/CN. 6/1989/6/Add. 1, 17 February 1989, paras 38-41.

35. Female Circumcision: Strategies to Bring About Change, Proceedings of the International Seminar on Female Circumcision, 13-16 June 1988, Mogadisho, Somalia.

36. Prohibition of Female Circumcision Act, 1985.

37. E. Graham, "Female mutilation: unsettled issues" Spare Rib, April 1989, p. 44; A. Whyte, "An act of love, not cruelty" Community Care, 7 September 1989

38. Sunday Observer, London, 5 March, 1989

39. Time Magazine, October 16, 1989, p. 35; Guardian Weekly March 24, 1991.