



Women's Rights in India: Hierarchical Ethics vs. Egalitarian Morality¹

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Introduction

The recent debates on sexual violence in India have brought to light the deeply entrenched hierarchical ideas about gender roles in Indian society and underlying social norms. Since the brutal gang-rape and subsequent death of Jyoti Singh Pandey, a 23 year old paramedical student, on 16 December 2012 in Delhi, the situation of women in India is under the spotlight of international public attention. In India itself the problem is evident since many years. Rape is one among the many terrifying dimensions of systemic disabilities that Indian women face – as women. As Anderson and Ray have established in a recent study (Anderson & Ray 2012: 87-95), about two million women go missing in India every year due to prenatal sex selection (Raju & Lahiri-Dutt 2011: 212), killing of new-born girl-children (Choudhry 2011), malnutrition of adolescent girls (Mehotra 2006), dowry murders (Oldenburg 2010) and other misogynist practices. Rape cases registered by the National Crime Records Bureau have "increased by almost 900 per cent over the past 40 years, to 24,206 incidents in 2011, while murder cases had gone up by only 250 percent over 60 years, and incidences of riot had actually dropped."²

This article deals with the ambivalences in the normative make-up of the Indian polity that contribute to ambivalent attitudes toward rape. Unlike more simple and homogeneous European societies, Indian society is governed by a bewildering multiplicity of normative systems, legal and para-legal, that tend to conflict with and undercut each other. On the one hand there is the constitutional legal framework that grants equal liberties to all citizens; on the other hand there is a plurality of bodies of social norms that interfere with each other and



with the legal framework. The phenomenon of legal pluralism in the case of India is well studied by legal anthropologists (Bavinck et al. 2011). In this article, the notion of normative pluralism is expanded to include normative bodies beyond the law, i.e. social norms, ethical codes etc.

Social norms governing Indian society are of course not uniform as India is a society of many diverse communities, each with their own common law. As much as these norms can vary from community to community, they also seem to converge on a large number of points. Especially the norms regulating the conduct of gender in public seem to be largely shared between communities. Special attention will be given to those aspects of social norms that appear to be common among the communities. Most Indian communities whether urban, rural or tribal, tend to agree *grosso modo* that a woman's place is primarily at home and not in the public square. If she has to venture out, then preferably during daytime and dressed in 'modest' clothes. Ideally she would be accompanied by another member of the family who can act as her 'guardian'. As will be shown, failure to abide by these norms can lead to punitive acts, sometimes taking the form of sexualised violence. To the extent that these acts of violence are seen as a justified social reaction in the name of customary law, such ideas of non-codified law can undercut codified law even in the established courts of India in ways that will become clear in the discussion below.

Confronted with the hiatus between social norms predominant in society and the egalitarian moral demands enshrined in the constitution, the Indian women's rights movement is faced with the problem of devising strategies to break the hegemony of the conservative discourse on the role of women in society. To better understand the mode of critique put forth by women's rights activists and feminists, the three-pronged terminology put forth by Rahel Jaeggi in her *Kritik von Lebensformen* (2014) where she differentiates between 'external', 'internal' and 'immanent' critique, will be analysed. These considerations are brought to bear on the notion of citizenship, among others, as discussed in Indian feminism. Indian feminists have criticised the methodological individualism inherent in the Western understanding of the unmarked citizen. The attempt to reformulate citizenship as a notion differentiated by communal and gender identities, however, raises concerns about the unity and strength of the women's movement to influence the prospects of an egalitarian morality emerging in the Indian context.



Viewed from the perspective of moral philosophy, the problem facing progressive women in India is similar to the dilemma facing Universalist moral philosophy in general. Before belief in the equal dignity of all human beings, irrespective of gender, class or caste, is not wide spread, universal human rights remain an aspiration, not an achievement. What is therefore called for is an emergent theory of human rights universalism. Rahel Jaeggi, who resorts to ideas of forms of life already present in the work of Jürgen Habermas, may be offering the tools to elucidate the circumstances of such an emergence. Although formally upholding his claims to the universal validity of moral norms, Habermas concedes that prior to its establishment

Universalist morality depends on *accommodating* life worlds; it relies on a certain amount of conformity with practices of socialization and education [...] on a certain degree of conformity with political and social institutions which already epitomise post-conventional ideas of morality and law. (1985: 25, my translation, emphasis in original)

The point of this paper is to see what philosophical and social critique can do in case these accommodating life worlds are not forthcoming. Habermas reminds us that "The incremental incorporation of moral principles in concrete life-forms [...] is chiefly owed to the collective efforts and sacrifices of social and political movements" (ibid.) – from within these societies themselves, as we might add. In situations where hierarchy prevails over equality, we have to wait for social and political movements to bring about conditions suitable for Habermas' post-conventional consciousness to arise on a broad scale. Only then can we engage in a wide-ranging social discourse about justice which may lead to the emergence of universal moral principles.

As we will see, the diagnosis of a possible asynchrony in the make-up of the normative framework provides a lever for social movements like the Indian women's movement to employ what Jaeggi has termed 'immanent critique'. The efficacy of immanent critique, however, depends on the capacity of the critique to analytically expose the contradictions that are constitutive of Indian society without itself getting entangled in them. The paper will show that feminist critique in India does not always succeed in escaping those entrapments.

Women's Rights: Social and Legal Norms

Three disclaimers beforehand: The reconstruction of the representations of social order predominant in India, along the lines of caste and



gender, are bound to be gross simplifications. Every historical period, every region, every caste, every religion, every tribe, even every family has different ideas about what women and men should do or not do. Moreover, social norms are not necessarily codified in writing. Customs and manners are handed down orally and they may be interpreted differently by every individual or group of individuals. Thus nowhere is this reconstruction meant to abet an essentialist, ahistorical view of society, particularly in view of the fact that Indian society is presently experiencing processes of rapid change. Therefore, this can only be a snapshot in time and a sweep across important differences. All we can derive from it are generic propositions and no universally valid statements.

The second disclaimer concerns the position of the author. How can a Westerner, particularly a male one, make common cause with the Indian women's movement? Is the author not bound to be caught up in the existing power relations, which would only reveal his heteronomy? (Spivak 1985: 336, 363) Is he not just going to project his own agenda into the 'other' when speaking about her? The risk is that the author uses his position to lend his own voice to the 'other', whom he construes to suit his own projects and projections. As I do not believe that an Archimedean theoretical position exists from which this problem could be avoided, the best the author can do is to try to reflect and render transparent the reasons behind his own interest in this engagement. To quote a famous passage of Gayatri Spivak's "Can the Subaltern Speak": The task is "not to represent (*vertreten*) them but to learn to represent (*darstellen*) ourselves" (Spivak 1988: 288-89). The engagement should not lead to a supersession of the voice of the 'other' and to an usurpation of her position. An integral part of the methodology is therefore to give her as much room as possible for self-articulation through interviews and other texts to avoid the 'fixation of the other' (Fuchs 1999: 156).

Third, the focus on controversies about patriarchal norms in India is not to divert attention from the fact that similar patriarchal norms exist in other countries including the West, where falling birth rates give tail wind to conservative policies in family politics and some of the same stereotypes and biases *vis-à-vis* women inform the police force and the judiciary.³ Patriarchal structures everywhere in the world fail to treat women as 'ends in themselves,' as Kant's categorical imperative would demand it. Instead they treat them as mere means to an end, which more often than not boils down to the preservation of the honour of the collective to which they belong, irrespective of whether this does or



does not serve the individual woman in question. Women are treated as custodians for the honour of their family, tribe or caste. In extreme cases, they symbolically, albeit literally, pay with their lives for it.⁴

The archetypical ordeal that women have to undergo as custodians of family honour is Sita's: "Sita had to prove her chastity, after being rescued from Lanka, through trial by fire, but still had to be abandoned by her Lord because she was not above suspicion in the eyes of at least one subject in his kingdom".⁵ According to Sudhir Kakar, however, Indian patriarchy is distinct from its counterparts elsewhere in that it strips women, as women, of personhood and reduces them to an object of pleasure for men: "In a society that has traditionally defined a person through her relationships rather than her individuality, a woman is certainly a person when she is a mother, a daughter, a sister or a wife. Any woman who does not fit into these mental categories, is a female, a stree, a *bhog ki cheez*" [an object of enjoyment]."⁶

Hierarchical Ethics

As many feminists deplore, the debates on gender equity of the last decades have not been able to displace the patriarchal discourse of mainstream society. Ratna Kapur regrets that "despite the legal victories over the years, the social, political, and economic status of women has shown remarkably little improvement" (Kapur 2012: 341). Invariably, amendments to the law are either half-hearted or watered down, or their sting is taken out by the judiciary in their patriarchal interpretation of the law. Feminists have realised that any legal discourse is embedded in the larger ethical discourse from which it receives basic notions and stereotypical representations of gender roles that help to distort the spirit of the law in the processes of application and enforcement. The patriarchal nature of the dominant discourse on gender can be detected from the discourse on sexual violence, which is fraught with patriarchal notions of shame and honour right up to the top of the legislative, the executive and the judiciary; notions of honour of which invariably women are the custodians (Kapur 2012; Menon 2004: Ch. 3). In this imaginary, women are represented as passive, penetrable, and therefore easy to victimise and not as active, pleasure seeking, and autonomous human beings.

For the purpose of this paper, the tentative reconstruction of the ideas that dominate representations of social order in India relies on two non-representative surveys carried out by the *Tehelka* magazine, firstly among 30 senior police officers in Delhi and National Capital



Region (Balla & Vishnu 2013), and secondly among 35 Indian men, randomly chosen from different social strata, age groups and regions of India (Chaudhury 2013). *Tehelka's* managing editor Shoma Chaudhury asks in the issue of 19 January 2013: "What creates the idea of women as 'fair game' for sexual violence? What, in effect, do Indian men think about women?" (ibid.) The short answer is that most Indian men generally do not hold the male side responsible when it comes to rape. Out of the 35 respondents, only seven younger men aged between 23 and 29 thought that men share a responsibility in cases of rape.

It is as if Manu's law was still very present in the collective unconscious of large sections of Indian society. According to Article 147 of the *Manusmriti*, a woman should never be *outside the custody of a male family member*: "By a girl, by a young woman, or even by an aged one, nothing must be done independently, even in her own house" (Bühler 1886: Article 147). Terms used today vary according to community and region. A woman is seen as the property of her future in-laws (Hindi: *paraya dhan*). Until marriage she is under the protection of her family (Hindi/Urdu: *hifazat*, Bhojpuri: *rakhval*, cf. the Bhojpuri-song in Jassal 2012: 8-9). The Hindi/Urdu term 'amanat' refers to the mutual obligation of trust in a hierarchical relationship (Rajshree Chandra, CSDS Fellow, interviewed on 27 May 2013). This illustrates that the dependency of women on the men of the family, and their lack of autonomy is considered the norm in Indian society.

The responses obtained by *Tehelka*, some of them quoted below, nurture the impression that these ancient norms persist in some minds and thereby seem to defeat history. After marriage, the guardianship of the parents is replaced by that of the husband's family. Article 138 of the *Manusmriti* says: "In childhood a female must be subject to her father, in youth to her husband, when her lord [her husband] is dead to her sons; a woman must never be independent" (ibid.). Today parents tell their children: "Till you marry, you are my responsibility" (Sharmistha Saha, PhD candidate in Theater Studies, interviewed on 19 May 2013). As the *Manusmriti* emphasises, "She must not seek to separate herself from her father, husband, or sons; by leaving them she would make both (her own and her husband's) families contemptible." (ibid. Article 149) Vicariously, brothers or other male members of the real or imagined family can exercise the role of (local) guardianship.



The system of mutual obligations in the name of their community's honour (maryada, cf. Bajpai 2013: 4) that both sexes have towards each other is metaphorically described as a boundary (Lakshman rekha) that they, particularly women, must not overstep so as not to imperil social order. "If girls don't stay within their boundaries, if they don't wear appropriate clothes, then naturally there is attraction. This attraction makes men aggressive, prompting them to just do it" (Sub-Inspector Arjun Singh, SHO Surajpur Police Station, Greater Noida, cit. in Balla & Vishnu 2013). A woman, who oversteps her boundaries for example by moving in public unaccompanied by her guardian, is to blame herself if anything happens to her, as women's rights activist Flavia Agnes explains: "[W]omen who dare to cross the boundaries [...] are seen as 'free for all' or rather, everyone thinks that they are the custodians of women's morality and that they have a right to 'teach them a lesson'" (Agnes 2013: 13). She risks being perceived as a 'loose girl' whom anyone can abuse with righteousness. Rape, particularly, is not an offence in such a case as a woman outside her boundary is equated to a prostitute.

This view again has an earlier avatar in a social norm from a Muslim society cited in 'Abd al-Qadir Bada'uni's sixteenth century chronicle where it says that "if a young women were found running about the lanes and bazars of the town, and while so doing either did not veil herself, or allowed herself to become unveiled, or if a woman was worthless and deceitful and quarrelled with her husband, she was to go to the quarter of the prostitutes, and take up the profession" (Lowe 1884: 405). Again the impression is that such ancient norms persist in some minds even today. The extant perception is that the rape of a prostitute constitutes no offence but rather "a deal gone sour" to quote Trinamul Congress leader Kakoli Ghosh Dastidar's remark in connection with the Kolkata Park Street rape case of 5 February 2012.⁷

Tehelka's study does not allow us to decide whether such anachronistic representations are mere coincidences or whether they do point to an existing asynchrony in the normative imaginary of Indian society. Quite anachronistic, however, is the fact that to date marital rape does not constitute a legal offence in India. Even though the Justice Varma Committee Report had demanded marital rape to be explicitly banned (Government of India 2013) the Criminal Law Amendment promulgated on 3 February 2013 has fallen short of any such expectations (Ministry of Law and Justice 2013). Consequently, the Tehelka study raises the question as to when and how, in the normative imaginary of the average Indian male, rape does constitute



a crime? “[F]or a vast majority of men, rape does not even register as a violent or heinous crime” writes Chaudhury (2013). The same is of course true of many women (confirmed by Shreya Sarawgi, Fellow at the Institute for Human Development in Delhi, interviewed on 15 July 2013).

The only situation in which rape would be an offence would be under the eyes of the guardian. There is an indication that an awareness of the possibility exists that men within the family might be a potential threat to the safety of women who at their hands could become victims of sexual molestation and even rape.⁸ This is suggested by the following quote: “In the olden days, our elders had a rule. A grown-up daughter would not be allowed to be in the same room as her father or her brother” (Vijay Prasad Shetty, 57, president of the Udupi Bar Association, cit. in Chaudhury 2013). Again, however, the responsibility to avoid ambiguous situations rests plainly on the female side who is to ensure that she leaves the room (or gets up from the bed) so as not to tempt the male family member. “As a child I was cautioned by my mother to get up from a bed should a male member of the family attempt to sit next to me” says Smita Tewari Jassal (CSDS Fellow, interviewed on 15 July 2013). “In the olden days, our elders had a rule [says Vijay Prasad Shetty, 57, president of Udupi bar association]. A grown-up daughter would not be allowed to be in the same room as her father or her brother” (cit. in Chaudhury 2013).

This raises the question as to whether there are any possible situations at all where the average male could conceive of forced intercourse as his own responsibility and as a crime; not in the house, because it is either no offence (as in marriage) or avoidable (as under guardianship), nor outside the house, because it is unprovided for (as under guardianship) or not an offence (because the victim would be to blame). In the traditional representation of social order there seems to be no room for an offence called rape. Ironically, therefore, RSS-Chief Mohan Bhagvat appears to be oddly correct when he states that “rape only occurs in India but not in Bharat,”⁹ – not because there is no forced intercourse in Bharat but because Bharat’s social imaginary cannot conceive of any relevant situation where forced intercourse would constitute an offence.

In India, in contrast to Bharat, rape *is* a legal offence. The palimpsest-like overwriting of two social scripts, Indian and Bharati, evidently has not led to the complete effacement of Bharati normative imaginaries. In a vexing way, the two continue to play a role in the



ambivalent discourse on Indian public life, where we seem to have two competing sets of norms: first, the system of Bharat which hardly knows of rape as a crime; second, the system of India where rape constitutes a statutory offence. The Indian penal code defines rape as sexual intercourse without consent. Court trials therefore revolve around the question whether the disputed sexual act occurred with or without the consent of the victim. Now the interference of the two normative systems, that of Bharat and that of India, can lead to grotesque consequences, as the following example will show.

In January 1996, a sixteen year old girl from Suryanelli, Kerala, who had eloped with her boyfriend, was subsequently deserted by him and fell into the hands of a couple who raped, confined and procured her as an alleged prostitute to as many as forty other men over a period of forty days.¹⁰ In 2000 the local Sessions Court sentenced thirty six of the men and one woman to various fines and rigorous imprisonment for varying terms. In 2005 the Kerala High Court acquitted thirty five of the accused citing as the principal reason that it was possible that the girl had *consented* to the repeated intercourse with several men. In 2013, this judgment, called 'shocking' by the Supreme Court of India, was set aside and returned for review to the Kerala High Court. On 4 April 2014, a new bench of the Kerala High Court finally sentenced one of the 35 accused to life imprisonment while 22 were sentenced to varying terms of rigorous imprisonment. Seven were acquitted and five had died during the pendency of trial.¹¹ The bench rejected the plea of the accused that the victim was 'deviant', and that she could have escaped during her captivity.

What is so shocking in the first judgment of the Kerala High Court is the rationale followed by the judges. Before considering the *legally* relevant facts of the case, the High Court went into an *ethical* assessment of the girl and concluded that she was 'deviant' and not 'a normal innocent girl of her age'. By that logic, whether a woman can be considered a victim of rape depends on whether she is considered 'good' or 'bad' by the standards of Bharati folk ethics. Only 'good' women can possibly be victims of rape. 'Bad' women are considered fair game without rights to their bodies, without legal defence, and without hope of solidarity from a society that rigorously ostracises them and condemns them to 'social death'.

The assumption that the girl could have possibly consented to being taken to places unknown to her and to have intercourse with complete strangers without any benefit or gain, and to be subjected to cruelty



resulting in severe physical and psychological injuries, was corroborated for the High Court by the fact that presumably she already had consented to having pre-marital intercourse with her boyfriend. Furthermore, the Kerala High Court decided that the girl was 'deviant' based on the fact that she had previously 'squandered' a couple of earrings and the pocket money she received from her parents. This understanding of 'deviance' prevalent among the judges also prevails in the police force: A girl who has consented to having pre-marital intercourse with one man is to blame herself if other men take advantage of her 'promiscuity' (Balla & Vishnu 2013).

By this logic, the fact that a woman has once consented to an act immoral in the eyes of society would imply that she has given away the right to her integrity once and for all. So, for any further sexual intercourse, consent presumably is no longer required. The misgiving that this logic seems to govern the minds of large sections of Indian society is supported by the fact that the social environment ostracised the Suryanelli rape victim to the extent that today she has no one to stand by her except for her parents. Everybody else, family and friends, have deserted her and nobody speaks to her in town or workplace. Even the church, of which she and her parents were regular members, has denied her access. In effect this implies that women considered unethical by the standards of folk ethics have thereby forfeited their most basic human rights.

The Suryanelli case shows how the social norms of Bharat can undercut the legal norms of India even in institutions like High Courts, which are meant to uphold Indian constitutional norms of equality. In congruence with this tendency is the practice of the 'two finger test' where a medical doctor inserts two fingers into the vagina of the victim to ascertain her virginity. Besides establishing forced intercourse, it is often employed to ascertain whether the victim was already "habituated to sexual intercourse" (Pitre & Lingam 2013). In the case of an unmarried girl this would amount to an admission of guilt. "Recently, in Bangaluru, a law student [...] was gang raped when she was in a lonely spot with a male companion. The doctors who examined her were more concerned about the elasticity of her vagina than finding forensic evidence of the gruesome crime" (Agnes 2013: 13). Pitre and Lingam find that often "[the two-finger test] is considered a proxy indicator of the victim's 'loose morals' and [...] often leads to character assassination of women in courts" (Pitre & Lingam 2013: 17). After such a verdict, the ostracised victim is often condemned to the life of a



'zinda laash' (living corpse). The term is cynically used even by some members of parliament (Agnes 2013: 12).

The *Tehelka* surveys add further flesh to the reconstruction of social norms governing Indian society. Twenty eight of the thirty five men interviewed by the investigative magazine consider it an indirect invitation to sexual intercourse when a woman moves about in the city without a guardian: "[...] women are somewhat responsible for the crimes against them, but ultimately it is actually the responsibility of their guardians, parents and husband" (Tabish Darzi, 26, Banker in Srinagar, cit. in Chaudhury 2013), or if she wears 'provocative clothes', or when she kisses in public: "Why was the girl out at that time of night? I heard when she got onto the bus with the man, they started kissing. So it's not the fault of the men who raped her" (Ram Kishen, 53, farmer from Bhiwani, cit. in Chaudhury 2013).

The survey indicates that many men all over India, independent of religious affiliation, profession, level of education, age, or regional origin, hold women responsible for rapes perpetrated on them. A majority of the men interviewed would not consider the possibility of the male perpetrator bearing any responsibility: "Hindu, Muslim, or Christian. Farmer, labourer, auto driver, scientist, lawyer or teacher. Educated or illiterate. Old or young. Haryanvi, UP-wallah, or Southie. Only one thing seemed to bind the men *Tehelka* spoke to: they had no concept of male accountability" (Chaudhury 2013). Common to them was "a fear and abhorrence of women who display autonomy over their own bodies and sexuality ... No culture, profession or age group – no level of education or exposure – seems to make men immune to this." (ibid)

According to these views, women must be kept subordinate to men at all times and according to some, this hierarchical relationship may be asserted by exemplary acts of violence. In the Delhi gang rape case, another aspect of the hierarchical nature of the norms partly governing Indian society was evident. In this particular case, the issue of gender hierarchy interacts with the issue of caste hierarchy. In parts of India, Dalit or Tribal women can be raped with impunity. In the most famous such case, the high caste rapists of Bhanwari Devi, a social worker and a Dalit, were acquitted by the Trial Court on grounds that "upper-caste men could not have raped a Dalit". Moreover, since the rapists included an uncle-nephew pair, the judge insisted that a man could not possibly have participated in a gang-rape in the presence of his nephew.¹² Once more, such judgements reveal how



received notions of caste and gender stereotypes prefigure the minds of judges who are then incapable of enforcing constitutional norms of equality.

Even the right to the newly wedded bride (*ius primae noctis*) is still claimed by landlords in some places without arousing concern. "Dalit women are raped with impunity as if Dalits were meant to be abused; the custom of offering newlywed brides to feudal landlords is still practiced in certain pockets" (Teltumbde 2013: 11). "[R]aping dalit or tribal women [...] has been a widely prevalent punishment [...] this is not [considered] a crime; it is albeit the most legitimate act to 'show them their place'" (Bajpai 2013: 5). When low caste or class men rape a girl who has the sympathy of the upper castes and middle classes, it is perceived as a provocation by those on top of the established power hierarchy. In the Delhi gang rape case, the victim, although from economically humble origins, was of high caste as suggests her name (confirmed by Arati Kumari, Pondicherry University, interviewed on 7 October 2013). She successfully aspired to belong to the upwardly mobile classes, whereas the perpetrators were all low caste and class with little chances for upward mobility. Her suitability as a role model for an aspiring, media conversant and internet savvy middle class partly explains the huge media response the case elicited while media are hardly interested in cases where Dalits, the lowest of the low, are the rape victims.

In stark contrast, for example, in the Kherlanji case "[i]t took a month following an incident of macabre caste violence [...] to burst to attention" (Editorial 2006: 4633). For the same reasons, the rape of tribal women in the North-East gains media attention only because of their large numbers.¹³ Against this backdrop, the assessment of the Delhi gang rape case by prominent intellectuals can be called into question. They make it seem like modernity and its mega cities were the root of the problem, as if rape did not happen in rural India.¹⁴ That this is not the case is shown in a recent study from Azim Premji Universtiy, which clearly could not find a higher incidence of rape in urban versus rural areas.¹⁵

Egalitarian Ethics

Today, some young men in India turn away from received ideas about gender roles: "Our rigid and orthodox societal mindset has to go" (Tejas Jain, 23, IT engineer and music student from Indore, cit. in Chaudhury 2013). In their view, women should be allowed to be



independent, economically and in their decisions regarding the way they dress, where they go, or with whom they sleep: "A successful woman is someone who is truly independent, who can live with her family or on her own, take her own decisions, dress as she wants, go where she wants and have as many sexual partners as she chooses" (Sukalyan Roy, 27, marketing executive in Delhi, paraphrased in Chaudhury 2013). In this view, "The emancipation of women is in the larger interest of society. They need more freedom, not less" (Abhishek Verma, 25, student of computer science, Ambedkar University, Lucknow, cit. in Chaudhury 2013). Emancipation is seen as a positive element of modern culture and should therefore be emulated. "The protest against rape by common people in Delhi and other places was, in fact, a product of modern culture ... Western culture is not just about wearing jeans and short skirts (Pramod Kumar, professor of history, Lucknow University, cit. in Chaudhury 2013). The relations of men and women should be governed by equality and reciprocity: "As far as clothes are concerned, if women cannot tell me what to wear, how can I dictate terms to them?" (Vipul Patel, 28, electrical goods shop owner in Udupi, cit. in Chaudhury 2013). "How can anyone hold women responsible for crimes against them? If anyone is responsible, it is the men" (Prakash, 35, daily wager and coconut plucker from Udupi, cit. in Chaudhury 2013). Thus Chaudhury demands:

As a modern democracy, the right of the individual – irrespective of religion, caste, class or gender – is enshrined in our Constitution. For a woman, this ought to mean a complete autonomy over her body, her choices, her movement and her right to work. These choices may be curtailed on the ground by the cultural or personal context she inhabits, or where she herself wants to stand on the ladder of emancipation. But, in essence, there should be no curtailments. (Chaudhury 2013)

One must note here that men are not the only ones who perpetuate traditional gender roles. Women also have a share in the responsibility. "I hold women equally responsible as men for the segregated outlook of our society that views them as a solitary object for childbearing and sexual gratification" (Rak Kumar Singh, documentary filmmaker from Manipur, cit. in Chaudhury 2013).

In the West, people tend to believe that history is on the side of progress. The egalitarian discourse is comfortably hegemonic and one can laugh about people with traditional hierarchical beliefs, or force them to comply, at least outwardly, with egalitarian norms. If the same was true in India, Chaudhury writes, it would be sufficient to ridicule those clinging to hierarchical representations



of social order. However, the examples cited above lead to the apprehension that hierarchical social norms are the rule, not the exception in the representations of social order widely upheld in Indian society.

Anti-Hegemonic Strategies

“And if they are that, how is one to negotiate such a gaping cultural divide? How can a society articulate – and enforce – desired values for itself if there is such a foundational disagreement over what those values should be?” (Chaudhury 2013).

In India, the hierarchical discourse is hegemonic and it is not obvious which side is favoured by the current tide of history. Struggling from a minority position requires caution. Some women’s rights activists admonish the ‘imperialist vocabulary’ in some of the egalitarian critique and point out: “If you treat everyone who does not agree with you as aliens and fools, if you refuse to accept them as your own people, what gives you the right to dictate to them? What makes you think they will even entertain your criticism?” (Madhu Kishwar, editor of *Manushi* and CSDS Fellow, cit. in *ibid.*). Chaudhury describes the difficulties faced by the Indian women’s movement as follows:

To speak of collective outrage is to assume a shared value system. Clearly, we don’t have that. The idea of equality may be non-negotiable, but the paths to it are many. If we stay committed [to the process of participatory dialogue], even after the clumsy water cannons are gone and the anguished candles have died, we might still have one billion rising. (*ibid.* 2013)

In her own words, Chaudhury describes what turns out to be a more general dilemma with Universalist aspirations of moral philosophy. The counterfactual thought experiments used in moral philosophy to produce reciprocity under conditions of equality all depend on the readiness of those invited to accept reciprocity and equality as a minimal condition for justice. This is clearly not the case in societies with a majority of people accepting hierarchy and inequality as principles of social order. Even while large numbers indignantly take to the streets to demand equality for men and women, the majority of Indian society seems to have little use for such ideas. Since rape does not register as a crime for many Indians, “it’s possible many [...] will read the excerpts of conversations with Indian men listed in this story and wonder why we are calling it a window into darkness”, writes Chaudhury (2013).



She also points to the only way out; the *emergence* of an egalitarian consensus through unconstrained participative dialogue and non-violent political action. Only such means can hope to weaken the hegemony of the hierarchical discourse in favour of an egalitarian one; though this approach must be taken with moderation. "If the framing of this debate gets too vociferous and extreme, it can galvanise the opposition in disturbing ways ... If one gets too absolutist, the whole thing can boomerang."¹⁶

Preconditions for Moral Universalism

What Chaudhury explains for the Indian context, i.e. the hiatus between egalitarian constitutional norms and hierarchical social norms, is *a fortiori* true of moral-philosophical universalism. Among its application requirements would have to be a consensus regarding the equal worth of every human being simply by virtue of being human. Only then can we engage everyone in thought experiments like Rawls' original position or Habermas' practical discourse. The dilemma of moral philosophical universalism can be represented as follows:

P1: No-one should have to be subject to a normative order to which s/he could not have given his/her assent. In his Theory of Public Right (öffentliches Recht), Kant speaks of the "lawful *freedom* [of the citizen] to obey no law other than that to which he has given his consent" (Kant 1900 VI: 314, my translation).

P2: There are societies in which the minimal preconditions for universal justice (recognition of the equal worth of all human beings as human beings) are not given.

D: Universalist moral theories claim to be valid even in societies as in P2. However, they could not ensure the minimal preconditions for their applicability without violating P1.

E: Therefore universalism must rely on the emergence of the recognition of the same dignity of all human beings as human beings, to avoid dilemma D. This is exactly what Chaudhury demanded.

P1 is a premise made by many moral theories in the tradition of Kant, e.g. Rawls in the justification of his original position through a "full reflective equilibrium" (Rawls 1995: 141, fn. 16), or Habermas in the justification of his ideal discourse situation. Habermas' 'principle of universalisation' intends to set the conditions for impartial judgement insofar as it constrains all affected to adopt the perspectives of all others in the balancing of interests. It states that:



Every valid norm must satisfy the condition that the consequences and side effects its *general* observance can be anticipated to have for the satisfaction of the interests of *each* could be freely accepted by *all* affected. (Habermas 2001: 32, emphases in original)

Thus the conditions for the practical discourse, out of which universally valid norms may emerge, include the participation and acceptance of all who are affected by such norms irrespective of their caste, class or gender. But consensus can only be achieved if all participants are allowed to participate as equals and all affected can freely accept the consequences and the side effects that the general observance of a controversial norm can be expected to have.

P1 assumes that deontological moral theories need to presuppose the effective recognition of the same dignity of all human beings as *human beings*, 'effective' meaning that they are recognised at least by those parts of society whose discourse exerts hegemony (as "intellectual and moral leadership", Gramsci 1971: 57) over the rest of society. This is at the same time an empirical as well as a meta-ethical condition. It alone lends plausibility to the assumption that all concerned by a certain normative order would be likely to engage in counterfactual thought experiments along the lines of Kant, Rawls or Habermas, that produce conditions of reciprocity and equality among empirically inequitably and unequally positioned individuals. These thought experiments lead to a normative order where social and juridical norms pertain to all individuals alike.

Such an egalitarian order is obviously very different from one where the value of different liberties and the consequences for the breach of norms vary due to differences in gender, status, and station, as in the erstwhile feudal societies of Europe or India. In Manu's Law and in Kautilya's Arthashastra for instance, the degree of punishment depends on the caste or gender of the perpetrator and the victim (Bühler 1886; Shamasastri 1915). Deontological constructivist procedures in moral philosophy assume empirically (as 'accommodating life word') as well as meta-ethically (as readiness to engage in equalising thought experiments) the general recognition of the idea of the equal dignity of all human beings. This is a prerequisite for engaging in counterfactual thought experiments such as a fair original position or an ideal discourse situation, and for the acceptance of their consequences in a full reflective equilibrium.



P2 is an empirical premise that this paper attempts to render plausible for the case of India. In India, as this paper has tried to demonstrate, hierarchical representations of social order prevail over egalitarian representations, which are also present in the social imaginary. In the hierarchical imaginary, men and women are not equal for principled reasons. Similarly, human beings of different castes and casteless Dalits and Adivasis are considered fundamentally unequal.¹⁷

The conclusion (E) sets its hope in the possible emergence of a wide acceptance of human dignity as a feature pertaining to all human beings alike and *only* in virtue of their humanity, i.e. independently of ethical merit, social status, caste, class or gender. The emergence of a hegemonic discourse of equality would serve as the empirical and meta-ethical precondition for the applicability of deontological theories of justice. Once its emergence is global, moral universalism becomes conceivable. Habermas' approach aims at the inclusion of 'all subjects capable of speech and action'. It is therefore universal relative to the globalised human perspective.

The horizon of every form of life is fluid, its boundaries permeable. There is no absolute barrier to the 'desire for as much intersubjective agreement as possible'. Practical knowledge can all the more readily claim to be knowledge the more radically we open ourselves to others and expand our local knowledge and ethnocentric outlook – indeed, extend our community in a virtual manner such that our discourse ultimately includes *all* subjects capable of speech and action. (2001: 124, emphasis in original)

Unlike Kant, Habermas does not reach out to rational beings as such, human or non-human, planetary or extra-planetary. His perspective remains internal to our human world. It is cosmopolitan more than it is universal in the Kantian sense, and it is historically indeterminate: the shrine of universal moral values remains empty, the concept of universal moral norm vacuous, until humanity has reached its potential to form a global practical discourse community.

The emergence of an egalitarian discourse receives support from parts of the women's rights movement in India, which take recourse to Universalist ideas of equal human rights. They are confronted with overpoweringly in-egalitarian notions of social order and are thus aware that, from such a vulnerable position they have to engage in practical discourse and non-violent political action in order to challenge the hegemony of the discourse of hierarchy and to herald the emergence of a more gender just social order in India. At their disposal are not only 'Western' egalitarian notions but a great variety of Indic tradi-



tions such as Buddhism, Jainism, Bhakti, Christianity, Islam, Sufism, Sikhism and Rationalism (for the latter cf. Quack 2012). Thus Rajeev Bhargava asks:

The Veer Shaivite movement, a strikingly radical movement in 12th century Karnataka, challenged Braminical and male supremacy, something impossible without the presupposition of egalitarian notions. What conception of equality did it embody and how different is it from modern conceptions? [...] What intellectual steps were taken to effect this transition and why have we frequently refracted these steps? (Bhargava 2013)

In modern times Dalits, notably Ambedkar and the Mahar movement, have appealed to these Indic traditions. They have however tended to help only their particular community, as anthropologist Martin Fuchs has pointed out (Fuchs 1999: 168-336). They have therefore not been able to displace the notion of a fundamental inequality of human beings in Indian society as a whole. Women, however, belong to no particular class or community. Theoretically, their movement could be all-encompassing and it is therefore the women's movement that would have the greatest potential for a transformation of Indian society as a whole. This, however, is an open-ended historical process. The outcome of the struggle is open and depends on important external factors, as the journalist and author David Devadas points out:

We need to investigate the influence of economic contexts on social norms. Not all that long ago, women were by and large treated as property in Europe too. Universal franchise, equal inheritance and other rights, and specific gender rights, all accompanied the growth of wealth and the establishment of welfare states in which the state took over responsibility for protection, provision and shelter instead of community, including religious, ethnic and clan. It is only when a woman (or any other weak member of society) feels secure that the state will protect her that she can dare claim her statutory rights. (David Devadas in response to an earlier draft of this paper)

An important internal factor would be the unity of the women's movement. This is however questionable owing to the divides cutting through Indian society along lines of class, caste, and religion, which of course also split the women's movement in many factions. Also in view of Indian legal pluralism in family and inheritance law it is doubtful whether the required unity can be attained. Indian legal pluralism can potentially harm the women's movement, for it divides women's rights activists into their different religious communities, Hindu, Muslim or Christian (Menon 1998).



Since the Shah Bano affair of the mid-1980s, the unified civil code (UCC) has ceased to be a goal shared by many women's rights activists (Agnes 2012). Because the Hindu right in 1986 had appropriated the demand for a UCC, liberal and leftist women's rights activists feared that they would become indistinguishable from right-wing forces if they continued to struggle for the same. Since then, most women's rights activists work from within their respective communities and so follow different agendas.¹⁸ As the Indian women's movement shied away from pressing for a uniform civil code since this had become a right wing position, the question arises to what extent the acceptance of community-based inequalities puts the movement in the same space as the reactionaries of another ilk who hold on to community based hierarchical norms.

What form should the practical discourse challenging the hegemony of hierarchy over equality take to be effective? The problem is that equality is itself a contested notion in feminist discourses. Feminists criticize the methodological individualism in the liberal notion of citizenship which renders the individual a human being without properties (Butler et al. 2000: 11-43, 40-41, 136-81). But they also remind us of the emancipative side to the idea of equal citizenship. Thus, Nivedita Menon writes: "Justice is seen to be ensured by the winning, granting and protection of rights which are held by the citizen. This citizen is unmarked by any other identifying markers than that of 'citizen' itself – this is precisely what is supposed to give the category the potential to ensure justice" (Menon 1998: PE-4). Thus, the same property, being blind to individual differences, on one hand lends 'justice' to the concept of citizenship because it abolishes hierarchy; on the other hand, however, this blindness renders it insensitive for considerations of individual circumstances and thereby 'inequitable'.

While in theory all citizens are equal before the law, in practice large parts of the population are disadvantaged due to their religion, caste, class or gender. Therefore, some feminists draw the conclusion that disadvantaged groups should struggle separately for their interests. Since their discrimination went unnoticed under the regime of unmarked citizenship, they went for demanding official recognition for their collective rights and quota for the representation of women (see for example the debate on the Women's Reservation Bill in Menon 2010: 3835-44). This corresponds to a general trend in India of tribal and caste groups demanding collective rights for themselves on a communal basis. They all demand "the right to difference as an integral part of citizenship" (Menon 1998: PE-3).



In her critique of formal equality, Nivedita Menon draws on Aristotle's maxim that justice consists in treating equals equally and unequals unequally. "Quarrels and complaints arise", writes Aristotle, "either when equals receive unequal shares in an allocation, or unequals receive equal shares" (Aristotle 2000: 86). At this juncture, however, the discussion reaches an aporia: While the status of undifferentiated citizenship in practice does not prevent discrimination, institutionalised inequality invites outright discrimination. The differences communities claim for themselves often consist precisely in the way communities treat their members unequally. Often the same right to difference that communities demand of the Indian state is denied by dominant members of those communities to other members, especially women (Menon 1998: PE-7). Thereby the community's right to be different turns out to be a right of the community to treat 'their' women differently and to exert power over them.

Where the preoccupation of a community with their difference is first and foremost a preoccupation with the gender roles of their members, the question arises why Indian feminists should not shun the notion of 'community' as an irreparably patriarchal notion. One may legitimately ask to what extent acceptance of community-based inequality put feminists in the same space as the reactionaries of those communities. Instead, if the women's movement were to overcome the many divisions fracturing Indian society, if they were to create and agitate the unmarked woman citizen, it might be powerful enough to overcome patriarchy in India.¹⁹

In the absence of any state provided social security, however, the community remains the prime guarantor of livelihood and cannot easily be dismissed. Additionally, the community may be a space within which equality may have a greater chance to overcome hierarchy than between communities. Egalitarian principles may prevail in insular form among individuals within the same caste, age and gender community. Ernst Tugendhat (Willaschek 1997) has pointed to the fact that these islands of equality never seem in need of justification. He concludes that the onus of proof is therefore on the defenders of inequality, which offers at least a slight argumentative advantage to the defenders of equality.

As mentioned at the outset of this paper, Jaeggi (2014: 261) distinguishes three forms of critique (external, internal and immanent) that may be useful in probing into the ambivalences and contradictions of the feminist discourse expounded here. *External* critique evaluates a



given life-form with reference to demands that go beyond the principles inherent in this life-form or which question the life-form altogether. The external critique does not share with the participants of a life-form their commitment to its inherent norms. *Internal* critique, by contrast, uses demands and norms already inherent in a life-form to criticise an eventual lack of compliance (ibid. 263). Internal critique does not aim for the reform or fundamental change of a life-form or for the establishment of a new social order. Instead it aims at the recovery or re-establishment of those already accepted norms that it perceives as having come into misuse or oblivion (ibid. 265). It is clear that the Indian feminist critique is neither external nor internal in this sense.

Immanent critique in contrast “assumes that the contexts from which it derives its standards are contradictory in themselves. Therefore, it is no accident that these standards are not realised for they are marred with a systematic problem” (Jaeggi 2014: 277, my translation). As we have seen, feminist critique in India exposes the inner contradiction of a life-form in crisis that is wedded to two incompatible representations of normative order, one egalitarian and one hierarchical. Often, however, it gets itself entangled in these contradictions. According to Jaeggi, the systematic problem inherent in an established practice reveals itself only through theoretic reflection (2014: 278). The internal contradictions of a life-form in crisis need to be analysed and understood by the critique using only those resources that are available with the ‘material’ provided within the life-form itself. Immanent critique thereby gains an exemplary role for the participants of the life-form in crisis. It demonstrates how any such participant can move from A to B without requiring resources other than those available to all.

Moreover, according to Jaeggi, the analysis of the crisis as rooted in an internal contradiction of a life-form needs to point out the *constitutive character* of this contradiction for the life-form in question. Mutually incompatible demands or norms are not by chance integrated in the same life-form and cause its tension; this tension plays an instrumental role in the very constitution of the life-form. Here Jaeggi draws on Hegel for whom modern life is marred by the contradiction of emphasising individual autonomy and setting the individual free from traditional communal bindings while at the same time increasing the dependency of the individual on an ever more tightly integrated society for its survival.



Conclusion

The Hegelian trope of a tragic entrapment, where all sides want only well, but produce only disaster, may not be a suitable template to follow in every analysis of life-forms in crisis. There is however a tragic element in the entanglement of feminist critique in the contradictions of Indian life. Feminist critique in India seems to be undecided whether wholeheartedly to embrace the egalitarianism and normative individualism expressed in the Indian constitution with its notion of equal (unmarked) citizenship, or to reinforce the communitarianism and sectarianism ubiquitous at all levels of Indian society by conceptualising it in terms of differentiated citizenship. The desire seems to be somehow to marry the two so as to have the cake and eat it. The question before the immanent critique, however, seems to be whether this fundamental contradiction between the egalitarianism of unmarked citizenship and the communitarianism of differentiated citizenship is not very much at the root of the gender-crisis in Indian society.

Stopping short of making this contradiction constitutive for Indian society, as Jaeggi's concept of immanent critique would demand, it seems nevertheless fundamental in the sense that it is indicative of the ambivalent role of the postcolonial state. The relatively weak state is not in a position to enforce its monopoly of power (and the rule of law) over and above the various entities out of which it is composed (regional powers, religious communities, caste communities, tribal communities etc.). The inability of the Indian state to consistently enforce constitutional law as against common or customary law leads to a lack of capacity to deliver justice and social security for the individual, which in turn strengthens the community as the guarantor of parallel jurisprudence and rudimentary social security. Communal paralegal institutions, however, lack an organised form. Their only way of delivering justice is by way of exemplary violence as a deterrent to those who violate the traditional hierarchical order that persists between religious, caste, and tribal communities and, within each of them, between genders.

Thus the analyst and immanent critique has to make a choice either to strengthen the centre, its monopoly of force, and its exclusive right to determine what counts as law, or to strengthen the communities as guarantors of rudimentary social security, identity and belonging. The communities, however, in their hierarchical, caste- and gender-biased ways, will always be at odds with the egalitarian project of the Indian constitution. It is hard to imagine how this choice could



be avoided, but of course a true Hegelian would tend towards the sublation of the two conflicting tendencies into a single synthesising framework.

Endnotes

¹ This research was made possible thanks to a one year visiting senior fellowship at the Centre for the Study of Developing Societies, Delhi. I could present it at the Department of Philosophy of Jawaharlal Nehru University, New Delhi, in September 2013 thanks to an invitation by Manidipa Sen. For valuable comments I am grateful to David Devadas and Michael Mann. I would like to thank Rajeev Bhargava for his permission to cite his unpublished lecture and my interview partners for allowing me to quote their remarks in this paper. A previous, shorter version of the paper was published in 2013 in German under the title 'Hierarchische Ethik oder egalitäre Moral? Emergente Frauenrechte in Indien' in *Widerspruch. Münchner Zeitschrift für Philosophie*, 32 (57), pp. 139-54. It appeared online at www.suedasien.info.

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¹⁰ The following is based on information gathered at the round table discussion on *The Suryanelli Case: PW3, The Willing Journey of a Misguided Girl*, Centre for the Study of Developing Societies, 29 April 2013. Chair: Mary John; Speakers: Rukhsana Chowdhari, Elizabeth Philip, Arathi P. M. and Poornima Joshi.

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¹⁶Santosh Desai, media commentator and head of Future Brands, cit. in Chaudhury 2013.

¹⁷For the problematic underlying the caste concept, see Fuchs, Martin. 1999. *Kampf um Differenz. Repräsentation, Subjektivität und soziale Bewegungen*. Frankfurt: Suhrkamp, pp. 52-4.

¹⁸Confirmed by Irfan Engineer, director of the Centre for the Study of Secularism and Society (son of late former director Asghar Ali Engineer); interview on 20 May 2013; and by Qutub Jehan Kidwai, women's rights activist; interview on 21 May 2013.

¹⁹There may be reasons for scepticism in this regard: "Es ist ein rasender Zorn in uns." Interview mit Binalakshmi Nepram. *Suedasien.info*, 16. Dez., <http://www.suedasien.info/interviews/3190> [retrieved 16.12.13].

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