

**Unheard and Unnoticed: Violence Against Women in India –
A Study of Practice of Witch-Hunting, Honour Killing and
Devadasi System**

by

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ABSTRACT

Title of the Thesis: Unheard and Unnoticed: Violence Against Women in India - A Study of Practice of Witch-Hunting, Honour Killing and Devadasi System

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Violence against women is globally pervasive as it cuts across boundaries of caste, class, culture, race, ethnicity and age. However, public authorities in India are only beginning to recognize violence against women as a violation of basic human rights of women. This is because violence against women is still not contextualized in its local-cultural setting, as a result, several violent practices against women, especially those against marginalized women, that have been customarily conceived and which tend to justify patriarchal norms often go unnoticed and unpunished. Violent practices such as, witch-hunting, honour killing and devadasi system, which this thesis focuses on, despite being prevalent in India for a long time, neither find considerable space in the literature nor are recognized as a matter of public concern by the State, civil society and media.

This thesis, therefore, addresses the issue of lack of attention to violence against women in India by highlighting neglected violent practices such as witch-hunting, honour killing and devadasi system towards women in the backdrop of social-cultural norms and fewer or no domestic laws. In addition, this thesis also examines the above mentioned practices within the existing framework of international human rights law and critically analyzes India's measures to eliminate violence against women.

DECLARATION

I confirm that the thesis is my own work, that it has not been submitted in substantially the same form for the award of a higher degree elsewhere. To the best of my knowledge and belief, this thesis contains no material previously published or written by another person, except where due reference has been made.

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DEDICATION

I dedicate my thesis in the loving memory of my grandmother Late (Mrs.) Shanti Devi who always cared and loved me and prayed for my success.

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CONTENTS

Abstract	2
Declaration	3
Dedication	4
Acknowledgements	5
List of Abbreviations	10
Chapter 1: Introduction	11
1.1 Research Question	16
1.2 Aims/Objectives of the Research	17
1.3 Rationale and Justification for the Study	17
1.4 Methodology and Conceptual Framework	21
1.5 Limitations of the Research	28
1.6 Overview of Chapters	29
Chapter 2: Theoretical Approach of the Research	31
2.1 Structural Violence	31
2.2 Legal Pluralism	36
2.3 Patriarchy	40
2.4 Concept of Gender and Gender Discrimination	44
Chapter 3: Violence Against Women in Contemporary India	
Introduction	53
3.1 Marital Rape	56
3.2 Under-reporting of Crimes Against Women	66
3.3 Sexual and Reproductive Health of Women	72
3.4 Conclusion	75
Chapter 4: Violence Against Women in India – Witch-Hunting, Honour Killing and The Devadasi System	
Introduction	77
4.1 Witch-Hunting	77
4.1.1 Defining Witchcraft	79

4.1.2 Understanding the Concept of Witch-beliefs in India	82
4.1.3 The Gender Dimension of Witch-hunts in India	87
4.1.4 Concluding Remarks	91
4.2 Honour Killing	92
4.2.1 Definition	92
4.2.2 Notion of Honour and Shame	95
4.2.3 History of Khap Panchayats	98
4.2.4 Caste Endogamy and Gotra Exogamy	100
a) Caste Endogamy	100
b) Gotra Exogamy	101
4.2.5 Working of Khap Panchayats	103
4.2.6 Concluding Remarks	106
4.3 The Devadasi System	107
4.3.1 Defining the Devadasis	108
4.3.2 Origin of the Devadasi System	110
4.3.3 Caste, Gender and Devadasis	113
4.3.4 Other Factors Responsible for Dedication	115
4.3.5 Concluding Remarks	116
4.4 Structural violence against women in India	117

Chapter 5: Violence Against Women, International Human Rights Law and Domestic Implementation

Introduction	124
5.1 The United Nations and Women's Human Rights	126
5.2 Violence Against Women and International Human Rights Law	130
5.2.1 The International Covenant on Civil and Political Rights (ICCPR)	130
5.2.2 The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)	136
5.3 The Public/Private Divide in International Human Rights Law	149
5.4 India - Violence Against Women, Human Rights and Domestic Laws	152
5.4.1 Witch-Hunting	153
5.4.2 Honour Killing	158
5.4.3 Devadasi System	162
5.5 Concluding Remarks	167

Chapter 6: Conclusion	168
6.1 India's Obligation to Transform Societal Values	170
6.2 Effective Measures in Eliminating Violence Against Women: Taking the Legal Route	174
6.2.1 Witch-Hunting	174
6.2.2 Honour Killing	175
6.2.3 Devadasi System	176
ANNEXURE-I: Proposed suggestions to the law on Witchcraft	179
ANNEXURE-II: Proposed suggestions for drafting the law on Honour Based Abuse	189
ANNEXURE-III: Proposed suggestions to the law on the Devadasi System	198
Bibliography	207

LIST OF ABBREVIATIONS

CCL	The Centre for Child and Law
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CRPC	The Code of Criminal Procedure
DEVAW	Declaration on the Elimination of Violence Against Women
ECtHR	European Court of Human Rights
HRC	Human Rights Committee
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IPC	Indian Penal Code
LoIPR	List of Issues Prior to Reporting
NCRB	National Crime Records Bureau
NCW	National Commission for Women
NFHS	National Family Health Survey
NGO	Non-Governmental Organization
RSS	Rashtriya Swayamsevak Sangh
UDHR	Universal Declaration of Human Rights
UN	United Nations

Chapter 1: Introduction

Indian society, similar to other patriarchal societies in the world, is governed by a system where men control and dominate women socially, politically and economically.¹ Patriarchal values and beliefs subjugate women at every stage of their lives. For instance, young girls are constantly pressured to remain within the confines of their homes and are taught to behave in an ‘appropriate’ manner, they are often not allowed to pursue education after a particular age, they are also discouraged from taking up high paying jobs or continue to work post marriage.² It is even possible to argue that societies which believe in male superiority and favour practices that place male authority at the centre of the family structure are the ones more prone to violence against women.³ This particular line of argument is supported by the constant control and restraint over women’s thoughts and movements in male-centred societies that do not leave any scope for dissent and punishes those women who either question the ‘status quo’ or try to break free from their stereotyped roles.⁴ As noted by Dagar,

‘Violence against women and girls was not the pathological behavior of a few ‘sick’ men; rather it was an extension of a system of practices and laws which sanctioned men’s rights to regard women as their property and therefore keep them under their control.’⁵

Violence against women is not new to India, one example is the disproportionate gender ratio resulting from female infanticide.⁶ As per the 2011 Census of India, the sex ratio stands at 940 females per 1000 males.⁷ The recent National Family Health Survey (NFHS), 2020 also

¹ Natasha Behl, *Gendered Citizenship: Understanding Gendered Violence in Democratic India* (1st edn, Oxford University Press 2019) 36-37.

² Mallarika Sinha Roy, ‘Intimate Spaces of Struggle: Rethinking Family and Marriage in Contemporary India’ in Knut A. Jacobsen (ed), *Routledge Handbook of Contemporary India* (1st edn, Taylor and Francis 2015) 288-290.

³ Gurvinder Kalra and Dinesh Bhugra, ‘Sexual Violence against Women: Understanding Cross-Cultural Intersections’ (2013) 55 (3) *Indian Journal of Psychiatry* 244, 244.

⁴ Geetanjali Gangoli, *Indian Feminisms: Law, Patriarchies and Violence in India* (1st edn, Routledge 2007) 2.

⁵ Rainuka Dagar, *Gender, Identity and Violence: Female Deselection in India* (1st edn, Routledge 2014) 53.

⁶ ‘India witnesses one of the highest female infanticide incidents in the world: study’ (*Down To Earth*, 08 July 2016) <<https://www.downtoearth.org.in/news/health/india-witnesses-one-of-the-highest-female-infanticide-incidents-in-the-world-54803>> accessed 27 March 2022.

⁷ C. Chandramouli, ‘Census of India 2011: Provisional Population Totals Paper 1 of 2011 India Series 1’ (*Office of the Registrar General & Census Commissioner, India*, 2011) <https://censusindia.gov.in/2011-prov-results/data_files/india/Final_PPT_2011_chapter5.pdf> accessed 27 March 2022; See also, Brian Stauffer, ‘You Should be Worrying about the Woman Shortage’ (*Human Rights Watch*, 2019) <<https://www.hrw.org/world-report/2019/country-chapters/global-0>> accessed 27 March 2022 - ‘The World Health Organization says the natural sex ratio at birth is about 105 boys to every 100 girls and its best to have equal numbers of men and women in a society. But, in the world’s two most populated countries—China and India—there is a serious woman

revealed a decline in the sex ratio. This decline was recorded in states which had shown gains in previous years.⁸ In India, violence against women appears to have been largely accepted as normal and is often justified. This is mainly because of society's own understanding of violence against young girls and women and how it chooses to respond to it.⁹ One example is the Delhi gang rape case of 2012, wherein a 23 year old woman was raped by six men and brutally assaulted when she was returning home after watching a movie with a male friend. When the incident came to light, people in the national capital came out on the streets demanding stringent laws to protect women in the country. As a result, amendments were brought especially to the offence of rape under the Indian Penal Code (IPC), 1860 with new crimes also being added to the list such as stalking and acid attack.¹⁰ But on the other side, soon after the incident, Mohan Bhagwat, the chief of the Hindu right wing organization Rashtriya Swayamsevak Sangh (RSS), said,

‘Such crimes hardly take place in ‘Bharat’ (meaning India in the Hindi language), but they occur frequently in ‘India’. You go to villages and forests of the country and there will be no such incidents of gang-rape or sex crimes. They are prevalent in some urban belts. Besides new legislation, Indian ethos and attitude towards women should be revisited in the context of ancient Indian values.’¹¹

Although, Bhagwat's victim-blaming statement was met with severe criticism from all corners of the media, his words did highlight the already prevailing notion of a particular ‘idea of Indian women’ according to which women are supposed to remain within their homes for their own protection and should only be allowed to go outside with family supervision.¹² More importantly, Bhagwat in his statement was pointing out how the ‘new liberal India’ that allows

shortage. For example, for several decades in China, the most populated country in the world, sex ratios at birth have been much higher than 105, sometimes exceeding 120 boys for every 100 girls. Many parts of India, the second most populated country, have also, for decades, had a sex ratio at birth significantly higher than 105.’

⁸ Aditi Tandon, ‘Worrying Sex Ratio Trend in Eight States’ *The Tribune* (New Delhi, 14 December 2020) <<https://www.tribuneindia.com/news/nation/worrying-sex-ratio-trend-in-eight-states-184002>> accessed 27 March 2022 – ‘The highest decline of 166 points in sex ratio at birth (SRB) over five years has been reported by the union territory of Dadra and Nagar Haveli, where female births per 1,000 male births fell from 983 in 2015-16 to 817 in the latest NFHS round. With a drop of 128 points in SRB over five years (966 in 2015 to 838 in 2020), Goa is the next worst performer, followed by Kerala, which has posted a loss of 96 points – down from 1,047 in 2015 to 951 in 2020.’

⁹ Pamela S. Johnson and Jennifer A. Johnson, ‘The Oppression of Women in India’ (2001) 7 (9) *Violence Against Women* 1051, 1052-1053.

¹⁰ ‘Nirbhaya case: Four Indian men executed for 2012 Delhi bus rape and murder’ (*BBC*, 20 March 2020) <<https://www.bbc.co.uk/news/world-asia-india-51969961>> accessed 27 March 2022.

¹¹ Deepti Misri, *Beyond Partition: Gender, Violence, and Representation in Postcolonial India* (1st edn, University of Illinois Press 2014) 1.

¹² *Ibid.*

women to go out at night with male friends has lost touch with ‘ancient values’ that have played a significant role in building ‘Bharat’. These ancient values, as per Bhagwat, in all probability are preserved and followed in rural settings where women are taught to live their lives in accordance with such values and therefore, are safe from violence, i.e., women who follow the rules without questioning them never have to face crimes like rape, domestic violence. Bhagwat is implying that the Delhi gang rape victim was part of the new liberal India and was raped because she represented a culture that had not only abandoned ‘ancient values’ but had also been polluted by free-thinking and westernization.¹³

Despite the amendments to the IPC in the aftermath of the Delhi gang rape, violent crimes against young girls and women have not stopped in India. As per the data released by the National Crime Records Bureau (NCRB), the Indian agency responsible for collecting data on crime, a rape was reported every 16 minutes on an average in 2019 in the country.¹⁴ Another important observation that can be drawn from the Delhi gang rape in relation to violence against women is with respect to the selective outrage of the general public to such crimes. Note that, there are no nation-wide protests for every rape victim or for every form of violence against women in India. As noted by Butalia,

‘In most societies, women who have had to face rape, are often stigmatized, as if they are the guilty ones. While this cuts across the board, it is true that certain kinds of rape, or the rape of certain women evokes more outrage than that of others. Caste rape, for example, where Dalit women are particularly targeted by upper caste men, is so naturalized in Indian culture, that it evokes very little outrage, and even the legal machinery sees it as something that is a part of our society.’¹⁵

This is the case because, there are a host of factors such as family, community, social norms, religion that directly or indirectly are responsible for violence against women and these factors

¹³ Misri, *Beyond Partition* (n 11).

¹⁴ Surabhi Shaurya, ‘One Rape Every 16 Minutes in India, NCRB Data Highlights Country’s Deteriorated Law & Order’ (*India.com*, 02 October 2020) <<https://www.india.com/news/india/no-country-for-women-one-rape-every-16-minutes-in-india-ncrb-data-highlights-countrys-deteriorated-law-order-4159540/>> accessed 27 March 2022.

¹⁵ Urvasi Butalia, ‘December 16th 2012: A Rape, A Murder and A Movement’ (*Gunda Werner Institute*, 02 April 2014) <<https://www.gwi-boell.de/en/2014/04/02/december-16th-2012-rape-murder-and-movement>> accessed 27 March 2022.

also play an important role in society's understanding of what acts constitute as violence against women and what should be society's reaction to such acts.¹⁶

In light of the above, this thesis will address the lack of focus on violence against women in India through the study of three specific violent crimes, considering how a number of gender based violent practices often go unnoticed and unpunished because they seem to be justified in the name of custom, culture, religion etc. Violent crimes such as, witch-hunting, honour killing and the devadasi system which this thesis focuses on are first and foremost difficult to associate with one particular factor. These three crimes, though, prevalent in many states in India, rarely make headlines either in print or visual media. Often most of these crimes go unreported, as a result, even the official data on these crimes is said to be mostly unreliable.

To begin with, the practice of **witch-hunting** in India is believed to be deeply rooted in patriarchy, superstition and gender based control.¹⁷ Almost every community in India believes in some form of superstition or in the existence of 'evil'. But, how and when these superstitious beliefs got associated only with women or began to be used to control women is not known. Note that, the practice of branding a woman as a witch enables people to manipulate others to believe that the woman is capable of bringing misfortune through the use of supernatural powers.¹⁸ In India, the general belief in the existence of 'evil' and the supernatural is used to suppress women belonging to marginalized communities and take control over their property. Branding a woman as a witch is 'a common ploy to grab land, settle scores or even to punish her for turning down sexual advances. Women who become too powerful, and thus threaten the male leadership can also become the target of witch-hunting.'¹⁹ Women are branded as witches and made to undergo inhuman trials to prove their innocence. They are subjected to horrific forms of violence including rape and extreme physical torture. They are ostracized

¹⁶ Ministry of Women and Child Development New Delhi, 'Report of the High Level Committee on the Status of Women in India vol 1' (*Government of India*, June 2015) 1, 137-139 <<https://wcd.nic.in/sites/default/files/Vol%20I.compressed.pdf>> accessed 27 March 2022.

¹⁷ Kanchan Mathur, 'Witchcraft, Witches and Social Exclusion' in Swati Shirwadkar (ed), *Family Violence in India: Human Rights, Issues, Actions and International Comparisons* (1st edn, Rawat Publications 2016) 294.

¹⁸ 'Report of the Independent Expert on the enjoyment of human rights by persons with albinism on the expert workshop on witchcraft and human rights' (*United Nations Human Rights Council A/HRC/37/57/Add.2*, 23 January 2018) 1, 15-16 <https://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/37/57/Add.2> accessed 27 March 2022.

¹⁹ Ministry of Women and Child Development, Report of the High Level Committee vol 1 (n 16) 89.

from the community and forced to live a secluded life. In short, the mere allegation of being a witch deprives a woman of the right to have a dignified life.²⁰

Instances of **honour killings** are on the rise in India despite being underreported by the media and the State.²¹ Honour killing, can be understood as the murder of the boy or girl or both either by members of their own family or community because of the belief that the person (victim) has brought dishonour to the family or community through his or her actions.²² The victims of such killings are mostly young girls and women in India. Here, 'honour' of the family or community is generally equated with the moral character of women in society. Every decision that is often made on behalf of a woman by her male family members has to do more with protecting the name of the family in the community rather than for the well-being of that particular woman.²³ One common means of ensuring the safety of one's family 'honour' is to marry the daughter as early as possible in order to avoid the possibility of any scandal that might raise questions about her 'purity' or 'chastity' in the community. Note that, the girl is rarely asked about her opinion regarding her own marriage as all decisions are made for her by the family thereby denying her the basic right to choose a spouse. But, in cases, where the girl marries someone out of her own free will, members of her family and community often go to the extreme extent of killing the new couple to wash off the stain on the family name which was brought by the actions of the girl.²⁴

The **devadasi system** is a social and religious practice of dedicating young girls to Hindu temples in India.²⁵ Girls belonging to the dalit community are married to a Hindu deity and are

²⁰ Ajay Skaria, 'Women, Witchcraft and Gratuitous Violence in Colonial Western India' (1997) 150 (1) Past & Present 109, 123.

²¹ Zainab Farhat and Nagendra Ambedkar Sole, 'Nothing Honourable in Honour Killings: A Study of Khap Panchayats, Honour Killings and the Response of Indian Judiciary' in Deepa Awasthi (ed), *Khap Panchayat – Women and Honour Killings* (1st edn, Kalpaz Publications 2016) 167-168; See also, '288 honour killing cases reported since 2014: Government' *The New Indian Express* (01 August 2017) <<http://www.newindianexpress.com/nation/2017/aug/01/288-honour-killing-cases-reported-since-2014-government-1636725.html>> accessed 27 March 2022.

²² 'Item 12 - Integration of the human rights of women and the gender perspective: Violence Against Women and "Honor" Crimes - Human Rights Watch Oral Intervention at the 57th Session of the UN Commission on Human Rights' (*Human Rights Watch*, 05 April 2001) <<https://www.hrw.org/news/2001/04/05/item-12-integration-human-rights-women-and-gender-perspective-violence-against-women>> accessed 27 March 2022.

²³ Ministry of Women and Child Development, Report of the High Level Committee vol 1 (n 16) 84.

²⁴ Kaushambi Kaushal, 'No Honour in Honour Killing: Comparative Analysis of Indian Traditional Social Structure vis-à-vis Gender Violence' (2020) 5 (1) *Antyajaa: Indian Journal of Women and Social Change* 52, 59.

²⁵ Ankur Shingal, 'The Devadasi System: Temple Prostitution in India' (2015) 22 (1) *UCLA Women's Law Journal* 107, 108.

asked to serve a temple. Once a girl becomes a devadasi she cannot remarry because of being married to a deity but anyone in the community is allowed to have sexual relations with her. As a result, these girls are sexually exploited by temple priests and people belonging to dominant castes.²⁶ After a certain age when these girls are not considered 'ideal' for temple service they are abandoned to lead a life of humiliation. These former devadasis are left with no other choice but to turn to prostitution to earn their living as no one else either marries or economically supports them.²⁷ The devadasi practice, unfortunately, has also become a means for poor dalit families to unburden themselves of their daughters. Due to social-economic pressures, families dedicate young girls as devadasis and after a certain period those devadasis dedicate their own daughters thereby making the entire practice an inter-generational cycle.²⁸ Note that, similar to the crimes of witch-hunting and honour killing, the devadasi system too is believed to be closely interlinked with a host of factors such as social, economic and religious due to which this practice continues to survive in society despite prohibitory legislations (this point will be further analyzed in later chapters in the thesis).

1.1 Research Question

The thesis focuses on the examination of role of law and social-cultural norms in shaping the discourse on violence against women in India in light of domestic and international human rights law. The thesis seeks to address this through the following research question: *to what extent has harmful social-cultural practices of witch-hunting, honour killing and the devadasi system against women and girls been recognized as part of gender based violence in India and how effective are the existing measures to combat such harmful practices in light of international human rights instruments and India's own constitutional and legislative framework?* In order to address this question, the following available sources have been relied upon: Legislation (Acts of Parliament and secondary legislation); Case law; Reports from the government, non-governmental organizations, different stakeholders, and academic research.

²⁶ Ibid.

²⁷ Treena Rae Orchard, 'Girl, woman, lover, mother: Towards a new understanding of child prostitution among young Devadasis in rural Karnataka, India' (2007) 64 (12) Social Science & Medicine 2379, 2381.

²⁸ V. Bharathi Harishankar and M. Priyamvada, 'Exploitation of Women as Devadasis and its Associated Evils' (National Commission for Women New Delhi, 2016) 1, 27-28 <http://newapps.nic.in/pdfReports/Exploitation_of_Women_as_Devadasis_and_its_Associated_Evils_Report.pdf> accessed 27 March 2022.

1.2 Aims/Objectives of the Research

The primary aim of this thesis is to highlight that violent practices of witch-hunting, honour killing and the devadasi system fall within the purview of violence against women. More importantly, this thesis aims to analyze whether neglecting to treat these so-called social practices as violent crimes only strengthens the prevailing patriarchal mindset in the Indian society which tramples upon the rights of women. Therefore, this thesis addresses these issues by examining the sociological dimensions within which violence occurs against women in India. This thesis also examines the assumptions, beliefs, practices, and the overall structural conditions that give rise to violence against women in India. The thesis discusses the three crimes and studies the implications of inequality, discrimination, and violence on the rights of women and finally, it evaluates the existing legal framework both at the domestic and international level in combating gender based violence in India.

1.3 Rationale and Justification for the Study

Violence against women and the unwillingness of most public authorities to deal with it is not new to the Indian setting. Only certain highly publicized violent crimes against women have gathered some public awareness of the problem and elevated the demands for punitive action. Still, tackling the issue of violence against women remains a serious challenge not only for the law enforcement and the judiciary but for the entire Indian society. The problem appears to lie in the poor recognition of what acts constitute violence against women.

This thesis is important in the sense that it addresses the issue of lack of attention to violence against women in India by highlighting some of the neglected violent practices towards women in the backdrop of social-cultural norms. Furthermore, as shown in the discussion below, the existing research on the three crimes neither completely acknowledges the social-cultural reality of India nor examines these crimes within the framework of violence against women. Therefore, there is a need to undertake comprehensive research in this area.

Witch-hunting: There is significant academic literature available which identifies, especially, the common factors behind the practice of witch-hunting in India. Most of the writings also provide a detailed account of the various punishments meted out to women who are accused of being a witch. In addition, the literature also mentions how communities which are largely affected by this practice believe in the existence of supernatural forces which is one of the main

reasons for increasing cases of witch-hunting in these communities. Further, the literature also points out that it is the belief in the supernatural that gives legitimacy to rumours about witches and witchcraft.²⁹

With reference to understanding witch-hunting in the Indian context, it is essential that the victimization of women due to allegations of witchcraft is not only examined on the basis of contemporary social-cultural factors behind such allegations which results in extreme forms of violence but is also understood within the framework of domestic and international outlook on violence against women (see discussion in chapter 4). This is crucial because women are identified as the main victims of witchcraft accusations (see discussion in chapter 4). The existing literature, however, fails to analyze witch-hunting in this particular gendered context. More importantly, it has to be acknowledged that, although witch-hunting is mostly reported from remote villages (there are now cases being reported from urban areas as well); the violence and victimization that results in this particular practice emanates from a deep-rooted patriarchal structure that touches every community and corner in India which gives rise to other harmful practices as well. Also, since, few states in India have enacted laws prohibiting the practice of witch-hunting, the discussion on witchcraft accusations and the ensuing violence needs to be revisited keeping in mind the effectiveness of the legal provisions (see discussion in chapters 4 and 5 + Annexure I) which the existing literature fails to undertake.

The researcher is, therefore, addressing the above key points in the thesis that needs to be considered while conducting a study on witch-hunting in India within the context of violence against women.

Honour Killing: There is considerable academic literature available on honour killing in India which sheds light on how and why young people, especially, women are killed in the name of protecting so-called honour of family and/or community. The literature also mentions that such

²⁹ Govind Kelkar and Dev Nathan, *Witch Hunts: Culture, Patriarchy and Structural Transformation* (1st edn, Cambridge University Press 2020); Soma Chaudhuri, 'Women as Easy Scapegoats: Witchcraft Accusations and Women as Targets in Tea Plantations of India' (2012) 18 (10) *Violence against Women* 1213-1234; Vanashree, 'Witchcraft: Pain, Resistance and the Ceremony of Punishment-Mahasweta Devi's Bayen' (2010) 17 (2) *Indian Journal of Gender Studies* 223-247; Shashank S. Sinha, 'Adivasis, Gender and the 'Evil Eye': The Construction(s) of Witches in Colonial Chotanagpur' (2006) 33 (1) *Indian Historical Review* 127-149; Nandini Sundar, 'Divining Evil: The State and Witchcraft in Bastar' (2001) 5 (3) *Gender, Technology and Development* 425-448; Samar Bosu Mullick, 'Gender Relations and Witches among the Indigenous Communities of Jharkhand, India' (2000) 4 (3) *Gender, Technology and Development* 333-358.

killings are mostly spread across the northern states in India and are often carried out on the orders of the Khap panchayat (or caste-councils, that can be roughly understood as clan based social organizations that mostly operate in the northern states of India) or done believing that the larger community would support such killings.³⁰ Further, there is also an extensive discussion in the literature regarding such killings taking place in traditional patriarchal societies across the world and how India is no different from such societies when it comes to exercising control over female sexuality.³¹ Additionally, how the issues of caste and religion play a crucial role in such killings is also discussed in most writings.³²

A holistic understanding on honour killing in the Indian context is incomplete without acknowledging the role of both ‘honour’ and ‘shame’ in such killings. Though, there is a considerable mention of these two concepts in most of the literature, it is important to discuss ‘honour’ and ‘shame’ from the point of view of violence against women.³³ Because, in most cases of honour killings the victims are young girls and women. Another important aspect missing in most writings is a discussion on ‘honour based abuse’ which need not always entail violence as is the case with honour killing. Honour based abuse could very well be an act carried out which includes intimidation, coercion that impacts on the mental and emotional health of the victim.

The researcher will, therefore, address the above mentioned issues along with also underlining the structural reasons behind honour killings. The discussion in chapter 3 is used in highlighting the various factors (caste, religion, social-cultural values) said to be responsible for such killings and how a union of such factors results in the continuance of violence against women in India. This particular analysis undertaken by the researcher is missing in most writings on

³⁰ John Alan Cohan, ‘Honor Killings and the Cultural Defense’ (2010) 40 (2) California Western International Law Journal 177, 194.

³¹ Ministry of Women and Child Development, Report of the High Level Committee vol 1 (n 16) 70.

³² Kaushal, No Honour in Honour Killing (n 24) 52-69; Tanya D’Lima, Jennifer L. Solotaroff, and Rohini Prabha Pande, ‘For the Sake of Family and Tradition: Honour Killings in India and Pakistan’ (2020) 5 (1) Antyajaa: Indian Journal of Women and Social Change 22-39; Gaurang R. Sahay, ‘Dominance of Jats is unabated: Caste and dominance in the villages of western Uttar Pradesh’ (2015) 49 (2) Contributions to Indian Sociology 216-249; Alan Page Fiske and Tage Shakti Rai, *Virtuous violence: hurting and killing to create, sustain, end and honor social relationships* (1st edn, Cambridge University Press 2015); Aisha K. Gill, Carolyn Strange and Karl Anton Roberts (eds), *“Honour” killing and violence: Theory, policy and practice* (1st edn, Palgrave Macmillan 2014); Lynn Welchman and Sara Hossain (eds), *‘Honour’: Crimes, Paradigms and Violence Against Women* (1st edn, Zed Books 2005).

³³ Neerja Ahlawat, ‘Marriage Norms, Notion of Honor and Khap in Haryana’ (2014) 67 (1-2) The Eastern Anthropologist 99, 103.

honour killing. Also, how these factors again come together to act as a hindrance in accessing justice by the victims is yet another aspect which has not been given due importance in the existing literature.

Devadasi System: With regard to the devadasi system, there is relatively less academic literature available when compared to the crimes of witch-hunting and honour killing in India. Nevertheless, it is important to note that most of the available literature on devadasis focuses mainly on providing information about the origin of this social practice and giving a detailed account of the customs and rituals surrounding the dedication of young girls to local deities.³⁴ Further, in most such writings, authors have often blamed the loss of religious sanctity of the customs and rituals surrounding the dedication process for the present-day downfall of the devadasis.³⁵ Several writings also tend to over emphasize the ‘glorious past’ of the devadasi system by highlighting the so-called high social and economic status of devadasis (it is said that devadasis used to receive gifts such as land by kings and other prominent persons in the society for their services and were more respected than ‘normal’ women because of their ‘marital’ status) during the Medieval period (500CE - 1500CE) in India.³⁶ But, the literature is not clear whether every devadasi was treated similarly during this period. Further, regardless of the ‘glorious past’ of devadasis, this was and still remains a practice which pushes young dalit girls into sexual slavery which the existing literature fails to properly acknowledge.

The devadasi system is an exploitative social practice that targets the most vulnerable section of women in the Indian society, i.e., dalit women. Because of this practice, young dalit girls are sexually abused, exploited and later forced in life to involve themselves in commercial sexual activity. This practice forces them to live a degraded life in the name of tradition and culture (see discussion in chapter 4). The literature on devadasis does not effectively reflect upon the question of why in the name of tradition and culture dalit women are forced into perennial oppression. Though, the literature mentions factors such as caste, poverty, societal

³⁴ K.C. Tarachand, *Devadasi Custom: Rural Social Structure and Flesh Markets* (1st edn, Reliance Publishing House 1992); See also, Lakshmi Vishwanathan, *Women of Pride – The Devadasi Heritage* (1st edn, Roli Books 2008).

³⁵ Shashi Panjra and O.P. Ralhan, *Devadasi System in India* (1st edn, OM Publications 2000).

³⁶ Kay K. Jordan, *From sacred servant to profane prostitute: A history of the changing legal status of the devadasis in India, 1857-1947* (1st edn, Manohar 2003); Amrit Srinivasan, ‘Reform and Revival: The Devadasi and Her Dance’ (1985) 20 (44) *Economic and Political Weekly* 1869-1876; Saskia C. Kersenboom-Story, *Nityasumangali: Devadasi tradition in South India* (1st edn, Motilal Banarsidass 1987).

pressure that are responsible for the continuity of the practice despite prohibitory legislation, there is, however, a failure to see the practice entirely as caste-based violence against women. Recognizing the devadasi practice as caste-based abuse is important as it reflects the complexities of the Hindu social order along with the status of women (see discussion in chapter 4). Further, the literature does not engage either with the effectiveness of the existing legal mechanisms that abolishes the practice or suggest measures to support victims of this practice (see discussion in chapter 5 + Annexure III).

The above key points will be addressed in this thesis as they have not been given due importance in the existing literature on the devadasi system.

1.4 Methodology and Conceptual Framework

The issue of violence against women and girls is not new to India. Women and girls continue to be subjected to different forms of violence that includes but is not limited to physical, psychological, sexual and economic. This has continued despite constitutional guarantees and various legislative responses, protests and struggles, and several women empowerment schemes. Unfortunately, the steps undertaken to address gender inequality have not been able to successfully upend India's patriarchal structure; its various social-cultural norms and value systems that control and define a woman's role and position in the family and community. It must also be acknowledged that women in India are not a homogenous group and their condition and position are influenced by various dimensions of their identity such as religion, class, caste. As a society, India's understanding and response to violence against women and girls is very much shaped by these social identities which play a pivotal role in influencing which instances fall within the category of violence against women and which do not.

In view of the pluralistic nature of Indian society, it is important that a broader and deeper examination of a nexus of State, society, social-cultural norms and more importantly the reasons that give rise to harmful practices of witch-hunting, honour killing and the devadasi system, is undertaken to address the issue of violence against women in India. The crimes of witch-hunting, honour killing and the devadasi system are taken as case studies in the thesis because of the interconnectedness of custom and tradition that contribute to these three crimes apart from the gender variable linking the three crimes. These three crimes continue to be justified and legitimized either on the argument of respect for custom and tradition or that they

are an inseparable part of India's social reality. These three crimes are not yet fully seen as harmful practices that infringe upon women's human rights which also separates them from other forms of violence against women such as rape. The defensive approach based in custom and tradition to exclude these crimes from the purview of harmful practices also separates them from most crimes against women necessitating a closer look at these crimes and through them also examine the role of non-state 'laws' in the family and the community and how they are responsible for violation of women's human rights. The three crimes also help in examining the role of law and its impact in a social setup that reinforces aspects of custom and tradition that often contributes to violence against women. In short, the aim here is to study the role of law and see to what extent, if any, the law has responded to women's problems and concerns that arise out of gender biased social-cultural norms using the harmful practices of witch-hunting, honour killing and the devadasi system as examples. As a result, *this thesis adopts the socio-legal methodology in answering the main research question, since, this approach will inform the study of violence against women in India from an interdisciplinary standpoint by moving beyond the legal text and investigating the application of law in society.*³⁷ Further, this particular methodology allows for taking a multidisciplinary approach by consulting literature in sociology, history, cultural studies and criminology which is an advantage in exploring issues of gender and gender discrimination.

Adopting the traditional legal methodological approach i.e., black letter law research methods with its rigid focus on statutory provisions and case law would not have allowed to approach the research question from a wider social-legal context. Legal research based on black letter law treats the law as 'a sealed system which can be studied through methods which are unique to the science of law and believe that legal developments can be interpreted, critiqued and validated by reference to the internal logic of this sealed system. The sources from which they collect their raw material are limited to a finite and relatively fixed universe of authoritative texts such as statutes, legal opinions and legal cases.'³⁸ Research conducted using the black letter law method is primarily top-down i.e., it starts with the law, legislations, court decisions and analyzes them using the standards and principles of the legal system. It does not, however,

³⁷ Michael Salter and Julie Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (1st edn, Harlow: Pearson Education UK 2007) 128.

³⁸ Douglas W Vick, 'Interdisciplinarity and the Discipline of Law' (2004) 31 (2) *Journal of Law and Society* 163, 178-179.

attempt to explore how the law impacts on society or evaluates the success or failure of the law in regulating behaviour of individuals as is often intended by the legislators.

Socio-legal research methods, on the other hand, by using theories, methods, and practices that are drawn from other subjects allows for the examination of why legal systems work or fail to work. A socio-legal approach, ‘takes legal study outside the legal “office” [it] . . . considers the law and the process of law (law-making, legal procedure) beyond legal texts. This can include addressing the socio-politic-economic considerations that surround and inform the enactment of laws, the operation of procedure, and the results of the passage and enforcement of laws.’³⁹ A socio-legal approach means focusing on the practical aspect of the law as it is applied in a given social context and not merely looking at the legal content.⁴⁰ In the current context, it helps in gaining a better understanding of the different patterns of violence against women and how it affects the operation of law on the ground. In the Indian society, multiple factors such as culture, religion shape the discourse on gender issues.⁴¹ Given the highly complex nature of the problem of violence against women in India, a socio-legal approach is essential also from a human rights perspective. This will help in gaining better clarity of the relationship between social norms, gender discrimination and protection of human rights.⁴² A socio-legal approach allows for a more nuanced study by using different concepts that help in better evaluation of the problem. It will help in exposing the power imbalances that play a significant part in gender based violence.⁴³ As explained by Harris,

‘We regard the law as a complex phenomenon, which is not likely to be adequately explained by reference to a single macro-theory. We believe that in the immediate future, progress in socio-legal studies will best be made by building up a number of detailed studies of particular topics in the law, using as many relevant perspectives as our resources permit. If we bring together the insights of sociology, economics, psychology and history upon a particular problem area in society, we hope that the

³⁹ Alan Bradshaw, ‘Sense and Sensibility: Debates and Developments in Socio-Legal Research Methods’ in Philip A. Thomas (ed), *Socio-Legal Studies* (1st edn, Dartmouth Publishing 1997) 99 – ‘Most sociolegal scholars would agree that law, as defined by the black-letter tradition, as a singular and self-contained discipline focused on ‘law in books’ needs to be either replaced with, or at least supplemented by, a different type of research deploying methodologies drawn largely from the social sciences’; See also, *Ibid* 132.

⁴⁰ Salter and Mason, *Writing Law Dissertations* (n 37) 130.

⁴¹ Jyoti Sarkar and Debaditya Das, ‘Female foeticide is a menace in our modern Indian society: Critical analysis’ (2018) 4 (3) *International Journal of Law* 37, 41.

⁴² Salter and Mason, *Writing Law Dissertations* (n 37) 138; See also, Tamara Relis, ‘Unifying benefits of studies in legal pluralism: Accessing actors’ voices on human rights and legal pluralities in gender violence cases in India’ (2016) 48 (3) *Journal of Legal Pluralism and Unofficial Law* 354, 360.

⁴³ Salter and Mason, *Writing Law Dissertations* (n 37) 138.

cumulative effect will be a deeper understanding than could be gained from any one discipline, given the all-pervasive nature of law in its social context.⁴⁴

With reference to this thesis, a socio-legal methodology allows for gaining a better understanding of Indian women's gendered and intersectional experiences within the context of gender based violence especially in terms of assessing its impact on policy formulation and legislation. This evaluation is made possible by referring to a number of concepts namely, structural violence, legal pluralism, patriarchy and concept of gender and gender discrimination. The use of these concepts within the framework of socio-legal methodology helps in identifying gendered and intersectional dimensions to violence against women in India. More importantly, these concepts help in understanding how harmful social-cultural practices are constructed, organized and regulated.

Gender as a social identity underpins this research, however, it must be acknowledged that experiences of all women in India, especially in the context of gender based violence cannot be explained by relying only on gender. Oppression of women (including women belonging to marginalized sections) in India can only be understood by highlighting the multiple and converging social-cultural foundations and reasons that perpetuate violence against women and girls. Violence faced by women and girls in the Indian context is shaped by different markers of their identity such as caste, class, religion. Therefore, this thesis uses intersectionality as a conceptual framework for analyzing the harmful practices of witch-hunting, honour killing and the devadasi system both from a social-cultural as well as a human rights perspective to assess India's understanding of gender based violence and the effectiveness/limitation of its response to combat harmful practices against women and girls.

The term intersectionality was first introduced by Crenshaw in 1989.⁴⁵ In her work, she demonstrates how there is an exclusion of black women from both feminist theory and antiracist policy discourse mainly because of the general tendency to see race and gender as separate categories.⁴⁶ She notes that,

⁴⁴ Don R. Harris, 'The Development of Socio-Legal Studies in the United Kingdom' (1983) 3 (3) *Legal Studies* 315, 319.

⁴⁵ Devon W. Carbado and others, 'Intersectionality: Mapping the Movements of a Theory' (2013) 10 (2) *Du Bois Review* 303, 303.

⁴⁶ Kimberle Williams Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' [1989] 1 *University of Chicago Legal*

‘while feminism purports to speak for women of color through its invocation of the term “woman,” the feminist perspective excludes women of color because it is based upon experiences and interests of a certain subset of women. On the other hand, when white feminists attempt to include other women, they often add our experiences into an otherwise unaltered work. It is important to name the perspective from which one constructs her analysis; and for me, that is as a Black feminist. Moreover, it is important to acknowledge that the materials I incorporate in my analysis are drawn heavily from research on Black women. On the other hand, I see my own work as part of a broader collective effort among feminists of color to expand feminism to include analyses of race and other factors such as class, sexuality and age.’⁴⁷

Crenshaw also finds the concept of intersectionality useful in better understanding identity-politics of not only African-Americans but also of other minority communities, especially with respect to violence against women.⁴⁸ She argues that, the omission of not taking into account the experiences based on race, gender and other categories in identity-politics is problematic as it not only undermines the efforts of broadening anti-discrimination laws but also weakens the discourse on gender based violence (because according to her, the violence that women face on a daily basis is often shaped by multiple factors).⁴⁹

But then, what is intersectionality? Despite its ever-expanding meaning, the concept of intersectionality can be understood in the following manner:

‘Intersectionality is a way of understanding and analyzing the complexity in the world, in people, and in human experiences. The events and conditions of social and political life and the self can seldom be understood as shaped by one factor. They are generally shaped by many factors in diverse and mutually influencing ways. When it comes to social inequality, people’s lives and the organisation of power in a given society are

Forum 139, 150 - ‘Unable to grasp the importance of Black women’s intersectional experiences, not only courts, but feminist and civil rights thinkers as well have treated Black women in ways that deny both the unique compoundedness of their situation and the centrality of their experiences to the larger classes of women and Blacks. Black women are regarded either as too much like women or Blacks and the compounded nature of their experience is absorbed into the collective experiences of either group or as too different, in which case Black women’s Blackness or femaleness sometimes has placed their needs and perspectives at the margin of the feminist and Black liberationist agendas.’

⁴⁷ Kimberle Williams Crenshaw, ‘Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color’ (1991) 43 (6) Stanford Law Review 1241, 1244.

⁴⁸ Ibid 1242.

⁴⁹ Crenshaw, Mapping the Margins (n 47) 1242.

better understood as being shaped not by a single axis of social division, be it race or gender or class, but by many axes that work together and influence each other. Intersectionality as an analytic tool gives people better access to the complexity of the world and of themselves.’⁵⁰

An alternative method of understanding the concept of intersectionality is to ask, what it does or can achieve.⁵¹ It is believed that, a broader application of this concept challenging conventional thinking in new areas will lead to better engagement of thought about how inequalities based upon race, gender, class etc., intermingle and are then used as a tool for oppression.⁵² Because intersectionality highlights and identifies the often hidden workings of structural systems, forms of power and modes of oppression and how these operate at once to create divisions and marginalize, the concept is also better acknowledged by scholars as a work-in-progress rather than a compartmentalized theory.⁵³ The dynamics of intersectionality is best explained by an observation made by Crenshaw in her work, wherein she explains through the case of *Emma DeGraffenreid v General Motors Assembly Division*, how the court failed to acknowledge the intersectional experiences of Black women.⁵⁴ In this particular case, five Black women went to court against their employer, General Motors claiming that a seniority-based layoff had disadvantaged Black women.⁵⁵ Note that, the claim made by the plaintiffs was based around an alleged violation of Title VII of the Civil Rights Act, 1964. Title VII prohibited employment discrimination based on ‘race, color, religion, sex and national origin.’⁵⁶ Evidence given at trial did reveal that General Motors never hired Black women prior to the Civil Rights Act and those Black women that were hired after 1970 had lost their jobs due to the seniority-based layoff policy of the corporation.⁵⁷ The court rejected the plaintiffs attempt to bring a suit specifically on behalf of Black women. The court stated:

‘Plaintiffs have failed to cite any decisions which have stated that Black women are a special class to be protected from discrimination. The Court’s own research has failed to disclose such a decision. The plaintiffs are clearly entitled to a remedy if they have been discriminated against. However, they should not be allowed to combine statutory

⁵⁰ Patricia Hill Collins and Sirma Bilge, *Intersectionality (Key Concepts)* (1st edn, Polity Press 2016) 11.

⁵¹ Carbado and others, *Intersectionality* (n 45) 304.

⁵² Vivian M. May, *Pursuing Intersectionality, Unsettling Dominant Imaginaries* (1st edn, Routledge 2015) 21.

⁵³ *Ibid* 19; See also, Crenshaw, *Mapping the Margins* (n 47) 1244-1245.

⁵⁴ Crenshaw, *Demarginalizing the Intersection of Race and Sex* (n 46) 141.

⁵⁵ 413 F. Supp. 142 (1976).

⁵⁶ 413 F. Supp. 142 (1976).

⁵⁷ 413 F. Supp. 142 (1976).

remedies to create a new ‘super-remedy’ which would give them relief beyond what the drafters of the relevant statutes intended. Thus, this lawsuit must be examined to see if it states a cause of action for race discrimination, sex discrimination, or alternatively either, but not a combination of both.’⁵⁸

The above instance highlights a common problem that exists in relation to understanding discrimination i.e., ignoring the occurrence of multi-layered discrimination in society.⁵⁹ As is evident from the *DeGraffenreid* case, by not acknowledging the uniqueness of their situation, the experiences of Black women were kept out of the debate on discrimination.⁶⁰ Similar issue is found within the Indian context, wherein, despite an increase in the usage of intersectionality to understand patterns of discrimination and deprivation in society, the co-relation between caste and gender is still not acknowledged as part of the human rights discourse.⁶¹ For example, regardless of several cases of violence against dalit women by dominant caste groups, the overall situation of dalit women in India has not received the required attention from the State machinery.⁶² Despite recent studies revealing that dalit women suffer from gender bias, caste discrimination and economic deprivation at the same time, there has been no comprehensive effort made to understand the intersectional issues of caste and gender.⁶³ In majority of cases, dalit women face more violence than dalit men because of the belief that by targeting dalit women, dominant caste groups can bring down the ‘honour’ of dalit men.⁶⁴ Further, apart from facing sexual violence, dalit women also suffer in almost every other aspect of their life due to the caste-gender intersectionality.⁶⁵ According to the data from the National Family Health Survey (NFHS) in 2018, ‘dalit women in India die younger than upper caste women, face discrimination in accessing healthcare and lag behind on almost all health indicators.’⁶⁶

⁵⁸ 413 F. Supp. 142 (1976).

⁵⁹ Crenshaw, Mapping the Margins (n 47) 1245.

⁶⁰ Crenshaw, Demarginalizing the Intersection of Race and Sex (n 46).

⁶¹ Rana Haq and Edwina Pio, ‘Intersectionality of Gender and Other Forms of Identity: Dilemmas and Challenges Facing Women in India’ (2013) 28 (3) *Gender in Management* 171, 176.

⁶² Nitya Rao, ‘Marriage, Violence, and Choice: Understanding Dalit Women’s Agency in Rural Tamil Nadu’ (2015) 29 (3) *Gender & Society* 410, 411-413.

⁶³ Ibid; See also, G. C. Pal, ‘Caste-Gender Intersectionality and Atrocities in Haryana: Emerging Patterns and State Responses’ (2018) 4 (1) *Journal of Social Inclusion Studies* 30, 32.

⁶⁴ Pal, Caste-Gender Intersectionality and Atrocities in Haryana (n 63) 32.

⁶⁵ Ashwaq Masoodi and Ajai Sreevatsan, ‘Dalit women in India die younger than upper caste counterparts: Report’ (*Livemint*, 06 June 2018) <<https://www.livemint.com/Politics/Dy9bHke2B5vQcWJJWNo6QK/Dalit-women-in-India-die-younger-than-upper-caste-counterpar.html>> accessed 27 March 2022.

⁶⁶ Ibid - ‘Following is the health status of women belonging to the dalit community:

1. Anaemia: According to the recent data from the National Family Health Survey (NFHS), among the women in the age group 25-49 who have anaemia, 55.9 % are Dalits. The national average among Indians is 53%. Even though anaemia is a widespread problem faced by women in India, for Dalit women the problem is compounded.

Intersectionality is therefore used as a conceptual framework in this thesis to understand oppression of women in the Indian society by identifying multiple, co-constituting factors that are operative and equally vital in institutionalizing violence against women including witch-hunting, honour killing and the devadasi system. What this means is that violence against women cannot be effectively understood solely through gender because experiences of violence against women depend on not one but different social divisions. Violence against women when mapped in intersectional terms, helps in using social constructs like gender which is considered the most important social category to highlight the interrelationships between multiple intersecting identities like gender and caste, gender and religion, gender and class, gender and social-cultural norms etc. Intersectionality as a conceptual framework helps in understanding the correlation between gender and superstitious beliefs that drives the practice of witch-hunting against women belonging to marginalized communities. In relation to honour killing, intersectionality helps in examining the hierarchy within the family structure and the ‘backlash’ against women and girls who question it. Note that, in a society such as India, which is deeply entrenched in patriarchy, men subordinate women and have ‘incontestable’ rights over all resources and therefore often make decisions even on matters concerning marriage, movement of unmarried daughters etc. With respect to devadasi system, intersectionality is helpful in studying the relationship between gender and religion and how religious rituals become a medium for sexual exploitation of young girls.

1.5 Limitations of the Research

Violence against women is a broad research area and not just limited to the three crimes discussed in this thesis. Since, this thesis focuses on witch-hunting, honour killing and the devadasi system in the Indian context, it was not possible to include and address other forms of violence against women in this study. In addressing the three crimes, both primary and secondary sources have been relied upon. With respect to the primary sources, only those case laws, legal instruments that have a specific relevance to the understanding and analysis of the three crimes have been focussed on. This study is restricted due to the difficulty in accessing secondary sources, more importantly, official local and national government statistics in

2. Life expectancy: The average age of death for Dalit women is 14.6 years younger than for higher caste women, according to the report. 3. Access to healthcare: According to the NFHS data, among Dalits, 70.4 % of women reported problems with accessing healthcare when they knew they are sick. Among the reasons cited, getting permission to go to the hospital facility, or distance to the health facility, or money were stated as the reasons.’

relation to the three crimes. Most statistics on the three crimes have either been contested in the existing literature or are unreliable.

Another limitation of the research is related to the researcher's decision of not undertaking fieldwork. Due to the highly sensitive nature of the research, it would not have been feasible to conduct substantial fieldwork mainly because of personal safety concerns of the researcher and the researched and limitations of time and finances. Conducting fieldwork would have required the researcher to overcome barriers of caste, gender, class, region, religion, language, etc. This would have also required extensive travelling to remote places. More importantly, because the research focuses on the issue of gender based violence, the researcher, a male, would have faced reluctance from victims of harmful social-cultural practices and from their families to discuss experiences openly. Conducting fieldwork in a non-conducive social setting would have placed victims and the researcher in danger. Therefore, the researcher decided not to undertake fieldwork. On the other hand, it must also be acknowledged that gaining access to research subjects in order to conduct interviews or questionnaires could have further enriched the analysis of the thesis, however, the same was not undertaken because of the above-mentioned reasons.

1.6 Overview of Chapters

This section provides a brief overview of the various chapters in this thesis.

Chapter 2: Theoretical Approach of the Research

This chapter lays down the theoretical concepts that are relied upon in the later chapters to analyze violence against women in India through the three crimes. The chapter focuses on the concepts of structural violence, legal pluralism, patriarchy and concept of gender and gender discrimination. These concepts are used to develop a deeper understanding about the three crimes alongside the social-cultural setup of India in which these crimes take place.

Chapter 3: Violence Against Women in Contemporary India

This chapter provides a brief overview of some of the current experiences and challenges faced by women in contemporary India in the context of violence against women that have also been highlighted as vital issues of concern as per the data collected by the government, non-governmental organizations etc. As a result, this chapter focuses, particularly on the following current challenges: a.) sexual violence within the context of marriage through the offence of

marital rape, b.) the problem of under-reporting of crimes against women and c.) the adverse impact of sexual violence on the reproductive health of women. This analysis helps shed light on how certain social-cultural norms that have existed for a long period of time continue to be the root cause of subjugation of women in contemporary India. More importantly, the discussion in chapter 3 acts as a starting point from which the discussion on violence against women in the Indian context is carried forward through the examples of witch-hunting, honour killing and the devadasi system.

Chapter 4: Violence Against Women in India – Witch-Hunting, Honour Killing and The Devadasi System

This chapter provides a detailed account of the three crimes. The primary aim of the chapter is to understand what these three crimes are, why and how they take place and who are the victims and perpetrators of these crimes. More importantly, this chapter, following from the discussion in chapter 3 makes the argument that witch-hunting, honour killing and the devadasi system are not crimes that take place in isolation but are the result of a larger structure of violence.

Chapter 5: Violence Against Women, Human Rights Law and Domestic Implementation

This chapter first provides a brief overview and analysis of the existing international human rights law mechanisms in relation to protecting women from gender based violence. The second part of this chapter examines and critiques the domestic legislations put in place to address violent practices against women in India, especially, in relation to witch-hunting and the devadasi system.

Chapter 6: Conclusion

The final chapter highlights the key findings of this thesis in order to effectively combat violence against women in India especially with respect to the three crimes and also by way of Annexures I, II and III suggest draft provisions to strengthen the law on these three crimes.

Chapter 2: Theoretical Approach of the Research

In order to understand the existence of systematic nature of discrimination against women in India that often results in violent acts and practices endangering their life and liberty, this thesis relies upon the following concepts namely, structural violence, legal pluralism, patriarchy and the concept of gender and gender discrimination. These concepts form part of the theoretical framework of the research, and will be used in the analysis throughout the thesis. The following sections provide a brief description of the above-mentioned concepts and their relevance to the research.

2.1 Structural Violence

Key to understanding any research from the standpoint of structural violence is to first and foremost acknowledge the difference that exists between behavioural violence on one hand and structural violence on the other.⁶⁷ Often, research conducted on different acts of violence e.g., rape, murder, domestic abuse tend to focus merely upon the actions of those individuals who commit such acts. This focus diverts the attention from examining the structural reasons that give rise to such acts in the first place.⁶⁸ A comprehensive study from the perspective of structural violence is, therefore, essential because unlike behavioural violence which is easier to point out and correct, structural violence is virtually invisible and problematic to address as it continues to operate unnoticed.⁶⁹ But, what is structural violence? The term ‘structural violence’ was coined by Johan Galtung in the 1960s, and essentially focuses upon ‘the wider social and structural forces which make some individuals, groups and societies more vulnerable to suffering while others are shielded from it.’⁷⁰

In his work, Galtung describes violent acts through the concept of ‘subject’ i.e., whether there is an involvement of a subject (person) who commits an act of violence?⁷¹ He draws a distinction between personal/direct violence and structural violence on the basis of identification of a subject (person) who carries out an act of violence. According to Galtung,

⁶⁷ Parul Sinha and others, ‘Structural Violence on Women: An Impediment to Women Empowerment’ (2017) 42 (3) *Indian Journal of Community Medicine* 134, 135.

⁶⁸ *Ibid.*

⁶⁹ Sinha and others, *Structural Violence on Women* (n 67).

⁷⁰ Shamshad Khan and others, ‘Dutiful daughters: HIV/AIDS, moral pragmatics, female citizenship and structural violence among Devadasis in northern Karnataka, India’ (2018) 13 (8) *Global Public Health* 1065, 1067-1068.

⁷¹ Johan Galtung, ‘Violence, Peace, and Peace Research’ (1969) 6 (3) *Journal of Peace Research* 167, 170.

personal violence is one where a person is identified carrying out violence, whereas, when no such person can be identified it is structural violence.⁷² Personal violence is more behaviour oriented i.e., it focuses on the subject and object (both are persons) involved in the violent act and therefore is easy to identify and correct. Personal violence is individual oriented and seen as the result of a person's abnormal conduct e.g., rape, murder, whereas, in structural violence, it is often difficult to identify person to person relation which makes violent acts less noticeable.⁷³ As rightly put by Galtung 'when one husband beats his wife, there is a clear case of personal violence, but when one million husbands keep one million wives in ignorance, there is structural violence.'⁷⁴

Another important observation made by Galtung with respect to the nature of personal and structural violence is its relation to the general perception of violence.⁷⁵ Violence has always been understood in terms of either intentional vs. non-intentional; physical vs. psychological and actual violence vs. threat of violence which has led to the overshadowing of structural reasons behind occurrence of violent acts.⁷⁶ Note that, structural violence reformulates the idea of risk or suffering of an individual or group by expanding the analytical perception from a person oriented approach to a more broader set of reasons rooted in society. It is believed that the understanding gained from such an approach which is aware of the structural reasons affecting the real-life experiences of certain individuals or a group, is more capable of bringing constructive change by securing basic rights through effective local governmental interventions, good policy and social transformation.⁷⁷

Structural violence is the violence resulting from social structures that lead to injustice, inequality and prohibit certain individuals or a group from exercising their basic rights.⁷⁸ The term 'structure' or 'structural' denotes,

'social relations and arrangements-economic, political, legal, religious or cultural that shape how individuals and groups interact within a social system. These include broad

⁷² Ibid.

⁷³ Galtung, Violence, Peace, and Peace Research (n 71) 171.

⁷⁴ Ibid 171-173.

⁷⁵ Galtung, Violence, Peace, and Peace Research (n 71) 173.

⁷⁶ Ibid.

⁷⁷ Barbara Rylko-Bauer and Paul Farmer, 'Structural Violence, Poverty and Social Suffering' in David Brady and Linda M. Burton (eds), *The Oxford Handbook of Social Science of Poverty* (1st edn, Oxford University Press 2016) 64.

⁷⁸ Khan and others, Dutiful daughters (n 70).

scale cultural and political-economic structures such as caste, patriarchy, slavery, apartheid, colonialism...as well as poverty and discrimination by race, ethnicity, gender, sexual orientation and migrant/refugee status. These structures are violent because they result in avoidable deaths, illness and injury; and they reproduce violence by marginalizing people and communities, constraining their capabilities and agency, assaulting their dignity and sustaining inequalities.’⁷⁹

For example, as per Ho, racism in the United States is an institutionalized social structure that creates systemic barriers for African-Americans in the fulfilment of basic rights such as, health, education, employment, housing. Racial segregation, as an example of structural violence leads to inequality in opportunity for African-Americans.⁸⁰ Racial bias is built into the structure which creates a disadvantageous position for African-Americans that places them at the bottom of society in terms of their social-economic status.⁸¹ Hence, structural violence targets a class of people by constraining their capabilities and condemning them to live an oppressed life. Structural violence also highlights the way in which society normalizes the machinery of continuous discrimination through historical biases of caste, race, gender.⁸²

The injustices that arise due to structural denial of basic freedoms, undoubtedly, are at the centre of the debate on structural violence, but, there are issues pertaining to the protection of basic human rights like food, health, clothing, decent standard of living which need immediate attention in order to make effective changes for the betterment of the marginalized communities.⁸³ It is only recently that the concept of structural violence has been debated bearing in mind the tenets of human rights law. This wider approach to studying structural inequalities is believed to not only create a strong mechanism to enforce social-economic rights but will also be helpful in assessing the feasibility of government policy on the grounds of

⁷⁹ Rylko-Bauer and Farmer, *Structural Violence, Poverty and Social Suffering* (n 77) 48; See also, Ashrafuzzaman Khan, ‘Structural violence: A tale of three women from marginalised communities in Bangladesh’ (2014) 21 (4) *International Journal on Minority and Group Rights* 547, 547-548 – ‘Unequal access to resources, political power, education, health care or legal standing are all forms of structural violence. Structural violence occurs whenever people are disadvantaged by political, legal, economic or cultural traditions.’

⁸⁰ Kathleen Ho, ‘Structural Violence as a Human Rights Violation’ (2007) 4 (2) *Essex Human Rights Review* 1, 4.

⁸¹ *Ibid.*

⁸² Rylko-Bauer and Farmer, *Structural Violence, Poverty and Social Suffering* (n 77) 48.

⁸³ *Ibid.*

social justice.⁸⁴ The concept of structural violence when studied through the lens of human rights law is said to highlight the structural causes behind human rights violations.⁸⁵

The Universal Declaration of Human Rights (UDHR), as the foundational document of international human rights law recognizes several key civil, political, economic, social, and cultural rights for all people.⁸⁶ The International Covenant on Economic, Social and Cultural Rights (ICESCR) guarantees a set of crucial rights such as the right to work, right to education and health to enable people to live a life of dignity.⁸⁷ In addition, several specialized agencies of the United Nations and other non-governmental organizations also work towards protecting the rights of people globally. Yet, the mission of securing human rights for everyone remains a difficult task to be achieved.⁸⁸ The problem is linked to the undermining of factors such as, social-economic conditions, societal structures, positioning of individual/groups within those structures which vary across regions.⁸⁹ Here, Galtung's concept of 'cultural violence' is useful in understanding how structural violence is legitimized or justified through varying aspects of culture such as religion and custom.⁹⁰

Cultural violence highlights the way in which structural violence is normalized in society.⁹¹ Structural violence is built into the social setup which oppresses some people by denying them economic, social and political opportunities. As a result, a new system of injustice and exploitation comes into effect which institutionalizes violence upon people and their dignity and later form the very basis of authoritative and unjust systems like patriarchy.⁹² Cultural violence, on the other hand, strengthens the prevailing beliefs in society that gives legitimacy to structural violence, making it seem like a daily affair. More importantly, these prevailing

⁸⁴ Ho, Structural Violence as a Human Rights Violation (n 80) 11.

⁸⁵ Khan, Structural violence (n 79) 549.

⁸⁶ 'Universal Declaration of Human Rights' (*United Nations General Assembly* 217 A (III), 10 December 1948) <<https://www.refworld.org/docid/3ae6b3712c.html>> accessed 27 March 2022. [Hereinafter, cited as Universal Declaration of Human Rights 1948].

⁸⁷ 'International Covenant on Economic, Social and Cultural Rights' (*United Nations General Assembly*, 16 December 1966) <<https://www.refworld.org/docid/3ae6b36c0.html>> accessed 27 March 2022. [Hereinafter, cited as International Covenant on Economic, Social and Cultural Rights 1966].

⁸⁸ Khan, Structural violence (n 79) 555-556.

⁸⁹ Dagar, *Gender, Identity and Violence* (n 5) 46.

⁹⁰ Johan Galtung, *Peace by peaceful means: Peace and conflict, development and civilization* (1st edn, Sage Publications 1996) 196.

⁹¹ Khan, Structural violence (n 79) 555-556.

⁹² David P. Barash, *Introduction to peace studies* (1st edn, Wadsworth Publication 1991) 8.

beliefs in society are based on notion of superiority/inferiority of class, race, sex, religion which shape human behaviour in accepting violence on some by others.⁹³

In the Indian scenario, to understand the existence of structural violence towards women and how violence against women is normalized through the use of 'cultural violence', it is necessary to first study the subordination of women through a host of issues such as caste, religion, gender roles, community beliefs, family values, tradition.⁹⁴ In India, the Constitution recognizes equal rights for all, however, in practice, the subordination of women exists in the society mostly because of customary practices that normalize gender discrimination.⁹⁵ As noted by Segal,

'In India's clearly patriarchal society, males are valued more, and preference is for a male child. Men act as heads of households, primary wage earners, decision makers and disciplinarians. Male children, especially the eldest male, grows with the knowledge that, upon the death of his father, he will become the head of the household, and will also be responsible for his mother, female relatives, and younger siblings. He is expected to model his behaviour after that of his father. Women in the family are subordinate and serve as caretakers. As children, they are groomed to move into, and contribute to, the well-being of the husband's family.'⁹⁶

One of the primary aims of this thesis is to highlight the pervasiveness of violence against women in India due to the existence of structural inequalities. Chapter 4 of the thesis which provides a detailed account of the crimes of witch-hunting, honour killing and the devadasi system makes an argument that these crimes take place due to a combination of factors such as caste, religion. These factors support a social system that exploits and subordinates women (see discussion in chapter 4).

⁹³ Galtung, *Peace by peaceful means* (n 90) 199-200.

⁹⁴ Govind Kelkar, 'Women and Structural Violence in India' (1985) 13 (3/4) *Women's Studies Quarterly* 16, 16.

⁹⁵ *Ibid* 17.

⁹⁶ Uma A. Segal, 'Family violence: A focus on India' (1999) 4 (2) *Aggression and Violent Behaviour* 213, 216; See also, Dyan Mazurana and Susan McKay, 'Women, Girls and Structural Violence: A Global Analysis' in Daniel J. Christie, Richard V. Wagner and Deborah DuNann Winter (eds), *Peace, Conflict, and Violence: Peace Psychology for the 21st Century* (1st edn, Pearson 2001) 3.

2.2 Legal Pluralism

Legal pluralism as a concept has been applied across various disciplines, e.g., sociology and anthropology.⁹⁷ However, for the purposes of socio-legal scholarship, legal pluralism can be understood as a scenario in which two or more legal systems coexist at the same time.⁹⁸ It is also possible that these legal systems exist and act independent of each other.⁹⁹ Going by Griffiths understanding of legal pluralism, more than one ‘law’ must be present to denote plurality of systems in any social field.¹⁰⁰ He also states that,

‘A situation of legal pluralism - the omnipresent, normal situation in human society - is one in which law and legal institutions are not all subsumable within one ‘system’ but have their sources in the self-regulatory activities of all the multifarious social fields present, activities which may support, complement, ignore or frustrate one another, so that the ‘law’ which is actually effective on the ‘ground floor’ of society is the result of enormously complex and usually in practice unpredictable patterns of competition, interaction, negotiation, isolationism, and the like.’¹⁰¹

Legal pluralism as a concept, thus, underlines the fluid nature of law and that how in practice its meaning is understood differently by different sections of society.¹⁰² Today, the concept of legal pluralism is also better understood via the debate regarding the relationship legal pluralism shares with human rights law and what meaning human rights law acquires when it interacts with more than one set of laws in a particular social system.¹⁰³ The complex relationship between legal pluralism and human rights has been highlighted as one of the main reasons behind failure of human rights initiatives in most parts of the world.¹⁰⁴ It is believed that human rights activism has only focused on the formal legal system of States rather than

⁹⁷ Chris Fuller, ‘Legal Anthropology: Legal Pluralism and Legal Thought’ (1994) 10 (3) *Anthropology Today* 9, 9.

⁹⁸ Ellen Desmet, ‘Legal Pluralism and International Human Rights Law: A Multifaceted Relationship’ in Giselle Corradi, Eva Brems and Mark Goodale (eds), *Human Rights Encounter Legal Pluralism: Normative and Empirical Approaches* (1st edn, Hart Publishing 2017) 42.

⁹⁹ *Ibid.*

¹⁰⁰ John Griffiths, ‘What is Legal Pluralism?’ (1986) 18 (24) *The Journal of Legal Pluralism and Unofficial Law* 1, 38.

¹⁰¹ *Ibid* 38-39.

¹⁰² Sally Engle Merry, ‘McGill Convocation Address: Legal Pluralism in Practice’ (2013) 59 (1) *McGill Law Journal* 1, 2.

¹⁰³ Jørgen Dalberg-Larsen, *The Unity of Law, An Illusion?: On The Legal Pluralism in Theory and Practice* (1st edn, Galda Wilch 2000) 129.

¹⁰⁴ Anne Hellum, ‘How to study human rights in plural legal contexts: an exploration of plural water laws in Zimbabwe’ in Bård A. Andreassen, Hans-Otto Sano and Siobhán McInerney-Lankford (eds), *Research Methods in Human Rights: A Handbook* (1st edn, Edward Elgar Publishing 2017) 436.

ensuring how justice is delivered to individuals placed at the bottom of society who are often governed by a separate 'local' system altogether.¹⁰⁵ Despite human rights initiatives in the form of international conventions, national laws and campaigns, the formal legal system has not been able to bring about any substantial change, for example, in the social status of women nor led to a reduction in violent crimes against women in most patriarchal societies.¹⁰⁶ Moreover, it is argued that, rights guaranteed to women under international conventions discussed at global forums have failed to bring fundamental shifts in attitude towards women at local levels because of failure to account for long held gender biased beliefs that often perpetuate systematic discrimination against women.¹⁰⁷

The complex relationship between legal pluralism and human rights, especially, in relation to women's rights is also related to a lack of consideration of the manner in which women negotiate their claims to justice keeping in mind their social position and the overall societal setup.¹⁰⁸ In most cases, 'state laws protecting women are often in direct conflict with non-state 'laws' based on community practices of patriarchal traditions. However, they simultaneously coexist and overlap, with the latter generally being viewed as more accessible and familiar.'¹⁰⁹ In short, non-state 'laws' based on community beliefs and norms often eclipse formal State laws in terms of influencing the decision-making processes of women who try to seek justice.¹¹⁰ As noted by Relis,

'From local actors' perspectives, non-state laws operate not in tension with state law, but in a more nuanced dance. Despite many being cognisant of prevailing state laws - some more aware of international human rights laws protections than others - formal laws emerge then disappear within their thoughts and decision-making processes in terms of their conduct within their cases. In contrast, for local actors it is non-state laws that are palpable for them, that touch them daily within the micro-realities of their lives.'¹¹¹

¹⁰⁵ Ibid.

¹⁰⁶ Relis, Unifying benefits of studies in legal pluralism (n 42) 355.

¹⁰⁷ Ibid.

¹⁰⁸ Erin P. Moore, 'Gender, Power, and Legal Pluralism: Rajasthan, India' (1993) 20 (3) *American Ethnologist* 522, 529.

¹⁰⁹ Relis, Unifying benefits of studies in legal pluralism (n 42) 355.

¹¹⁰ Tommaso Sbriccoli, 'Legal pluralism in discourse: Justice, politics and marginality in rural Rajasthan, India' (2013) 45 (1) *The Journal of Legal Pluralism and Unofficial Law* 143, 158.

¹¹¹ Relis, Unifying benefits of studies in legal pluralism (n 42) 359.

The framework of legal pluralism is also important for gender based studies because it allows for discussion on issues such as gender norms, social beliefs that surround a women's reality mostly in the developing world.¹¹² But, despite existing redressal mechanisms (formal in nature), women suffering from human rights violations often do not make use of such systems nor do they find support from within the society to seek justice from such systems.¹¹³ Women neither file complaints nor directly approach any judicial authority. This is because of varied reasons such as lack of knowledge of formal justice system, ignorance of rights, fear, financial problems and lack of trust in the functioning of formal institutions (police, courts).¹¹⁴ Women in general as well as women belonging to marginalized communities also show disbelief in formal legal institutions mostly due to social-cultural reasons. They are made to believe that making use of State run institutions to seek justice will only do them more harm than good.¹¹⁵ Additionally, these formal institutions are not free from biases including those of caste, class, religion and gender. Therefore, most cases pertaining to human rights violations go before the non-state 'justice regimes' (which often rely heavily on community norms and beliefs) in the developing world.¹¹⁶

It is hoped that formal state laws upend community backed non-state 'laws' in order to safeguard the rights of women in India.¹¹⁷ But, due to factors such as language, family bond, religious beliefs, local customs and community ties, non-state 'laws' appear safe and reliable to women and hence more accessible when compared to the formal setup.¹¹⁸ As observed by Relis, victims perceptions of 'justice' in the local context when compared with global standards of international human rights reveal a complete lack of understanding of the true meaning of justice.¹¹⁹ For example, while narrating her story to a local woman's court in New Delhi, a victim of violence said that,

'if her husband stops beating her she be willing to go back to him. She said, why would she not want this? An Indian woman would always want that, we have been brought up in our house and family with this thinking that only the husband's house is our house

¹¹² Miranda Forsyth, 'How Can The Theory of Legal Pluralism Assist the Traditional Knowledge Debate?' [2013] 33 *Intersections* <<http://intersections.anu.edu.au/issue33/forsyth.htm>> accessed 27 March 2022.

¹¹³ Moore, Gender, Power, and Legal Pluralism (n 108).

¹¹⁴ Sbriccoli, Legal pluralism in discourse (n 110).

¹¹⁵ Relis, Unifying benefits of studies in legal pluralism (n 42) 359.

¹¹⁶ *Ibid.*

¹¹⁷ Forsyth, How Can The Theory of Legal Pluralism Assist the Traditional Knowledge Debate? (n 112).

¹¹⁸ Relis, Unifying benefits of studies in legal pluralism (n 42).

¹¹⁹ *Ibid* 361.

... I will forget everything, it is the duty of every wife to stay with her husband in one house.’¹²⁰

Further, the inability of women to exit family, community ties and live on their own also reflects the complete unfamiliarity of the notion of an individual’s self-identity in most patriarchal societies.¹²¹ As explained by Coomaraswamy, the day-to-day experiences of women in a patriarchal setup needs to be taken into account as they play a significant role in shaping their identity as well as interaction with both state and non-state ‘laws’.¹²² On a regular basis, women without choice have to submit to discriminatory practices that re-enforce their subordinate status. Moreover, since, most women have no other alternative, they agree to ill-treatment fearing backlash from family and community. On the other hand, women who go against community norms are labelled as ‘bad women’ as they are seen trying to bring shame to the whole community.¹²³ In short, the Indian scenario, underscores the nuanced interplay between formal state law and non-state ‘law’ especially in relation to upholding human rights on the ground.¹²⁴ More importantly, it also displays how women’s lives are shaped by an overlap of often competing international law, state law and non-state ‘laws’ (which mean different things in different social contexts).¹²⁵ But, as mentioned earlier, in India, customs, traditions, local beliefs etc., in relation to women have been found to be often detrimental to their basic rights which are guaranteed to them under the Constitution (this point is further analyzed in chapter 4 by focussing on reasons that have led to crimes related to witch-hunting, honour killing and the devadasi system).

The contradictions between formal state law and community backed non-state ‘law’ in India can be clearly understood through legal pluralism. With reference to witch-hunting, though certain Indian states have passed legislations prohibiting this practice, the belief in the existence of witches and witchcraft remains strong in the communities affected by this practice (see discussion in chapter 4). Further, this also shows that non-state ‘law’ could very well include

¹²⁰ Relis, Unifying benefits of studies in legal pluralism (n 42) 362.

¹²¹ Flavie Agnes and Shoba Venkatesh Ghosh (eds), *Negotiating Spaces: Legal Domains, Gender Concerns, and Community Constructs* (1st edn, Oxford University Press 2012) XX.

¹²² Radhika Coomaraswamy, ‘Identity Within: Cultural Relativism, Minority Rights and the Empowerment of Women’ in Indira Jaising (ed), *Men’s Laws Women’s Lives: A Constitutional Perspective on Religion, Common Law And Culture In South Asia* (1st edn, Women Unlimited 2005) 24.

¹²³ Ibid.

¹²⁴ Relis, Unifying benefits of studies in legal pluralism (n 42) 372.

¹²⁵ Ibid.

community beliefs, traditional values which makes addressing non-state 'law' all the more complex. In the context of honour killing, the role of Khap panchayats in these killings is yet another example of how non-state 'law' takes precedence over formal state law (see discussion in chapter 4). Similarly, laws prohibiting dedication of young girls as devadasis fail to acknowledge or root out traditions, religious beliefs, caste hegemony that have been around for a long period of time. In short, legal pluralism helps identify those crucial areas that require immediate attention in order to raise awareness and trust in formal state law mechanisms.

2.3 Patriarchy

Gender is one of the main divisions that exists in society and it is also one of the key identity markers often used as a tool to categorize men and women into specific gender based roles.¹²⁶ Though, feminist scholars have studied gender and its impact on society from varied perspectives, it is safe to say that, there is a common belief among scholars that a deeper theoretical understanding of violence against women can only be achieved by focusing on value systems that strengthen social structures which lead to oppressive practices targeting women.¹²⁷ Further, it can be said that, these social structures are rooted in traditional and outdated values that remain either hidden or invisible and evolve with time to maintain the power differences between men and women.¹²⁸ Feminist scholars believe that there is a lack of a gender sensitive approach in relation to formulating a theory that explains the true nature and form of violence against women by uncovering these value systems. Because, on a general basis, instances of violence against women are either not discussed or are side-lined by being portrayed as minor issues that only result from the behaviour of few irrational men.¹²⁹

Given that traditional value systems are often used as a tool for maintaining a visible gender divide in most societies, it is essential that violence against women should be examined taking into consideration existing social beliefs and values from a gendered perspective.¹³⁰ Because, in most societies, gender based violence is not seen as a violation of basic human rights of

¹²⁶ Perianayagam Arokiasamy and Srinivas Goli, 'Explaining the Skewed Child Sex Ratio in Rural India: Revisiting the Landholding-Patriarchy Hypothesis' (2012) 47 (42) *Economic and Political Weekly* 85, 87-88.

¹²⁷ Gwen Hunnicutt, 'Varieties of Patriarchy and Violence Against Women: Resurrecting "Patriarchy" as a Theoretical Tool' (2009) 15 (5) *Violence Against Women* 553, 555.

¹²⁸ Veronica Beechey, 'On Patriarchy' (1979) 3 (1) *Feminist Review* 66, 79-80.

¹²⁹ Hunnicutt, *Varieties of Patriarchy and Violence Against Women* (n 127) 556.

¹³⁰ *Ibid.*

women but are rather seen as a day to day aspect of social relation.¹³¹ A chief feature of most traditional value systems which is largely responsible for women being targeted in a systemic way is patriarchy. Understanding violence against women through patriarchy is vital in recognizing how value systems based on biased notions of gender strengthen social structures which oppress women.¹³² Patriarchy is a system in which men dominate and oppress women.¹³³ Often patriarchy is only understood in terms of male authority and superiority over others, but, when studied from a gender sensitive approach, it can also explain the changing form and nature of patriarchy in modern times. For example, a gender sensitive approach may help to understand how in traditional societies, like India, patriarchy is being taken forward more by females than males.¹³⁴ In India, according to the National Commission for Women (NCW), patriarchy is surviving due to the actions of older women in families especially through practices such as female foeticide.¹³⁵ As per the data by the National Crime Records Bureau (NCRB), in 2015, almost 7,600 women died in India due to dowry harassment. Moreover, in 2016, around 3,800 cases were registered in New Delhi alone against in-laws for the offence of cruelty.¹³⁶

The Indian scenario also directs our attention to the two domains of patriarchy i.e., public and private sphere. Often the discourse on patriarchy is limited to underlining the unequal treatment of women in the public sphere but not on how they are treated within their homes, i.e., private sphere.¹³⁷ Patriarchy in the private sphere leads to subjugation of women within the family structure via observing values based on gender inequality and strict adherence to gender specific roles. Male members are given more importance because of their status as

¹³¹ Rylko-Bauer and Farmer, *Structural Violence, Poverty and Social Suffering* (n 77) 48.

¹³² Holly M. Hapke, 'Theorizing Patriarchy: Development Paradoxes and the Geography of Gender in South Asia' (2013) 17 (1) *Gender, Technology and Development* 1, 12.

¹³³ Sylvia Walby, *Theorizing Patriarchy* (1st edn, Blackwell 1990) 20.

¹³⁴ Hunnicutt, *Varieties of Patriarchy and Violence Against Women* (n 127) 559.

¹³⁵ 'Patriarchy also taken forward by women, not just men: NCW chief' *The Indian Express* (New Delhi, 09 July 2015) <<https://indianexpress.com/article/india/india-others/patriarchy-also-taken-forward-by-women-not-just-men-ncw-chief/>> accessed 27 March 2022; See also, Hunnicutt, *Varieties of Patriarchy and Violence Against Women* (n 127) 564 – 'Systems of male dominance are systems in which both women and men are complicit. Both women and men create and sustain these power arrangements. Enjoying one position of domination, be it by age, race, or class, allies women with patriarchal interests. There are numerous cultures where older women occupy some position of respect and status in their respective patriarchal family systems, creating an incentive to uphold their particular patriarchal ideology.'

¹³⁶ Chayyanika Nigam, '21 lives lost to dowry every day across India; conviction rate less than 35 per cent' (*India Today*, 22 April 2017) <<https://www.indiatoday.in/mail-today/story/dowry-deaths-national-crime-records-bureau-conviction-rate-972874-2017-04-22>> accessed 27 March 2022.

¹³⁷ Ume Habiba, Rabia Ali and Asia Ashfaq, 'From Patriarchy to Neopatriarchy: Experiences of Women from Pakistan' (2016) 6 (3) *International Journal of Humanities and Social Science* 212, 214.

breadwinners which also grants them the authority to exercise power over women in the family.¹³⁸ As per Walby, family as a social structure in the private sphere is strongly influenced by patriarchal values. Moreover, it is within the family structure that gender segregation takes place in the form of assigning specific roles for men and women which leads to weakening the personality of women.¹³⁹ Patriarchy makes women subordinate to men socially, culturally and economically thereby restricting their movement to only performing household work. In other words, women are oppressed in the family because men control economic resources and hold the power to make important decisions.¹⁴⁰

The oppression of women as part of the family structure in India is further explained by scholars through the concept of 'classic patriarchy'.¹⁴¹ Classic patriarchy is based upon the existence and reproduction of the extended family households or joint family system wherein the senior male has authority over everyone else in the family. Under this system, property also devolves through the male line.¹⁴² Girls are considered burden upon the family and are given away in marriage at a very young age. When young girls enter their husbands' household they are oppressed not only by male members of the family but by older women as well. Their contribution in the new family upon marriage is only limited to bearing children.¹⁴³ As best described by Kandiyoti,

'woman's life cycle in the patriarchally extended family is such that the deprivation and hardship she experiences as a young bride is eventually superseded by the control and authority she will have over her own subservient daughters-in-law. The cyclical nature of women's power in the household and their anticipation of inheriting the authority of senior women encourages a thorough internalization of this form of patriarchy by the women themselves. In classic patriarchy, subordination to men is offset by the control older women attain over younger women.'¹⁴⁴

¹³⁸ Ibid 215.

¹³⁹ Walby, *Theorizing Patriarchy* (n 133) 24.

¹⁴⁰ Karen F. Parker and Amy Reckdenwald, 'Women and Crime in Context Examining the Linkages Between Patriarchy and Female Offending Across Space' (2008) 3 (1) *Feminist Criminology* 5, 9.

¹⁴¹ Deniz Kandiyoti, 'Bargaining with Patriarchy' (1988) 2 (3) *Gender & Society* 274, 278.

¹⁴² Hapke, *Theorizing Patriarchy* (n 132).

¹⁴³ Kandiyoti, *Bargaining with Patriarchy* (n 141).

¹⁴⁴ Ibid 279.

Though, it has been argued that due to advancement in areas of education, employment and protection of human rights, new avenues have opened for women which have led to the weakening of classic patriarchy in traditional societies, still, many believe that this system has continued to survive.¹⁴⁵ One of the main reasons behind its survival is attributed to the fear among women of losing their little economic and emotional security that exists within the patriarchal structure which provides them with some form of stability.¹⁴⁶ Hence, in the absence of sustainable alternatives to existing social structures that are responsible for systematic oppression of women, it remains difficult to identify and correct the true nature of patriarchy.¹⁴⁷

Despite various human rights instruments guaranteeing equal rights to women, patriarchal values have not only acted as a significant barrier to the realization of women's human rights in the public sphere but have also led to violence against women in the private sphere.¹⁴⁸ But, because international law-making institutions have been mostly male dominated, the experiences of women in the private sphere have largely been excluded from the human rights narrative.¹⁴⁹ It is also argued that, even in the process of drafting laws for the protection of women's rights, the international community has only strengthened values promoting gender stereotypes by failing to address the underlying causes of human rights violations that deny women equal access to health, education, employment etc.¹⁵⁰ According to feminist scholars, major human rights instruments have failed to guarantee rights to women.¹⁵¹ Moreover, words proclaiming that women are entitled to enjoy equal rights as men only appear to most scholars as empty rhetoric because minimal attention has been given to women's problems while formulating laws and not much has been done to raise the level of awareness of important issues such as violence against women in the private sphere.¹⁵² As described by Otto,

¹⁴⁵ Maxine Molyneux, 'Mobilization without Emancipation? Women's Interests, the State, and Revolution in Nicaragua' (1985) 11 (2) *Feminist Studies* 227, 234.

¹⁴⁶ *Ibid.*

¹⁴⁷ Kandiyoti, *Bargaining with Patriarchy* (n 141) 285.

¹⁴⁸ Dianne Otto, 'Women's Rights' (*SSRN*, 22 March 2010) <<https://ssrn.com/abstract=1576229>> accessed 27 March 2022.

¹⁴⁹ Laura Parisi, 'Feminist Perspectives on Human Rights' (*Oxford Research Encyclopedia of International Studies*) <<http://internationalstudies.oxfordre.com/view/10.1093/acrefore/9780190846626.001.0001/acrefore-9780190846626-e-48>> accessed 27 March 2022.

¹⁵⁰ Otto, *Women's Rights* (n 148).

¹⁵¹ Andrew Byrnes, 'Women, Feminism and International Human Rights Law--Methodological Myopia, Fundamental Flaws or Meaningful Marginalisation? Some Current Issues' (1992) 12 (1) *Australian Year Book of International Law* 205, 212.

¹⁵² *Ibid.*

‘A comparison with the rights that men enjoy does not help in situations where women’s experience is substantially different from men’s, as in the case of the right to work. Rights recognised by ICESCR that protect the right to work assume a male model of employment, which makes women’s unremunerated work in the family and their poorly remunerated work in the informal sector invisible. This approach also fails to take account of women’s often interrupted patterns of paid work, the problem of gender segregation in the workforce and the need for maternity leave and childcare provision.’¹⁵³

The problem is the sole focus on the public sphere as the only ‘real realm’ of human rights which has led to the depoliticization of women’s experiences in the private sphere and reinforced discriminatory practices.¹⁵⁴

2.4 Concept of Gender and Gender Discrimination

Though most societies in modern times remain largely patriarchal, they are often identified through the social, political and economic status of their women.¹⁵⁵ Recognized as the ‘silent half of humanity’ by Simone de Beauvoir, women and their treatment in patriarchal societies provides an opportunity to engage in discussions about the ‘other’ (i.e., women) and question the power hierarchy which places women at the margins in a male dominated world.¹⁵⁶ As a result, when one talks of the concept of gender or takes a gendered approach, it often means that the focus is on women because ‘it is women who need to be heard and felt and known’ although gender refers to both experiences of men and women.¹⁵⁷

Beauvoir in her classic work ‘The Second Sex’ provides a feminist perspective to the understanding of gender (an aspect of identity politics) by challenging the belief in the ‘natural causes’ (i.e., biological condition) for the differences between men and women.¹⁵⁸ She argues that the very idea of a ‘woman’ is a male concept and that what it means to be a woman is

¹⁵³ Otto, *Women’s Rights* (n 148).

¹⁵⁴ Parisi, *Feminist Perspectives on Human Rights* (n 149).

¹⁵⁵ Subhadra Channa, *Gender in South Asia: Social imagination and constructed realities* (1st edn, Cambridge University Press 2013) 1.

¹⁵⁶ *Ibid* 2.

¹⁵⁷ Channa, *Gender in South Asia* (n 155) 2.

¹⁵⁸ Felicity Joseph, ‘Becoming A Woman: Simone de Beauvoir on Female Embodiment’ (*Philosophy Now*, 2008) <https://philosophynow.org/issues/69/Becoming_A_Woman_Simone_de_Beauvoir_on_Female_Embodiment> accessed 27 March 2022.

defined by men. Further, it is society (mostly patriarchal in nature) that also accords meaning (mostly negative) to female experiences such as the development of female sex organs, menstruation, pregnancy, menopause and considers these experiences as a burden and disadvantage.¹⁵⁹ Judith Butler also agrees with Beauvoir's claim that 'one is not born, but rather becomes a woman'.¹⁶⁰ Butler says,

'If there is something right in Beauvoir's claim that one is not born, but rather becomes a woman, it follows that woman itself is a term in process, a becoming, a constructing that cannot rightfully be said to originate or to end. As an ongoing discursive practice, it is open to intervention and resignification. Even when gender seems to congeal into the most reified forms, the 'congealing' is itself an insistent and insidious practice, sustained and regulated by various social means. It is, for Beauvoir, never possible finally to become a woman, as if there were a telos that governs the process of acculturation and construction.'¹⁶¹

In her work 'Gender Trouble' Butler also raises certain important questions in relation to gender being a process which is always occurring. According to her, 'if gender is a process or a 'becoming' rather than an ontological state of being that one simply 'is', then what determines what we become, as well as the way in which we become it? To what extent does one choose one's gender? Indeed, what or who is it that is doing the choosing, and what if anything determines that choice?'¹⁶²

¹⁵⁹ Ibid. - 'De Beauvoir points out that pre-adolescent boys and girls are really not very different: they "have the same interests and the same pleasures". If the initial psychological differences between young boys and girls are relatively trivial, what then causes them to become important? If one 'becomes' a woman, how does this 'becoming' happen? De Beauvoir argues that as a girl's bodily development occurs, each new stage is experienced as traumatic and demarcates her more and more sharply from the opposite sex. As the girl's body matures, society reacts in an increasingly hostile and threatening manner. De Beauvoir talks about the process of 'becoming flesh', which is the process whereby one comes to experience oneself as a sexual, bodily being exposed to another's gaze. This does not have to be a bad thing; but unfortunately, young girls are often forced to become flesh against their will: "The young girl feels that her body is getting away from her...on the street men follow her with their eyes and comment on her anatomy. She would like to be invisible; it frightens her to become flesh and to show flesh". There are many more such events in a growing girl's life which reinforce the belief that it is bad luck to be born with a female body. The female body is such a nuisance, a pain, an embarrassment, a problem to deal with, ugly, awkward, and so on. Even if a girl tries to forget that she has a female body, society will soon remind her.'; See also, Karen Vintges, *A New Dawn for the Second Sex* (1st edn, Amsterdam University Press 2017) 11-12.

¹⁶⁰ Judith Butler, 'Sex and Gender in Simone de Beauvoir's *Second Sex*' (1986) 72 (72) *Yale French Studies* 35, 35.

¹⁶¹ Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (1st edn, Routledge 2006) 33; See also, Sara Salih, *Judith Butler* (1st edn, Routledge 2002) 45-46.

¹⁶² Ibid 46.

The concept of gender and its understanding within this thesis is concerned with the social-cultural construction of the concept and how the lived realities of women are an expression of India's patriarchal structure which is rooted in its history.¹⁶³ In the Indian setting, even the 'philosophical and historical foundations of emergence of multiple-forms and multi-vocal notions of gender' are defined by the overall values and beliefs that are tied to India's history or at least need to be studied within a historical framework without which the substantive effect of gender and how it operates in the Indian scenario cannot be truly ascertained.¹⁶⁴ In this context, both Beauvoir and Butler's claim of gender being a process or a 'becoming' can be said to be also applicable in the Indian context considering gendering as a process is seen here as being integrated with or rather shaped by social, cultural, political and economic dimensions. More importantly, when studying gendering as a process in India, it is also vital to note that the construction of gender is linked with patriarchy i.e., the manner in which gender is understood or rather how the roles and obligations of women are defined to mainly serve the dominant male interests in society.¹⁶⁵ As noted by Channa, 'though patriarchy is a significant aspect on which inequality is justified, gendering as a process cannot also be delinked from hierarchical structures of caste, class that strengthen it.'¹⁶⁶ In this way, the concept of gender is not simply natural or biological¹⁶⁷ but is a social-cultural construction shaped and interpreted by the intersection of variables of caste, class, religion, race in a given society all working against women's interests.¹⁶⁸

In India, the experiences of women vary according to the intersection of different social-cultural variables of caste, class, religion. For instance, society accords higher value to the body of a dominant caste woman than the body of a lower caste woman.¹⁶⁹ As will be discussed in chapter 4 the devadasi system is an example of how society determines and dictates the sexual

¹⁶³ Channa, *Gender in South Asia* (n 155) 184.

¹⁶⁴ Ibid 185.

¹⁶⁵ Channa, *Gender in South Asia* (n 155) 186.

¹⁶⁶ Ibid.

¹⁶⁷ Joseph, *Becoming A Woman* (n 158); See also, Butler, *Sex and Gender* in Simone de Beauvoir's *Second Sex* (n 160).

¹⁶⁸ Channa, *Gender in South Asia* (n 155) 185.

¹⁶⁹ Bernard S. Cohn, *Colonialism and its Forms of Knowledge: The British in India* (1st edn, Princeton University Press 1996) 139 - 'Since the upper castes had rights over the bodies of the lower caste women, these bodies were also crafted by dress, ornaments and specific mannerisms to identify the varna status. Cohn describes an interesting case involving the Nadar women and their protest in the Travancore state in the nineteenth century: The Nadars were supposed to remain thirty-six paces from the person of the Nambudri Brahmins...They were prohibited from carrying umbrellas and wearing shoes or golden ornaments. Their houses had to be only one story high and they could not milk cows. Nadar women could not carry pots on their hips nor could they cover upper part of their body.'

experiences of young dalit girls. As part of the devadasi practice, girls belonging to the dalit community are dedicated at an early age to Hindu temples and then sexually exploited by higher caste men in the name of religion. The notion of ‘honour’ and ‘shame’ and how both only refer to or are associated with women in India is yet another example of society playing a significant role in the gendering process. Because of the belief that women are the ‘honour’ of the family, their actions need to be constantly monitored by the men in the household, in this way, society decides a woman’s right to autonomy and choice in matters of marriage for her (see discussion in chapter 4).¹⁷⁰ In short, the concept of gender in the Indian context is decided not through the biological differences but according to what society thinks are the appropriate qualities that represent maleness and femaleness. The gendering process or a ‘becoming’ is therefore determined not by the mere fact of a woman’s existence but by rather who she is which is defined by various social-cultural variables.¹⁷¹ The construction of gender in the Indian setting is fundamental to understanding the general approach towards women including the discourse on violence against women. The following paragraphs explain gender discrimination which is an expression of concept of gender.

Gender stereotype is at the core of understanding gender discrimination i.e., unfair treatment based on a person’s sex.¹⁷² As per Moreau, ‘a stereotype is a generalized view or preconception of attributes or characteristics possessed by, or the roles that are or should be performed by, members of a particular group.’¹⁷³ Stereotyping neglects the possibility of whether or not an individual in a group has attributes other than the ones he/she is supposed to. The only consideration that matters is that, since, a group is simply thought to possess certain attributes

¹⁷⁰ Channa, *Gender in South Asia* (n 155) 205 - ‘Gender is an identity, an aspect of social personhood... ‘the key component in the construction of identity in North India is sexuality... female sexuality rather than male sexuality is a threat to family honor’. Since the family is patriarchal, it is the male honour that is vested in the female body and at the root of it is caste identity. An upper-caste man needs to protect the wombs of his women so that the identity of his ‘jāti’ (meaning caste in the Hindi language) does not get polluted. Just like in the Western concept of race, blood and hence purity of blood is underneath the domination of female bodies (white) and exploitability of female bodies (black), the upper-caste female bodies are vested with the honour of the men and the lower-caste female bodies are exploitable because they have no honour to protect as the lower-caste men are not seen as having any. Instead of blood, the ‘jāti’ system operates on the metaphysical concept of shared substances.’

¹⁷¹ Ibid 202.

¹⁷² Joan Wallach Scott, ‘Gender as a Useful Category of Historical Analysis’ in Richard G. Parker and Peter Aggleton (eds), *Culture, Society and Sexuality: A Reader* (2nd edn, Routledge 2007) 59.

¹⁷³ Sophia R. Moreau, ‘The Wrongs of Unequal Treatment’ (2004) 54 (3) *University of Toronto Law Journal* 291, 298-299.

or characteristics, every individual in that group, is also believed to conform to that generalized view or preconception.¹⁷⁴ As noted by Cook and Cusack,

‘For instance, consider the stereotypical belief that “motherhood is women’s natural role and destiny.” In this example, there is a generalized view that all women should become mothers, irrespective of their distinctive reproductive health capacity and physical and emotional circumstances, or their individual priorities. It does not matter for purposes of defining the stereotype that an individual woman, say Mary, may not wish, for whatever reason, to become a mother. Precisely because Mary is categorized as a woman, it is believed that motherhood is her natural role and destiny.’¹⁷⁵

Stereotyping also ignores an individual’s personal needs and abilities by restricting their thought process and forcing them to follow predefined roles. In short, stereotyping takes away the power to make decisions from an individual regarding his/her own life.¹⁷⁶ As is evident from the above-mentioned example, stereotyping in this case, resulted in specific characterization based solely on gender thereby constricting Mary’s identity and forcing her to adopt caregiving roles because of her gender without taking into consideration her individual preferences.¹⁷⁷ The same logic also applies for men, as they too are stereotyped as being strong and less emotional and therefore thought to be less suitable for say taking responsibilities of children.¹⁷⁸

Individuals are stereotyped based on various criteria’s such as gender, race, sexual orientation. Gender stereotype is one form of stereotype which presumes that all members of a group (mostly women) are only meant to perform specific roles say of housewives.¹⁷⁹ Gender stereotype is an overarching term that refers to a ‘structured set of beliefs about the personal attributes of women and men. Beliefs can cover a range of components, including personality traits, behaviours and roles, physical characteristics and appearance, occupations, and

¹⁷⁴ Michelle O’Sullivan, ‘Stereotyping and Male Identification: Keeping Women in Their Place’ in Christina Murray (ed), *Gender and The New South African Legal Order* (1st edn, Juta 1994) 187.

¹⁷⁵ Rebecca J. Cook and Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (1st edn, University of Pennsylvania Press 2011) 11.

¹⁷⁶ Moreau, *The Wrongs of Unequal Treatment* (n 173) 299.

¹⁷⁷ Cook and Cusack, *Gender Stereotyping* (n 175) 11-12.

¹⁷⁸ *Ibid.*

¹⁷⁹ Sharada Srinivasan, ‘Growing Up Unwanted: Girls’ Experiences of Gender Discrimination and Violence in Tamil Nadu, India’ (2014) 26 (2) *European Journal of Development Research* 233, 236-238.

assumptions about sexual orientation.’¹⁸⁰ The process of gender stereotyping is usually based on the social and cultural understanding of ‘gender’ which differs from place to place.¹⁸¹ In some cultures, gender is seen as a tool for social division and is used to influence social relations.¹⁸² For example, in India, electronic and print media is often blamed for portraying women in stereotypical roles of a good wife, mother and daughter-in-law. The notion of an ‘ideal woman’ who is submissive, dutiful and self-sacrificing is used extensively in television advertisements, newspapers and movies which reveal patriarchal mindset prevalent in the society.¹⁸³ The unnecessary glorification of family and marriage by the media only reaffirms the control of men over women in the Indian society and is seen as a major hinderance in rooting out discriminatory practices such as honour killings.¹⁸⁴

A crucial feature of gender stereotype is its pervasive and persistent nature which makes tackling issues of discrimination difficult.¹⁸⁵ The pervasive and persistent nature of gender stereotype becomes even more rigid when discriminatory practices get normalized in society in the name of tradition and culture.¹⁸⁶ The stereotyping of women as mothers and housewives across cultures globally is an example of pervasive and persistent form of gender stereotype. According to Frances Raday, former member of the Committee on the Elimination of Discrimination against Women, ‘stereotypical assignment of sole or major responsibility for childcare to women disadvantages women across cultures and is often used to justify women’s

¹⁸⁰ Richard D. Ashmore and Frances K. Del Boca, ‘Sex Stereotypes and Implicit Personality Theory: Toward a Cognitive-Social Psychological Conceptualization’ (1979) 5 (2) *Sex Roles* 219, 222; See also, Monica Biernat and Diane Kobrynowicz, ‘A Shifting Standards Perspective on the Complexity of Gender Stereotypes and Gender Stereotyping’ in William B. Swann, Jr., Judith H. Langlois, and Lucia Albino Gilbert (eds), *Sexism and Stereotypes in Modern Society: The Gender Science of Janet Taylor Spence* (1st edn, American Psychological Association 1999) 76–77.

¹⁸¹ Report of the Secretary General, ‘1999 World Survey on the Role of Women in Development: Globalization, Gender and Work’ (*United Nations General Assembly A/54/227*) <https://www.ucl.ac.uk/dpu-projects/drivers_urb_change/urb_society/pdf_gender/UN_1999_World_Survey_Women_in_Development.pdf> accessed 27 March 2022.

¹⁸² Robert Post, ‘Prejudicial Appearances: The Logic of American Antidiscrimination Law’ (2000) 88 (1) *California Law Review* 1, 18.

¹⁸³ Ministry of Women and Child Development, Report of the High Level Committee vol 1 (n 16) 91-92.

¹⁸⁴ *Ibid.*

¹⁸⁵ Reva B. Siegel, ‘Discrimination in the Eyes of the Law: How ‘Color Blindness’ Discourse Disrupts and Rationalizes Social Stratification’ (2000) 88 (1) *California Law Review* 77, 82.

¹⁸⁶ *Ibid.*; See also, Cook and Cusack, *Gender Stereotyping* (n 175) 32 - ‘As individuals, we absorb stereotypes through our everyday interactions with family, friends, neighbours, and, for example, colleagues, and also through exposure to our cultural heritage comprised of, among other influences, politics, art, literature, media, sport, and religion. Over time, through these daily encounters, stereotypes become deeply embedded in our unconscious such that we come to accept them uncritically as a normal or inevitable understanding of life. That is to say, our everyday encounters with stereotypes are often rendered invisible.’

exclusion from public life.’¹⁸⁷ Hence, in order to ensure the elimination of gender stereotype it is necessary to first have a broad interpretation and recognition of the various forms of violations of women’s right that hinder the realization of equality.¹⁸⁸

Under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), all States parties are obligated to eliminate all forms of discrimination against women. Article 1 of CEDAW provides a broad definition of what constitutes ‘discrimination against women’ by bringing within its ambit ‘any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment of human rights and fundamental freedoms by women.’¹⁸⁹ Further, Article 2(f) of the Convention, obligates States parties to take necessary steps to either modify or abolish laws, regulations, customs and practices that discriminate women.¹⁹⁰ The Committee on the Elimination of Discrimination against Women has even interpreted the obligation to eliminate all forms of discrimination against women under Article 1 to include those practices that result from deep rooted gender stereotypes prevalent in society. In addition, as per the Committee, addressing prevailing gender relations and gender stereotypes that affect women is one of three main obligations that are crucial for States parties to fulfil as part of their duty to protect women from any kind of discrimination.¹⁹¹

Young girls and women have been facing discrimination in India for a long time.¹⁹² According to a global survey conducted in 2018, India has been named as the world’s most dangerous country for women due to a high risk of sexual violence.¹⁹³ Young girls face discrimination at

¹⁸⁷ Cook and Cusack, *Gender Stereotyping* (n 175) 22.

¹⁸⁸ Srinivasan, *Growing Up Unwanted* (n 179) 237.

¹⁸⁹ ‘Convention on Elimination of All Forms of Discrimination Against Women’ (*United Nations General Assembly*, 18 December 1979) art 1 <<https://www.refworld.org/docid/3ae6b3970.html>> accessed 27 March 2022. [Hereinafter, cited as Convention on Elimination of All Forms of Discrimination Against Women 1979].

¹⁹⁰ Convention on Elimination of All Forms of Discrimination Against Women 1979, art 2(f).

¹⁹¹ ‘General Recommendation No. 25, on Article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures’ (*United Nations Committee on the Elimination of Discrimination Against Women*, 2004) <<https://www.refworld.org/docid/453882a7e0.html>> accessed 27 March 2022.

¹⁹² Rashida Manjoo, ‘Report of the Special Rapporteur on violence against women, its causes and consequences, Addendum: Mission to India’ (*UN Human Rights Council A/HRC/26/38/Add.1*, 1 April 2014) <<https://www.refworld.org/docid/53982c3e4.html>> accessed 27 March 2022.

¹⁹³ Belinda Goldsmith and Meka Beresford, ‘India most dangerous country for women with sexual violence rife-global poll’ (*Thomson Reuters Foundation News*, 26 June 2018) <<http://news.trust.org/item/20180612134519-cxz54/>> accessed 27 March 2022.

an early stage in their life in the form of female infanticide.¹⁹⁴ The declining sex ratio, as a result of discriminatory practices, is not just limited to one strata of society but is evenly spread across all castes, regions and religions in the country. As per the 2011 Census data, the current sex ratio (number of females per 1000 males) at the national level is 943. Rural sex ratio stands at 949 and urban data is at 929.¹⁹⁵ While conducting interviews of young girls (11-13 year old) as part of her research on female infanticide in Madurai district of Tamil Nadu, India, Srinivasan noted that, the parents of most girls who were interviewed had tried to kill them. According to one girl:

‘I heard from my neighbours, may be when I was in Class 5 (10 years old) that my mother had tried to eliminate me. When I asked my mother about this, she said, I was under pressure to get rid of you. Relatives who visited us during your birth advised your father not to have a second daughter. Everybody was asking us to get rid of you. So, I tried but in the end we did not.’¹⁹⁶

Even when young girls survive female infanticide, they often face further discrimination because they are seen as a burden to their families. Most families continue to have children after they have had a girl child in the hope that they will get a son. Further, all economic resources are spent on the boys in the family as they are considered to be the ones who will add to the name and wealth of the family when they grow up.¹⁹⁷ It can be argued that, social-economic factors also play a significant role in gender based discrimination in India. Beliefs around marriage, family honour etc., go on to strengthen gender stereotypes that result in discriminatory practices such as female infanticide. Therefore, gender discrimination continues to take place in India in complete violation of the provisions of CEDAW as well as the Constitution of India which guarantees the right to life with dignity to every individual under article 21.¹⁹⁸

The concept of gender is relied upon all throughout the thesis to answer the primary research question which is to focus on the examination of role of law and social-cultural norms in shaping the discourse on violence against women in India in light of domestic and international

¹⁹⁴ Ministry of Women and Child Development, Report of the High Level Committee vol 1 (n 16) 110.

¹⁹⁵ Ibid.

¹⁹⁶ Srinivasan, *Growing Up Unwanted* (n 179) 235.

¹⁹⁷ Ministry of Women and Child Development, Report of the High Level Committee vol 1 (n 16) 124.

¹⁹⁸ Sarkar and Das, *Female foeticide is a menace in our modern Indian society* (n 41).

human rights law. The discussion in chapters 4 and 5 are important here especially in the context of gender discrimination because they represent two opposing sides of the discourse on violence against women in India i.e., a culture of normalization of subordination of women on one hand and India's domestic and international obligation to uphold rights of women on the other.

The next chapter provides a brief overview of some of the current experiences and challenges faced by women in contemporary India in the context of violence against women.

Chapter 3: Violence Against Women in Contemporary India

Introduction

It has been acknowledged that, in contemporary India, violence against women has serious and profound multidimensional impact on lives of women including social, physical, psychological and economical impediments.¹⁹⁹ As noted by Ghuge,

‘Violence is infused to such extent that its saturation entirely devastates the women’s psychology affecting her life adversely. Violence against women ultimately imperils gender equality; it not only encumbers but also hampers female education. Violence also threatens the health of women, especially in case of sexual violence spread of AIDS is tremendously accelerated.’²⁰⁰

Young girls and women in India have continued to suffer from physical, sexual and psychological violence even after the highly publicized Delhi gang rape of 2012.²⁰¹ The nationwide protests post the Delhi gang rape led to amendments in the Indian Penal Code (IPC), 1860, making existing provisions on offences against women more stringent.²⁰² However, daily occurrences of varied forms of violence against women show that there is firstly little or no recognition of violence against women as a human rights issue and secondly only those instances of violence are addressed that are brutal and gain public attention.²⁰³ The widespread nature and normalization of violence against young girls and women in contemporary India can also be gauged from the data on different forms of violence against women. For example, the National Crime Records Bureau (NCRB), 2019 report stated that every four minutes a woman is subjected to the offence of cruelty at the hands of her in-laws.²⁰⁴ According to the National Family Health Survey (NFHS-5) 2019-2020, over 30 per cent women suffered

¹⁹⁹ Ministry of Women and Child Development, Report of the High Level Committee vol 1 (n 16) 142.

²⁰⁰ Sharmila Ghuge, ‘Violence Against Women in India: Its Causes and Consequences: A Human Rights Perspective’ (2012) 1 (1) Asia Pacific Journal of Management and Entrepreneurship Research 82, 85.

²⁰¹ Salman Ravi, ‘Dalit girl rape and murder: Indians protest over girl’s forced cremation’ (*BBC*, 04 August 2021) <<https://www.bbc.com/news/world-asia-india-58083052>> accessed 27 March 2022; See also, Dipankar Ghose, ‘NCRB data: 7% rise in crimes against women’ *The Indian Express* (New Delhi, 30 September 2020) <<https://indianexpress.com/article/india/ncrb-data-7-rise-in-crimes-against-women-6636529/>> accessed 27 March 2022; ‘India sees 88 rape cases a day; conviction rate below 30%’ *The Times of India* (07 October 2020) <<https://timesofindia.indiatimes.com/india/india-sees-88-rape-cases-a-day-but-conviction-rate-below-30/articleshow/78526440.cms>> accessed 27 March 2022.

²⁰² The Criminal Law (Amendment) Act, 2013.

²⁰³ Ministry of Women and Child Development, Report of the High Level Committee vol 1 (n 16) 137.

²⁰⁴ Anirudh Pratap Singh, ‘The impunity of marital rape’ *The Indian Express* (20 December 2020) <<https://indianexpress.com/article/opinion/columns/the-impunity-of-marital-rape/>> accessed 27 March 2022.

physical and sexual violence by their husbands in 5 out of 22 surveyed states in India.²⁰⁵ Further, as per a report released by the Office of the Registrar General and Census Commissioner, India (Census of India) between 2015-2017 a female infant was more likely to survive in only 5 out of 29 states in India.²⁰⁶

Young girls and women face wide range of violence that includes but is not limited to physical, sexual and psychological. Because of gender discriminatory social structures, women in India continue to face different forms of violence at various stages of their lives. For example, gender-biased sex selection is the very first form of violence that a woman faces which results in the physical elimination of a girl child before her birth.²⁰⁷ According to the State of World Population 2020 report released by the United Nations Population Fund (UNFPA), India accounted for 45.8 million missing females as of 2020.²⁰⁸ Missing females include women who are missing from the population due to postnatal and prenatal sex selection. As per the report, between 2013-2017, about 460,000 girls in India were missing at birth each year. Gender-biased sex selection accounted for about two-thirds of the total missing girls and post-birth female mortality accounted for about one-third.²⁰⁹

As an adolescent, girls are also often less cared for if they have brothers in the family. Since, boys are expected to provide financial support and care for their parents in old age, parents often spend more on their educational attainment, whereas girls are married as early as possible because they are considered a financial liability due to the practice of dowry system in India.²¹⁰ Dowry is generally understood as the transfer of resources such as money, or property from the

²⁰⁵ 'Over 30% women suffered spousal violence in five states: NFHS survey' *The Times of India* (14 December 2020) <<https://timesofindia.indiatimes.com/india/over-30-women-suffered-spousal-violence-in-five-states-nfhs-survey/articleshow/79723744.cms>> accessed 27 March 2022.

²⁰⁶ Rahul Tripathi, 'Girl child survival rate higher than boy in only five states' *The Economic Times* (23 July 2019) <<https://economictimes.indiatimes.com/news/politics-and-nation/girl-child-survival-rate-higher-than-boy-in-only-five-states/articleshow/70339668.cms>> accessed 27 March 2022.

²⁰⁷ Arpita Banerjee and Ranjita Biswas, 'Globalization and Violence against Women: The Missing Girls of India' (2016) 28 (1) *Journal of Interdisciplinary Economics* 30, 31.

²⁰⁸ Division of Communications and Strategic Partnerships, 'Against My Will: Defying the practices that harm women and girls and undermine equality' (*United Nations Population Fund*, 2020) 1, 51 <https://www.unfpa.org/sites/default/files/pub-pdf/UNFPA_PUB_2020_EN_State_of_World_Population.pdf> accessed 28 March 2022.

²⁰⁹ *Ibid* 45.

²¹⁰ Adriana D. Kugler and Santosh Kumar, 'Preference for Boys, Family Size, and Educational Attainment in India' (2017) 54 (3) *Demography* 835, 840.

bride's family to the groom's family at the time of marriage.²¹¹ Unfortunately, the dowry system continues to be practiced in India despite being made an offence under the Dowry Prohibition Act, 1961. The practice of giving and taking dowry also has a significant role in the increase of dowry deaths in India because of the economic burden of arranging dowry.²¹² As per the NCRB 2019 report, a woman becomes a victim of dowry death roughly every hour in India.²¹³ Upon marriage, as wives, women experience domestic abuse, marital rape, dowry related violence and as widows are often deprived of a share in their husband's property.²¹⁴

Regardless of the reasons for violence against young girls and women, it cannot be denied that there are serious negative health (physical and psychological), social and economic repercussions that result from such violence. Some of the current issues that have been identified around violence against women are increase in spousal sexual violence, under-reporting of crimes against women and impact on women's reproductive health. These are again mostly linked to the impact of fear of violence.²¹⁵ Fear of violence also inhibits younger women from exercising control over their reproductive choices.²¹⁶ The Ministry of Women and Child Development, Government of India has acknowledged in its report that women suffer from unwanted pregnancies, unsafe abortions, HIV, chronic malnutrition and other negative reproductive and sexual health problems as a consequence of not only being exposed to

²¹¹ Saseendran Pallikadavath and Tamsin Bradley, 'Dowry, 'Dowry Autonomy' and Domestic Violence among Young Married Women in India' (2019) 51 (3) *Journal of Biosocial Science* 353, 353.

²¹² B. R. Sharma and others, 'Dowry - A Deep-Rooted Cause of Violence Against Women in India' (2005) 45 (2) *Medicine, Science, and the Law* 161, 162; See also, The Indian Penal Code 1860, s 304B(1) – 'Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death.'

²¹³ Prerna Mitra and Ishita Sengupta, 'Ayesha suicide: Despite one death every hour, the menace of dowry persists' *The Indian Express* (New Delhi, 05 March 2021) <<https://indianexpress.com/article/lifestyle/lifestyle/ayesha-suicide-despite-one-death-every-hour-the-menace-of-dowry-persists-7215490/>> accessed 28 March 2022.

²¹⁴ B.R. Sharma, 'Social etiology of violence against women in India' (2005) 42 (3) *The Social Science Journal* 375, 385.

²¹⁵ Ministry of Women and Child Development, Report of the High Level Committee vol 1 (n 16) 142; See also, Sravasti Dasgupta, 'Under-Reporting, no Access to Recourse Behind 'Dip' in Crimes Against Women in 2020, Say Experts' (*News Click*, 17 September 2021) <<https://www.newsclick.in/Under-Reporting-no-Access-Recourse-Behind-Dip-Crimes-Against-Women-2020-Experts>> accessed 28 March 2022; Payal Seth, 'Decoding the Extent to Which Domestic Violence Is Under-Reported in India' (*The Wire*, 12 February 2021) <<https://thewire.in/women/domestic-violence-india-underreported>> accessed 28 March 2022; Sharan Poovanna, 'Domestic, sexual violence rising in state: NFHS data' *Hindustan Times* (Bengaluru, 25 November 2021) <<https://www.hindustantimes.com/india-news/domestic-sexual-violence-rising-in-state-nfhs-data-101637781327387.html>> accessed 28 March 2022.

²¹⁶ Ministry of Women and Child Development, Report of the High Level Committee vol 1 (n 16) 142.

violence but also by giving up control over their life choices fearing violence or fearing further violence.²¹⁷

With this backdrop, this chapter provides a brief overview of some of the current experiences and challenges faced by women in contemporary India in the context of violence against women that have also been highlighted as vital issues of concern as per the data collected by the government, non-governmental organizations etc. As a result, this chapter focuses, particularly on the following current challenges: a.) sexual violence within the context of marriage through the offence of marital rape, b.) the problem of under-reporting of crimes against women and c.) the adverse impact of sexual violence on the reproductive health of women. This analysis will help shed light on how certain social-cultural norms that have existed for a long period of time continue to be the root cause of subjugation of women in contemporary India.

3.1 Marital Rape

As per the NFHS-5 data instances of sexual violence against married women between the ages of 18-49, who have ever experienced spousal violence is the highest in the state of Karnataka (44%), followed by Bihar (40%), Manipur (39.6%), Telangana (36.9%), Assam (32%), Andhra Pradesh (30%).²¹⁸ However, the NFHS-5 data when compared with the NCRB 2019 report also demonstrates the issue of under-reporting of crimes against women in certain states thereby making the above statistics to a certain degree unreliable. This, however, does not undermine the existing necessity to recognize and criminalize marital rape in India.²¹⁹

²¹⁷ Ibid.

²¹⁸ Nikhil Rampal, '3.9% Indian women who were ever married reported sexual violence from spouse, 9.7% in Karnataka' (*The Print*, 24 January 2022) <<https://theprint.in/india/3-9-indian-women-who-were-ever-married-reported-sexual-violence-from-spouse-9-7-in-karnataka/809825/>> accessed 28 March 2022.

²¹⁹ Pavithra K M, 'NFHS-5 data clearly establishes under reporting of Crime against Women in some States' (*Factly*, 17 December 2020) <<https://factly.in/nfhs-5-data-clearly-establishes-under-reporting-of-crime-against-women-in-some-states/>> accessed 28 March 2022 - 'According to the data released by NCRB, the All-India rate of total crime against women in 2019 was 62.4 per lakh female population. That is about 62 cases of reported crime against women for every one lakh women. This number includes all forms of crimes against women. The rate of crime against women in Bihar was 32.3 whereas, in Kerala, the same was 62.7 in the year 2019. What this means is that as far as reported crimes against women of all ages are concerned, the crime rate in Kerala is almost twice the rate in Bihar. However, the data provided in the NFHS-5 report presents a completely opposite picture. According to the NFHS data, 40% of the ever-married women aged between 18 to 49 years in Bihar had faced spousal violence while in Kerala, this is only 9.9%. In other words, the proportion of women who experienced spousal violence in Bihar is almost 4 times more than in Kerala. This is exactly the opposite of what the NCRB data indicates. The numbers for Bihar are much higher than Kerala in all the forms of gender-based violence reported in NFHS-5. Though the data of NCRB & NFHS-5 are not directly comparable, the numbers clearly establish heavy under-reporting in states like Bihar.'

Sexual violence in the form of rape by the husband against the wife is not recognized as a crime under the Indian law. More importantly, in February 2022, while responding to a question on the issue of criminalization of marital rape, the Minister of Women and Child Development, Government of India made a statement in the parliament that, ‘the protection of women and children in the country is a priority for all but condemning every marriage as violent and every man a rapist is not advisable.’²²⁰ The Minister’s statement also came in the backdrop of petitions being currently heard by the High Court of Delhi that have challenged the constitutional validity of Exception 2 of Section 375 of the Indian Penal Code (IPC), 1860 which protects men, who have forced non-consensual intercourse with their wives from criminal prosecution.²²¹ The Ministry of Home Affairs, Government of India in an affidavit before the High Court has urged the Court to defer the proceedings by stating that,

“...considering the social impact involved, intimate family relations being the subject matter and this Hon’ble Court not having the privilege of having been fully familiarised with ground realities prevailing in different parts of society...taking a decision merely based upon arguments of (a) few lawyers may not serve the ends of justice.”²²²

The above statement by the Ministry of Home Affairs underscores the existence of the public-private divide and how the institution of marriage is part of the private sphere which is not to be interfered with because it is a highly sensitive issue for the Indian society. The statement is also indicative of placing a restriction on the power of the judiciary to permeate the private sphere. This is despite the government acknowledging violence against women within the household, for instance, the Ministry of Women and Child Development’s own report on the status of women in India acknowledges that the condition of women is quite alarming because they are often subjected to beatings, burnt alive and even killed in their own homes.²²³

²²⁰ ‘To condemn every marriage as violent and every man a rapist not advisable: Smriti Irani’ *The Indian Express* (New Delhi, 02 February 2022) <<https://indianexpress.com/article/india/smriti-irani-rajya-sabha-marital-rape-7753060/>> accessed 29 March 2022.

²²¹ Joshua Boscaini, ‘Delhi High Court challenge to marital rape exemption in Indian law sparks fierce debate’ (*ABC News*, 04 February 2022) <<https://www.abc.net.au/news/2022-02-05/india-high-court-marital-rape/100792530>> accessed 29 March 2022.

²²² Sofi Ahsan, ‘Centre urges Delhi HC to put off marital rape hearing: Issue involves broad implications’ *The Indian Express* (New Delhi, 04 February 2022) <<https://indianexpress.com/article/cities/delhi/centre-delhi-hc-put-off-marital-rape-hearings-consultative-process-7755053/>> accessed 29 March 2022.

²²³ Ministry of Women and Child Development, Report of the High Level Committee vol 1 (n 16) 138.

India being a largely patriarchal society continues to be governed by beliefs, practices and customs that are incongruent with human rights principles especially the right to equality. Note that, these beliefs, practices and customs are often made and controlled by men for the purposes of exercising social control over women.²²⁴ In most male headed households, men control the use and distribution of economic resources which allows them to also dictate women and their life choices such as their sexuality and mobility. Violence acts as a primary mode through which not only men exercise this control but also reinforce and legitimize female subordination and discrimination.²²⁵ The on-going debate on the criminalization of marital rape in India is crucial from the point of view of understanding the nature of contemporary forms of violence against women since it stresses upon the need to examine the overall status of women in the Indian society, particularly by focussing on the position of women as wives and the issues and experiences of young married women. It is argued that most of the experiences that women undergo or the challenges they face today are the result of the disproportionate power relations between men and women both within the home and outside that are an extension of traditional social-cultural norms rooted in patriarchy which places women in a vulnerable position and makes them more susceptible to violence.²²⁶ Violence against women occurs throughout her life cycle. The patriarchal system which has continued from the Vedic period (1500BCE - 500BCE) with its customs and values often favouring men over women has often been held responsible for the suffering of women in the public-private sphere. For example, during the Vedic period, birth of a daughter was not welcomed in the household. Sons were valued more than daughters.²²⁷ Birth of a son was seen as a blessing as he was someone who would bring prosperity to the family later in life, while, a daughter on the other hand would leave the family in which she is born and will go to another family after marriage which is said to permanently break off her relationship from her parents.²²⁸ Again, Indian society was also not in favour of women holding property. The wife had only limited rights over the family property when compared to the husband. Hence, as expected, a widow's right to inherit her husband's property

²²⁴ Nasrina Siddiqi, 'Gender inequality as a social construction in India: A phenomenological enquiry' (2021) 86 Women's Studies International Forum 1, 5.

²²⁵ Ibid.

²²⁶ Siddiqi, Gender inequality as a social construction in India (n 224).

²²⁷ Ralph T.H. Griffith, 'Hymns of the Atharva Veda' <<http://www.sacred-texts.com/hin/av/av03023.htm>> accessed 29 March 2022 - 'Book 3, Hymn 23 of Atharva-Veda contains charms and rituals to ensure the birth of a son.'

²²⁸ Shakuntala Rao Shashtri, *Women in the Sacred Laws – Dharmasutras, Manusamhita etc* (3rd edn, Bharatiya Vidya Bhavan 1990) 17.

was also not recognized.²²⁹ Society was very reluctant in recognizing a widow as the sole heir of the husband's estate and therefore only accorded her a limited right at least indirectly as a guardian to their minor sons. Further, in the absence of a son, the property went to the nearest male relative of the husband but not to the widow.²³⁰ The Medieval period (500CE - 1500CE), further cemented male dominance over the property rights of Hindu women by encouraging the practice of transferring only limited ownership on widows to protect ancestral property. During this period, young widows were forced to transfer the succession rights to the nearest male member of the husband's family and after that were left to live a life of hardship.²³¹ These traditional social-cultural norms have continued to impact upon the lives of women despite the Constitution of India prohibiting gender discrimination in 1950. For example, it was only in 2005 by virtue of the Hindu Succession (Amendment) Act that daughters received equal rights over their parental property similar to sons.²³² Violence against women in India is still not equated with or seen as the outcome of the patriarchal system. Structural inequalities created because of social-cultural factors (rooted in patriarchy - that plays a significant role in the broader 'Indian culture') which lead to normalization of certain practices (such as gender biased sex selection, denial of property rights) that are detrimental to rights of women, are not considered important in the discourse on violence against women. It is therefore crucial that the real-life experiences of young married women in the context of marital rape are examined keeping in mind the historical reasons behind the intersection of multiple social-cultural factors that have led to a further emboldening of patriarchal values in contemporary India.

Since there is a lack of a widely accepted definition of marital rape under the Indian law, marital rape is generally explained as sexual intercourse by the husband without the wife's consent.²³³

²²⁹ Mytheli Sreenivas, 'Conjugalities and Capital: Gender, Families, and Property under Colonial Law in India' (2004) 63 (4) *The Journal of Asian Studies* 937, 940; See also, Sukumari Bhattacharji, 'Economic Rights of Ancient Indian Women' (1991) 26 (9/10) *Economic and Political Weekly* 507, 509.

²³⁰ Sreenivas, *Conjugalities and Capital* (n 229).

²³¹ Debarati Halder and K. Jaishankar, 'Property Rights of Hindu Women: A Feminist Review of Succession Laws of Ancient, Medieval and Modern India' (2008) 24 (2) *Journal of Law and Religion* 663, 672.

²³² *The Hindu Succession Act 1956*, s 6.

²³³ Meghna Bhat and Sarah E. Ullman, 'Examining Marital Violence in India: Review and Recommendations for Future Research and Practice' (2014) 15 (1) *Trauma, Violence & Abuse* 57, 63.

Further, offences such as domestic violence,²³⁴ cruelty²³⁵ etc. are used to support the understanding of marital rape in the Indian context.

Lack of consent is considered a vital aspect in defining the offence of rape under Section 375 of IPC. However, in the Indian scenario, it can be argued that consent for sexual intercourse on behalf of the wife is presumed to exist and is considered irrevocable and complete simply because the victim (wife) and the perpetrator (husband) are married to each other therefore, making the offence of marital rape an impossibility. Because of this particular reasoning, the law might have excluded rape in marriages from the definition of rape under Section 375.²³⁶ Note that, Section 375 does not provide a justification for excluding rape in marriages from the definition of rape. The justification, however, often provided by those who advocate against criminalization of marital rape is that the concept of marriage in India is different from how it is viewed in the west and since marriage falls within the private sphere, the State should not

²³⁴ The Protection of Women From Domestic Violence Act 2005, s 3 – ‘For the purposes of this Act, any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it - (a) harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse; or (b) harasses, harms, injures or endangers the aggrieved person with a view to coerce her or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security; or (c) has the effect of threatening the aggrieved person or any person related to her by any conduct mentioned in clause (a) or clause (b); or (d) otherwise injures or causes harm, whether physical or mental, to the aggrieved person.

Explanation I.—For the purposes of this section, - (i) “physical abuse” means any act or conduct which is of such a nature as to cause bodily pain, harm, or danger to life, limb, or health or impair the health or development of the aggrieved person and includes assault, criminal intimidation and criminal force; (ii) “sexual abuse” includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman; (iii) “verbal and emotional abuse” includes - (a) insults, ridicule, humiliation, name calling and insults or ridicule specially with regard to not having a child or a male child; and (b) repeated threats to cause physical pain to any person in whom the aggrieved person is interested; (iv) “economic abuse” includes - (a) deprivation of all or any economic or financial resources to which the aggrieved person is entitled under any law or custom whether payable under an order of a court or otherwise or which the aggrieved person requires out of necessity including, but not limited to, house hold necessities for the aggrieved person and her children, if any, stridhan, property, jointly or separately owned by the aggrieved person, payment of rental related to the shared house hold and maintenance; (b) disposal of household effects, any alienation of assets whether movable or immovable, valuables, shares, securities, bonds and the like or other property in which the aggrieved person has an interest or is entitled to use by virtue of the domestic relationship or which may be reasonably required by the aggrieved person or her children or her stridhan or any other property jointly or separately held by the aggrieved person; and (c) prohibition or restriction to continued access to resources or facilities which the aggrieved person is entitled to use or enjoy by virtue of the domestic relationship including access to the shared household.’

²³⁵ The Indian Penal Code 1860, s 498A – ‘For the purposes of this section, “cruelty” means (a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or (b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.’

²³⁶ Saptarshi Mandal, ‘The Impossibility of Marital Rape: Contestations Around Marriage, Sex, Violence and the Law in Contemporary India’ (2014) 29 (81) Australian Feminist Studies 255, 255.

interfere in it.²³⁷ The justification against criminalization of marital rape is rooted in the historical reasons (mentioned above) that strengthen patriarchal structures which are responsible for contemporary structural violence against women in India and also draws its strength from the manner in which women perceive or have been made to perceive the relationship between non-state ‘laws’ and formal law and are often ‘guided’ to rely on traditions, community beliefs and values rather than formal institutions when it comes to ‘solving’ family matters. It must also be noted that factors such as women’s inability to exit family, community ties and live on their own make it impossible for them to opt out of social systems governed by patriarchal norms. The debate on the criminalization of marital rape is also therefore significant from the point of legal pluralism as it allows for a wider discussion on how patriarchy surrounds and impacts women’s reality and influences laws and policies affecting them.²³⁸

Section 375 of IPC provides the definition for the offence of rape. However, exception 2 of section 375 states that sexual intercourse or sexual acts between a husband and wife (the wife not being under fifteen years of age) is not rape.²³⁹ Note that as per the Supreme Court’s ruling in *Independent Thought v. Union of India*, exception 2 was partly struck down because in its current form exception 2 allowed for sexual intercourse with a girl who is married and is between the age of 15 to 18. The Supreme Court found this to be unreasonable, arbitrary and unconstitutional.²⁴⁰ Going by the ruling in *Independent Thought*, exception 2 should now be read as: ‘sexual intercourse by a man with his own wife, the wife not being under 18 years, is not rape’.²⁴¹ But, the Supreme Court also mentioned that their decision in *Independent Thought* will have no bearing upon the issue of adult marital rape.²⁴² Since exception 2 does not provide any justification for excluding sexual intercourse or sexual acts between a man and his wife from the definition of rape it is argued that the decision to exclude sexual intercourse within the context of marriage might have been based upon the argument of existence of presumption

²³⁷ Bhat and Ullman, *Examining Marital Violence in India* (n 233) 62-63.

²³⁸ Relis, *Unifying benefits of studies in legal pluralism* (n 42).

²³⁹ The Indian Penal Code 1860, s 375.

²⁴⁰ AIR 2017 SC 4904.

²⁴¹ Akanksha Yadav, ‘SC Case Analysis on Marital Rape: *Independent Thought v. Union of India* and Another’ (*LatestLaws.com*, 12 August 2018) <<https://www.latestlaws.com/case-analysis/sc-case-analysis-on-marital-rape-independent-thought-v-union-of-india-and-another-by-akanksha-yadav/>> accessed 29 March 2022.

²⁴² AIR 2017 SC 4904.

of consent on behalf of the wife. Further, another argument is that the decision to exclude might have also rested upon the notion of sacred nature of marriage as per the ‘Indian culture’.²⁴³

The Law Commission of India in its 172nd report has stated that ‘criminalization of marital rape would lead to excessive interference with the institution of marriage.’²⁴⁴ Further, despite the Verma committee’s recommendation to delete exception 2, the Criminal Law Amendment Bill, 2012 did not contain any provision to criminalize marital rape. The Verma committee was constituted in the aftermath of the Delhi gang rape of 2012 to propose amendments to criminal law to put an end to heinous crimes against women.²⁴⁵ The committee made the following recommendations in relation to marital rape:

‘The preliminary recommendation was simply that the exception clause must be deleted. The second suggestion was that the law must specifically state that a marital relationship or any other similar relationship is not a valid defence for the accused, or relevant while determining whether consent existed or not and that it was not to be considered a mitigating factor for the purpose of sentencing.’²⁴⁶

The Parliamentary Standing Committee on Home Affairs which reviewed the Criminal Law Amendment Bill, 2012 stated in its 167th Report that, if marital rape is criminalized, the entire family system would collapse.²⁴⁷ In 2016, this argument was also reiterated by the former Minister of Child and Development, Government of India wherein she stated that, ‘the concept of marital rape, as understood internationally, cannot be suitably applied in the Indian context due to various factors, like level of education or illiteracy, poverty, myriad social customs and values, religious beliefs, the mindset of the society to treat the marriage as a sacrament, etc.’²⁴⁸ It is quite evident from this line of reasoning that especially in the Indian setup marriage is

²⁴³ Deborah Kim, ‘Marital Rape Immunity in India: Historical Anomaly or Cultural Defence?’ (2017) 69 (1) *Crime, Law and Social Change* 91, 95-96.

²⁴⁴ J.S. Verma, ‘Report of the Committee on Amendments to Criminal Law’ (*PRS Legislative Research*, January 2013) <https://prsindia.org/files/policy/policy_committee_reports/1359132636--Justice%20Verma%20Committee%20Report%20Summary_0.pdf> accessed 29 March 2022.

²⁴⁵ *Ibid.*

²⁴⁶ Verma, Report of the Committee on Amendments to Criminal Law (n 244).

²⁴⁷ M. Venkaiah Naidu, ‘One Hundred and Sixty Seventh Report - The Criminal Law (Amendment) Bill, 2012, Department-Related Parliamentary Standing Committee on Home Affairs’ (*Parliament of India Rajya Sabha*) <<http://164.100.47.5/newcommittee/reports/EnglishCommittees/Committee%20on%20Home%20Affairs/167.pdf>> accessed 29 March 2022.

²⁴⁸ Rajyasree Sen, ‘Maneka Gandhi tells us marital rape isn’t rape after all’ (*Live Mint*, 14 March 2016) <<https://www.livemint.com/Opinion/jdWYjEBWesSGEP17aDgMbJ/Maneka-Gandhi-tells-us-marital-rape-isnt-rape-after-all.html>> accessed 29 March 2022.

understood solely as a valid license for entering into sexual relations and not as a union between equals. This particular idea of marriage with a selective use of consent for entering into sexual relations goes against the dignity and freedom of an individual (wife).²⁴⁹ As noted earlier, the argument advanced is that a woman gives her unconditional consent to sexual relations to the husband upon entering into marriage, therefore, the proposition of the husband raping the wife within the context of marriage is absurd.²⁵⁰ As noted by Choudhary,

‘The typical marital rapist is a man who still believes that husbands are supposed to ‘rule’ their wives. This extends, to sexual matters: when he wants her, she should be glad, or at least willing, if she is not, he has the right to force her. But in forcing her, he gains far more than a few minutes of sexual pleasure. He humbles her and reasserts, in the most emotionally powerful way possible, that he is the ruler and she is the subject.’²⁵¹

Furthermore, more prominent than the legal objections to criminalizing marital rape are the social-cultural reasons that are often advanced for continuing with the exception in India. As a result, the debate on the criminalization of marital rape in India is mostly focussed on the preservation of the traditional Indian family structure and the institution of marriage. It is argued that the abolishing of the marital rape exception poses a significant threat to Indian families and would do an irreparable damage to the institution of marriage. The examination of marital rape in India as a contemporary form of violence against women also provides an opportunity to acknowledge the intersection between patriarchal norms on one hand and their impact on the status of women particularly married women on the other. This intersection and how it adversely affects the daily experiences (physical, psychological) of married women in their marital home is best explained by reflecting upon some of the historical aspects related to the institution of marriage under the Hindu culture.²⁵²

²⁴⁹ Sandra L. Ryder and Sheryl A. Kuzmenka, ‘Legal Rape: The Marital Rape Exemption’ (1991) 24 (2) John Marshall Law Review 393, 399.

²⁵⁰ Sumedha Choudhury, ‘Why Is Outlawing Marital Rape Still a Distant Dream in India?’ (*The Wire*, 28 October 2018) <<https://thewire.in/law/india-marital-rape-criminal-law>> accessed 29 March 2022.

²⁵¹ *Ibid.*

²⁵² Mandal, *The Impossibility of Marital Rape* (n 236) 259-260.

Since the Vedic period (1500BCE - 500BCE), the institution of marriage has been seen as a social and religious duty.²⁵³ Marriage was also regarded as a ‘religious sacrament’²⁵⁴ in which a man and a woman are bound in permanent relationship for the physical, social and spiritual purposes of dharma,²⁵⁵ procreation and sexual pleasure.²⁵⁶ Later, marriage became an obligation, especially for girls. The general view with respect to marriage of girls was that an unmarried girl has to face ‘great difficulties’ in life when compared to a married girl. She needed to be protected from the hardships of a lonely life and it was only through marriage that she could be saved.²⁵⁷ During the Vedic period, girls were married at the age of 15 or 16.²⁵⁸ In the Post Vedic period (500BCE - 500CE), education of young girls also suffered as a result of being neglected, mostly, due to their early marriage.²⁵⁹ With the lowering of the marriage age for girls in later years, the prerequisite of having Vedic knowledge for marriage, was first reduced to a mere formality and later on declared totally unnecessary, which put an end to any opportunities of self-development for girls.²⁶⁰ Because girls had to be married off at an early age, they were denied access to education. They were only seen as child-bearers with no other function.²⁶¹ This particular view further gained strength during the time of Manu,²⁶² which is roughly estimated to be around 100CE.²⁶³ As per Manu, ‘day and night women must be kept

²⁵³ Monmayee Basu, *Hindu Women and Marriage Law: From Sacrament to Contract* (1st edn, Oxford University Press 2000) 22.

²⁵⁴ Neelam Singh, ‘Women and Hindu Marriage’ (2014) 9 (1) Vidhigya: The Journal of Legal Awareness 62, 65 - ‘The sacramental marriage among Hindus has three characteristics: It is a permanent, indissoluble union and it is a holy union.’

²⁵⁵ Shashtri, *Women in the Sacred Laws* (n 228) 13 - ‘In the whole range of Sanskrit literature ‘Dharma’ is one of the few words with a comprehensive meaning. It is a word that means variously: sacred law, duty, justice and religious merit. It also denotes any act which can give heavenly bliss and ultimate liberation to the human soul.’

²⁵⁶ Madhumita Acharjee and Fakhru Islam Choudury, ‘Marriage as a Sacrament and as a Contract’ 2 (II) International Journal of Socio-Legal Analysis and Rural Development 27, 28.

²⁵⁷ A.S. Altekar, *The Position of Women in Hindu Civilization – From Prehistoric Times to the Present Day* (2nd edn, Motilal Banarsidass Indological Publishers 1959) 33.

²⁵⁸ Ibid 49.

²⁵⁹ Julius Lipner, *Hindus: Their Religious Beliefs and Practices* (2nd edn, The Library of Religious Beliefs and Practices 2012) 116.

²⁶⁰ Altekar, *The Position of Women in Hindu Civilization* (n 257) 16.

²⁶¹ Indra, *The Status of Women in Ancient India: A Vivid and Graphic Survey of Women’s Position, Social, Religious, Political, and Legal, in India* (2nd edn, Oriental Publishers 1955) 142.

²⁶² Vasudha Narayanan, ‘Hinduism’ (*Britannica*) <<https://www.britannica.com/topic/Hinduism/The-Upanishads#ref303667>> accessed 29 March 2022 - ‘Among the texts inspired by the Vedas are the Dharma-sutras, or “manuals on dharma,” which contain rules of conduct and rites. The most important of these texts are the sutras of Gautama, Baudhayana, and Apastamba. The contents of these works were further elaborated in the more systematic Dharma-shastras, which in turn became the basis of Hindu law. First among them stands the Dharma-shastra of Manu, also known as the *Manu-smriti* (Laws of Manu). It deals with topics such as cosmogony, the definition of dharma, the sacraments, initiation and Vedic study, the eight forms of marriage, hospitality and funerary rites, dietary laws, pollution and purification, rules for women and wives, royal law, juridical matters, pious donations, rites of reparation, the doctrine of karma, the soul, and punishment in hell. The influence of the Dharma-shastra of Manu has been enormous, as it provided Hindu society with the basis for its practical morality.’

²⁶³ Ibid.

dependent by their menfolk, and if they become attached to worldly things they must be kept under one's control. Protected in childhood by her father, in youth by her husband, and in old age by her sons, a woman is not fit for independence.²⁶⁴ Manu also states that, marriage for girls is akin to them taking up Vedic studies; serving the husband is equivalent to studying at a school and doing household duties is a substitute for doing daily prayers.²⁶⁵ With such views on women, there was a continuous deterioration in the position of women till the early 20th century CE.²⁶⁶ Note that, prior to the British rule, the marriageable age for girls was only 8 or 9.²⁶⁷ Because the brides were young and illiterate, they were more susceptible to ill-treatment at home.²⁶⁸ The idea of subordination of the wife took a more concrete shape during the Post Vedic period mostly because of the ancient Hindu literature during this period which considered them to be weak, dishonest, unfaithful and required them to be guarded and controlled by their husbands at all times.²⁶⁹ As per Manu, 'women only have a place of dependence in the household. She must be kept in subordination, day and night, by the males of the family. In household affairs she is so much subservient to her husband that her very individuality is submerged in that of her lord's.'²⁷⁰

The brief historical account mentioned above on the institution of marriage and more importantly, the condition of women in the household depicts a biased picture of marital expectations under the Hindu culture. The marital expectations, for both men and women appear to be solely based on their gender and not their individuality. In short, the condition of women in the household brings to light the degree of interdependence between the husband and wife especially in their relationship and the influence of customs and traditions in their personal life.

The preservation of the traditional idea of marriage including the gender driven roles of husband and wife (as developed through customs and traditions based on ancient religious texts) or the need to protect the 'private' i.e., domestic matters from State interference is one

²⁶⁴ F. Max Müller, *The Laws of Manu* (1st edn, Motilal Banarsidass 1896) 327-328.

²⁶⁵ Ibid 42.

²⁶⁶ Altekar, *The Position of Women in Hindu Civilization* (n 257) 24-25.

²⁶⁷ J. N. Dasgupta, *Bengal in the 16th Century* (1st edn, Vintage Books 1996) 131.

²⁶⁸ Lipner, *Hindus* (n 259).

²⁶⁹ Biren Bonnerjea, 'The Hindu Family' (1930) 3 (1/2) *Primitive Man* 3, 17-18.

²⁷⁰ Indra, *The Status of Women in Ancient India* (n 261) 31-32.

of the most significant obstacles to achieving gender equality in modern India.²⁷¹ It is argued that State interference in the ‘private’ sphere disrupts marital relations and damages the family structure.²⁷² In addition, the right to privacy has also often been invoked to justify the public-private divide and restrict State interference in the private affairs between husband and wife. However, this approach, limits the right to privacy to spaces (marital home) rather than individuals within those spaces.²⁷³ India is also in light of its international obligations bound to guarantee women the full protection and enjoyment of their human rights by eliminating all discriminatory practices against women including marital rape (see discussion in chapter 5).

Having given a brief understanding of the current legal position of marital rape in India by focussing on some of the social-cultural and legal reasons that play a significant role in prohibiting its criminalization, the next section highlights the issue of under-reporting of crimes against women which has also been identified as a current issue and challenge for women in contemporary India. As noted earlier, there is massive under-reporting of marital rape in India. The following section, therefore, attempts to understand the various reasons behind under-reporting by victims.²⁷⁴

3.2 Under-reporting of Crimes Against Women

The level of reporting of various crimes against women including sexual offences are particularly low in South Asia (including India) when compared to rest of the world.²⁷⁵ The low reporting of crimes against women is often attributed to poor legal protections to victims

²⁷¹ Amit Anand, Preethi Lolaksha Nagaveni and Tripti Bhushan, ‘Marital rape in India: a socio-legal analysis’ (2021) 7 (4) *International Journal of Public Law and Policy* 351, 357.

²⁷² *Ibid.*

²⁷³ Anand, Lolaksha Nagaveni and Bhushan, *Marital Rape in India* (n 271) - ‘Privacy as a right protects an individual’s ability to decide which parts of his/her life are accessible to others and which parts are not. The denial of the right to privacy should focus on the curtailment of one’s self-expression rather than reducing the question to where the said violation has taken place. Privacy does not protect spaces so much as it protects individuals within those spaces. It would protect the sexual acts within the confines of the marital bedroom, from the unwanted gaze of a stranger. Where the dignity and autonomy of one of the individuals within a marital relation is jeopardised, privacy cannot be manipulated to protect the interest of one against the other.’

²⁷⁴ Apurva Vishwanath, ‘Explained: The debate over marital rape’ *The Indian Express* (New Delhi, 23 January 2022) <<https://indianexpress.com/article/explained/explained-debate-over-marital-rape-7732470/>> accessed 29 March 2022.

²⁷⁵ Lotus McDougal and others, ‘Releasing the Tide: How Has a Shock to the Acceptability of Gender-Based Sexual Violence Affected Rape Reporting to Police in India?’ (2021) 36 (11-12) *Journal of Interpersonal Violence* NP5921, NP5922 – ‘Most recently available national data indicate that 68% of women in India who experienced nonspousal sexual violence have not sought help from to anyone; fewer than 1.5% reported to the police.’; See also, Sujan Bandyopadhyay, ‘A Closer Look at Statistics on Sexual Violence in India’ (*The Wire*, 08 May 2018) <<https://thewire.in/society/a-closer-look-at-statistics-on-sexual-violence-in-india>> accessed 29 March 2022.

and deep rooted social-cultural norms that blame and stigmatize women for reporting.²⁷⁶ Note that, the NCRB 2020 report recorded a decline of over 8 percent in crimes against women in India in 2020 in comparison to 2019.²⁷⁷ The 2020 report mentioned that the decline in the number of cases was mostly due to the nationwide lockdown imposed during the first wave of Covid-19. However, it is argued that the decline in crimes against women reflected in the NCRB report is due to under-reporting of such cases which only worsened during the lockdown as women's access to police and courts got even more restricted.²⁷⁸

The problem of under-reporting of crimes against women remains massive despite the widely publicized Delhi gang rape of 2012 which was considered by many as a watershed moment in the manner in which violence against women in India is seen and understood.²⁷⁹ Despite the nationwide media coverage that followed the Delhi gang rape including subsequent public outrage and protest, shift in judicial response, policy change, the steps to raise awareness regarding the broader understanding of violence against women together with attempts to remove any institutional barriers in the criminal justice system have remained largely static.²⁸⁰ As noted by McDougal and others,

‘In 2016, there were 38,947 rapes reported to police across India, or more than four per hour. Annual rapes reported to police incidence rates at the national level have increased by 79% between 2005 and 2016 (increasing from 3.4 rapes per 100,000 women to 6.1 rapes per 100,000 women). Throughout this same period, rape case progression through the police and court systems has remained relatively static. Of all rapes reported to police in India over the past decade, 63% to 70% of investigations have concluded, and charge sheets were filed in 86% to 89% of concluded investigations. Only 12% to 20% of rape trials have been completed, with a conviction rate of 24% to 29%.’²⁸¹

²⁷⁶ “‘Everyone Blames Me’: Barriers to Justice and Support Services for Sexual Assault Survivors in India” (*Human Rights Watch*, 08 November 2017) <<https://www.hrw.org/report/2017/11/08/everyone-blames-me/barriers-justice-and-support-services-sexual-assault-survivors>> accessed 29 March 2022.

²⁷⁷ Dasgupta, Under-Reporting, no Access to Recourse Behind ‘Dip’ in Crimes Against Women in 2020 (n 215) - ‘A total of 3,71,503 cases of crime against women were registered during 2020, showing a decline of 8.3% over 2019 (4,05,326 cases).’

²⁷⁸ *Ibid.*

²⁷⁹ McDougal and others, *Releasing the Tide* (n 275) NP5923.

²⁸⁰ *Ibid* NP5924.

²⁸¹ McDougal and others, *Releasing the Tide* (n 275) NP5928.

The initial increase in the number of rapes being reported to police soon after the Delhi gang rape was only limited to areas closer to Delhi with other factors such as awareness about sexual violence and access to internet also playing a crucial role in sustaining the effects of the Delhi gang rape on rape reporting.²⁸² However, a report by Human Rights Watch in 2017 revealed that even five years after the Delhi gang rape, girls and women survivors of sexual violence in India not only remained fearful of the societal repercussions of reporting rape to police but also continued to face significant barriers in access to justice.²⁸³ The report also highlighted persistent gaps in enforcing existing legislation, policies and guidelines aimed at protecting victims of sexual violence. The report underscored poor police response as a key factor behind the unwillingness of survivors to take their cases to courts.²⁸⁴ Nonetheless, both social and institutional barriers are equally responsible for firstly, poor understanding of the discourse on violence against women (see discussion in chapters 4 and 5) and secondly under-reporting of various forms of violence against women in India (including marital rape).

As per Section 154 of the Code of Criminal Procedure (CrPC), 1973, every information given by the woman relating to the commission of sexual assault or attempted is to be mandatorily recorded by a woman police officer. The information shall also be videotaped and the statement made by the woman shall also be recorded by a Judicial Magistrate as soon as possible.²⁸⁵ Amendments to the Criminal Law in 2013 also make it mandatory for police officers to record any information given under Section 154 of the CrPC (including sexual assault complaints) and a failure to do so is a punishable offence under Section 166A of the IPC.²⁸⁶ But, police in India do not always abide by these rules. Poor police response has been identified as a major contributing factor in under-reporting of crimes against women in India.²⁸⁷ As per the Human Rights Watch report, police resist recording of the information (also known as the First Information Report [FIR]) under Section 154 of the CrPC which is the first step to initiate a police investigation. This has been found to be true especially when the victim belonged to an economically or socially marginalized community. Police also pressurize the victims and their

²⁸² Ibid NP5933.

²⁸³ “Everyone Blames Me” (n 276).

²⁸⁴ Ibid.

²⁸⁵ The Code of Criminal Procedure 1973, s 154.

²⁸⁶ The Indian Penal Code 1860, s 166A.

²⁸⁷ “Everyone Blames Me” (n 276).

family to ‘settle’ or ‘compromise’ when the perpetrator is from a dominant social community.²⁸⁸

Because the police often fail to register FIRs or properly conduct investigations most parents remain fearful for their daughters safety after deciding to lodge a formal complaint because due to the failure of the police to present a strong case the accused are often released on bail and then threaten the safety of the girls. As a result, either girls restrict their movement outside of their homes or parents put similar restrictions on them.²⁸⁹ As pointed out by Human Rights Watch in its report,

‘In October 2016, after 16 year old Meena filed a police complaint against three men who assaulted her in a village in Jhansi in Uttar Pradesh state, the families of the accused began to threaten her family, warning that they would be killed. Meena’s parents appealed to the police, including the superintendent of police, seeking protection. But the police failed to take any action regarding the threats. Meanwhile, Meena’s parents were so concerned about her safety that they would not let her out of the house, not even to attend school. Her mother told Human Rights Watch: We stopped our daughter’s education because we were scared to send her to school after that. If the accused are in jail, then we won’t be scared to send her to school. But until then, we have to keep her safe with us. We reported the incident but now we have lost our honour.’²⁹⁰

Note that in most north Indian states like Haryana, Punjab, Rajasthan, Uttar Pradesh, Bihar, Khap panchayats (caste councils) often pressurize members of the dalit community not to file

²⁸⁸ Uma Chakravarti, ‘From fathers to husbands: of love, death and marriage in North India’ in Welchman and Hossain (eds), *‘Honour’: Crimes, Paradigms and Violence Against Women* (n 32) 316-319; See also, “Everyone Blames Me” (n 276) - ‘Police in Lalitpur district in the state of Uttar Pradesh state refused to file a complaint after 22 year old Barkha and her husband were attacked by three men from their village around midnight in their home on January 30, 2016. Barkha said two men beat her husband and took him away while the third, belonging to a dominant caste, raped her, abused her using caste slurs, and threatened to kill her if she went to the police. Barkha says the police were reluctant to act because the main accused is a local leader of the ruling political party. Finally, after Barkha approached the judiciary, on March 2, the courts ordered the police to file an FIR and take appropriate action. However, the police took another eight months to register the FIR. Meanwhile, Barkha and her husband had to flee the village and move hundreds of miles away after repeated threats and harassment from the accused and others in the village. Barkha says she has lost hope for justice: How long will we be on the run like this? Not able to see our family, our homes, our village? The entire family is scattered. The police do not want to investigate the case. We weren’t able to stay in the village because they [the accused] are ready to kill us and the police did not take any action against them. We also went to the village headman, but he didn’t listen to us either. There’s no one for us.’

²⁸⁹ “Everyone Blames Me” (n 276).

²⁹⁰ Ibid.

FIRs or pursue a criminal case if the accused belongs to a dominant caste (see discussion in chapter 4 on the role of Khap panchayats in strengthening existing social-cultural barriers that prohibit young girls and women from seeking justice through formal institutions).

Apart from poor police response, another crucial factor (though not directly related to the problem of under-reporting) that needs to be highlighted is the failure on part of respective state governments to provide adequate health services for survivors/victims of sexual violence. The failure of healthcare system in providing therapeutic care and counselling is important to be acknowledged because this results in having a negative effect on survivors as they become hesitant in coming forward and seeking justice by relying on formal institutions in the face of overwhelming social opposition.²⁹¹ Note that, the Ministry of Health and Family Welfare, Government of India released the ‘Guidelines and Examinations Proforma for Medico Legal Cases of victims of sexual violence’ in 2013 recognizing the vital role played by healthcare professionals in providing support to survivors/victims of sexual violence and collecting relevant evidence in order for the police to build a strong case against the accused.²⁹² As per Section 357C of the CrPC, medical practitioners are under an obligation to provide medical treatment free of cost to girls and women who approach them and disclose having faced sexual assault including rape.²⁹³ The medical examination conducted not only serves a therapeutic

²⁹¹ “Everyone Blames Me” (n 276).

²⁹² ‘Guidelines & Protocols: Medico-legal care for survivors/victims of sexual violence’ (*Ministry of Health & Family Welfare Government of India*, March 2014) <<https://main.mohfw.gov.in/sites/default/files/953522324.pdf>> accessed 29 March 2022 - ‘The guidelines recognize the role of health sector in strengthening legal frameworks, developing comprehensive and multi-sectoral national strategies for preventing and eliminating all forms of sexual violence. Through these, the Ministry of Health and Family Welfare proposes to provide clear directives to all health facilities to ensure that all survivors of all forms of sexual violence, rape and incest, including people that face marginalisation based on disability, sexual orientation, caste, religion, class, have immediate access to health care services that includes immediate and follow up treatment, post rape care including emergency contraception, post exposure prophylaxis for HIV prevention and access to safe abortion services, police protection, emergency shelter, documentation of cases, forensic services and referrals for legal aid and other services. It recognizes the need to create an enabling environment for survivors/victims where they can speak out about abuse without fear of being blamed, where they can receive empathetic support in their struggle for justice and rebuild their lives after the assault. The guidelines also provide scientific medical information and processes that aid in correcting pervasive myths and degrading practices around rape that have been reinforced by common medico-legal practices. It eliminates what is known as the “two-finger test” by limiting internal vaginal examinations to those “medically indicated” and rejects the use of medical findings for unscientific and degrading characterizations about whether the victim was “habituated to sex”.’

²⁹³ The Code of Criminal Procedure 1973, s 357C - Treatment of victims: ‘All hospitals, public or private, whether run by the Central Government, the State Government, local bodies or any other person, shall immediately, provide the first-aid or medical treatment, free of cost, to the victims of any offence covered under section 326A, 376, 376A, 376B, 376C, 376D or section 376E of the Indian Penal Code (45 of 1860), and shall immediately inform the police of such incident.]’

purpose, but is also vital for gathering possible forensic evidence.²⁹⁴ However, medical practitioners do not always follow these rules and guidelines. As noted by Human Rights Watch in its report, in one particular case, when a 18 year old dalit girl who was kidnapped and raped went to seek medical treatment, the medical practitioner who attended her engaged in victim blaming further harming her mental health. The girl's mother who was present in the room with her during the medical examination told Human Rights Watch that the medical practitioner tried to insinuate that her daughter was lying and the sex must have been consensual.²⁹⁵

The existing institutional lacunae (including poor police response, failure to provide access to health services) is the result of India's lack of a holistic nationwide programme which can monitor the work undertaken by various central ministries and state governments to prevent violence against women and provide support to survivors/victims.²⁹⁶

The next section briefly highlights the negative impact of gender based violence, particularly, sexual violence in marriage on the reproductive health of women which has been identified as another challenge facing women in contemporary India.

²⁹⁴ The Code of Criminal Procedure 1973, s 164A – Medical examination of the victim of rape: ‘(1) Where, during the stage when an offence of committing rape or attempt to commit rape is under investigation, it is proposed to get the person of the woman with whom rape is alleged or attempted to have been committed or attempted, examined by a medical expert, such examination shall be conducted by a registered medical practitioner employed in a hospital run by the Government or a local authority and in the absence of such a practitioner, by any other registered medical practitioner, with the consent of such woman or of a person competent to give such consent on her behalf and such woman shall be sent to such registered medical practitioner within twenty-four hours from the time of receiving the information relating to the commission of such offence. (2) The registered medical practitioner, to whom such woman is sent shall, without delay, examine her person and prepare a report of his examination giving the following particulars, namely— (i) the name and address of the woman and of the person by whom she was brought; (ii) the age of the woman; (iii) the description of material taken from the person of the woman for DNA profiling; (iv) marks of injury, if any, on the person of the woman; (v) general mental condition of the woman; and (vi) other material particulars in reasonable detail. (3) The report shall state precisely the reasons for each conclusion arrived at. (4) The report shall specifically record that the consent of the woman or of the person competent, to give such consent on her behalf to such examination had been obtained. (5) The exact time of commencement and completion of the examination shall also be noted in the report. (6) The registered medical practitioner shall, without delay forward the report to the investigating officer who shall forward it to the Magistrate referred to in section 173 as part of the documents referred to in clause (a) of Sub-Section (5) of that section. (7) Nothing in this section shall be construed as rendering lawful any examination without the consent of the woman or of any person competent to give such consent on her behalf.’

²⁹⁵ “Everyone Blames Me” (n 276).

²⁹⁶ ‘Towards Violence-Free Lives for Women: Tracking of Union Budgets (2018-21) for Violence Services’ (OXFAM India, February 2021) <<https://d1ns4ht6ytuzzo.cloudfront.net/oxfamdata/oxfamdatapublic/2021-02/Gender%20Budget%20and%20Financing%20for%20VAW%20-9.pdf?ZoJ4ukZCF1zMZrqtWwt2M7yagQyKAerv>> accessed 29 March 2022.

3.3 Sexual and Reproductive Health of Women

Gender based violence, particularly, sexual or physical violence within marriage and its adverse impact on the sexual and reproductive health of women in the Indian context has been highlighted mostly within the framework of the Protection of Women from Domestic Violence Act, 2005.²⁹⁷ As per the latest NFHS-5 data nearly 3 in 10 women in India experience domestic violence by the spouse.²⁹⁸ Note that, the 2005 Act also refers to the concept of rape within marriage (referring to it as ‘sexual abuse’) however its application remains restricted in the Indian society (see section 3.1 of this chapter - Independent Thought v. Union of India).²⁹⁹ Even though the NFHS has included data on physical abuse of pregnant married women and sexual violence on young women in its survey there is however less clarity on the resulting health related impact of this physical abuse on women.³⁰⁰ The negative health implications for women resulting from sexual violence in marriage includes attempt to suicide, mental ill-health, poorer health outcomes for women and their children, women’s inability to negotiate condom use or contraception and high vulnerability to HIV/AIDS and other sexually transmitted infections.³⁰¹ Despite the existing interlinkages between sexual violence within marriage and health outcomes (which is now only beginning to be partially reflected in the NFHS data), the adverse impact on sexual and reproductive health of women due to spousal violence is still far from being recognized as a public health concern in India.³⁰² This is mainly because of under-reporting, stigma attached to disclosure of certain behaviour and the pervasiveness of violence in Indian marriages.³⁰³ The institution of marriage in India continues to be perceived as a setting in which women are always safe and protected. However, there is ever-increasing evidence which suggests otherwise. The following three cases noted by Mitra reflect the adverse physical, reproductive and mental health outcomes linked to sexual violence in marriage:

²⁹⁷ Keerty Nakray (ed), *Gender-based violence and public health: International perspectives on budgets and policies* (1st edn, Routledge 2013) 163.

²⁹⁸ ‘3 in 10 women report violence by spouse: Survey’ *The Tribune* (29 November 2021) <<https://www.tribuneindia.com/news/nation/3-in-10-women-report-violence-by-spouse-survey-343934>> accessed 29 March 2022.

²⁹⁹ The Protection of Women From Domestic Violence Act 2005.

³⁰⁰ Sadia Akhtar, ‘NFHS-5: Physical abuse of pregnant women, sexual violence rising in Delhi’ *Hindustan Times* (New Delhi, 26 November 2021) <<https://www.hindustantimes.com/cities/delhi-news/nfhs5-physical-abuse-of-pregnant-women-sexual-violence-rising-in-delhi-101637864253196.html>> accessed 29 March 2022.

³⁰¹ Ernestina Coast, Tiziana Leone and Alankar Malviya, ‘Gender-based violence and reproductive health in five Indian states’ in Nakray (ed), *Gender-based violence and public health* (n 297) 165.

³⁰² Shoba Suri, Mona and Debosmita Sarkar, ‘Domestic Violence and Women’s Health in India: Insights from NFHS-4’ (*Observer Research Foundation*, 14 January 2022) <<https://www.orfonline.org/research/domestic-violence-and-womens-health-in-india-insights-from-nfhs-4/>> accessed 29 March 2022.

³⁰³ Sandra L. Martin and others, ‘Domestic violence across generations: findings from northern India’ (2002) 31 (3) *International Journal of Epidemiology* 560, 572.

‘I was suffering from a severe vaginal infection so I suspected my husband of having HIV/AIDS. I refused to have sex with him. However, he beat me and also hit on my head and stomach with an iron rod and said that ‘If I get AIDS I will kill you.’³⁰⁴

‘After two years of being humiliated as *baanj* [Hindi: infertile], I was able to conceive. In spite of which my husband insisted on having sex and I refused to do so he hit and kicked me on my stomach. He threatened to have extramarital relations. I miscarried.’³⁰⁵

‘I was on the verge of labour pains yet my husband wanted sex and I met his demand. I was in severe pain and suffering from high blood pressure. I wanted the baby to survive. The doctor advised a birth through Caesarean section. My husband refused because it would affect his sex life. I was partly conscious and I signed the papers of consent.’³⁰⁶

The above cases not only indicate the prevalence of sexual violence in Indian marriages (that has an adverse impact on a women’s physical and mental health) but also point out the secondary position accorded to women in the marital home.³⁰⁷ The prevalence of sexual violence can be explained by the predominant patriarchal values that shape everyday gender relations in the marital home. The institution of marriage in India is rooted in patriarchal norms with violence being the primarily tool through which control is exercised on women in most male-headed households. In other words, masculinity plays a significant role in shaping sexual relationships in marriages.³⁰⁸ Control over women inside the marital home is exercised not only through sexual violence but through other forms of physical and emotional violence that

³⁰⁴ Ernestina Coast, Tiziana Leone and Alankar Malviya, ‘Gender-based violence and reproductive health in five Indian states’ in Nakray (ed), *Gender-based violence and public health* (n 297) 156-157 - ‘Sexual jealousy and fear of infidelity plays a vital role in male attitudes to contraception, as some men think that the use of contraception in the marital relationship would enable the wife to have sexual relationships outside marriage. These beliefs might be completely unfounded and may be largely explained by an excessive need by men to control women. Non-use of appropriate contraception in the marital relationship further exacerbates women’s vulnerability to contracting HIV/AIDS. Women are often married to men who might have contracted HIV/AIDS or engaged in pre-marital sex without any form of contraception. It is also important that couples address safe sexual practices after diagnosis with HIV/AIDS to address any further health threats. However, the social context of sexual relationships, which is largely driven by male power, often undermines the health risks posed.’

³⁰⁵ Nishi Mitra, ‘Sexual violence within intimate contexts of marriage: Integrating human rights and public health approach for gender-sensitive interventions’ in Nakray (ed), *Gender-based violence and public health* (n 297) 157.

³⁰⁶ Ibid 158.

³⁰⁷ Nishi Mitra, ‘Sexual violence within intimate contexts of marriage: Integrating human rights and public health approach for gender-sensitive interventions’ in Nakray (ed), *Gender-based violence and public health* (n 297) 153.

³⁰⁸ Ibid 152.

intersect and contribute towards sexual violence such as economic dependence of women, poverty, social stigma and lack of supportive environment.³⁰⁹ Further, since most marriages in India are arranged, there is little or no emotional connection between the new couple from the very beginning. As a result, the existence of sexual violence in such marriages also reflect the poor understanding of roles and obligations between the husband and wife.³¹⁰ It is argued that forced sex and its adverse physical, reproductive and mental health outcomes for women are less likely to occur if there is equality in marital relationships.³¹¹ However, in reality, in the Indian scenario, a woman is likely to be isolated if she talks openly about forced sex in her marriage. Once she is married she is less likely to leave an abusive marriage because there is minimal chance of her receiving any emotional and financial support from her parents.³¹²

The severity of experiences of sexual violence along with the adverse health related impacts on women also draws attention to the existing gaps in understanding the nature of varied forms of violence in Indian marriages. This further highlights, for instance, the need for having a systematic data collection practice to record sexual violence and its impact on women; the need to develop comprehensive policies which address structural factors such as prevailing gender biased social-cultural norms in society that allow for sexual violence to continue unabated; the need for developing effective monitoring mechanisms that allow for early identification of women who are victims or potential victims of sexual violence so that appropriate health and social protection interventions can be taken; the need to develop and strengthen existing institutions that are easily accessible to women and which can facilitate access to resources that enable them to walk out of abusive marriages.³¹³

³⁰⁹ Nishi Mitra, 'Sexual violence within intimate contexts of marriage: Integrating human rights and public health approach for gender-sensitive interventions' in Nakray (ed), *Gender-based violence and public health* (n 297) 151.

³¹⁰ Ibid.

³¹¹ K.G. Santhya and others, 'Consent and coercion: Examining unwanted sex among married young women in India' (2007) 33 (3) *International Family Planning Perspectives* 124, 130.

³¹² Nishi Mitra, 'Sexual violence within intimate contexts of marriage: Integrating human rights and public health approach for gender-sensitive interventions' in Nakray (ed), *Gender-based violence and public health* (n 297) 159.

³¹³ Ibid 153.

3.4 Conclusion

This chapter provided a brief overview of violence against women in contemporary India by highlighting some of the issues and challenges that women face in their daily lives due to India's complex social-cultural reality which often perpetuates and normalizes gender based violence. The challenges that women continue to face are the result of customs, practices, traditions which have remained more or less same since ancient times. This chapter highlighted those customs, traditions and practices through the examples of marital rape, under-reporting of crimes against women and the negative health impact of sexual violence on women which have been identified as some of the current challenges facing women in contemporary India. The examples used in this chapter also help in gauging the magnitude of other forms of violence against women in various life situations that result from the intersection of varied social-cultural factors. The examples used in this chapter not only highlight the issues and challenges around them (for instance, control over women's sexual choices, institutional barriers and health concerns) but also reflect upon the larger alarming situation of women in India which is often the result of a combination of family, caste, community, religion, values and ideas that give rise to various modes of oppression against women both within and outside the family. Further, the issues and challenges around the three examples are also closely interlinked with India's social-cultural landscape which is mostly tied to its traditional base that disregards women's individuality and restricts her roles and obligations only to the family setting. This is a major obstacle (as seen from the three examples) in ensuring not only equal rights to women but also in eradicating the varied forms of violence against women. Patriarchal values and ideas within the family structure not only restrict legislative changes (as seen in the case of marital rape) but also act as a hindrance in women being able to make their own life choices. The institutional barrier (as seen in the form of poor police response to sexual violence victims/survivors) is an extension of the patriarchal values and ideas that expect women to endure violence both within and outside the home. If women choose to speak up for their rights or try to challenge patriarchal norms, they bear the backlash of the family and society (this point is addressed in the next chapter).

The contemporary issues relating to violence against women in the Indian society generally explored in this chapter, leads to the more specific analysis of the three specific crimes against women, subject of this thesis. This analysis will show that these crimes - witch-hunting, honour killing and the devadasi system - are the result of customs, traditions and practices (briefly

highlighted in this chapter) that have existed for a long time and subordinated women through a host of factors such as caste, religion. These factors are responsible in one way or other for the oppression of women and have given legitimacy to a structure of violence that makes the present-day extreme forms of violence against women (addressed in the next chapter) appear as 'normal' practice. Note that, the contemporary issues and challenges relating to violence against women (including women belonging to marginalized sections) highlighted in this chapter and the further analysis undertaken on the three crimes in the next chapter remains incomplete without situating it within an intersectional framework which will help in the better understanding of the impact of customs, traditions and practices rooted in patriarchy and how they fundamentally affect not only the general approach towards women but also shape the broader response to varied forms of violence against women in India.

Chapter 4: Violence Against Women in India – Witch-Hunting, Honour Killing and The Devadasi System

Introduction

The previous chapter gave a brief description of violence against women in contemporary India and highlighted how the present-day issues and challenges that women face in relation to gender based violence are rooted in customs, practices, traditions that have largely continued unchecked since ancient times. The primary aim of this chapter is to highlight practices of witch-hunting, honour killing and the devadasi system in India that have often been left out from the discourse on violence against women. This chapter lists some of the most important reasons behind these three violent practices taking into consideration the social-cultural setup in which they take place.

In this backdrop, this chapter under Section 4.1, focuses on the practice of witch-hunting, the understanding of witchcraft beliefs, who are the victims and perpetrators of witch-hunting, what factors contribute towards witchcraft accusations and why the term ‘witch’ is often associated with women. Section 4.2 of this chapter discusses the practice of honour killing in the Indian context, what factors contribute towards such a practice, who is responsible for it and also what is the co-relation between the practice of honour killing and the social setting in which such a practice persists. Section 4.3 of this chapter focuses on the practice of the devadasi system, its meaning and origin, who this practice mostly affects and the factors that are responsible for the continuity of this practice. Section 4.4 concludes this chapter by making the argument how witch-hunting, honour killing and the devadasi system form part of structural violence against women in India.

4.1 Witch-Hunting

Killing and torturing of individuals in the name of harmful beliefs and practices associated with witchcraft has taken place in several societies across the world such as Europe, Africa, South Asia.³¹⁴ The belief in witchcraft has also given rise to serious human rights violations such as public beatings, banishment, and cutting of body parts. Such punishments are common in societies that strongly believe in sorcery, magic, superstition or attribute any misfortune to

³¹⁴ Wolfgang Behringer, *Witches and Witch-hunts: A Global History* (1st edn, Polity Press 2004) 11.

supernatural entities or malevolent spirits. Women, children, the elderly and persons with disabilities (such as persons with albinism) are some of the most affected people by witchcraft related violence in such societies.³¹⁵ But, despite such violations, witchcraft and witchcraft related killings are yet to be completely incorporated within the discourse on violence against women, especially, in the Indian context, as highlighted in this chapter.³¹⁶

In India, as per the National Crime Records Bureau (NCRB), between 2001 and 2014, a total of 464 women have been killed as a result of witchcraft allegations in the state of Jharkhand. Further, more than 2000 people have died in that same period across India due to witchcraft accusations.³¹⁷ In traditional societies, people practicing witchcraft are often equated with evil. It is believed that, such people can cause serious harm to others by using mystical powers, however, such beliefs are usually based upon fear and rumours.³¹⁸ As explained by Behringer, ‘The structure and persistence of witch-beliefs are regarded as a result of its anchoring in social life, its function for coping with situations of fear and danger, and of interpersonal conflict. Witch-beliefs structure the perception and simplify categorization of the environment, and serve as an organizing and relieving mechanism. Unexpected hardship or bad luck, sudden and incurable diseases, all can be accounted to the actions of “evil people”, to magical forces, sorcery or witchcraft.’³¹⁹

Witchcraft beliefs and practices are not uniform and tend to vary even within the same country.³²⁰ Nevertheless, the issue here is mainly associated with how such beliefs are acknowledged by the society at large.³²¹ Though, the practice of witchcraft is ‘real’ for those who believe in it, it is however, the larger community which brushes it away by not acknowledging it. This also results in ignoring the harm caused to those who are accused of

³¹⁵ ‘Witchcraft Accusations and Persecution; Muti Murders and Human Sacrifice: Harmful Beliefs and Practices Behind a Global Crisis in Human Rights’ (*The Witchcraft & Human Rights Information Network*, 2017) 1, 3 <<http://www.whrin.org/wp-content/uploads/2017/10/2017-UNREPORT-final.pdf>> accessed 30 March 2022.

³¹⁶ Ibid 4.

³¹⁷ Amitabh Srivastava, ‘Over 2000 women killed in India for practicing ‘black magic’ in 14 years’ (*India Today*, 20 June 2016) <<https://www.indiatoday.in/india/story/over-2000-women-killed-in-india-for-practicing-black-magic-in-14-years-15280-2016-06-20>> accessed 30 March 2022.

³¹⁸ Behringer, *Witches and Witch-hunts* (n 314) 2-3.

³¹⁹ Ibid 23.

³²⁰ Report of the Independent Expert on the enjoyment of human rights by persons with albinism (n 18) 3.

³²¹ Ibid.

practicing witchcraft.³²² However, the tendency to attribute misfortunes and hardships to occult forces or the work of an ‘evil eye’ is even found among the educated sections of society (this point will be further explained in the following sections). In short, the complexities related with the understanding of witchcraft or superstitious beliefs highlights a general reluctance among people to accept the existence of a natural cause behind an event.³²³ As explained by Lévy-Bruhl,

‘To the native mind what has occurred cannot be accidental. For example, if three women were sitting on a river bank, and an alligator pulled one of them into the water, this could not be by chance because, although there are many predators, and many women, a specific crocodile had attacked a particular woman. In conclusion, ‘someone must have incited this one to do it.’³²⁴

The following sections deal with questions such as, what is witchcraft, what is the understanding of witchcraft beliefs in India, who are the victims and perpetrators of witch-hunting, what are the factors that are behind witchcraft accusations and why often women are the main target of such accusations.

4.1.1 Defining Witchcraft

There is no universally accepted definition of the term ‘witchcraft’.³²⁵ However, both in academic and non-academic discussions, there are a number of words in varied languages that are put to use in order to explain this particular practice. For example, words such as witch, witch-hunting, magic, sorcery are used in the English language and words such as *dayan*, *dakan*, *chudail*, *ojha* are used in different Indian languages.³²⁶ But, despite the difficulty in finding a common ground with respect to a working definition of witchcraft that takes into

³²² Jill Schnoebelen, ‘Witchcraft allegations, refugee protection and human rights: a review of the evidence’ (*Policy Development and Evaluation Service United Nations High Commissioner for Refugees*, January 2009) 1, 2 <<https://www.unhcr.org/4981ca712.pdf>> accessed 30 March 2022.

³²³ Ibid.

³²⁴ Lucien Lévy-Bruhl, *Primitive Mentality* (1st edn, Beacon Press 1966) 50.

³²⁵ Behringer, *Witches and Witch-hunts* (n 314) 4; See also, Friday Mufuzi, ‘The Practice of Witchcraft and the Changing Patterns of its Paraphernalia in the Light of Technologically Produced Goods as Presented by Livingstone Museum, 1930s – 1973’ (2014) 5 (1) *Zambia Social Science Journal* 50, 54.

³²⁶ ‘Piecing Together Perspectives on Witch Hunting: A Review of Literature’ (*Partners for Law in Development*, 2013) 1, 10 <https://www.academia.edu/15476694/Piecing_Together_Perspectives_on_Witch_Hunting_A_Review_of_Literature> accessed 30 March 2022.

consideration all different practices across cultures, there have been some attempts to explain the phenomena of witchcraft. As per Evans-Pritchard,

‘The concept of witchcraft...provides [the Azande] with a natural philosophy by which the relations between men and unfortunate events are explained and a ready and stereotyped means of reacting to such events. Witchcraft beliefs also embrace a system of values, which regulate human conduct.’³²⁷

According to Stewart and Strathern, witchcraft can be understood as ‘the expression of malign power in a person’s body.’³²⁸ Similarly, the term ‘witch’ is often understood to mean a woman possessed by an evil spirit which gives her supernatural powers to bring about change in the course of nature. ‘Witch-hunting’ means the search for witches who are believed to use witchcraft against people with an intention to cause harm.³²⁹ Hutton, describes the term ‘witch’ in the following manner:

‘it is a person who uses non-physical means to cause misfortune or injury to other humans; they work to harm neighbours or kin rather than strangers and hence are a threat to their community; they earn social disapproval by working in secrecy and are motivated in action by malice and spite; they work within a tradition with their knowledge learnt from others; and they can be resisted by fellow humans who can use persuasion, counter-magic or punishment aided by a witch-finder to counter the witch.’³³⁰

The Report of the Independent Expert on the Enjoyment of Human Rights by Persons with Albinism on the expert workshop on witchcraft and human rights also highlighted the need to define and conceptualize an umbrella definition for the term ‘witchcraft’ at the international level that not only covers the varied practices associated with the phenomena but also focuses on the resulting harm and the obligation of States’ to protect the victims from such harm.³³¹

³²⁷ E.E. Evans-Pritchard, *Witchcraft, Oracles and Magic among the Azande* (1st edn, Clarendon Press 1937) 63.

³²⁸ Pamela J. Stewart and Andrew Strathern, *Witchcraft, Sorcery, Rumors and Gossip* (1st edn, Cambridge University Press 2004) 1.

³²⁹ Rachana Shrestha, ‘Witch-hunting: A Study of Cultural Violence Against Women with reference to Nepal and India’ (*International Institute of Social Studies*, December 2004) 1, 1-2 <<https://thesis.eur.nl/pub/8400>> accessed 30 March 2022.

³³⁰ Ronald Hutton, ‘Anthropological and Historical Approaches to Witchcraft: Potential for a New Collaboration?’ (2004) 47 (2) *Historical Journal* 413, 421-423.

³³¹ Report of the Independent Expert on the enjoyment of human rights by persons with albinism (n 18) 15.

Additionally, the following point was also emphasized when considering defining the term ‘witchcraft’:

‘Witchcraft is a deeply rooted reality, engrained in societies that serve as a system of explanation as well as of exploitation of misfortune. It is fuelled by misbeliefs in supernatural powers and misconception of public health issues. Witchcraft is a global phenomenon that is part of a wider system of oppression that often amounts to a criminal enterprise.’³³²

Hence, attempts have been made either to define witchcraft or arrive at a working definition by focusing on different aspects related to the phenomena per se. However, the concept of witchcraft still remains ambiguous mainly because of the beliefs associated with it that operate differently in different social-cultural setup and also because most of such beliefs are founded upon fear, gossip and superstition.³³³ But, an important element behind the concept of witchcraft or the various terms that are employed in order to understand it are the practices that take place as a result of a particular belief system. Existence of witches or magic are all part of a society’s belief system that has been built and strengthened over a long period of time.³³⁴ It is this belief system that creates a general opinion (among most people across cultures) which associates witchcraft practices with evil. This belief system describes people practising witchcraft as those who invoke supernatural powers to inflict harm on others. Moreover, this belief system provides ‘answers’ to any mysterious event.³³⁵ The main concern here is with how a particular belief system should be addressed in relation to witchcraft accusations, since, the implications of such a belief system often gives rise to serious violations of human rights ranging from beatings and banishment to physical torture and murder.

³³² Report of the Independent Expert on the enjoyment of human rights by persons with albinism (n 18).

³³³ Stewart and Strathern, *Witchcraft, Sorcery, Rumors and Gossip* (n 328) 2; See also, Philip Alston, ‘Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions’ (*UN Human Rights Council*, 27 May 2009) 1, 14 <<https://www.refworld.org/docid/4a3f526d2.html>> accessed 30 March 2022 - ‘Witchcraft has denoted many different practices or beliefs at different times and in diverse cultures. In some cultures, belief in witchcraft is rare; in others, people see it as every day and ordinary, forming as it does an integral part of their daily lives. Such beliefs are not confined to any particular strata of society, whether in terms of education, income or occupation. Both the concept and the terminology also vary from one scholarly discipline to another.’

³³⁴ Piecing Together Perspectives on Witch Hunting (n 326).

³³⁵ Alston, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (n 333).

4.1.2 Understanding the Concept of Witch-beliefs in India

Belief in the notion of evil and other superstitions such as '*nazar*' (evil eye), are the root cause behind labelling of women as witches in India.³³⁶ Although, rumour and gossip (beside social-economic factors) play their respective roles in witchcraft allegations; superstitious belief is at the core of such allegations and is a major factor behind the existence of witchcraft allegations in the first place.³³⁷

Like most religions, Hinduism also deals with questions of good and evil. Most scholars attribute the origin of witchcraft to the Atharva-Veda (one of the sacred texts of Hinduism).³³⁸ According to the Bhagavad Gita (part of Hindu epic Mahabharata), people are either good or evil by birth. It is said that, those who are born good will be saved (attain salvation) and those who are born evil are destined to remain bound.³³⁹ There are individuals who are evil or associated with evil (people with magical powers, witches) according to Hinduism. These men and women possess magical powers.³⁴⁰ Men who possess these powers have access to special incantations and can bring harm to others by reciting them. But, they can also cure people by using these powers. These men have control over god, spirits as well as people and have the ability to remove evil and suffering from anyone. These men are often asked to help people who are either possessed or protect them from someone who intends to do them any harm.³⁴¹

Witches who are mostly women also possess magical powers. It is said that, during the day it is quite difficult to differentiate between a witch and an ordinary woman. However, during night, witches gain their power. They dance around naked and roam near cremation grounds.³⁴²

³³⁶ Mathur, *Witchcraft, Witches and Social Exclusion* (n 17).

³³⁷ *Ibid.*

³³⁸ R. N. Saletore, *Indian Witchcraft A Study in Indian Occultism* (1st edn, Abhinav Publications 1981) 4-6; Maurice Bloomfield, *Hymns of the Atharva-Veda, Together with Extracts from the Rituals Books and Commentaries* (1st edn, Greenwood Press 1969) 56; Aravind Jeyakumar Moniraj, 'An Overview of the Practice of Witchcraft in India' (*Academia.edu*) 1, 5 <https://www.academia.edu/34254885/An_Overview_of_the_Practice_of_Witchcraft_in_India> accessed 30 March 2022 - 'The Atharva-Veda contains mainly mantras used in witchcraft or sorcery, in the curing of diseases, for destruction of enemies, etc. They can be classified as the hymns, meant to secure long life, get good wishes of the deities, ward off misfortune, pardon the misdeeds, obtain the kingship, as well as others. Similarly, these hymns also include charms to cure diseases and heal wounds; imprecations against demons, sorcerers, and enemies; charms to obtain a husband, wife, or son; and charms to obtain prosperity in house, field, cattle, business, gambling, and kindred matters.'

³³⁹ Othmar Gächter, 'Evil and Suffering in Hinduism' (1998) 93 (4/6) *Anthropos* 393, 396.

³⁴⁰ Christopher John Fuller, *The Camphor Flame: Popular Hinduism and Society in India* (1st edn, Princeton University Press 1992) 236-239.

³⁴¹ Gächter, *Evil and Suffering in Hinduism* (n 339).

³⁴² *Ibid.*

As per Khanapurkar, a witch attacks a man by calling out his name when he is travelling through forests at night. If the man responds to her call, then either illness or any other misfortune is bound to follow. It is believed that, witches could also transform themselves into any animal or bird and even after their death they could still attack people.³⁴³ Apart from the general belief in the notion of evil, both tribal and the non-tribal communities in India also believe in the common superstition of ‘*nazar*’ (evil eye). This ‘evil eye’ is often attributed to those who are suspected of being jealous by nature of other people’s wealth, success, health etc.³⁴⁴ As observed by Spiro:

‘It is believed that small children are at risk of falling ill due to the power of the evil eye. But, there is a generation change in this belief. My mother-in-law believes in the evil eye more strongly than me. Older people believe that you have to pass a container of water, made of glass or steel, around the baby’s head seven times in a clockwise direction. Then you take it outside through the front door, not the back, to a crossroad and pour the water in the middle of the roads, without looking at it. This ritual is done to ward off the presence of evil around the baby.’³⁴⁵

If the ‘evil eye’ falls on adults, it brings illness along with other hardships and sometimes even causes death. In India, witches are often accused of casting the ‘evil eye’ mostly on children and men. It is said that, children who are still very young are at high risk of being harmed by witches.³⁴⁶ People are asked to be careful of ‘old, sterile women and of women who had a miscarriage. When a child is frequently ill, it is usual in Indian villages to attribute the illness to the work of a witch.’³⁴⁷ The superstitious beliefs of people also gets highlighted by the many practices done in order to ward off the effects of the ‘evil eye’, such as, carrying of some form of protection with them: ‘amulets, rings, threads which people wear around their wrists, lockets which has mantras (incantations) etc.’³⁴⁸ People also perform different rituals either on their own or take the help of an *ojha* (witch-doctor) to drive away evil out of their homes.³⁴⁹

³⁴³ D.P. Khanapurkar, ‘The Aborigines of South Gujarat’ (PhD thesis, The University of Bombay 1944) 62.

³⁴⁴ Mathur, *Witchcraft, Witches and Social Exclusion* (n 17).

³⁴⁵ Alison M. Spiro, ‘Najar or Bhut—Evil eye or ghost affliction: Gujarati views about illness causation’ (2005) 12 (1) *Anthropology & Medicine* 61, 63.

³⁴⁶ Sinha, Adivasis, Gender and the ‘Evil Eye’ (n 29) 128; See also, Robert Gabriel Mac-Machado, ‘Witchcraft and Witchcraft Cleansing among the Vasava Bhils’ (2010) 105 (1) *Anthropos* 191, 199.

³⁴⁷ Gächter, *Evil and Suffering in Hinduism* (n 339) 397.

³⁴⁸ *Ibid*; See also, Saletore, *Indian Witchcraft A Study in Indian Occultism* (n 338).

³⁴⁹ Helene Stork, ‘Mothering Rituals in Tamil Nadu: Some Magico-Religious Beliefs’ in Julia Leslie (ed), *Roles and Rituals for Hindu Women* (1st edn, Motilal Banarsidass Publishers 1992) 101.

Thus, the beliefs and practices associated with witchcraft has been more or less a cultural phenomenon in India.³⁵⁰ But, there has been minimal research done on various aspects of witchcraft in India (for example, what is witchcraft in the Indian context and when it originated, is there any similarity in its practice across different states in India, how the practice came to be associated only with women belonging to dalit and tribal communities) and therefore, not much can be said with absolute certainty.

Studies on witchcraft in India (though limited in number) which have been carried out in the disciplines of gender studies, sociology, tribal studies etc., have relied heavily on the accounts from the colonial period to gather information about the general understanding of the practice. Note that, the colonial administrators made an attempt to record and investigate the practice of witchcraft and witch-hunting mainly to control and regulate the colonized people.³⁵¹ Most colonial accounts are also in the form of trial records that are focussed mainly on deciding who was responsible for killing of a suspected witch in the village.³⁵² These trial records do not mention other details such as, any social-cultural tension in the village, reasons behind accusation, misfortune or hardship faced by the victim. More importantly, since most accounts are of instances wherein the suspected witch has been killed, it is impossible to get a clear picture of the entire incident.³⁵³ Therefore, any information acquired from such sources and other records of the colonial period does not give a complete picture of witchcraft beliefs and practices. However, since most scholars begin their analysis of witchcraft in India from the colonial period, primarily focusing on accounts from western and central parts of colonial India, it is important to acknowledge the same here. As per the available literature, the tribal communities of western and central colonial India believed in the existence of witches, magic, spirits and witch-hunters.³⁵⁴

‘There is no genuine Santhal (a tribe) who does not believe in witches. An old Oraon (a tribe) saying is often recounted that the world is full of disembodied spirits as a tree is full of leaves. The characteristics of a “witch” are fairly common across tribes: they eat people, destroy cattle, crop, can induce illness, have the evil eye or evil mouth. What

³⁵⁰ Shamsheer Alam and Aditya Raj, ‘The Academic Journey of Witchcraft Studies in India’ (2017) 97 (21) *Man in India* 123, 125.

³⁵¹ Piecing Together Perspectives on Witch Hunting (n 326) 35-36.

³⁵² Skaria, *Women, Witchcraft and Gratuitous Violence in Colonial Western India* (n 20) 114.

³⁵³ *Ibid.*

³⁵⁴ Piecing Together Perspectives on Witch Hunting (n 326) 40; See also, Shashank Sinha, ‘Witch-Hunts, Adivasis, and the Uprising in Chhotanagpur’ (2007) 42 (19) *Economic and Political Weekly* 1672, 1673.

can differ is the range of myths and legends about the origins of the witch that exist from tribe to tribe and contribute to the community understanding.’³⁵⁵

As per historical records, most tribal communities in this region (western and central colonial India) also differentiated between good and bad/evil magic.³⁵⁶ Use of magic by invoking spirits was mainly a male activity and was employed for hunting purposes. Use of magic by women was considered problematic mainly because of the assumption that they had a weak nature and therefore could easily get attracted to evil spirits. Women were therefore, not allowed to perform magic or take part in sacrifices meant for pleasing spirits.³⁵⁷ Apart from hunters, other men also made use of this magic such as the *bhopas* (witch-doctors) in the western parts of colonial India (people believe in the power of the *bhopas* even today in this region).³⁵⁸ Different *bhopas* had different specializations such as curing illness, selling remedies made of local herbs. Other *bhopas* were more like priests who worshipped local deities and conducted animal sacrifices during festivals to please the spirits and deities. These *bhopas* also performed rituals for individuals in the village who claimed to have undergone a sudden hardship or illness.³⁵⁹ Some *bhopas* only specialized in the task of finding witches.³⁶⁰ It is said that by the mid-twentieth century, the *bhopas* were considered important figures within the village community (in the western parts of colonial India) because they did the ‘dangerous and difficult work’ of identifying *dakans* (witches) who posed a threat to the entire community.³⁶¹ Several beliefs existed with respect to women being witches such as, the *dakan* (witch) ‘usually happens to be the most notorious, quarrelsome and troublesome woman in a family, or one gifted with the longest broadest and sharpest tongue in a family.’³⁶²

³⁵⁵ Piecing Together Perspectives on Witch Hunting (n 326) 40; See also, Paul Olaf Bodding, *Studies in Santal Medicine and Connected Folklore* (Asiatic Society reprint 1986) 38.

³⁵⁶ Brishti Banerjee, ‘Witch Beliefs and Violence Against Women Among Tribal Communities in the State of West Bengal’ (M.A. Social Work Dissertation, Tata Institute of Social Sciences, Mumbai 2017) 29.

³⁵⁷ Sinha, Adivasis, Gender and the ‘Evil Eye’ (n 29) 131 - ‘The exclusion of Kharia (tribe) women from religious festivals and ritualistic observances was due to the tribals’ horror of the menstrual blood, which attracted evil spirits. For similar reasons, there were restrictions against women accompanying funeral processions to burial place or cremation ground or against their going to *sarnas* (sacred groves) or even attending sacrifices.’

³⁵⁸ Skaria, Women, Witchcraft and Gratuitous Violence in Colonial Western India (n 20) 115-116; See also, Helen Roberts, ‘India takes aim at the witch doctors who brand children with hot irons’ *The Guardian* (Rajasthan, 11 June 2018) <<https://www.theguardian.com/global-development/2018/jun/11/india-fight-to-end-child-branding>> accessed 30 March 2022.

³⁵⁹ Skaria, Women, Witchcraft and Gratuitous Violence in Colonial Western India (n 20) 116.

³⁶⁰ Ibid.

³⁶¹ Y. V. S. Nath, *Bhils of Ratanmal: An Analysis of the Social Structure of a Western Indian Community* (Maharaja Sayajirao University 1960) 197-198.

³⁶² Skaria, Women, Witchcraft and Gratuitous Violence in Colonial Western India (n 20) 120.

The *bhopa* (witch-doctor) was consulted either by the person suffering himself or by his relatives. At times, the village headman too approached the *bhopa*, if many in the village were affected by a ‘witch’.³⁶³ Once consulted, the *bhopa* revealed if the concerned ailment was due to the magic practiced by a witch or not. In situations where the presence of a witch was suspected, the *bhopa* would then identify the witch through his powers and then proceed to take action.³⁶⁴ The suspected witch before she was punished was asked to prove her innocence by undergoing different tests in front of the entire village. If found guilty she was either beaten, paraded naked, fed human excreta or burned alive.³⁶⁵ The following are some of the tests conducted in order to ascertain whether a woman was a witch or not: the suspected woman was forced to dip her hand in boiling oil and if her hand got burned then she was pronounced guilty; she was forced to hold her breath under water while an arrow was shot into the distance and brought back by someone; she was put in a bag and thrown in the river and if she tried to struggle she was found to be guilty.³⁶⁶ In addition, there was also the ‘swinging test’, which has been noted by several scholars in which,

‘the eyes of the suspected witch were first covered up with a cloth filled with chillies, since ‘a single glance’ of an enraged witch could cause certain death upon whom it falls. She was then strung up by her feet from a tree and a slow fire was lit on the ground below her. She was swung just above the fire through most of the day and taken down only at night, when her feet were kept tied. This usually continued up to three days, and if the woman survived this ordeal she was set free.’³⁶⁷

The brutality of the tests, the role of the *bhopa/ojha* and the overall belief system of communities in witchcraft and its related practices has continued from the colonial period into contemporary India.³⁶⁸ Today, cases of witchcraft are being reported from the following states in India – Jharkhand, West Bengal, Assam, Bihar, Rajasthan, Haryana, Chhattisgarh, Odisha,

³⁶³ Skaria, *Women, Witchcraft and Gratuitous Violence in Colonial Western India* (n 20).

³⁶⁴ *Ibid.*

³⁶⁵ Mathur, *Witchcraft, Witches and Social Exclusion* (n 17) 290-291.

³⁶⁶ Mathur, *Witchcraft, Witches and Social Exclusion* (n 17) 291; See also, Sundar, *Divining Evil* (n 29) 436.

³⁶⁷ Mathur, *Witchcraft, Witches and Social Exclusion* (n 17) 291; Mac-Machado, *Witchcraft and Witchcraft Cleansing among the Vasava Bhils* (n 346) 196-197; Skaria, *Women, Witchcraft and Gratuitous Violence in Colonial Western India* (n 20) 124.

³⁶⁸ Ila Ananya, ‘Witch-hunts in India: We don’t talk about this form of violence against women’ (*Firstpost*, 05 Nov 2016) <<https://www.firstpost.com/india/witch-hunts-in-india-we-dont-talk-about-this-form-of-violence-against-women-3089712.html>> accessed 30 March 2022.

Madhya Pradesh, Gujarat, Maharashtra and Andhra Pradesh.³⁶⁹ The next section highlights how the practice of labelling a woman as a witch is the result of prevailing unequal gender relations in the Indian society.

4.1.3 The Gender Dimension of Witch-hunts in India

The practice of labelling women as witches and thereafter inflicting various forms of physical violence upon them is hardly a new phenomenon in India.³⁷⁰ Women belonging to the marginalized communities are often the main target of such practices, especially dalit and tribal women.³⁷¹ There are a number of factors that play a crucial role in understanding why dalit and tribal women are labelled as witches. Superstition is the most common factor behind labelling a woman as a witch since it acts as a powerful tool in the hands of the patriarchal and feudal setup to maintain subjugation of marginalized women.³⁷² Superstitious beliefs which are strengthened by folklore and myths allows malicious intent to spread rapidly within a community and creates a sense of fear which is used by powerful groups to dominate and control women.³⁷³ An example of a superstitious belief prevalent in the state of Rajasthan, India is that women belonging to the dalit community are more vulnerable to being attracted by dark spirits because they clean human waste.³⁷⁴

³⁶⁹ Ministry of Women and Child Development, Report of the High Level Committee vol 1 (n 16) 89.

³⁷⁰ Vanashree, *Witchcraft* (n 29) 224.

³⁷¹ Ministry of Women and Child Development, Report of the High Level Committee vol 1 (n 16) 89; See also, Centre for Alternative Dalit Media, 'Research Study on Violence against Dalit Women in Different States of India by studying the Sources of Materials that are Available and Conducting Interview of the Perpetrators, Victims and Witnesses' (*National Commission for Women New Delhi*) 1, 34 <<http://ncw.nic.in/content/research-study-violence-against-dalit-women-different-states-india-studying-sources>> accessed 30 March 2022.

³⁷² Vanashree, *Witchcraft* (n 29) 226.

³⁷³ Vanashree, *Witchcraft* (n 29) 226-227; See also, Dev Nathan, Govind Kelkar and Yu Xiaogang, 'Women as Witches and Keepers of Demons - Cross-cultural Analysis of Struggles to Change Gender Relations' (1998) 33 (44) *Economic And Political Weekly* 58, 60 - 'The Santhal myth of the origin of witchcraft ascribes it to the struggle between the genders, between men and women, in the family and in Santhal society as a whole. One day the village men assembled. We are men, they said, why are we disobeyed? if we say a word or two to women, they reply with twenty words of anger. We can bear this state no longer. Then they said, let us go to Marang buru (God of Forest) and learn an art so that these women will respect us more. At midnight they met in the forest and called to Marang buru. 'Grandfather', they said, many men are so harassed that they have come to see you. Marang buru came to them. What is troubling you, grandchildren? he asked. They told of their trouble and implored him to teach them how to keep their womenfolk in order. As the myth goes, the women came to know that the men had approached Marang buru to teach them something. The women got the men drunk, dressed up in men's clothes and tricked Marang buru into teaching them. Marang buru then taught them the incantations and gave them the power of 'eating men'. The next day when the men came, Marang buru realised that he had been tricked by the women. He then made the men expert in the art of witch-finding.'

³⁷⁴ Mathur, *Witchcraft, Witches and Social Exclusion* (n 17) 295.

Apart from superstition there are other factors that are responsible behind labelling a woman as a witch.³⁷⁵ Property dispute is one of the main reasons among them. Labelling a woman as a witch is seen as one of the easiest ways to get hold of her property. Mostly widows and single women are accused of being witches by one of their relatives with the intention of grabbing property.³⁷⁶ Infertility in women in India is viewed as a ‘disability’ and is seen as another reason for labelling a woman as a witch. Any physical deformity in a woman is also a reason for accusing her of being a witch.³⁷⁷ Another important factor is that of personal conflict and caste rivalry. Because of personal enmity or when a woman protests sexual advances by a man belonging to dominant caste, she is branded as a witch.³⁷⁸ Labelling here is done as a form of punishment to those women who protest against the ‘traditional’ norms of behaviour. Women who take a stand or fight against ill-treatment are accused by men as sharp-tongued, bad tempered and of immoral character and in order to suppress their ‘unnatural’ behaviour they are labelled as witches.³⁷⁹ As noted by Chaudhuri,

‘To teach someone a lesson, to exert their influence over someone, they might start to malign the reputation of the individual, accusing her of practicing witchcraft. These people, they take advantage of the superstition of the tribals. Who are these people who get accused? They could be relatives of individuals over whom the powerful leader wants to exert his influence . . . it could be a woman who has some money, property. Then if someone in the neighbourhood runs a fever or has malaria etc., then these people (the accusers) come together and start making trouble. They start spreading rumours about the accused woman . . . the illness was started by the woman. Naturally the illiterate people in the village do not understand the politics. All they understand is witchcraft. They then join the harassment against the accused woman.’³⁸⁰

As noted above, witchcraft accusations are rarely made against total strangers.³⁸¹ Mostly, these allegations are made either by close relatives within the family or by neighbours. Accusations

³⁷⁵ Madhu Mehra and Anuja Agrawal, ‘Witch-hunting in India? Do We Need Special Laws?’ (2016) 51 (13) Economic and Political Weekly 51, 53; See also, Shivani Satija, Govind Kelkar and Dev Nathan, ‘Witches: Through Changing Contexts Women Remain the Target’ (2015) Working Papers id:7186, eSocialSciences, 1, 5 <<https://ideas.repec.org/p/ess/wpaper/id7186.html>> accessed 30 March 2022.

³⁷⁶ Mehra and Agrawal, Witch-hunting in India? (n 375) 53; See also, Archana Mishra, *Casting the Evil Eye – Witch Trials in Tribal India* (1st edn, Namita Gokhale Editions 2003) 43.

³⁷⁷ Mathur, Witchcraft, Witches and Social Exclusion (n 17) 295-296.

³⁷⁸ Centre for Alternative Dalit Media, Research Study on Violence against Dalit Women (n 371) 57.

³⁷⁹ Vanashree, Witchcraft (n 29) 224.

³⁸⁰ Chaudhuri, Women as Easy Scapegoats (n 29) 1226.

³⁸¹ Satija, Kelkar and Nathan, Witches (n 375) 4.

are made against women who have been involved in a prior conflict or attempted to protest against any form of harassment. More importantly, women are chosen as targets from vulnerable groups because they are less likely to retaliate and that no one in the community would step forward to help them.³⁸² The answer to the question as to why dalit and tribal women are targeted in witch hunts also lies in understanding the structure of society in which such a practice takes place.³⁸³ In a patriarchal society like India, men control gender relations through various rules and regulations that are imposed on women and when women do not abide by them they are punished. Punishment ranges from rape, domestic abuse and other gender based crimes. Witchcraft accusation is another example of such a punishment.³⁸⁴ The assumption that women are essentially to be kept under control and that their behaviour is to be monitored at all times is one of the core beliefs of the Indian social system.³⁸⁵ As noted by Roy,

‘Witches, a personification of evil, are almost always women; and witch-doctors, the symbols of power and good, are always men. The relationship between witches and the witch-doctor is clearly a reflection of deeply embedded patriarchal values within society. These reinforce the idea that it is the men who are authorized to control and prevent women from going astray; their power is strong, necessary, and positive, and any power that a woman acquires is regarded with suspicion, and seen as negative and destructive. In other words, men use their power constructively and legitimately, whereas women’s power is unauthorized, harmful, and needs to be controlled by men. Men and women are conditioned to believe and perpetuate this belief, with serious consequences for gender equity.’³⁸⁶

According to the United Nations Special Rapporteur on Violence Against Women, ‘dalit and tribal women are frequent victims of multiple and intersecting forms of discrimination, as well as violence.’³⁸⁷ Although, violence against dalit women is mostly committed by upper caste men, there is some evidence to show that dalit men are also responsible for perpetrating violence against dalit women in order to maintain control over them. Dalit women, therefore,

³⁸² Ibid.

³⁸³ Ministry of Women and Child Development New Delhi, ‘Report of the High Level Committee on the Status of Women in India vol 3’ (Government of India, June 2015) 697, 1011 <<https://wcd.nic.in/sites/default/files/Vol%203.compressed.pdf>> accessed 30 March 2022.

³⁸⁴ Puja Roy, ‘Sanctioned Violence: Development and the Persecution of Women as Witches in South Bihar’ (1998) 8 (2) *Development in Practice* 136, 137.

³⁸⁵ Vanashree, *Witchcraft* (n 29) 224.

³⁸⁶ Roy, *Sanctioned Violence* (n 384) 143.

³⁸⁷ Manjoo, *Report of the Special Rapporteur on violence against women, its causes and consequences* (n 192) para 15.

become victims of patriarchal mindset both inside and outside their own community. The patriarchal suppression of dalit women by members of her own community also explains instances wherein family members are the ones who accuse them of practicing witchcraft.³⁸⁸ Tribal communities in India also exhibit patriarchal suppression of women, for example in the Santhal tribe, women are banned from taking part either in family or community rituals.³⁸⁹ Women are not allowed to worship spirits. They are not allowed to take part in sacrifices or enter the holy shrine (place of worship). Though, unmarried girls are allowed to clean the place of worship, they are never allowed to participate in performing rituals. In short, by virtue of being denied the right to worship, women in a way never gain full membership of the tribe.³⁹⁰ Therefore, both in public and family rituals, Santhal women are excluded due to their inferior position in the community. Also, since, men alone could worship spirits they began persecuting women who disobeyed them by labelling them as witches.³⁹¹

The existing power structure, which victimizes a woman mostly because of her assertive nature also makes her go through various forms of social exclusion.³⁹² As already mentioned, once a woman is branded a witch, she is subjected to extreme torture, which often results in her death. However, if she survives, she continues to be humiliated and harassed. Note that, the act of labelling itself violates a woman's dignity.³⁹³ Social exclusion or alienation associated with witchcraft accusations is another facet of the patriarchal mindset in the society which compels women to feel devalued. Once the stigma of being labelled as a witch is attached to a woman, she is forced to leave her family and village and live a secluded life.³⁹⁴ Witchcraft accusations have wide ranging impact and consequences. It compels women to feel alienated, fearful and helpless. The act of labelling itself, at times, forcefully displaces women from their occupations which puts them under great economic pressure.³⁹⁵ Those who choose to stay in the community are either left with no access to common resources or are further tortured and humiliated. Unable to bear the humiliation, many women commit suicide or are forced to forever live outside the village.³⁹⁶ In short, labelling women as witches and the accompanying violence

³⁸⁸ Ministry of Women and Child Development, Report of the High Level Committee vol 3 (n 383) 1005.

³⁸⁹ Mullick, Gender Relations and Witches among the Indigenous Communities of Jharkhand (n 29) 353.

³⁹⁰ Ibid.

³⁹¹ Nathan, Kelkar and Xiaogang, Women as Witches and Keepers of Demons (n 373) 61.

³⁹² Mehra and Agrawal, Witch-hunting in India? (n 375).

³⁹³ Ibid.

³⁹⁴ Mathur, Witchcraft, Witches and Social Exclusion (n 17) 297.

³⁹⁵ Roy, Sanctioned Violence (n 384) 144.

³⁹⁶ Rakesh K. Singh, 'Witch-Hunting: Alive and Kicking' (2011) 17 (1) Women's Link 16, 16.

leaves them in a state of deprivation and poverty. With no support from family and community women often are left with nothing. Social exclusion, therefore, is one of the most significant aspects of witch-beliefs which not only reinforces a woman's inferior social, economic and political position in society but also discourages her to assert herself and fight for her rights.³⁹⁷

4.1.4 Concluding Remarks

The belief that women are easy victims for evil/evil spirits to prey upon is present in both tribal and non-tribal communities in India. As a result, women have been labelled as witches in the past and continue to be labelled even today. While women are labelled as witches, men are always the witch-hunters. This practice essentially suggests that witchcraft accusations are gender specific and that such accusations benefit patriarchal ideology by allowing it to preserve its power and authority. The labelling of women as witches and men as witch-hunters only re-confirms the 'othering' of women as inferior or subordinate based on notions of male supremacy. It can also be argued that, the so-called hunting of witches is done to punish women who attempt to break free from the male dominated structures of power and force them to conform to traditional concepts of power which favour men.³⁹⁸ Women, especially, those belonging to the weaker sections of society are considered easy targets and therefore, their suppression is seen as a means to re-inforce dominant male supremacy in the society. In other words, the motivating force behind witchcraft accusations is always the preservation of the structural gender inequalities. As mentioned in the above sections, because of the intersection of a number of factors, women belonging to only dalit and tribal communities are targeted as witches and not other higher caste women. The intersectional approach, here, is relevant because it helps in further understanding the argument often advanced by radical feminists i.e., that women are compelled to accept the status quo in society and are often punished for revolting against it. Further, by only targeting dalit and tribal women as witches, there is again a further division which is created in the already existing 'other' (which comprises of all women) with a new category now added i.e., the 'dalit other' and the 'tribal other'.

Having discussed the various aspects associated with witch-hunting, the next section deals with the practice of honour killings in India.

³⁹⁷ Ibid 18.

³⁹⁸ Catharine A. MacKinnon, 'Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence' (1983) 8 (4) Signs 635, 636.

4.2 Honour Killing

Increasing incidents of honour killings in India have not only raised concerns over the issue of women's life choices domestically but also brought shame to India globally.³⁹⁹ However, despite an increase in such killings, the debate on honour killing as part of violence against women has not been given adequate space either by the media or policy makers. Honour killings have not yet been contextualized as part of gender based violence in the Indian setting because practices such as honour killings are often 'socially-tolerated' or defended within the framework of culture/tradition.⁴⁰⁰ The primary concern therefore, is to create a space for dialogue that re-examines the whole understanding of violence against women in India bearing in mind social practices that affect domestic as well as international human rights of women. This section, hence, approaches the practice of honour killing from a socio-legal perspective by focussing on the connection among a range of contributing factors such as caste, religion, gender relations, social control and legal norms in order to understand why this practice exists in India.

4.2.1 Definition

There is no universal definition of honour killing because of a lack of consensus over the meaning of the term 'honour'.⁴⁰¹ The term 'honour' is understood differently in different social and cultural settings. Consequently, the true meaning of the phrase is often contested as it carries different connotations for different people. In fact, this definitional issue is also closely related with the debate on using the term 'honour' with the term 'killing' to identify a social practice.⁴⁰² Considering the definitional issue, honour killing can be understood in the following ways:

'Honour killing also known as 'customary killing' is the murder of a family or clan member by one or more family members where the murderers, essentially the community at wider scope thinks that the victim through his/her actions has brought

³⁹⁹ Farhat and Sole, Nothing Honourable in Honour Killings (n 21).

⁴⁰⁰ Aisha K. Gill, 'Introduction: 'Honour' and 'Honour'-Based Violence: Challenging Common Assumptions' in Gill, Strange and Roberts (eds), *"Honour" killing and violence* (n 32) 1.

⁴⁰¹ Purna Sen, 'Crimes of honour', value and meaning' in Welchman and Hossain (eds), *'Honour': Crimes, Paradigms and Violence Against Women* (n 32) 49.

⁴⁰² Rochelle L. Terman, 'To Specify or Single Out: Should We Use the Term "Honor Killing"?' (2010) 7 (1) *Muslim World Journal of Human Rights* 1, 7.

disgrace to the family honour. The motives of honour killings differ from culture to culture, all having varying rationales for committing these crimes.’⁴⁰³

Chakravarti defines honour killing as follows:

‘The theme of violence surrounding marriages or relationships not arranged by the parents of the partners, particularly of the woman/girl, has caused considerable concern in India over the last few years. The violence surrounding these self-arranged marriages, often called love marriages in South Asia, have come to be (mis-)termed ‘honour crimes’ (and in the case of homicide ‘honour killings’) in a wide range of locations – including in West Asia and South Asia, and in diaspora communities from these areas.’⁴⁰⁴

Various attempts have been made to define and describe the complex problem of honour killing. However, in such attempts to provide a definition, scholars have often restricted the understanding of honour killing to only specific acts, thereby neglecting the fact that the concept of ‘honour’ even in particular social settings can be interpreted to include varied acts. For example, the definition given by Chakravarti, restricts the understanding of honour killing in India only to marriages, whereas, the so-called dishonour leading to crimes can also be the result of certain acts such as: ‘loss of virginity outside marriage, asking for divorce, leaving the family or marital home without permission, causing scandal or gossip in the community and falling victim to rape.’⁴⁰⁵

Basically, honour killings are barbaric acts of murder which are committed usually either by male members of the family or the local community mostly against female family members (there have been cases of even men being attacked) on the belief that their ‘actions’ have brought dishonor to the family and/or community.⁴⁰⁶ The practice of honour killing, in patriarchal societies, is believed to be the result of deeply engrained norms of male authority often resulting in female subordination. Strict female obedience to male superiority in such

⁴⁰³ Ravindra Kumar, ‘Honour Killing: An Indian Perspective’ (International Conference on Law, Education, Business and Interdisciplinary Studies [LEBIS-17], London, March 20-21, 2017) 141, 141.

⁴⁰⁴ Uma Chakravarti, ‘From fathers to husbands: of love, death and marriage in North India’ in Welchman and Hossain (eds), *‘Honour’: Crimes, Paradigms and Violence Against Women* (n 32) 308.

⁴⁰⁵ Kanika Sharma, ‘Understanding the Concept of Honour Killing within the Social Paradigm: Theoretical Perspectives’ (2016) 21 (9) IOSR Journal of Humanities and Social Science 26, 27.

⁴⁰⁶ Item 12 - Integration of the human rights of women and the gender perspective (n 22).

societies takes place primarily through the family setup which strengthens inequality by way of maintaining total separation of male and female roles resulting in social, political and economic oppression of women.⁴⁰⁷ Men often go to the extent of murdering women, if they feel that their ‘actions’ have tainted the family name. Killing the woman in question is deemed morally necessary to restore the family’s lost ‘honour’ in most traditional societies.⁴⁰⁸

Honour killing is a global phenomenon and has been reported from countries like Bangladesh, United Kingdom, Brazil, Ecuador, Egypt, India, Israel, Italy, Jordan, Pakistan, Turkey, United States.⁴⁰⁹ With respect to India, it is believed that, one in five cases reported internationally comes from India.⁴¹⁰ Note that, the National Crime Records Bureau (NCRB) has only started collecting data on honour killings from January 2014 and has no data available prior to that period.⁴¹¹ Moreover, as per the NCRB, only a total of 288 cases of honour killings have been officially reported between 2014 - 2016.⁴¹² On the other hand, as per some experts, close to 1000 honour killings have been taking place every year in India.⁴¹³ The latest NCRB data of 2019 only recorded 24 cases of honour killings in the country, however, the same report placed a total of 4806 adult victims (men and women) in a separate category of ‘kidnapping and abduction’ citing elopement/love relationship as the primary reason.⁴¹⁴ Note that, young couples elope because their families often disapprove of their relationships due to differences of caste, class or religion. These differences of caste, class or religion between young couples are some of the main reasons behind honour killings in India (this point is further explained through the discussion in the following sections). The NCRB should, therefore, widen the scope of its data on honour killings to not only include murder committed in the name of honour but also other offences that take place in the name of preserving family/community honour. Honour killings have been mostly reported from the states of Haryana, Punjab, Rajasthan, Uttar

⁴⁰⁷ Cohan, Honor Killings and the Cultural Defense (n 30) 191.

⁴⁰⁸ Fiske and Rai, *Virtuous violence* (n 32) 82.

⁴⁰⁹ Law Commission of India, ‘Prevention of Interference with the Freedom of Matrimonial Alliances (in the name of Honour and Tradition): A Suggested Legal Framework’ (*Government of India*, August 2012) para 1.3 <<https://lawcommissionofindia.nic.in/reports/report242.pdf>> accessed 30 March 2022.

⁴¹⁰ Ministry of Women and Child Development, Report of the High Level Committee vol 1 (n 16) 84.

⁴¹¹ Ministry of Home Affairs New Delhi, ‘Action Taken in Cases of Honour Killings’ (*Government of India*) <<https://mha.gov.in/MHA1/Par2017/pdfs/par2015-pdfs/rs-040315/990.pdf>> accessed 30 March 2022.

⁴¹² 288 honour killing cases reported since 2014 (n 21).

⁴¹³ ‘More than 1000 honour killings in India every year: Experts’ *The Times of India* (04 July 2010) <<https://timesofindia.indiatimes.com/India/More-than-1000-honour-killings-in-India-every-year-Experts/articleshow/6127338.cms>> accessed 30 March 2022.

⁴¹⁴ ‘Crime in India 2019: Statistics vol 1’ (*National Crime Records Bureau, Ministry of Home Affairs New Delhi, Government of India*) <<https://ncrb.gov.in/sites/default/files/CII%202019%20Volume%201.pdf>> accessed 30 March 2022.

Pradesh, Bihar, Telangana, Andhra Pradesh and Tamil Nadu in India.⁴¹⁵ Despite having data from various sources on the number of honour killings in the country, it is still difficult to provide an accurate figure here.⁴¹⁶

The practice of honour killing has become a tool for societies based on the patriarchal mindset to ensure continuance of its social norms without any ‘deviation’. As a result, practices like honour killings have also become an instrument for social regulation.⁴¹⁷ Such practices get normalized as part of general behaviour of members in the society and it is expected from every member to act/ behave in a particular manner because failure to do so would risk inviting sanctions from the society at large.⁴¹⁸ Therefore, if once the family or the community decides that there has been an attack on the family’s ‘honour’, the next ‘logical’ step for them is to restore the lost ‘honour’ by any means necessary regardless of their actions being right or wrong. As mentioned earlier, family or community actions often result in the death of the female family member who has brought ‘dishonour’ by going against accepted social norms.⁴¹⁹ It is believed that, only by taking the life of the person responsible for tainting the family’s ‘honour’ can the male members of the family or community reclaim their lost respect in the eyes of the society.⁴²⁰ The following section examines how the twin concepts of ‘honour’ and ‘shame’ play a pivotal role in the understanding of honour killings in the Indian society.

4.2.2 Notion of Honour and Shame

In India, control over women, their sexuality and reproductive behaviour has been systematic largely because of various social practices. Different factors such as family, caste, religion have contributed towards reinforcing and legitimizing patriarchal mindset and brought about inequality between the sexes.⁴²¹ This systematic effort to undermine women and their rights needs to be understood in the debate on violence against women in India. The notion of ‘honour’ and ‘shame’ is one such tool to further widen the gap between the sexes by attributing

⁴¹⁵ Saumya Bansal, Rising Cases of ‘Honour Killings’ in India’ (*Media India Group*, 26 September 2018) <<https://mediaindia.eu/social-vibes/rising-cases-of-honour-killings-in-india/>> accessed 30 March 2022.

⁴¹⁶ Ministry of Women and Child Development, Report of the High Level Committee vol 1 (n 16) 84.

⁴¹⁷ Cohan, Honor Killings and the Cultural Defense (n 30) 193.

⁴¹⁸ Ibid.

⁴¹⁹ Cohan, Honor Killings and the Cultural Defense (n 30).

⁴²⁰ Ibid.

⁴²¹ Ministry of Women and Child Development, Report of the High Level Committee vol 1 (n 16) 70; See also, Inderpal Grewal, ‘Outsourcing Patriarchy: Feminist Encounters, Transnational Mediations and The Crime of ‘Honour Killings’’ (2013) 15 (1) *International Feminist Journal of Politics* 1, 4.

and ensuring strict compliance of gender specific roles with different implications for both men and women.⁴²² Based on honour codes, men are required to regulate and protect their family's 'honour' whereas women are responsible for keeping the family's 'honour' intact and not bring shame through their 'actions' because it is believed that even a single violation stigmatizes not only the family but the entire community.⁴²³ It is interesting to note that sanctions for violating cultural or religious codes are only meant for women whereas there is absolutely no mention of any societal punishment when men act against the law while protecting/defending the so-called honour.⁴²⁴

The control of sexuality through the notion of 'honour' and 'shame' as explained above is also mentioned by Coomaraswamy, Special Rapporteur on Violence against Women (1994-2003):

'Frameworks of 'Honour' and its corollary 'shame' operate to control, direct and regulate women's sexuality and freedom of movement by male members of the family... 'Regulation' of such behaviour may in extreme cases involve horrific direct violence – including 'honour killing', perhaps the most overt example of the brutal control of female sexuality – as well as indirect subtle control exercised through threats of force or the withdrawal of family benefits and security.'⁴²⁵

As stated earlier, the term 'honour' has been problematic to define mainly because it is understood differently across cultures. 'Honour' often has overlapping meanings and is also associated with words such as pride, dignity, reputation, virtue depending upon community norms and values.⁴²⁶ Further, in defining 'honour', scholars have also taken into account the

⁴²² Neerja Ahlawat, 'Marriage Norms, Notion of Honor and Khap in Haryana' (2014) 67 (1-2) *The Eastern Anthropologist* 99, 103.

⁴²³ Sharma, Understanding the Concept of Honour Killing within the Social Paradigm (n 405); See also, Prem Chowdhry, *Contentious Marriages, Eloping Couples: Gender, Caste and Patriarchy in Northern India* (1st edn, Oxford University Press 2010) 17-18 - 'Being the repository of the family and caste honour, a woman is rendered an object of protection and violence at the same time. The fear of losing this honour makes the men rationalize and justify masculine aggression and violence against her. Violence against her within the four walls of the house in the capacity of a daughter, sister, wife and mother is widely accepted and legitimized under the patriarchal order and ultimately transcends caste divisions. Violence against her has a public face and is always committed in response to the cultural expectations of the larger community.'

⁴²⁴ Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (2nd edn, Cambridge University Press 2016) 518-519; See also, Satnam Singh Deol, 'Honour Killings in India: A Study of the Punjab State' (2014) 3 (6) *International Research Journal of Social Sciences* 7, 7-8.

⁴²⁵ Radhika Commaraswamy, 'Violence Against Women and 'Crimes of Honour'' in Welchman and Hossain (eds), *'Honour': Crimes, Paradigms and Violence Against Women* (n 32) xi.

⁴²⁶ Aisha K. Gill and Aytar Brah, 'Interrogating Cultural Narratives About 'Honour'- Based Violence' (2013) 21 (1) *European Journal of Women's Studies* 72, 74.

concept of 'shame'. Societies that attribute a higher value to 'honour' are not only concerned with safeguarding or maintaining it but also make simultaneous efforts to avoid 'shame'.⁴²⁷ The concept of shame is also vital in understanding the reasons for honour killings in patriarchal societies, because, 'actions' that bring upon shame to family or community often demand for restoring the lost 'honour' through brutal punishments targeted against the violators (mostly women). Therefore, there is a constant struggle to maintain 'honour' on one hand and avoid 'shame' on the other.⁴²⁸

Interestingly, the notion of 'honour' and 'shame' applies differently to men and women.⁴²⁹ As stated by Gill,

'Honour codes apply to both men and women, but place different obligations upon the sexes. Men are encouraged to be generous, hospitable and responsive to threats to their honour, displaying strength, power and toughness in the face of potential shame... Meanwhile, women are expected to maintain their own as well as their family's honour by behaving appropriately through deference, fidelity, modesty and chastity.'⁴³⁰

Furthermore, men are duty bound to defend their family and community's 'honour' by regulating the behaviour of their women by any means necessary. Thus, societies with deep rooted honour-based value systems, strongly advocate for regulating women's movement and remodelling of their behaviour to suit social and traditional norms to safeguard the so-called honour.⁴³¹

Since, most cases of honour killings especially in north India are attributed directly or indirectly to Khap panchayats, the following section, focuses on the social-cultural impact of Khap panchayats in *jat* dominated areas and examines their role in strengthening and maintaining

⁴²⁷ Aisha K. Gill, 'Introduction: 'Honour' and 'Honour'-Based Violence: Challenging Common Assumptions' in Gill, Strange and Roberts (eds), *"Honour" killing and violence* (n 32) 2.

⁴²⁸ Ibid; See also, Cohan, Honor Killings and the Cultural Defense (n 30) 183 - 'Honour seems to be an earned trait...One can both acquire and lose honour. In a sense, honour is a latent trait. It is noticed more in its absence than in its presence. When honour is present in a person, others do not give it much thought; it does not stand out as a trait until someone commits a dishonorable act or in some other way suffers dishonour.'

⁴²⁹ Steve Darné, 'Hindu Men Talk about Controlling Women: Cultural Ideas as a Tool of the Powerful' (1994) 37 (2) *Sociological Perspectives* 203, 207-208.

⁴³⁰ Aisha K. Gill, 'Introduction: 'Honour' and 'Honour'-Based Violence: Challenging Common Assumptions' in Gill, Strange and Roberts (eds), *"Honour" killing and violence* (n 32) 5-6.

⁴³¹ Sulakshana Banerjee Mukherjee, 'Honour Killing - A Cataclysm in the Name of Honour' (2017) 2 (2) *International Journal of Legal Research and Studies* 9, 12.

both caste and gender hierarchy in the Indian society. As far as the southern part of India is concerned, there is no hard evidence of influence of Khap panchayats like north India over this entire region, however, cases of honour killings are reported from here too. In most cases of honour killings in south India, the victims have been targeted by their own family members who took it upon themselves to protect their family's lost 'honour'.⁴³²

4.2.3 History of Khap Panchayats

In March 2010, the Karnal District Court, in a landmark judgment awarded death sentence to five members of a family for killing their daughter and her husband, while the head of the local Khap who had ordered the killings was awarded life sentence.⁴³³ According to the Court, 'Khap Panchayats have functioned contrary to the Constitution, ridiculed it and have become law into themselves.'⁴³⁴ The decision by the Court was considered landmark because this was the first case in which head of a Khap panchayat was convicted and the first case in which capital punishment was awarded for the crime of honour killing in India.⁴³⁵ It is also important to note that there was no specific legislation on honour killing at the time when the matter was decided by the District Court.

However, despite the 2010 judgment, several such cases of honour killings have continued to take place.⁴³⁶ Honour killings have revealed the existence of two parallel systems of governance, one which is operated on legal rules and principles and the other which relies upon community beliefs often rooted in customs, traditions and religion. Khap panchayats as a community-based organization in present day India represent the system of governance which is based on community beliefs and practices that operate on feudal notions of 'honour' and 'shame'.

Khap panchayats are loosely defined as 'gotra (clan) based social organizations of *jats* that operate mostly in the northern states of India which support caste endogamy and *gotra*

⁴³² Rohini Swamy, 'Progressive South India is catching up with the North when it comes to honour killings' (*The Print*, 23 September 2018) <<https://theprint.in/politics/progressive-south-india-is-catching-up-with-the-north-when-it-comes-to-honour-killings/123234/>> accessed 30 March 2022.

⁴³³ *In the High Court of Punjab and Haryana at Chandigarh* (Murder Reference No. 2 of 2010, Criminal Appeal No. 479-DB of 2010 and Criminal Revision No. 2173 of 2010).

⁴³⁴ Kumar, Honour Killing (n 403) 144-145.

⁴³⁵ *Ibid.*

⁴³⁶ 'Khaps, Castes and Violence: Decrees by khap panchayats and violence against dalits paint a gruesome picture of rural Haryana' (2010) 45 (18) *Economic and Political Weekly* 7, 7.

exogamy.⁴³⁷ There is, however, no concrete data available on Khaps but their origin is often traced back to the time when the *jat* community arrived in India (again there is also no consensus on this among scholars).⁴³⁸ It is believed that the *jat* community came to India from Sindh (present day Pakistan) in the 11th century CE and gradually became agricultural cultivators like the local population. This also led to the mixing of the *jat*'s clan-based social institution with the caste-based system of the local population.⁴³⁹ It is said that during the Mughal rule (1526 - 1761), the *jats* emerged as a powerful community because of the control they exercised over landless peasants, artisans, tenants and other castes by collecting heavy taxes from them for the Mughals.⁴⁴⁰ The tenants who were mostly dalits or members of the backward castes were forced by the *jat* landlords 'to take up sharecropping on the fields, to work as bonded labourers and to supply the means and tools of production.'⁴⁴¹ Post India's independence, the situation did not change much in *jat* dominated areas of Haryana, Punjab and western Uttar Pradesh as *jats* continued to hold most of the land and any attempt to introduce land reform measures proved to be ineffective, since, by now *jat* landlords themselves had gained political power and were capable enough to prevent reforms on the ground.⁴⁴²

With respect to the claim that Khap panchayats existed in the Mughal period or that they have a long historical origin, as mentioned earlier, there is no concrete evidence available on this issue. As per one view, 'the village panchayat was not an autonomous or independent organization in the Mughal period, and its area and reach of work were limited and when rural panchayats were neither autonomous nor independent then how is it possible to consider the autonomy and influence of Khap Panchayats in this period?'⁴⁴³ On the other hand, as per some scholars, Khaps made use of the powerful *jats* in the Mughal period to maintain their role as

⁴³⁷ Caste Endogamy and Gotra Exogamy will be explained and analysed in the next section. Vidya Vati, 'Past and Present of Khap Panchayats: Social and Cultural Perspectives' in Deepa Awasthi (ed), *Khap Panchayat – Women and Honour Killings* (1st edn, Kalpaz Publications 2016) 39.

⁴³⁸ Ibid 40-41.

⁴³⁹ Ajay Kumar, 'Khap Panchayats: A Socio-Historical Overview' (2012) 47 (4) Economic and Political Weekly 59, 60 - 'What has to be noted is that the *jat* settlers were not transformed into an agrarian, caste-based feudal society in the course of a long process in which their gotra-based institutions were eroded. Instead, they adapted to the relatively advanced land revenue and caste based feudal system of their new habitat with their social institutions based on kinship intact. Thus, the gotra-based institutions of the khap continued to survive and coexist with a feudal social and political structure.'

⁴⁴⁰ Suraj Bhan Bharadwaj, 'Myth and Reality of the Khap Panchayats: A Historical Analysis of the Panchayat and Khap Panchayat' (2012) 28 (1) Studies in History 43, 58-59.

⁴⁴¹ Kumar, Khap Panchayats (n 439) 61.

⁴⁴² Ibid 61-62.

⁴⁴³ Bharadwaj, Myth and Reality of the Khap Panchayats (n 440) 65.

intermediaries in the collection of land revenue from the peasants (as per this view it appears that Khaps were in existence in some form even before the arrival of the *jats* and that they even negotiated with them at some level).⁴⁴⁴

Having briefly mentioned the history of the *jat* community which currently dominates most of the Khaps in northern India, the next section focuses on two significant social-cultural aspects i.e., caste endogamy and *gotra* exogamy which are the two most important reasons cited behind honour killings in India.

4.2.4 Caste Endogamy and Gotra Exogamy

a) Caste Endogamy

Caste endogamy⁴⁴⁵ is often considered a crucial element for maintaining the caste system in India.⁴⁴⁶ According to Dumont, ‘the regulation of marriage is an expression of the principle of separation: castes separate themselves from one another by prohibiting marriages outside the group.’⁴⁴⁷ The practice of endogamy through the regulation of marriages ensures the survival of the caste system in the Hindu society. Further, by advocating marriages in one’s own caste group, the Hindu social order remains intact and avoids the inter-mixing of castes.⁴⁴⁸

The Khap panchayats are opposed to young people marrying into other castes. Inter-caste marriages are considered as a taboo. The Khaps with their orthodox mindset believe that marriages are only possible within the same community and caste group. Those who oppose social beliefs by violating the caste barrier and marry outside the caste are severely punished.⁴⁴⁹ But, despite the fear of Khap retaliation in Haryana and other adjacent states, increase in urbanization and the opening up of educational and employment opportunities has led to an increase in the interaction between young men and women from different caste backgrounds.

⁴⁴⁴ Kumar, Khap Panchayats (n 439) 61.

⁴⁴⁵ ‘Endogamy’ (*Britannica*) <<https://www.britannica.com/topic/endogamy>> accessed 30 March 2022 - ‘Endogamy, also called in-marriage, is the custom enjoining one to marry within one’s own group. Caste endogamy refers to marrying within one’s own caste.’

⁴⁴⁶ Uma Chakravarti, ‘From fathers to husbands: of love, death and marriage in North India’ in Welchman and Hossain (eds), *‘Honour’: Crimes, Paradigms and Violence Against Women* (n 32) 309.

⁴⁴⁷ Louis Dumont, *Homo Hierarchicus: The Caste System and Its Implications* (1st edn, Oxford University Press 1980) 109.

⁴⁴⁸ Susan Bayly, *Caste, Society and Politics in India from the Eighteenth Century to the Modern Age* (1st edn, Cambridge University Press 1999) 52.

⁴⁴⁹ Paro Mishra, ‘Sex Ratios, Cross-region Marriages and the Challenge to Caste Endogamy in Haryana’ (2013) 48 (35) *Economic and Political Weekly* 70, 72-73.

As a result, there has been a blurring of caste distinctions which has led to inter-caste marriages, especially between dalits and upper castes.⁴⁵⁰ However, inter-caste marriages have also increased caste anxiety resulting in backlash from the *jat* community.⁴⁵¹ Moreover, ‘the fear of inter-caste marriages creating a big social upheaval is unsurprising as caste is a system in which differences in the distribution of economic and political power are expressed through restrictions.’⁴⁵² The dominant castes have resorted to caste violence against the dalit community in order to ‘show them their right place’ for violating the social code of marriage. There also has been an increase in violence against dalit women in recent years who have been deliberately targeted by dominant caste men to re-assert their caste dominance.⁴⁵³

b) Gotra Exogamy

Under the Hindu religion, the term ‘*gotra*’ broadly refers to persons who are believed to have a common male ancestry and therefore, are treated as part of the same extended family. *Gotra* assumes significance especially in determining Hindu marriage alliances as marriages within the same *gotra* are prohibited by custom. The term *gotra* is also often equated with the word clan.⁴⁵⁴ The Hindu customary rules regulating marriages, however, stand in direct conflict with Indian laws as far as marriages within the same *gotra* are concerned. ‘*Sagotra*’ marriages or marriages within the same *gotra* are valid under the law by virtue of Section 2 of the Hindu Marriage Disabilities Removal Act, 1946.⁴⁵⁵ As per Section 2, ‘Notwithstanding any text, rule or interpretation of the Hindu Law or any custom or usage, a marriage between Hindus, which is otherwise valid, shall not be invalid by reason only of the fact that the parties thereto - (a) belong to the same *gotra*.’⁴⁵⁶ Even the Hindu Marriage Act, 1955 does not prohibit marriages

⁴⁵⁰ Reena Kukreja, ‘Caste and Cross-region Marriages in Haryana, India: Experience of Dalit cross-region brides in Jat households’ (2018) 52 (2) *Modern Asian Studies* 492, 502.

⁴⁵¹ *Ibid* 493.

⁴⁵² Suvira Jaiswal, *Caste: Origin, Function, and Dimensions of Change* (1st edn, Manohar Publishers 1998) 34.

⁴⁵³ Ritwika Mitra, ‘Dalit women to march across seven Haryana districts against caste violence’ *The New Indian Express* (24 June 2018) <<http://www.newindianexpress.com/nation/2018/jun/24/dalit-women-to-march-across-seven-haryana-districts-against-caste-violence-1832746.html>> accessed 30 March 2022.

⁴⁵⁴ ‘Gotra: Indian Caste System’ (Britannica) <<https://www.britannica.com/topic/gotra>> accessed 30 March 2022 - ‘Gotra, lineage segment within an Indian caste that prohibits intermarriage by virtue of the members descent from a common mythical ancestor, an important factor in determining possible Hindu marriage alliances. The practice of forbidding marriage between members of the same *gotra* was intended to keep the *gotra* free from inherited blemishes and also to broaden the influence of a particular *gotra* by wider alliances with other powerful lineages.’

⁴⁵⁵ Law Commission of India, *Prevention of Interference with the Freedom of Matrimonial Alliances (in the name of Honour and Tradition): A Suggested Legal Framework* (n 409) para 2.4.

⁴⁵⁶ The Hindu Marriage Disabilities Removal Act 1946, s 2.

between same *gotra*.⁴⁵⁷ Yet, despite these legislations, both caste endogamy and *gotra* exogamy are upheld by a number of rules and practices relating to marriages in India.⁴⁵⁸ Customary rules on marriages in north India adopt and follow the principle of *gotra* exogamy i.e., a person is not allowed to marry another if both belong to the same *gotra*. Further, certain caste groups also follow a rule of three or four *gotra* exogamy i.e., ‘a person is not permitted to marry into his or her own *gotra*, nor into the *gotra* of his mother, his father’s mother, or the mother’s mother.’⁴⁵⁹

Furthermore, there is also the concept of territorial exogamy which is followed in addition to *gotra* exogamy in marriages.⁴⁶⁰ Territorial exogamy is seen mostly among the *jat* community in northern India where community leaders forbid marriages not only within the same village but also with every adjoining village.⁴⁶¹ As a result, in light of the rules on caste endogamy, *gotra* and territorial exogamy, marriages should take place within one’s caste; if marriage takes place within the same caste, it should not be done between people belonging to the same *gotra*; further, even when *gotra* of two people are different, marriage between people living in the same village or adjoining villages is strictly prohibited.⁴⁶² Marriages within the same *gotra* or within the same village are considered as incest which is a social taboo as decreed by the Khap panchayats.⁴⁶³ As per the principle of territorial exogamy, men and women who belong to the same *gotra* within a particular village and all members of the same *gotra* in the adjoining villages are related to one another and, therefore, there is no possibility of marriage between such members.⁴⁶⁴

Significantly, villages which strictly uphold *gotra* exogamy, also often use terms like ‘brother’ and ‘sister’ even for persons who are not related by blood in order to create a feeling of a close

⁴⁵⁷ The Hindu Marriage Act 1955, s 29(1) - ‘A marriage solemnized between Hindus before the commencement of this Act, which is otherwise valid, shall not be deemed to be invalid or ever to have been invalid by reason only of the fact that the parties thereto belonged to the same *gotra* or *pravara* or belonged to different religion, castes or sub-divisions of the same caste.’

⁴⁵⁸ Kukreja, Caste and Cross-region Marriages in Haryana, India (n 450) 493-494.

⁴⁵⁹ Prem Chowdhry, ‘Caste Panchayats and the Policing of Marriage in Haryana: Enforcing Kinship and Territorial Exogamy’ (2004) 38 (1-2) Contribution to Indian Sociology 1, 4.

⁴⁶⁰ Suruchi Thapar-Björkert and Gurchathen Sanghera, ‘The Ascendancy of the Khap Panchayats in Contemporary India: Gender, Caste, Globalisation and Violence’ [2014] 34 Intersections <http://intersections.anu.edu.au/issue34/thapar-bjorkert_sanghera.htm> accessed 30 March 2022.

⁴⁶¹ Chowdhry, Caste Panchayats and the Policing of Marriage in Haryana (n 459).

⁴⁶² Thapar-Björkert and Sanghera, The Ascendancy of the Khap Panchayats in Contemporary India (n 460).

⁴⁶³ Ibid.

⁴⁶⁴ Paul Hershman, *Punjabi Kinship and Marriage* (1st edn, Hindustan Pub. Corp 1981) 133-34.

knit community. In such villages, the emphasis again is more on the term ‘brother’ who is responsible for protecting the ‘honour’ of all his ‘sisters’ regardless of biological ties.⁴⁶⁵ Cultural concepts like, ‘honour’ and brotherhood are created in patriarchal societies in order to maintain and safeguard traditional norms which mostly concern themselves with marriage prohibitions.⁴⁶⁶ Considering the ‘oversensitive’ nature of inter-caste and *sagotra* marriages whose transgressions supposedly bring inexcusable shame to both family and community, the next section highlights the procedure, if any, behind the dispute resolution mechanism adopted by the Khap panchayats when faced with resolving such issues.

4.2.5 Working of Khap Panchayats

Khap panchayats have been declared unconstitutional and illegal by the Supreme Court of India in very strong words. In *Arumugam Servai v State of Tamil Nadu*, the court made the following observation:

‘We have in recent years heard of “Khap Panchayats” which often decree or encourage honour killings or other atrocities in an institutionalised way on boys and girls of different castes and religion, who wish to get married or have been married, or interfere with the personal lives of people. We are of the opinion that this is wholly illegal and has to be ruthlessly stamped out. There is nothing honourable in honour killing or other atrocities and, in fact, it is nothing but barbaric and shameful murder. Other atrocities in respect of personal lives of people committed by brutal, feudal-minded persons deserve harsh punishment. Only in this way can we stamp out such acts of barbarism and feudal mentality. Moreover, these acts take the law into their own hands, and amount to kangaroo courts, which are wholly illegal.’⁴⁶⁷

Despite the ruling by the Supreme Court, Khap panchayats continue to usurp the judicial powers of the courts and make decisions that affect lives of individuals. Khaps are mainly unelected bodies mostly composed of village elders belonging to the dominant castes of a given area who exercise influence over others.⁴⁶⁸ Though little has been written about how Khap

⁴⁶⁵ Chowdhry, Caste Panchayats and the Policing of Marriage in Haryana (n 459) 5.

⁴⁶⁶ Prem Chowdhry, ‘Redeeming ‘Honour’ through Violence: Unravelling the Concept and its Application’ (2010) CEQUIN 1, 5 <<http://cequinindia.org/wp-content/uploads/2018/01/Honour-killings-by-Prem-Choudhury.pdf>> accessed 30 March 2022.

⁴⁶⁷ (2011) 6 SCC 405.

⁴⁶⁸ Mehnaz Najmi, ‘Socio-Political Role of Khap Panchayat in India’ in Deepa Awasthi (ed), *Khap Panchayat – Women and Honour Killings* (Kalpaz Publications 2016) 56.

panchayats function, some scholars are of the opinion that there are certain fundamental aspects which are common in the running of all Khaps. For instance, when families fail to resolve disputes they refer the matter to their local Khap panchayat. These disputes could be related to property rights, marriage etc.⁴⁶⁹ Further, as explained by Chowdhry,

‘At every social level, panchayat action begins when leading men of a group, meet to deal with a problem that affects that group. Those who convene the meeting are ones who feel endangered by the problem and those who feel involved in it attend it. A panchayat meeting usually attracts a lot of men. As caste fellows these men have the right to hear and to be heard.’⁴⁷⁰

As Khap panchayats do not form part of the formalized local self-government system in India, it is the village elders who devise rules for governing themselves and for everyone else to follow.⁴⁷¹ Caste related issues are often referred to Khap panchayats for a final decision. Especially, inter-caste marriages call for a larger participation from village elders belonging to all dominant castes considering the ‘criminal’ nature involved in the issue. Greater the problem, greater is the participation in the gatherings of the Khap panchayat.⁴⁷² Any matter before the Khap is decided when all or most of the presiding elders reach a consensus. Once a decision is reached, Khap panchayats unite people on the basis of family, caste, *gotra*, community, religion etc., in order to ensure compliance of its decision. In other words, by gathering wider public support to its ‘rulings’, Khaps not only ensure swift enforcement of its decisions but also add validity to their existence and need in the region.⁴⁷³ For this, the concept of ‘community honour’ is often brought in as a strategy to highlight the possible destruction caused to tradition, customs and rituals, if violations go unpunished.⁴⁷⁴

There is no formal mechanism of appeal from a decision of the local Khap. But, say, if a man is dissatisfied with the decision of the local Khap (note that, mostly men attend Khap meetings and even if women are party to a dispute, they are represented by the male members of the family), then, if he is able to exert influence, he can try to persuade the elders to reconsider his

⁴⁶⁹ Ralph Herbert Retzlaff, *Village Government in India: A Case Study* (1st edn, Asia Publishing House 1962) 18.

⁴⁷⁰ Chowdhry, *Contentious Marriages, Eloping Couples* (n 423) 98.

⁴⁷¹ *Ibid* 97.

⁴⁷² Chowdhry, *Contentious Marriages, Eloping Couples* (n 423) 97.

⁴⁷³ *Ibid* 99.

⁴⁷⁴ Chowdhry, *Contentious Marriages, Eloping Couples* (n 423) 98.

case or refer it to a larger Khap.⁴⁷⁵ More importantly, these meetings of the Khap are controlled by dominant caste elders who in situations of a conflict with members of the lower caste are in a position to exercise pressure on them to abide by the decision of the Khap. Khap panchayats forcefully implement their orders against lower caste groups either through economic sanctions or physical violence.⁴⁷⁶ Following are some of the punishments given by the Khap panchayats for violating ‘social codes’:

‘Fines (nominal or substantial) to be deposited in a common fund of the panchayat, ritual expiation, public humiliation (ranging from blackening of the face, to rubbing the victim’s nose into the dust, shaving of the head and dipping the victim’s nose in human urine), forcing him or her to host a feast; subjecting the victim to a beating; forcing him or her to visit the elders in the village and give a public assurance not to err in the future; banishment from the caste society; dissolving a valid marriage.’⁴⁷⁷

Therefore, Khap panchayats as autonomous, non-transparent, extra judicial bodies often use force to impose far reaching sanctions in order to preserve feudal-minded notions of family and ‘community honour’.

The dominance of Khap Panchayats can be attributed not only to the issues of social stratification but also to the trust placed by those relying upon and participating in this informal and customary conflict resolution mechanism. Though, formal state law and courts exist, it is the concept of community justice that is given more importance over the formal justice system. Community justice through informal conflict resolution mechanisms such as Khap panchayats is considered easy to negotiate, understand and implement unlike formal court proceedings. Further, community justice is also deeply infused within local traditions, culture and religious norms that appear more familiar to an individual than legal rules and procedures in a courtroom. The main belief here is that any matter that affects a local community should be dealt by members of that community only.

⁴⁷⁵ M.C. Pradhan, *The Political System of the Jats of Northern India* (1st edn, Oxford University Press 1966) 22-23.

⁴⁷⁶ Retzlaff, *Village Government in India* (n 469) 21; See also, Kukreja, Caste and Cross-region Marriages in Haryana, India (n 450) 503.

⁴⁷⁷ Bhupendra Yadav, ‘Khap Panchayats: Stealing Freedom?’ (2009) 44 (52) *Economic and Political Weekly* 16, 17.

4.2.6 Concluding Remarks

The above sections have explored the problem of violence against women through the practice of honour killings in India. It has argued that violence against women in India requires a more serious examination especially in light of practices such as honour killings. The problem lies in the understanding of violence against women in a society in which men still hold power to make decisions both within and outside the family structure. As explained in above sections, honour killing takes place in the name of preserving a perverse perception of either group or individual 'honour'. Honour killings have been justified by mostly leaning on social norms and their so-called legitimacy, however, such practices have only shown the feudal mindset prevalent in the society. The notion of 'honour' and 'shame' coupled with the patriarchal family structure in India has only underlined the position men have held within the family and the restrictions they have placed on the freedom and movement of women both within and outside the household. In order to protect the 'honour' of the family, men often monitor their unmarried daughters and restrict their interactions with other men. These restrictions are placed upon young girls even before they reach puberty. Post marriage, it is the husband who monitors the movement of his wife outside the household. As observed by Derné,

'It is the tradition of our place that women here are not left independent. Women here are not free. They are under control. But they can roam around with my desire. If I give my permission, she can go to the movies but not alone. She can travel somewhere for pilgrimage, but she goes on the desire of her husband. Even this is according to her age. If she is young, then she will not be allowed to go anywhere.'⁴⁷⁸

The reasons behind honour killings in India are rooted in the gender biased beliefs that have continued from the ancient period. These beliefs have largely contributed towards the subordinate position of women in India. Women have been denied equal opportunity in every sphere such as education, employment, marital rights, rights over property. The assumptions, beliefs, practices associated with gender within the household have given rise to violence against women. Further, as noted by Derné,

'The meaning attributed to gender does not follow mechanically from family structure, gender structure, or caste structure, but is constituted in day-to-day discourse. To protect the honour that is the basis of family alliances, many men feel constrained to continue to demand that their female relatives remain restricted to the home. Most men also

⁴⁷⁸ Derné, Hindu Men Talk about Controlling Women (n 429) 208.

recognize the advantages they gain from women's subordination, and they seek to maintain their superordinate position.⁴⁷⁹

Having explained some of the crucial aspects related to honour killings as part of violence against women, the next part of this chapter deals with the devadasi system.

4.3 The Devadasi System

Gender as a concept has often been used in traditional societies to construct identities, dictate relationships and establish principles to govern various aspects of social life such as sexuality, marriage and property.⁴⁸⁰ Most social practices in traditional societies are even tailored around a certain perception of gender.⁴⁸¹

In the Indian context, social practices (witch-hunting, honour killing etc.) that are condemned by feminist scholars as oppressive in nature, demonstrate how gender is used to build hierarchies and clearly mark out the difference in power relations between men and women.⁴⁸² But, this distortion of gender either remains hidden or is ignored despite repeated incidents of violence against women that are carried out in the name of social-cultural norms. Further, neglecting to recognize the intersection of other social markers such as caste, class with gender has brought the fight against gender inequality in India to almost a standstill.⁴⁸³ As explained by Torri,

‘Feminist scholars have persuasively argued for the analysis of race, class and gender as intersecting and interlocking systems of oppression. Focusing on the mechanisms of intersection across caste and gender allows for exploring how individuals negotiate, resist, and struggle against inequalities. In the Indian context, the caste system is an important aspect of the social sphere. The hierarchy and characteristics that govern the caste system constrain life changes gained through acquiring skills. Intersection of caste

⁴⁷⁹ Ibid 221.

⁴⁸⁰ Maria Costanza Torri, ‘Abuse of Lower Castes in South India: The Institution of Devadasi’ (2009) 11 (2) *Journal of International Women's Studies* 31, 31.

⁴⁸¹ Ibid 31-32 - ‘As an organizing principle, gender is constituted simultaneously through the deployment of gendered rhetoric, symbols, and images and through the allocation of resources and power along gender lines.’

⁴⁸² Torri, *Abuse of Lower Castes in South India* (n 480) 32.

⁴⁸³ Ibid.

and gender lead to women having less prestige and respect compared with the men even within the same caste.⁴⁸⁴

Therefore, though gender is used as a primary tool for organizing social relations in most societies, in India, caste plays a significant role in ‘determining both the social division of labour as well as the sexual division.’⁴⁸⁵ For instance, under the devadasi system, young girls belonging to the dalit community are ‘married’ to a Hindu deity and then sexually exploited by temple priests and members of the higher caste.⁴⁸⁶ As noted by Torri,

‘The dedication usually occurs before the girl reaches puberty and requires the girl to become sexually available for community members. Traditionally, it is believed that these girls are “serving” society as “ordained” by the goddess. In other words, “the devadasis are courtesans in God’s court”. Due to her sacred condition and her belonging to the divinity, a devadasi cannot be married to one particular man. Instead, she is a property of a divinity that benevolently concedes her to the whole community. This concept is well summarized by a saying that: “a devadasi is servant of God but wife of the whole town.”’⁴⁸⁷

Addressing the practice of dedicating young girls to Hindu temples requires an analysis through a combination of concepts of gender, sexuality, caste and religion.⁴⁸⁸ In this backdrop, the following sections will address some of the key aspects of the devadasi system in India, keeping in mind the intersection and integration of the above mentioned concepts.

4.3.1 Defining the Devadasis

The devadasi system is a social-cultural practice that exists mostly in the southern states of India (Maharashtra, Karnataka, Andhra Pradesh, Telangana, and Tamil Nadu) and is believed to have been first reported between 6th and 7th century CE. However, there is no concrete

⁴⁸⁴ Torri, *Abuse of Lower Castes in South India* (n 480) 33.

⁴⁸⁵ *Ibid.*

⁴⁸⁶ Shingal, *The Devadasi System* (n 25); See also, Ministry of Women and Child Development, *Report of the High Level Committee vol 3* (n 383) 1009.

⁴⁸⁷ Torri, *Abuse of Lower Castes in South India* (n 480) 33.

⁴⁸⁸ Eve Rebecca Parker, ‘Theologising With The Sacred ‘Prostitutes’ of South India: Towards An Indecent Dalit Theology’ (PhD thesis, University of St. Andrews 2016) 69-70; See also, Ministry of Women and Child Development, *Report of the High Level Committee vol 3* (n 383) 1009.

answer available on when the system first originated in India.⁴⁸⁹ The term ‘devadasi’ means ‘female slave of god’.⁴⁹⁰ It is said that devadasis served gods and later men (kings), as their slaves and considered it an honour.⁴⁹¹

The practice of dedicating young girls to local deities differs in different regions and therefore, the term ‘devadasi’ is often used as an umbrella term for a general understanding of this practice. In different regions in India ‘devadasis’ are known by several names such as *jogini*, *mathammas*.⁴⁹² According to Farquhar,

‘Every well-appointed Hindu temple aims at being an earthly reproduction of the paradise of the god in whose honour it was built...The *Gandharvas* (celestial musicians in Hindu mythology) are represented by the Temple-band, the *Apsaras* (celestial dancers in Hindu mythology) by the courtesans who sing and dance in the service. These are dedicated to the service of the god; but they give their favours to his worshippers. They are usually called Devadasis, handmaidens of the god...’⁴⁹³

Altekar defines the devadasi system as follows:

‘When temples of Hindu gods came to be built and endowed on a magnificent scale, some people began to feel in course of time that there should be singing girls attached to shrines to play music on the occasions of the different services and worships of the day...The introduction of dancing girls in temples tended to lower their moral and spiritual atmosphere. Some people began to visit shrines not so much to pay their respects to deities, as to carry on their love intrigues with the singing girls employed there.’⁴⁹⁴

Despite the devadasi system having a long history in India, the general understanding about devadasis and how the practice came into being is limited in nature mostly due to scarcity of historical accounts. Nonetheless, ethnographic accounts of late nineteenth and early twentieth

⁴⁸⁹ Leslie C. Orr, *Donors, Devotees, and the Daughters of God: Temple Women in Medieval Tamilnadu* (1st edn, Oxford University Press 2000) 4-5.

⁴⁹⁰ Tarachand, *Devadasi Custom* (n 34) 1.

⁴⁹¹ Vishwanathan, *Women of Pride* (n 34) 1.

⁴⁹² Tarachand, *Devadasi Custom* (n 34) 2.

⁴⁹³ J. N. Farquhar, *Modern Religious Movements in India* (1st edn, Munshiram Manoharial Publishers 1977) 408-409.

⁴⁹⁴ Altekar, *The Position of Women in Hindu Civilization* (n 257) 182-183.

century along with the social movements in South India and the legislative debates that took place during that period throw sufficient light on the influence of religion, role of women in society and how the devadasi practice came into being.⁴⁹⁵

Another important aspect worth noting is with respect to the exact number of devadasis in the Indian states where the practice still exists. Lack of official data has been identified by many scholars as a major hindrance in understanding and prohibiting the practice in the first place.⁴⁹⁶ However, in an affidavit before the Supreme Court of India in 2015, the National Commission for Women (NCW) said that there were 250,000 dalit girls dedicated in various temples along the Karnataka-Maharashtra border alone. The NCW affidavit was in response to a public interest litigation filed by an NGO to immediately stop a dedication ceremony in the state of Karnataka.⁴⁹⁷ An officer of the NCW also acknowledged in the same affidavit that despite the state of Karnataka having passed a legislation, The Karnataka Devadasi (Prohibition of Dedication) Act, 1982 to prohibit temple dedication, there had been no study undertaken either on the status of devadasis or on the implementation of the said legislation since its inception.⁴⁹⁸ In addition, in the states of Andhra Pradesh and Telangana, there were about 80,000 devadasis as per a report submitted by former Justice Raghunath Rao in 2015.⁴⁹⁹

4.3.2 Origin of the Devadasi System

The dedication of young girls to Hindu temples varies from region to region in India and is composed of different local traditions, however, all variations generally share certain common features associated with the devadasis.⁵⁰⁰ The common features consists of the following: dedication of a young dalit girl by ‘marrying’ her to the deity; her deflowering immediately

⁴⁹⁵ Orr, *Donors, Devotees, and the Daughters of God* (n 489).

⁴⁹⁶ Parker, *Theologising With The Sacred ‘Prostitutes’ of South India* (n 488) 69.

⁴⁹⁷ Ashish Tripathi, ‘NCW to study actual status of ‘devadasi’ system’ *Deccan Herald* (New Delhi, 24 January 2015) <<https://www.deccanherald.com/content/455398/ncw-study-actual-status-devadasi.html>> accessed 30 March 2022.

⁴⁹⁸ *Ibid.*

⁴⁹⁹ Sribala Vadlapatla, ‘Devadasi system still exists in Telangana, AP, says report’ *The Times of India* (Hyderabad, 23 February 2015) <<https://timesofindia.indiatimes.com/india/Devadasi-system-still-exists-in-Telangana-AP-says-report/articleshow/46337859.cms>> accessed 30 March 2022.

⁵⁰⁰ Maggie Black, ‘Women in Ritual Slavery: Devadasi, Jogini and Mathamma in Karnataka and Andhra Pradesh, Southern India’ (*Anti-Slavery International*, 2007) 1, 8 <http://idsn.org/wp-content/uploads/user_folder/pdf/New_files/Key_Issues/Dalit_Women/WomeninRitualSlavery.pdf> accessed 30 March 2022.

after the dedication ceremony or at puberty either by the temple priest or a high caste person and her subsequent availability to all for sexual use.⁵⁰¹

With respect to the question on the origin of the devadasi system, though, several scholars have referred to this issue either through mythology or ancient literature, yet, there is no final answer available regarding the same.⁵⁰² As mentioned earlier, the devadasi practice is believed to have been first reported sometime in the 6th century CE, but, there are some indications that the practice might also have existed in the 2nd century BCE. The famous bronze dancing girl figurine found in the city of Mohenjo-daro (one of the largest cities of the Indus-Valley civilization) is often associated with the devadasis, but there is no evidence to corroborate the same.⁵⁰³ The Vedic literature too has references of courtesans who frequented places of gambling and of slave girls who were gifted to kings to serve them.⁵⁰⁴ During the Medieval period (500CE - 1500CE), kings kept courtesans to promote dance, music etc. The performer of these arts were mostly young women and sometimes they were used to provide hospitality to other kings who visited the royal court. There are also references to courtesans being subjugated when a kingdom was captured, and it is believed that the subjugation of courtesans later also gave rise to organized prostitution in society.⁵⁰⁵ Note that, since, there is no mention of the term 'devadasi' per se prior to 6th and 7th century CE in any literature, most scholars have tried to analyze the devadasi system either by associating it with the keeping of courtesans by kings or by the practice of prostitution prevalent at the time.⁵⁰⁶

Furthermore, during the early Medieval period, art as a knowledge was under the exclusive domain of the Brahmans who were priests in Hindu temples and controlled all the activities associated with it.⁵⁰⁷ It is believed that, the Brahmans would have wanted courtesans who were young and beautiful girls in their temple courts and therefore, they encouraged local families to dedicate their girls to the services of the temple. Later, when temples began to spread, the dedication process also increased and young girls who once were the courtesans of royal courts

⁵⁰¹ Ibid.

⁵⁰² Kamal K. Mishra and K. Koteswara Rao, 'Evolution and Devolution of the Devadasi System in India: A Socio-Historical Analysis' (2005) 40 (1) Journal of the Indian Anthropological Society 31, 33.

⁵⁰³ Ibid.

⁵⁰⁴ Vishwanathan, *Women of Pride* (n 34) 13.

⁵⁰⁵ Awadh Kishore Prasad, 'Origin of the Devadasi System' (1999) 60 Proceedings of the Indian History Congress 129, 132.

⁵⁰⁶ Panjraht and Ralhan, *Devadasi System in India* (n 35) 44-45.

⁵⁰⁷ Ibid 156-158.

became devadasis dedicated to the gods.⁵⁰⁸ During the Medieval period, temples began getting huge donations first from kings and later from landlords and as a result, they gradually assumed the status of social-financial institutions.⁵⁰⁹ With increase in economic resources, temples were now in a position to perform more rituals. However, they soon were in need of a lot of servants to manage the vast property. This led to temples recruiting many young girls as servants. Besides working as labourers in temples, girls were also being employed to sing and dance on festivals and other religious occasions.⁵¹⁰

As noted by, Mishra and Rao, apart from recruiting labour for the maintenance of temples, there was also a religious sentiment attached to dedicating young girls during the Medieval period.

‘It was said and believed that the dedication of dance or song by young girls became more meritorious than other offerings like flowers and food; it helped fulfilling all desires and equalled in virtues to the performance of a sacrifice. Since the chastity of a virgin was considered to be of incomparable value, sacrificing one’s chastity to the god as a devadasi was also taken as one of the highest virtues. Due to these beliefs, girls were sacrificed to temples; the kings and nobles often appointed or presented well-trained girls to the temples and made rich endowments. The rich class devotees even purchased the girls from the poor class parents and offered them for the service of the gods.’⁵¹¹

As far as the ritual of dedication is concerned, several authors highlight that it was necessary that the girl who was to be dedicated belonged to the family of an existing devadasi. The dedication ritual generally took place between the age of six and nine. Usually, a senior devadasi or the mother of the girl recommended the name of the girl to the temple for dedication. But, often young girls were purchased by high caste individuals and dedicated to temples.⁵¹² The dedication ritual was followed by ceremonies that lasted two to three days

⁵⁰⁸ Panjrath and Ralhan, *Devadasi System in India* (n 35) 156-158; See also, Mishra and Rao, *Evolution and Devolution of the Devadasi System in India* (n 502) 35-36.

⁵⁰⁹ Mishra and Rao, *Evolution and Devolution of the Devadasi System in India* (n 502) 36.

⁵¹⁰ *Ibid.*

⁵¹¹ Mishra and Rao, *Evolution and Devolution of the Devadasi System in India* (n 502) 36.

⁵¹² Khan and others, *Dutiful daughters* (n 70) 1072.

resembling a Hindu marriage. The expenses for the dedication ritual was usually borne by a rich high caste individual or the head priest who later claimed first rights over the girl.⁵¹³

4.3.3 Caste, Gender and Devadasis

As noted previously, most devadasis are dalit women and the caste factor is an essential feature of this practice. Additionally, according to a report by the Ministry of Women and Child Development, New Delhi, the social and religious custom of devadasi victimizes dalit women in India.⁵¹⁴

Caste in India is a social, political and economic reality and the dalit community are placed at its bottom. As a result, the dalit community has been denied opportunities in every sphere of life such as education, employment, healthcare. Moreover, there are numerous instances of caste based violence against dalits in the form of murder and rape being reported on a daily basis.⁵¹⁵ As rightly mentioned by Ghose, ‘the idea of the polluted bonded servant is so ingrained in the subcontinental mind that the Dalit remains at the bottom of the intellectual and emotional landscape of contemporary India, however far he may advance in a public career and agitate for change.’⁵¹⁶ Majority of dalits today still live in rural areas and continue to face discrimination. Since, large sections of the dalit population live below the poverty line and have no access to jobs they are forced to either work as bonded labourers or take up caste-designated occupations such as manual scavenging.⁵¹⁷

The discrimination faced by dalit women is closely associated with the Hindu religion which has a significant role in the subjugation of women in India. Controlling female movement and their sexuality is crucial to maintaining the patriarchal ideology and caste hierarchy under the Hindu religion. This control is also exercised rigidly on upper caste women. As far as dalit

⁵¹³ Ibid 1073.

⁵¹⁴ Ministry of Women and Child Development, Report of the High Level Committee vol 3 (n 383) 1008; K. A. Geetha, ‘In Perennial Oppression: Internalized Ideologies of the Devadasis’ (2020) 21 (2) Journal of International Women’s Studies 67, 68; Harishankar and Priyamvada, Exploitation of Women as Devadasis and Its Associated Evils (n 28) 25; Nash Colundalur, ‘Devadasis are a cursed community’ *The Guardian* (21 January 2011) <<https://www.theguardian.com/lifeandstyle/2011/jan/21/devadasi-india-sex-work-religion>> accessed 30 March 2022.

⁵¹⁵ Sukhadeo Thorat, ‘Oppression and Denial: Dalit Discrimination in the 1990s’ (2002) 37 (6) Economic and Political Weekly 572, 573.

⁵¹⁶ Sagarika Ghose, ‘The Dalit in India’ (2003) 70 (1) Social Research 83, 86.

⁵¹⁷ Ghanshyam Shah, *Dalits and the State* (1st edn, Concept Publishing Company 2002) 18.

women are concerned, under the Hindu religion, they have always been portrayed as opposites to the ‘virtuous’ upper caste women. While upper caste women were shown to be of high moral character, dalit women were depicted as loud, unfaithful and immoral.⁵¹⁸ As noted by Gupta,

‘Dalit women were said to live in temporary marriages, have questionable sexual morals and experience frequent divorces and desertions. They were seen as sex objects by the high-caste men...the Dalit female body, while represented as ‘unfeminine’, was also perceived as lustful. She was unattractive but alluring. Her body was both at the same time-repulsive and desirable, untouchable and available, reproductive and productive, ugly and beautiful. Sexual exploitation of Dalit women was an everyday fact, which was often expressed in terms of the alleged ‘loose’ character of the Dalit women themselves.’⁵¹⁹

Because of socially created notions of gender, dalit women often find themselves in a hostile environment which normalizes discrimination through force and coercion.⁵²⁰ According to data collected by an NGO as part of its report to the International Labour Organization (ILO) in 2015, it was found that almost 85 per cent of devadasis belonged to the dalit community within the sample that was taken for study.⁵²¹ Further, as part of its report, the NGO also took interviews of devadasis from the states of Karnataka, Maharashtra and Telangana. The following is an excerpt from one of the interviews showing how devadasis often belong to the dalit community:

‘Rathnakka, Devadasi from Belagavi, Karnataka stated: I belong to Scheduled Caste. I am the third child for my parents after two elder brothers. I used to fall ill often, and my parents would take me to all the nearby temples but finally my parents felt that offering me to the Goddess was their only option and that is how I am dedicated to the Yellamma (Goddess). I was made devadasi at the age of 8.’⁵²²

⁵¹⁸ Charu Gupta, ‘(MIS) Representing the Dalit Woman: Reification of Caste and Gender Stereotypes in the Hindi Didactic Literature of Colonial India’ (2008) 35 (2) *Indian Historical Review* 101, 110.

⁵¹⁹ *Ibid* 120.

⁵²⁰ Aloysius Irudayam, Jayshree P. Mangubhai and Joel G. Lee, *Dalit Women Speak Out: Caste, Class and Gender Violence in India* (1st edn, Zubaan 2011) 209-210.

⁵²¹ ‘Gender based Violence on Scheduled Caste Girls: A Rapid Assessment of the Devadasi Practice In India’ (*Sampark, Bangalore*, August 2015) 1, 30 <<https://www.sampark.org/wp-content/uploads/2021/01/A-Rapid-Assessment-of-the-Devadasi-Practice-in-India.pdf>> accessed 30 March 2022.

⁵²² *Ibid* 31.

The devadasi practice can be better understood as an outcome of the use of both caste and gender to bind dalit women and their families in the perpetual cycle of discrimination in the name of social and religious custom.⁵²³ But, the discourse on gender-caste and its implications on the present position of devadasis in India seems to be missing. Devadasis themselves are also unaware of the root cause of the practice and at present there are no other agencies (barring a few NGOs) which are able to shed light on the genesis and current growth of the devadasi system.⁵²⁴

4.3.4 Other Factors Responsible for Dedication

While caste is a major factor responsible for dedication of young dalit girls as devadasis, dedication is also prompted by several other reasons. One such significant reason is gender.⁵²⁵ According to the data released as part of India's annual economic survey 2017-18, 'there are 63 million women "missing" from India's population, with 2 million more from every age group going "missing" every year because the desire for sons has given rise to sex-selective abortions, and girls suffer disproportionately from disease, neglect, or inadequate nutrition.'⁵²⁶ For instance, in the state of Andhra Pradesh, girls are dedicated because they are considered an economic burden in the absence of sons in the family. By dedicating their daughters to temples, families avoid giving dowry and hope that their daughters can support the family like a son through their temple earnings.⁵²⁷ Superstition is also closely associated with dedication of girls in Andhra Pradesh, wherein, lack of knowledge on health issues significantly affects the decision of a family. For example, health issues such as cough, dehydration, malnutrition, mental illness are interpreted as work of 'evil' or are seen as a sign of godly displeasure and as a result, families dedicate their daughters as devadasis to ward off any further danger or harm to the family.⁵²⁸ Poverty is another key factor responsible for dedication of young girls to temples.⁵²⁹ Religion too plays a crucial role apart from caste, gender and economic compulsion

⁵²³ Harishankar and Priyamvadha, *Exploitation of Women as Devadasis and Its Associated Evils* (n 28) 25.

⁵²⁴ Kakolee Chakraborty, *Women as Devadasis: Origin and Growth of the Devadasi Profession* (1st edn, Deep and Deep Publications 2000) 31.

⁵²⁵ Lucinda Ramberg, 'When the Devi is your Husband: Sacred Marriage and Sexual Economy in South India' (2011) 37 (1) *Feminist Studies* 28, 33.

⁵²⁶ Ministry of Finance Department of Economic Affairs, 'Economic Survey 2017-18 vol 1' (*Government of India*, January 2018) 1, 112 <https://www.thehinducentre.com/multimedia/archive/03223/Economic_Survey_20_3223793a.pdf> accessed 30 March 2022.

⁵²⁷ Harishankar and Priyamvadha, *Exploitation of Women as Devadasis and Its Associated Evils* (n 28) 103.

⁵²⁸ Caroline Lalou, 'What future for the Devadasis and their children?' (1995) 3 (1) *International Journal of Children's Rights* 19, 22.

⁵²⁹ Harishankar and Priyamvadha, *Exploitation of Women as Devadasis and Its Associated Evils* (n 28) 23.

in explaining the dedication of young girls as devadasis.⁵³⁰ Majority of the dalit community in India, strongly believe in the power of gods/goddesses and the possible harm they can cause if displeased. This strong belief usually leads to blind faith and superstition due to lack of education resulting in dedicating young girls for ensuring either well-being of the family or a male heir.⁵³¹ As noted by Lalou, dedication is often done to please local gods/goddesses out of fear of any repercussion and also to ask for favours.⁵³²

Hereditary practice and societal pressure are two other reasons responsible for keeping the devadasi practice alive.⁵³³ The practice is hereditary in nature as most girls become devadasis because either their mother or grandmother had been dedicated. Often the practice of dedication is also carried forward because of pressure from within the family as well as from dominant castes in the village.⁵³⁴ Upper caste men often force families to dedicate their daughters as devadasis. As noted by Harishankar and Priyamvadha,

‘Most often it is the upper class men who have first sexual intercourse with these girls. Likewise, the temple priest who has a hold on the community will give “religious sanction” to families to dedicate their girls. Once a girl is dedicated, she should offer sexual service to the upper class men, priests and other men of power and money. The upper class people encourage the lower class people to practice the system in order to get access to the desirable women to fulfil their extra marital sexual needs.’⁵³⁵

Though one factor may take precedence over the other for a particular family, it needs to be understood that all the above mentioned factors are interlinked with one another and contribute towards the continuity of the devadasi practice within the dalit community.

4.3.5 Concluding Remarks

The above sections have shown how the devadasis who belong to the dalit community coming from extremely poor family backgrounds are dedicated to temples at very young age mostly at the behest of upper caste men. Young dalit girls after their dedication are made sexually

⁵³⁰ Ramberg, When the Devi is your Husband (n 525).

⁵³¹ Ibid.

⁵³² Lalou, What future for the Devadasis and their children? (n 528).

⁵³³ Harishankar and Priyamvadha, Exploitation of Women as Devadasis and Its Associated Evils (n 28) 27.

⁵³⁴ Ibid 27-28.

⁵³⁵ Harishankar and Priyamvadha, Exploitation of Women as Devadasis and Its Associated Evils (n 28) 28.

available to everyone in the name of religion and after a certain age are left with no choice but to take up prostitution to earn their livelihood.

Today, the devadasi practice exists merely to satiate the sexual needs of the dominant castes and to ensure the continuity of caste hierarchy in the society. As noted in the above section, factors such as poverty, illiteracy, religious beliefs also play an important role in the continuation of the practice of dedication. More importantly, these factors contribute towards strengthening of the caste hegemony through the practice of dedication. The devadasi practice also shows that both superstition and religious beliefs are deep rooted in the Hindu society and dalits themselves firmly believe in them. Devadasis consider the rituals of dedication as sacrosanct and therefore, once the ritual is over, they feel obligated to serve as devadasis for the rest of their lives. This firm belief in many ways is also the result of societal pressure which forces dalits to conform to the practice of dedication.⁵³⁶

In addition, an important aspect often left out from the debate on devadasis worth mentioning is with respect to the children of devadasis. Since, not much has been written about children of devadasis and their legal rights, a question remains as to what happens to such children and their future. It is however, often said that daughters of devadasis especially have no choice but to become devadasis themselves just like other women in their family.⁵³⁷

4.4 Structural violence against women in India

Chapters 3 and 4 of the thesis so far have examined the contemporary position of women in India and the violence against them through the three crimes. The purpose of these two chapters was to highlight how violence is a fundamental aspect of women's lives and to understand the factors that have contributed towards making women vulnerable to various forms of violence in the Indian society. The above mentioned chapters sought to answer these issues by contending that violence against women in India can be better understood if studied in

⁵³⁶ Khan and others, *Dutiful daughters* (n 70) 1078 - 'Once beads are tied and dedication rituals are performed, these Devadasis are unable to break from them and the family – dedication rituals tie them to a life of perpetual duties to deities as well as to maternal family, and almost always become a basis for escalating family pressure to enter into the sex trade. Importantly, despite pressures from family and kin groups to enter into the sex trade, few Devadasi women blamed them directly. Instead, they saw it as their own decision and responsibility. We argue that the lack of attributing blame to family by Devadasis can be better understood in terms of their moral pragmatics and daily moralities of being 'dutiful daughters' – values that remain simultaneously tied, however tangentially and latently, to the hegemonic national-patriarchal order.'

⁵³⁷ *Ibid* 1075.

conjunction with the social-cultural factors that play a crucial role in such violence. Because, often an argument is made that instances of violence against women are the sole outcome of an individual's abnormal conduct, but, the discussion in chapter 4 has shown that violence against women in the Indian context is a direct outcome of prevailing social norms, religion, traditions etc. Furthermore, as this section will show, socially condoned practices like witch-hunting, honour killing and the devadasi system that draw strength from these social norms fall within the ambit of a larger structure which is mainly responsible for perpetrating violence against women in the Indian setting.

The violence caused by social structures that often leads to curtailment of basic rights of certain individuals or groups is referred to as 'structural violence'.⁵³⁸ As discussed in chapter 2, the term 'structure' represents how the day to day interactions between individuals and among groups are shaped by economic, political, religious and cultural elements.

In India, violence against women is carried out in the name of caste, gender, religion, family values, tradition etc. Women suffer from this violence right from their childhood in various forms. In short, in a patriarchal society like India, a host of issues are responsible for the subordination of women. But, violence against women in India is not equated with or seen as the outcome of structural violence. Structural inequalities created as a result of social-cultural factors which lead to normalization of certain practices that are detrimental to rights of women, are not considered important in the discourse on violence against women. The discussions in chapters 3 and 4 show that factors such as caste, gender, religion, family values, community beliefs are responsible for violence against women in India because they are not only deep rooted in society but also affect the real-life experiences of women. More importantly, these factors form part of a larger structure which reproduces violence by normalizing gender based discrimination.

Structural violence is legitimized or justified in society by relying upon religion, customs, traditions, community beliefs etc.⁵³⁹ For instance, as noted in this chapter, there are multiple factors at play behind witchcraft accusations in India. Factors such as patriarchy, gender, caste

⁵³⁸ Galtung, *Violence, Peace, and Peace Research* (n 71) 170-171.

⁵³⁹ Galtung, *Peace by peaceful means* (n 90) 196.

and superstition are at the root of witch-beliefs and form the basis for violence against dalit and tribal women in the name of witch-hunting. Witch-hunting, as another form of structural violence, uses a host of social factors to invariably target women and isolate them. Superstitious beliefs, for example, are used to associate women belonging to the marginalized communities with evil and discriminate against them in order to preserve and ensure the continuity of male dominance. As discussed in this chapter, property rights are one of the most common disputes over which a woman is labelled as a witch by her family members and the community in order to deny her an independent existence.⁵⁴⁰ Because in male dominated societies like India, women are seen as the weaker gender, superstitious beliefs become an easy tool to attack women for personal gains by portraying them as evil by nature.⁵⁴¹ Witchcraft accusations are also gender specific as they benefit the patriarchal ideology by continuing the exploitation of women. Further, equating 'witch' with women and 'witch-hunters' with men, sheds light on the control and authority of the masculine order in society.⁵⁴² In short, the targeting of dalit and tribal women as witches unquestionably establishes the direct association of these accusations with gender stereotyping in order to suppress women.

The reason why witchcraft accusations are gender specific is also closely linked with the violation of those conventional rules which essentially are in place to control and monitor the behaviour of women in society. Again, the issue why women are equated with 'witches' and men as 'witch-hunters' is reflective of the deeply embedded gender biased values which delegitimize women's power. As observed by Nathan, Kelkar and Xiaogang, 'the persecution of women in the name of witchcraft is a process of establishing the authority of men. Women are turned into the source of all evil. Such an ideology is certainly conducive to the social process of controlling women. The threat of being declared a witch will help to restrict non-conformism or deviance from the rules that are being established.'⁵⁴³

Similar to the crime of witch-hunting, honour killing targeting women in India is also mostly an outcome of intersection of factors such as patriarchy and caste structure.⁵⁴⁴ Young men and women who defy customary rules by marrying either within the same *gotra* or outside their

⁵⁴⁰ Mehra and Agrawal, Witch-hunting in India? (n 375) 53.

⁵⁴¹ Ibid.

⁵⁴² Roy, Sanctioned Violence (n 384) 143.

⁵⁴³ Nathan, Kelkar and Xiaogang, Women as Witches and Keepers of Demons (n 373) 61.

⁵⁴⁴ Chowdhry, Caste Panchayats and the Policing of Marriage in Haryana (n 459) 31.

caste or who decide to elope are punished by the community. Punishment ranges from social boycott to even killing of the young couple either by members of the community or by family members.⁵⁴⁵ With the subjugation of women in the private sphere, especially, by her own family and then by her in-laws, the pressure to conform to socially sanctioned norms is always more on women than men in India.⁵⁴⁶ As observed by Chakravarti,

‘Actions that are appropriate, or in accordance with normative codes, maintain the ‘purity’ and ‘honour’ of the family, lineage or caste, whereas actions that are inappropriate defile the ‘honour’ and ‘purity’ of the caste, family and lineage. Women are the repositories of ‘family honour’ - of their own family as daughter, and of their husband’s family as wife and mother; as noted in the common saying, often repeated by parents to girl-children and in-laws, The prestige of the family is in the hands of its daughter.’⁵⁴⁷

It is interesting to note that, the restrictions placed on women by family or community in the name of safety and protection are actually done to protect and safeguard men and their ‘honour’ so that they can walk freely among others without the fear of any humiliation.⁵⁴⁸

Caste is also another significant factor responsible for structural violence against women in India.⁵⁴⁹ Caste coupled with gender is used to maintain control over women’s sexuality and sustain the patriarchal foothold in society. This is generally done by forbidding inter-caste marriages. Upper caste men see inter-caste marriages as a threat because to them these marriages act as an opportunity for lower caste groups, especially dalits, to move upward in the social ladder.⁵⁵⁰

⁵⁴⁵ Prem Chowdhry, ‘‘First Our Jobs Then Our Girls’: The Dominant Caste Perceptions on the ‘Rising’ Dalits’ (2009) 43 (2) *Modern Asian Studies* 437, 457.

⁵⁴⁶ Walby, *Theorizing Patriarchy* (n 133) 24.

⁵⁴⁷ Uma Chakravarti, ‘From fathers to husbands: of love, death and marriage in North India’ in Welchman and Hossain (eds), *‘Honour’: Crimes, Paradigms and Violence Against Women* (n 32) 310.

⁵⁴⁸ Aisha K. Gill, ‘Introduction: ‘Honour’ and ‘Honour’-Based Violence: Challenging Common Assumptions’ in Gill, Strange and Roberts (eds), *‘Honour’ killing and violence* (n 32) 5-6.

⁵⁴⁹ Suruchi Thapar-Björkert, ‘If there were no khaps [. . .] everything will go haywire [. . .] young boys and girls will start marrying into the same gotra’: Understanding Khap - Directed ‘Honour Killings’ in Northern India’ in Gill, Strange and Roberts (eds), *‘Honour’ killing and violence* (n 32) 159.

⁵⁵⁰ Bayly, *Caste, Society and Politics in India from the Eighteenth Century to the Modern Age* (n 448) 316.

Gender within caste is also used by the dominant castes to strengthen their ‘manhood’ and diminish the ‘manhood’ of the vulnerable groups. For example, dominant caste groups humiliate dalit women in order to punish dalit men for their ‘transgressions’.⁵⁵¹ The intersection of caste, gender and patriarchal mindset also places limitations on the constitutional right of women to freely choose their partner.⁵⁵² As per the Supreme Court of India, the right to choose a partner flows from Article 19 of the Indian Constitution which recognizes individual choice. Further, this right cannot be restrained under the guise of individual or group ‘honour’.⁵⁵³

With respect to the devadasi system, there are again a host of factors that intersect with each other to contribute towards the oppression of young dalit girls. The devadasi system, in particular, is also another form of structural violence wherein the entire practice is tailored mostly around caste and gender. Caste and gender are used not only to label a particular section of women as devadasis but to dictate their day to day relations with the society at large. As explained by Torri,

‘Gender is not a homogeneous category; it is internally differentiated and elaborated by class, race and ethnicity, region and education. Like caste, gender organizes social prestige and status in rituals of interaction. In different ways and for different reasons, all cultures use gender as a primary category of social relations. Integrating race, class and gender into feminist thinking requires a process of transformation that involves seeing race, class and gender in relational ways.’⁵⁵⁴

The section on devadasi system has also shown how religion and religious beliefs play a significant role in the continuity of this practice. The devadasi system represents a form of social control exercised by the upper castes over dalits in India. The practice of dedication strengthens the caste hierarchy and further marginalizes the dalit community. In short, both caste and gender dynamics are used to suppress dalit women by making them victims of structural violence through the devadasi institution.

⁵⁵¹ ‘Khap panchayat issues diktat to rape and parade two Dalit women naked’ (*India Today*, 21 August 2015) <<https://www.indiatoday.in/fyi/story/khap-panchayat-issues-diktat-to-rape-and-parade-two-dalit-women-naked-289507-2015-08-21>> accessed 30 March 2022.

⁵⁵² *Shakti Vahini v Union of India and Others* Writ Petition (Civil) NO. 231 OF 2010.

⁵⁵³ *Asha Ranjan v State of Bihar and Others* (2017) 4 SCC 397.

⁵⁵⁴ Torri, *Abuse of Lower Castes in South India* (n 480) 32.

Witch-hunting, honour killing and the devadasi system exist as examples of structural violence in India because the belief in caste, gender, class etc., which plays a significant role in these crimes are on a daily basis being strengthened.⁵⁵⁵ It is not enough to only identify the various factors responsible for violence against women but it is also necessary to acknowledge the intersection of these factors that contribute towards structural violence. For example, as shown in this chapter, the three crimes are not just the result of one factor (e.g., gender bias) but a culmination of several other factors such as caste, religion. The concept of intersectionality, therefore, here is useful in highlighting the correlation between various factors that are responsible for gender based violence and in better understanding the existence of structural violence in the Indian society.⁵⁵⁶

To summarize, all the three crimes discussed in this chapter show how social-cultural norms are used to embolden patriarchal values in the Indian society and how these three crimes are the end result of not one but multiple factors interlocking with each other forming part of structural violence against women in India. This chapter also highlights how in order to exercise control over women and their sexuality, social, cultural and religious reasons are often advanced by family and society. More importantly, the above sections emphasize upon the importance of identifying some of the structural reasons responsible behind the three crimes which are vital in understanding why there exists a denial of violence against women in India in the first place or why crimes against women are seen as normal practice.

The next chapter examines violence against women in India in light of the three crimes discussed in this chapter vis a vis existing human rights laws and mechanisms at the domestic as well as international level. Note that, new developments in national and international human rights regime often influence customs, traditions and practices in any given society to undergo a transformative change and adopt to a new reality which is shaped by human rights norms.⁵⁵⁷ However, an analysis of existing mechanisms to address the three crimes in the next chapter will show how gender biased customs, traditions and practices continue to be neglected especially within India's legislative process resulting in not only denying women complete justice but also obstructing any transformative change (shaped by contemporary human rights

⁵⁵⁵ Galtung, *Peace by peaceful means* (n 90).

⁵⁵⁶ Pal, *Caste-Gender Intersectionality and Atrocities in Haryana* (n 63) 33.

⁵⁵⁷ Ministry of Women and Child Development, *Report of the High Level Committee vol 1* (n 16) 141.

law) in the broad understanding of violence against women and fully recognizing the harmful practices of witch-hunting, honour killing and the devadasi system as legal crimes. The next chapter also aims to pinpoint gaps in India's legislative mechanism in relation to the three harmful practices keeping in mind the complexity of legal plurality in India and the intersectional conceptual framework. The existing legislative gaps (for example, in defining the crime, in providing adequate punishment) hinder in the complete recognition of the three harmful practices as violative of women's rights.

Chapter 5: Violence Against Women, International Human Rights Law and Domestic Implementation

Introduction

Article 2 of The Universal Declaration of Human Rights (UDHR) 1948, ‘entitles to everyone all the rights and freedoms set forth in the Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’⁵⁵⁸ But, despite this declaration, there still exists a lack of understanding of women’s rights as human rights in many societies globally due to which women continue to suffer violations of their basic rights.⁵⁵⁹ Women suffer abuse on a daily basis both within and outside of their homes but their experiences are often not considered as legitimate human rights issues.⁵⁶⁰ The advocates for women’s human rights are therefore focused on expanding the meaning of ‘human rights violation’ to incorporate all experiences of women so that their voices can be appropriately represented in framing policies that affect their rights.⁵⁶¹ Note that, violence against women covers far more instances than sexual harassment or rape as shown in the previous chapter through the three crimes, though even these crimes have not found appropriate space within the human rights discourse.⁵⁶² As noted by Manjoo in the context of human rights law,

‘violence against women impairs and nullifies women’s realisation of all human rights; prevents women from participating in their community as full, equal citizens; reinforces male dominance and control; supports discriminatory gender norms; and also maintains systemic inequalities between women and men. These factors, among others, in turn preserve and perpetuate the conditions that facilitate the continuation of gender-based violence.’⁵⁶³

⁵⁵⁸ Universal Declaration of Human Rights 1948, art 2.

⁵⁵⁹ Joan Fitzpatrick, ‘The Use of International Human Rights Norms to Combat Violence Against Women’ in Rebecca J. Cook (ed), *Human Rights of Women: National and International Perspectives* (1st edn, University of Pennsylvania Press 1994) 532.

⁵⁶⁰ Geraldine Terry, *Women’s Rights: Small Guides to Big Issues* (1st edn, Pluto Press London 2007) 25-26.

⁵⁶¹ Catharine A. Mackinnon, *Are Women Human? - And Other International Dialogues* (1st edn, Harvard University Press 2007) 41-42.

⁵⁶² Charlotte Bunch, ‘Transforming Human Rights from a Feminist Perspective’ in Julie Peters and Andrea Wolper (eds), *Women’s Rights, Human Rights: International Feminist Perspectives* (1st edn, Routledge 1995) 12-13.

⁵⁶³ Rashida Manjoo, ‘Special Guest Contribution: Violence against Women as a Barrier to the Realisation of Human Rights and the Effective Exercise of Citizenship’ (2016) 112 (1) *Feminist Review* 11, 12.

Similarly, as per MacKinnon, in order to change the notion of equality by making it truly inclusive under the human rights regime, it is necessary to understand violence against women by identifying the reasons responsible for it.⁵⁶⁴ By violence against women MacKinnon refers to the,

‘aggression against and exploitation of women because we are women, systemically and systematically. Systemic, meaning socially patterned, including sexual harassment, rape, battering of women by intimates, sexual abuse of children, and woman-killing in the context of poverty, imperialism, colonialism, and racism. Systematic, meaning intentionally organized, including prostitution, pornography, ritual torture and official custodial torture in which women are exploited and violated for sex, politics, and profit in a context of, and in intricate collaboration with, poverty, imperialism, colonialism, and racism.’⁵⁶⁵

Violence against women is a human rights issue because the discrimination and abuse that women experience takes place because of the gendered nature of the violence i.e., the victims suffer because they are females. Gender is often the primary factor that impacts women’s social, political, cultural and economic rights.⁵⁶⁶ However, as mentioned above, the challenge is to transform the concept of human rights to adequately reflect the gendered nature of violence that impairs the right to life and liberty of women.⁵⁶⁷ Further, the feminist critique of the current human rights regime and its enforcement mechanisms also argue that, the definition of rights are always evolving and are not static in nature, therefore, the meaning of rights should be allowed to transform with the changing time and should stop representing the needs and aspirations of a historical time (i.e., when such rights came into being).⁵⁶⁸

⁵⁶⁴ Mackinnon, *Are Women Human?* (n 561) 29.

⁵⁶⁵ Ibid.

⁵⁶⁶ Bunch, *Transforming Human Rights from a Feminist Perspective* (n 562) 12; See also, Manjoo, Special Guest Contribution: *Violence against Women as a Barrier to the Realisation of Human Rights and the Effective Exercise of Citizenship* (n 563) - ‘Gendered violence violates numerous rights, including those to equality and non-discrimination on the basis of sex and gender, to liberty and security of the person, and not to be subjected to torture, cruel or inhuman or degrading treatment or punishment, among others. Such violence, whether in the private or public spheres, impedes women’s right to equality within the family, the community and the workplace. Crucially, the experience or threat of violence can further deprive women of their right to participate in the political, economic, social and cultural life of the country within which they live. This, in turn, precludes women from exercising their right to vote, to hold public office, to work, to education, to the right to a secure livelihood, to access justice and to health, among others.’

⁵⁶⁷ Hilary Charlesworth, ‘What are “Women’s International Human Rights”?’ in Rebecca J. Cook (ed), *Human Rights of Women: National and International Perspectives* (1st edn, University of Pennsylvania Press 1994) 59-60.

⁵⁶⁸ Otto, *Women’s Rights* (n 148); See also, Bunch, *Transforming Human Rights from a Feminist Perspective* (n 562) 13-14 - ‘Because those Western-educated propertied men who first advanced the cause of human rights most

In light of the above, this chapter will broadly examine the relationship between violence against women and international human rights law. This chapter will at first look briefly into women's human rights and the attention it has received by the United Nations (UN) before focusing upon the laws both at the international and domestic level relating to violence against women in India with specific reference to witch-hunting, honour killing and the devadasi system. While addressing the issue of violence against women in India, this chapter will refer to the concepts of gender discrimination, legal pluralism and also rely on the feminist critique of the mechanisms meant for the protection of women's rights under the current human rights regime. This chapter will essentially examine and discuss the capability of existing laws and mechanisms (at the domestic as well as international level) in addressing violent practices against women in India that have often been presented as part of traditional or cultural practices in the Indian society.

5.1 The United Nations and Women's Human Rights

As per article 2 of the UDHR, everyone is entitled to all the rights and freedoms set forth in the declaration without distinction of any kind, such as sex and others.⁵⁶⁹ Similarly, articles 3 and 5 state that everyone has the right to life and that no one shall be subjected to torture or cruel, inhuman treatment.⁵⁷⁰ In addition, the International Covenant on Civil and Political Rights (ICCPR) 1966, under article 2(1) contains the right to be free from any kind of discrimination including sex.⁵⁷¹ Article 3 of the ICCPR, ensures the right to equality of both men and women.⁵⁷² Article 6(1) provides for the inherent right to life of every human being and article

feared the violation of their civil and political rights in the public sphere, this area of violation has been privileged in human rights work. They did not fear, however, violations in the private sphere of the home because they were the masters of that territory. The distinction between private and public is a dichotomy largely used to justify female subordination and to exclude human rights abuses in the home from public scrutiny.'

⁵⁶⁹ Universal Declaration of Human Rights 1948, art 2.

⁵⁷⁰ Universal Declaration of Human Rights 1948, art 3 and 5.

⁵⁷¹ 'International Covenant on Civil and Political Rights' (*United Nations General Assembly*, 16 December 1966) art 2(1) <<https://www.refworld.org/docid/3ae6b3aa0.html>> accessed 30 March 2022 - 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.' [Hereinafter, cited as International Covenant on Civil and Political Rights 1966].

⁵⁷² International Covenant on Civil and Political Rights 1966, art 3 - 'The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.'

7 prohibits any kind of torture or cruel, inhuman treatment to anyone.⁵⁷³ Further, article 1 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1979 defines the term ‘discrimination against women’ (Section 5.2.2 of this chapter provides a detailed analysis of relevant provisions of CEDAW).⁵⁷⁴

Clearly, as far as international law is concerned, women’s rights have been given some place in the human rights discourse, however, it is only recently that the global community has begun to truly recognize women’s issues as human rights.⁵⁷⁵ The challenge faced by women’s rights advocates since the beginning has been to work out a relationship between ‘women’s rights’ on one hand and ‘traditional human rights’ on the other keeping in mind the functioning of various UN structures.⁵⁷⁶ One significant challenge in this regard is: ‘how can women’s claims to human rights incorporate both the traditionally ‘public’ sphere of legal and political rights of women as well as the important ‘private’ sphere, where discriminatory economic, social, and cultural policies vitally affect women’s lives?’⁵⁷⁷ Further, the exclusion of women’s rights issues from the traditional human rights discourse becomes more apparent when it gets reflected in society’s disregard towards adequately addressing violence against women both globally as well as domestically.⁵⁷⁸ As noted by Bunch,

‘Violence against women is the issue which most parallels a human rights paradigm and yet is excluded. You can see in violence all the things the human rights community already says it’s against: it involves slavery, it involves situations of torture, it involves terrorism, it involves a whole series of things that the human rights community is

⁵⁷³ International Covenant on Civil and Political Rights 1966, art 6(1) - ‘Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life’; International Covenant on Civil and Political Rights 1966, art 7 - ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.’

⁵⁷⁴ Convention on Elimination of All Forms of Discrimination Against Women 1979, art 1 - ‘For the purposes of the present Convention, the term “discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.’

⁵⁷⁵ Alice Edwards, *Violence Against Women under International Human Rights Law* (1st edn, Cambridge University Press 2011) 7-8.

⁵⁷⁶ *Ibid.*

⁵⁷⁷ Felice Gaer, ‘Women, International Law and International Institutions: The Case of the United Nations’ (2009) 32 (1) *Women’s Studies International Forum* 60, 60.

⁵⁷⁸ Elisabeth Friedman, ‘Women’s Human Rights: The Emergence of a Movement’ in Julie Peters and Andrea Wolper (eds), *Women’s Rights, Human Rights: International Feminist Perspectives* (1st edn, Routledge 1995) 20.

already committed to fighting, but which have never been defined in terms of women's lives.⁵⁷⁹

But, such difficult questions or linkages as noted above were not asked or made because there was little attention paid to specific issues concerning women and their rights before the 1990s.⁵⁸⁰ However, prior to the 1990s efforts were made by the UN through the UN Decade for Women (1976-1985) to consider the status of women and promote equal rights and opportunities for women. Note that, CEDAW, a landmark treaty protecting the rights of women also came into existence during this period. Three world conferences were held in 1975, 1980 and 1985 respectively.⁵⁸¹ A major outcome of the decade long meetings and conferences was that women's disadvantaged circumstances were discussed widely and thus could no longer be overlooked at the international level.⁵⁸² As observed by Chen, 'much of the Decade for Women was spent in addressing differences in approaches to feminism at the theoretical or ideological levels and differences between women from different social, cultural, historical and geographic locations at the practical level.'⁵⁸³ Nevertheless, the issue of violence against women did not receive much attention during the Decade for Women.⁵⁸⁴

It was only in 1993 at the World Conference on Human Rights that the issue of violence against women was equated with human rights and all States were asked to protect and promote the rights of women.⁵⁸⁵ As stated in para 18 of the Vienna Declaration and Programme of Action, 'The human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights. The full and equal participation of women in political, civil, economic, social and cultural life, at the national, regional and

⁵⁷⁹ Ibid.

⁵⁸⁰ Friedman, *Women's Human Rights* (n 578) 25.

⁵⁸¹ Judith P. Zinsser, 'The United Nations Decade for Women: A Quiet Revolution' (1990) 24 (1) *The History Teacher* 19, 21.

⁵⁸² Gaer, *Women, International Law and International Institutions* (n 577) 63; See also, Ibid 22 - 'The Decade for Women brought changes in governmental and institutional practices which had far-reaching significance, especially for women of the Third World. As a result of the Decade, governments and international organizations had to take women into account, had to acknowledge that women's lives and needs could not be subsumed under those of men.'

⁵⁸³ Martha Alter Chen, 'Engendering World Conferences: The International Women's Movement and the United Nations' (1995) 16 (3) *Third World Quarterly* 477, 480.

⁵⁸⁴ Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (1st edn, University of Chicago Press 2006) 21.

⁵⁸⁵ The World Conference on Human Rights, 'Vienna Declaration and Programme of Action' (*United Nations General Assembly A/CONF.157/23*, 12 July 1993) <<https://www.refworld.org/docid/3ae6b39ec.html>> accessed 30 March 2022.

international levels, and the eradication of all forms of discrimination on grounds of sex are priority objectives of the international community. Gender-based violence and all forms of sexual harassment and exploitation, including those resulting from cultural prejudice and international trafficking, are incompatible with the dignity and worth of the human person, and must be eliminated. This can be achieved by legal measures and through national action and international cooperation in such fields as economic and social development, education, safe maternity and health care, and social support.⁵⁸⁶

More importantly, General Recommendation No. 19 on violence against women was adopted by the Committee on CEDAW in 1992 which as per the Committee reflected ‘a close connection between discrimination against women, gender-based violence, and violations of human rights and fundamental freedoms.’⁵⁸⁷ Further, the Declaration on the Elimination of Violence against Women (DEVAW) was also adopted in 1993 by the United Nations General Assembly with a view that the Declaration will both strengthen and complement the effective implementation of CEDAW and contribute towards the elimination of violence against women. Articles 1 and 2 of the Declaration are significant here (especially in relation to the three crimes discussed in the thesis) as they provide the meaning and definition of ‘violence against women’.⁵⁸⁸ As per article 1 of the Declaration, the term ‘violence against women’ means ‘any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.’⁵⁸⁹ Under article 2, ‘violence against women shall be understood to encompass, but not be limited to, the following:

- (a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;

⁵⁸⁶ Ibid para 18.

⁵⁸⁷ ‘CEDAW General Recommendation No. 19: Violence Against Women’ (*United Nations Committee on the Elimination of Discrimination*, 1992) <<https://www.refworld.org/docid/52d920c54.html>> accessed 30 March 2022.

⁵⁸⁸ United Nations General Assembly, ‘Declaration on the Elimination of Violence Against Women’ (*United Nations General Assembly A/RES/48/104*, 20 December 1993) <<https://www.refworld.org/docid/3b00f25d2c.html>> accessed 30 March 2022. [Hereinafter, cited as Declaration on the Elimination of Violence Against Women 1993].

⁵⁸⁹ Declaration on the Elimination of Violence Against Women 1993, art 1.

- (b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;
- (c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.⁵⁹⁰

Furthermore, the Fourth World Conference on Women in Beijing (1995) highlighted that violence against women and a lack of respect for human rights of women were critical areas of concern that required immediate action on part of both civil society and the international community.⁵⁹¹ More importantly, the Beijing conference emphasized upon the reasons and the effects of violence against women on women's lives.⁵⁹² Although, women's experiences started to slowly gain recognition as part of mainstream human rights agenda after the late 1980s, human rights still remain to be fully reinterpreted from a feminist perspective.⁵⁹³

The next section will examine instruments of international human rights law, focusing specifically on relevant provisions that are directly or indirectly applicable to practices of witch-hunting, honour killing and the devadasi system in India.

5.2 Violence Against Women and International Human Rights Law

5.2.1 The International Covenant on Civil and Political Rights (ICCPR)

With reference to violence against women (especially in relation to the three crimes), articles 2(1) [freedom from discrimination], 3 [right to equality], 6(1) [right to life] and 7 [prohibition against torture etc.] of the ICCPR are important as far as India's international obligations to promote and protect human rights are concerned.⁵⁹⁴ Additionally, India has ratified the ICCPR

⁵⁹⁰ Declaration on the Elimination of Violence Against Women 1993, art 2.

⁵⁹¹ United Nations Specialised Conferences, 'Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women' (*United Nations*, 27 October 1995) paras 41-44 <<https://www.refworld.org/docid/3dde04324.html>> accessed 30 March 2022.

⁵⁹² Ibid paras 118-119 - 'Acts or threats of violence, whether occurring within the home or in the community, or perpetrated or condoned by the State, instil fear and insecurity in women's lives and are obstacles to the achievement of equality and for development and peace. The fear of violence, including harassment, is a permanent constraint on the mobility of women and limits their access to resources and basic activities... Violence against women is a manifestation of the historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of women's full advancement. Violence against women throughout the life cycle derives essentially from cultural patterns, in particular the harmful effects of certain traditional or customary practices.'

⁵⁹³ Bunch, *Transforming Human Rights from a Feminist Perspective* (n 562) 17.

⁵⁹⁴ International Covenant on Civil and Political Rights 1966.

in 1979 but not the First and Second Optional Protocol to the ICCPR. The First Optional Protocol to the ICCPR enables the Human Rights Committee (HRC) to receive and consider complaints from individuals whose countries are party to both the ICCPR and the first protocol.⁵⁹⁵ The Second Optional Protocol to ICCPR aims at the abolition of the death penalty.⁵⁹⁶ India has not ratified the First Optional Protocol to the ICCPR and as a result individuals are barred from reporting to the HRC regarding any violation of their rights under the ICCPR which raises questions over India's commitment to safeguard civil and political rights including combating violence against women. India has also not ratified the Second Optional Protocol to the ICCPR possibly because the death penalty is still being awarded for serious offences under the Indian criminal justice system.

One of the main functions of the HRC (which is created under article 28 of the ICCPR) is to draw up conclusions from reports submitted by the States parties and to issue General Comments which act as an explanation to the various ICCPR provisions.⁵⁹⁷ Article 40 of the ICCPR allows the HRC to examine and comment upon State party reports.⁵⁹⁸ Note that, 'this is the only compulsory monitoring mechanism under the ICCPR: State parties are required to submit periodic reports on their implementation of the Covenant. States must submit an initial report within a year of the entry into force of the ICCPR, and periodic reports whenever the HRC so requests, normally every five years.'⁵⁹⁹ The HRC examines State party reports in a dialogue with the concerned State representative and at the conclusion of such a discussion, the HRC issues its Concluding Observations which act as an assessment report for the concerned State party. The purpose behind issuing Concluding Observations is to highlight areas of concern for the States parties to act upon and respond back to the HRC with its progress.⁶⁰⁰ In October 2009, the HRC adopted a new reporting mechanism under which a list of issues is given to the States before the submission of the periodic reports and the State's response to these list of issues is taken as the report for the purposes of article 40 of the

⁵⁹⁵ 'Optional Protocol to the International Covenant on Civil and Political Rights' (*United Nations General Assembly*, 19 December 1966) <<https://www.refworld.org/docid/3ae6b3bf0.html>> accessed 30 March 2022.

⁵⁹⁶ 'Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty' (*United Nations General Assembly A/RES/44/128*, 15 December 1989) <<https://www.refworld.org/docid/3ae6b3a70.html>> accessed 30 March 2022.

⁵⁹⁷ Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (3rd edn, Oxford University Press 2014) 15.

⁵⁹⁸ International Covenant on Civil and Political Rights 1966, art 40.

⁵⁹⁹ Joseph and Castan, *The International Covenant on Civil and Political Rights* (n 597).

⁶⁰⁰ United Nations Human Rights Committee, 'Guidelines for the Treaty-Specific Document to be Submitted by States Parties under Article 40 of the International Covenant on Civil and Political Rights' (CCPR/C/2009/1, 22 November 2010) <<https://digitallibrary.un.org/record/710290?ln=en>> accessed 30 March 2022.

ICCPR.⁶⁰¹ But, many States parties have not been cooperating with the reporting mechanism and are often late in submitting their reports.⁶⁰² For example, India's State party report as part of Fourth Reporting Cycle under LoIPR (List of Issues Prior to Reporting) which has been due for submission from 2001 had been allocated a new due date of 07 August 2020.⁶⁰³ Although, General Comment No. 30: Reporting Obligations of State Parties under Article 40 of the Covenant was adopted on 18 September 2002 to remedy situations of delay on part of States in submission of reports, this particular step by the HRC appears to have no effect on the reporting pattern (as is the case with India).⁶⁰⁴ Note that, there is no new information available on the official webpage either on allotment of a new due date for submission of India's State party report (since the previous date of 07 August 2020 has lapsed) or on any discretionary action taken by the HRC against India under para 4 of the General Comment No. 30 considering the inordinate delay by India.⁶⁰⁵ This delay also reflects upon the level of seriousness with which India has approached its international obligations to safeguard the rights of its citizens. As per the LoIPR, the HRC had sought information under para 11 on any significant steps undertaken by India to stop persisting harmful practices against women and girls such as accusations of witchcraft, honour killings, devadasi which so far India has failed to provide.

Before highlighting the status of implementation of the Covenant especially with respect to the rights of women in India, it is important to take note of HRC's interpretation of article 3 of ICCPR through General Comment No. 28. Article 3 places an obligation on States parties to take all necessary steps to ensure equality between men and women within their domestic

⁶⁰¹ Ibid.

⁶⁰² 'CCPR General Comment No. 30: Reporting Obligations of States Parties under Article 40 of the Covenant' (*United Nations Human Rights Committee* CCPR/C/21/Rev.2/Add.12, 18 September 2002) para 4 <<https://www.refworld.org/docid/453883fe11.html>> accessed 30 March 2022 - 'To remedy such situations, the Committee has adopted new rules: (b) When the State party has not presented a report, the Committee may, at its discretion, notify the State party of the date on which the Committee proposes to examine the measures taken by the State party to implement the rights guaranteed under the Covenant: (ii) If the State party is not represented, the Committee may, at its discretion, either decide to proceed to consider the measures taken by the State party to implement the guarantees of the Covenant at the initial date or notify a new date to the State party.'

⁶⁰³ Joseph and Castan, *The International Covenant on Civil and Political Rights* (n 597); See also, United Nations Human Rights Committee, 'List of Issues Prior to Submission of the Fourth Periodic Report of India' (CCPR/C/IND/QPR/4, 22 August 2019) <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fIND%2fQPR%2f4&Lang=en> accessed 30 March 2022.

⁶⁰⁴ 'CCPR General Comment No. 30: Reporting Obligations of States Parties under Article 40 of the Covenant' (*United Nations Human Rights Committee* CCPR/C/21/Rev.2/Add.12, 18 September 2002) <<https://www.refworld.org/docid/453883fe11.html>> accessed 30 March 2022.

⁶⁰⁵ United Nations Human Rights Committee, 'List of Issues Prior to Submission of the Fourth Periodic Report of India' (CCPR/C/IND/QPR/4, 22 August 2019) <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fIND%2fQPR%2f4&Lang=en> accessed 30 March 2022.

jurisdictions.⁶⁰⁶ Through General Comment No. 28, the HRC underlines the responsibility of States parties to ensure the protection of women's rights at all costs.⁶⁰⁷ In this regard, as per the HRC,

'Inequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history and culture, including religious attitudes. The subordinate role of women in some countries is illustrated by the high incidence of prenatal sex selection and abortion of female foetuses. States parties should ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women's right to equality before the law and to equal enjoyment of all Covenant rights. States parties should furnish appropriate information on those aspects of tradition, history, cultural practices and religious attitudes which jeopardize, or may jeopardize, compliance with article 3, and indicate what measures they have taken or intend to take to overcome such factors.'⁶⁰⁸

As explained in this thesis, caste, religious beliefs, gender, patriarchal values etc., play a crucial role in the continuity of the three crimes in India. Therefore, the removal of such obstacles is a must for ensuring the equal enjoyment of rights by men and women as per article 3 of the ICCPR. Further, in relation to the General Comment, India as a State party is obligated to not only ensure that every person within its jurisdiction enjoys the rights enshrined in the Covenant but, it is also duty bound to bring in domestic legislations in order to give effect to the rights under the Covenant. This is important vis a vis the practice of honour killings in India, as currently there is no national or state law against this practice. Again, as a signatory to the ICCPR, India has to provide the HRC with information (through the reporting mechanism) regarding the actual status of women in the society so that the HRC can ascertain what additional measures are required to overcome the challenges that hinder the enjoyment of rights by women guaranteed under the Covenant.

⁶⁰⁶ 'CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)' (*United Nations Human Rights Committee* CCPR/C/21/Rev.1/Add.10, 29 March 2000) para 2 <<https://www.refworld.org/docid/45139c9b4.html>> accessed 30 March 2022 - 'Article 3 implies that all human beings should enjoy the rights provided for in the Covenant, on an equal basis and in their totality. The full effect of this provision is impaired whenever any person is denied the full and equal enjoyment of any right. Consequently, States should ensure to men and women equally the enjoyment of all rights provided for in the Covenant.'

⁶⁰⁷ 'CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)' (*United Nations Human Rights Committee* CCPR/C/21/Rev.1/Add.10, 29 March 2000) <<https://www.refworld.org/docid/45139c9b4.html>> accessed 30 March 2022.

⁶⁰⁸ *Ibid* para 5.

In relation to the status of implementation of the rights mentioned in the Covenant (especially article 3) in the Indian jurisdiction, the HRC while considering the third periodic report of India (1996) made the following observations in 1997 under para 17:

‘The Committee is concerned that women in India have not been accorded equality in the enjoyment of their rights and freedoms in accordance with articles 2 paragraph 1, 3 and 26⁶⁰⁹ of the Covenant. Nor have they been freed from discrimination.’⁶¹⁰

The HRC also commented upon the practice of devadasis stating that India had failed to bring in a national legislation to outlaw this practice and had left the same to the states where this practice is prevalent. Further, even those states had failed to bring in comprehensive legislation against this practice. In short, the HRC emphasized upon the incompatibility of the practice of devadasis with the core principles of the Covenant.⁶¹¹ The HRC also raised concerns about the caste based violence against the dalit community in India which continued to take place despite the efforts by the Indian government to stop them.⁶¹²

⁶⁰⁹ International Covenant on Civil and Political Rights 1966, art 26 - ‘All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’

⁶¹⁰ United Nations Human Rights Committee, ‘Consideration of Reports Submitted by State Parties under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee – India’ (CCPR/C/79/Add.81, 4 August 1997) <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f79%2fAdd.81&Lang=en> accessed 30 March 2022.

⁶¹¹ Ibid. Note: The reason for India’s failure to legislate on honour killing and passing a central legislation on devadasi system could relate to influence of strong social-cultural values and traditions (as highlighted in chapters 3 and 4) surrounding these two social practices that prohibit their recognition as serious offences through formal law. As discussed under chapters 3 and 4 non-state ‘laws’ have a significant impact not only on the understanding of international human rights law including rights of women domestically but also on the formal structures (such as police) that ensure the implementation of those rights.

⁶¹² United Nations Human Rights Committee, ‘Consideration of Reports Submitted by State Parties under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee – India’ (CCPR/C/79/Add.81, 4 August 1997) para 15 <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f79%2fAdd.81&Lang=en> accessed 30 March 2022 - ‘The Committee notes with concern that, despite measures taken by the Government, members of scheduled castes and scheduled tribes, as well as the so called backward classes and ethnic and national minorities continue to endure severe social discrimination and to suffer disproportionately from many violations of their rights under the Covenant, inter alia inter caste violence, bonded labour and discrimination of all kinds. It regrets that the de facto perpetuation of the caste system entrenches social differences and contributes to these violations.’

As noted earlier, India was required to submit its State party report on 07 August 2020 which was to include a reply to the HRC's List of Issues on the measures taken with respect to the implementation of the Covenant. The HRC had asked for specific information on the following points:

'Measures taken to: (a) eradicate the persistent patriarchal attitudes and deep-rooted stereotypes that perpetuate discrimination against women; (b) address the low representation of women in political and public life, particularly in Parliament and state legislatures and in the judiciary, including in decision-making positions; (c) ensure substantive equality between women and men in matters related to marriage and family relations, including marital property, under the laws governing different religious groups; and (d) abolish all customary and traditional practices that prevent rural women, especially women from scheduled castes and scheduled tribes, from inheriting or acquiring land and other property.'⁶¹³

In relation to violence against women and harmful practices, the HRC had asked India to respond to harmful practices such as child marriage, honour killings, devadasi, witchcraft accusations etc., and take measures to eliminate such practices. The HRC had also asked India to effectively tackle domestic violence, rape (including marital rape) and other forms of sexual violence and acid attacks.⁶¹⁴ It is important to note that, despite the HRC's Concluding Observations in 1997 on gender equality and violence against women, these issues have remained largely unresolved (the current serious nature of some of these issues have been highlighted in this thesis) which raises serious questions on India's commitment to protect and promote human rights.

The issue of insufficient compliance by States parties in relation to reporting mechanisms is also reflective of a major challenge for the growth of the treaty body systems. According to the document on reporting compliance by States parties, 'as of 06 March 2020, 154 of 197 States

⁶¹³ United Nations Human Rights Committee, 'List of Issues Prior to Submission of the Fourth Periodic Report of India' (CCPR/C/IND/QPR/4, 22 August 2019) para 10 <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fIND%2fQPR%2f4&Lang=en> accessed 30 March 2022.

⁶¹⁴ Ibid para 11.

parties (78.2 per cent) were overdue in submitting initial or periodic reports.’ India had 2 such overdue reports as of 06 March 2020.⁶¹⁵

5.2.2 The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

CEDAW was adopted in 1979 in light of the concern that despite several international covenants, discrimination against women continued to exist which was seen not only violative of the principles of equality but also an obstacle in the progress and development of society.⁶¹⁶ CEDAW has also been described as the UN’s ‘landmark treaty in the struggle for women’s rights’, and as constituting ‘an international bill of rights for women’.⁶¹⁷

The Convention defines ‘discrimination against women’ under article 1 as: ‘any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.’⁶¹⁸ Further, as per article 2, States parties are under an obligation to ensure the total elimination of discrimination against women in all its forms through legislative and other appropriate measures.⁶¹⁹ More importantly, CEDAW through its provisions seeks to address the fundamental issue of subordination of women in society, since, women have been historically dominated by men in all spheres of life.⁶²⁰ For example, provisions such as article 5 (which will be discussed in detail later in this section) highlight that in order to ensure equality of rights and freedoms for all, it is necessary to eliminate the structural factors of discrimination that are often rooted in patriarchal values and beliefs which get reflected through social-cultural practices.⁶²¹ Article 5 is based on the

⁶¹⁵ ‘Compliance by States Parties with their Reporting Obligations to International Human Rights Treaty Bodies’ (*Thirty-Second Meeting of Chairs of the Human Rights Treaty Bodies*, 1-5 June 2020) <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT/CHAIRPERSONS/CHR/32/31688&Lang=en> accessed 30 March 2022.

⁶¹⁶ Convention on the Elimination of All Forms of Discrimination against Women 1979.

⁶¹⁷ Marsha A. Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (1st edn, Oxford University Press 2012) 121.

⁶¹⁸ Convention on the Elimination of All Forms of Discrimination against Women 1979, art 1.

⁶¹⁹ Convention on the Elimination of All Forms of Discrimination against Women 1979, art 2.

⁶²⁰ Freeman, Chinkin and Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women* (n 617) 127.

⁶²¹ Convention on the Elimination of All Forms of Discrimination against Women 1979, art 5 - ‘States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women; (b)

premise that violation of women's human rights is done more by private individuals than by the State. Further, women's rights and freedoms are denied not only by family members but also by the community.⁶²² Thus, by placing an obligation on States parties to eliminate social and cultural practices that are prejudicial in nature, article 5 also acknowledges the shift from the traditional human rights discourse (which is centred on the relationship between the individual and the State) to a broader concept of human rights.⁶²³

With respect to violence against women, the Committee on CEDAW through General Recommendation No. 19, on Violence against Women (1992), expanded the meaning of 'discrimination against women' to include gender based violence.⁶²⁴ As per para 6 of General Recommendation No. 19: 'The Convention in article 1 defines discrimination against women. The definition of discrimination includes gender based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.'⁶²⁵ The Committee through General Recommendation No. 19 has therefore, brought 'gender based violence' within the human rights framework by equating it with the right to life, liberty and security of a person.⁶²⁶ The Committee recognizes that discrimination against women has varied forms and is inclusive of gender based violence. Moreover, gender based violence is the result of various factors associated with gender (such as exerting male power etc.) which infringes upon the life and liberty of women in society.⁶²⁷ The Committee notes that, traditional practices which are often based on patriarchal values place women in a subordinate position to men. Women are forced into performing stereotyped roles either

To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.'

⁶²² Ibid.

⁶²³ Freeman, Chinkin and Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women* (n 617) 128.

⁶²⁴ 'CEDAW General Recommendation No. 19: Violence Against Women' (*United Nations Committee on the Elimination of Discrimination*, 1992) <<https://www.refworld.org/docid/52d920c54.html>> accessed 30 March 2022.

⁶²⁵ Ibid.

⁶²⁶ United Nations Committee on the Elimination of Discrimination against Women, 'General Recommendation No. 35 on Gender-Based Violence Against Women Updating General Recommendation No. 19' (CEDAW/C/GC/35, 26 July 2017) para 9 <<https://digitalibrary.un.org/record/1305057?ln=en>> accessed 30 March 2022.

⁶²⁷ Ibid para 15 and 19.

through coercion or violence which affects them both physically as well as mentally and prohibits them from making their own life choices and exercising their basic human rights.⁶²⁸

Another important characteristic highlighted by the Committee in relation to combating gender based violence is with reference to acknowledging intersectional discrimination. While all women are at risk of facing gender based violence, some women due to their vulnerable position face even greater risk. This vulnerability is the result of a host of factors working together that make particular women more susceptible to violence.⁶²⁹ As mentioned by the Committee,

‘Discrimination against women is inextricably linked to other factors that affect their lives. These may include ethnicity/race, indigenous or minority status, colour, socio economic status and/or caste, language, religion or belief, political opinion, national origin, marital and/or maternal status, age, urban/rural location, health status, disability, property ownership, being lesbian, bisexual, transgender or intersex, illiteracy, trafficking of women, armed conflict, seeking asylum, being a refugee, internal displacement, statelessness, migration, heading households, widowhood, living with HIV/AIDS, deprivation of liberty, being in prostitution, geographical remoteness and stigmatisation of women fighting for their rights, including human rights defenders. Accordingly, because women experience varying and intersecting forms of discrimination, which have an aggravating negative impact, the Committee acknowledges that gender-based violence may affect some women to different degrees, or in different ways, so appropriate legal and policy responses are needed.’⁶³⁰

In order to understand why harmful practices such as the three crimes discussed in this thesis continue to affect women in India and as a State party to CEDAW what is India’s obligation towards those affected by such practices, it is necessary to examine article 5 of the Convention in more depth.

⁶²⁸ ‘CEDAW General Recommendation No. 19: Violence Against Women’ (*United Nations Committee on the Elimination of Discrimination*, 1992) para 11 <<https://www.refworld.org/docid/52d920c54.html>> accessed 30 March 2022.

⁶²⁹ United Nations Committee on the Elimination of Discrimination against Women, ‘General Recommendation No. 35 on Gender-Based Violence Against Women Updating General Recommendation No. 19’ (CEDAW/C/GC/35, 26 July 2017) para 12 <<https://digitallibrary.un.org/record/1305057?ln=en>> accessed 30 March 2022.

⁶³⁰ Ibid.

Article 5 of CEDAW obligates States parties to ensure the elimination of those customary and other practices within their jurisdictions that are either based on the inferiority or superiority of either of the sexes or on stereotyped roles of men and women. Further, article 5 also demands that maternity should not be considered as a ground for discrimination against women but should be seen as a shared responsibility between men and women.⁶³¹ The Committee in its General Recommendation No. 25 stated that one of three obligations that are vital for elimination of discrimination against women is ‘addressing prevailing gender relations and the persistence of gender based stereotypes that affect women not only through individual acts by individuals but also in law, and legal and societal structures and institutions.’⁶³² Therefore, through article 5, the Convention seeks to not only address gender inequality in society but also bring about change in the traditional roles of men and women by rooting out harmful practices that are often socially constructed.⁶³³

Since, article 5 addresses the issue of eliminating stereotyped roles of men and women by modifying customary practices in order to achieve equality of rights, the reason why harmful practices such as witch-hunting, honour killing and the devadasi system continue to exist in the Indian society can be further understood when examined within the framework of this article. Moreover, the working principle behind CEDAW is that it is by only bringing change in the traditional roles of men and women in society that full equality can be achieved.⁶³⁴ As per the discussion in the previous chapters, in most traditional societies (including India), social interactions are mostly regulated by community values which reflect the existing gender hierarchy. Although, domestic laws in several of such traditional societies guarantee basic rights (rights that are similar to those mentioned in various international instruments) to its

⁶³¹ Convention on the Elimination of All Forms of Discrimination against Women 1979, art 5.

⁶³² ‘General Recommendation No. 25, on Article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures’ (*United Nations Committee on the Elimination of Discrimination Against Women*, 2004) paras 6-7 <<https://www.refworld.org/docid/453882a7e0.html>> accessed 30 March 2022.

⁶³³ Sandra Fredman, ‘Beyond the Dichotomy of Formal and Substantive Equality: Towards New Definitions of Equal Rights’ in Ineke Boerefijn and others (eds), *Temporary Special Measures: Accelerating De Facto Equality of Women under Article 4(1) UN Convention on the Elimination of all Forms of Discrimination Against Women* (1st edn, Intersentia Publishers 2003) 116.

⁶³⁴ Convention on the Elimination of All Forms of Discrimination against Women 1979.

citizens, there exists a gap between what the law guarantees and the manner in which society governs itself.⁶³⁵ As noted by Mullay in the context of Pakistan,

‘Although the fundamental rights chapter of the Constitution guarantees equality before the law, the pursuit of gender equality has frequently been sacrificed to religious-cultural claims defining and limiting women’s status. Lost within such compromises is the recognition of women as bearers of rights, with equal rights to participate in the definition of religious-cultural norms.’⁶³⁶

Traditional societies that govern themselves based on patriarchal values only view women in the role of mothers and caregivers. Women are respected or even considered sacred and placed on a higher pedestal than men only because of these roles. However, society only bestows this level of protection on women till they fulfil the traditional role of being mothers and caregivers. Any ‘transgression’ from the traditional gender roles is not allowed and is severely punished either by members of the family or the community. As seen in the previous chapter, especially in the context of the crimes of witch-hunting and honour killing, women face different forms of punishment because they choose to take control of their life choices.⁶³⁷ As noted by Freeman, Chinkin, and Rudolf:

‘The social and cultural patterns of conduct and stereotyped roles that are addressed by Article 5, which are based on prejudice and on traditional or customary ideas about the inferiority of women, deny individual women the possibility to be a person in their own right and to employ all of their human capacities and capabilities to lead a meaningful life as a human being. Gender stereotypes and fixed parental gender roles therefore not only deny women the right to be treated respectfully as an equal and dignified human being; they also deny women the autonomy to live their lives according to their own choice and convictions about their personal and unique contribution to sustaining and developing humanity.’⁶³⁸

⁶³⁵ Madhu Mehra, ‘India’s CEDAW Story’ in Anne Hellum and Henriette Sinding Aasen (eds), *Women’s Human Rights - CEDAW in International, Regional, and National Law* (1st edn, Cambridge University Press 2013) 396.

⁶³⁶ Siobhán Mullally, ‘“As Nearly as May be”: Debating Women’s Human Rights in Pakistan’ (2005) 14(3) *Social and Legal Studies* 341, 342.

⁶³⁷ Freeman, Chinkin and Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women* (n 617) 241.

⁶³⁸ *Ibid* 240.

With regard to India's compliance with CEDAW, it is important to highlight that, India has signed the Convention on 30 July 1980 and ratified it on 9 July 1993 (with two declarations and one reservation).⁶³⁹ India, however, is not a signatory to the Optional Protocol to CEDAW (a State party to the Optional Protocol recognizes the competence of the Committee on CEDAW to receive and consider communications submitted by or on behalf of individuals or group of individuals claiming to be victims of violation).⁶⁴⁰ India's reservation to article 29(1)⁶⁴¹ is of little importance in relation to its obligation to eliminate all forms of discrimination against women, however, India's declarations, under articles 5(a), 16(1)⁶⁴² and 16(2)⁶⁴³ raise serious concerns over its commitment to promote equality of rights of men and women under the Convention.⁶⁴⁴ The two declarations are as follows:

‘With regard to articles 5(a) and 16(1) of the Convention on the Elimination of All Forms of Discrimination Against Women, the Government of the Republic of India declares that it shall abide by and ensure these provisions in conformity with its policy of non-interference in the personal affairs of any Community without its initiative and consent. With regard to Article 16(2) of the CEDAW, the Government of the Republic

⁶³⁹ Convention on the Elimination of Discrimination against Women, 18 December 1979 (*United Nations Treaty Collection*) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=_en> accessed 30 March 2022.

⁶⁴⁰ ‘Optional Protocol to the Convention on the Elimination of Discrimination Against Women’ (*United Nations General Assembly*, 6 October 1999) <<https://www.refworld.org/docid/3ae6b3a7c.html>> accessed 30 March 2022.

⁶⁴¹ Convention on the Elimination of All Forms of Discrimination against Women 1979, art 29(1) – ‘Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.’

⁶⁴² Convention on the Elimination of All Forms of Discrimination against Women 1979, art 16(1) - ‘States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: (a) The same right to enter into marriage; (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent; (c) The same rights and responsibilities during marriage and at its dissolution; (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount; (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights; (f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount; (g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation; (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.’

⁶⁴³ Convention on the Elimination of All Forms of Discrimination against Women 1979, art 16(2) - ‘The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.’

⁶⁴⁴ Convention on the Elimination of Discrimination against Women, 18 December 1979 (*United Nations Treaty Collection*) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=_en> accessed 30 March 2022.

of India declares that though in principle it fully supports the principle of compulsory registration of marriages, it is not practical in a vast country like India with its variety of customs, religions and level of literacy.⁶⁴⁵

The declarations by India restrict its obligations to eliminate several harmful practices including the three crimes that strengthen existing social-cultural stereotypes about women in society. In short, India's declarations go against the fundamental principle of protecting the 'dignity and worth of every human being'.⁶⁴⁶ As noted by Vasudevan,

'India's CEDAW Declaration, indirectly protects and promotes those majoritarian Hindu cultural traditions that cause violence. In effect, there exists empirical interconnections between the patriarchal, cultural traditions that cause gender-based violence in Hindu society and the religious norms of gender subordination codified in the Hindu Personal Laws.'⁶⁴⁷

Note that, the Hindu community is the largest legal category with several other communities within its ambit such as Jains and Sikhs for the purposes of laws relating to marriage, succession etc.⁶⁴⁸ The codification of Hindu law was done with a view to do away with caste and regional diversities, however, since custom is allowed to override the codified law in India, the divisions in society have only become wider with time.⁶⁴⁹ For example, the succession and inheritance laws for Hindus (including Jains, Sikhs and Buddhists) is regulated by The Hindu Succession Act, 1956.⁶⁵⁰ Prior to 2005, a daughter had no right over her father's property, but by virtue of The Hindu Succession (Amendment) Act, 2005, daughters now have an equal right in their father's property right from the time of birth.⁶⁵¹ It is interesting to note that, despite the Constitution of India guaranteeing equal rights to all its citizens in 1950, daughters got the right to have an equal share in their father's property only in 2005. This itself highlights the gap

⁶⁴⁵ Ibid.

⁶⁴⁶ Convention on the Elimination of All Forms of Discrimination against Women 1979; See also, Mehra, India's CEDAW Story (n 635) - 'The declarations are rooted in the politics of patriarchy, cultural identity and electoral gain, in which the women question is embedded in India. Religion-based family law has come to be positioned as an exercise of religious freedom that trumps sex equality, although both are equally placed as constitutionally guaranteed fundamental rights.'

⁶⁴⁷ Shritha Vasudevan, 'A Gendered Refutation of Epiphenomenal Norms Through The Median Voter: A Case Study of India's CEDAW Compliance' (2019) 33 (2) Emory International Law Review 223, 231.

⁶⁴⁸ The Hindu Marriage Act 1955; See also, The Hindu Succession Act 1956.

⁶⁴⁹ Mehra, India's CEDAW Story (n 635) 395.

⁶⁵⁰ The Hindu Succession Act 1956.

⁶⁵¹ The Hindu Succession Act 1956, s 6.

between law on one hand and societal reality on the other. Further, as per a study published in 2018, various state amendments to The Hindu Succession Act, 1956 between the period 1970 to 1990 (to give property rights to girls) had an adverse effect leading to ‘elimination of girls’ from society.⁶⁵² As per this study, changes to the law between 1970 to 1990 led to increased female foeticide and higher female infant-mortality rates. The study also found that ‘girls born after legal reforms were 2-3 percentage more likely to die before reaching their first birthday, and 9 percentage more likely to have a younger sibling if the firstborn child was a girl.’⁶⁵³

Therefore, from the above example, it can be concluded that India’s declaration to article 5(a) of CEDAW weakens its own domestic laws by strengthening the patriarchal mindset of society which gives rise to harmful practices against women. India’s declaration prohibits the elimination of practices that are motivated by biased notions of gender. It can also be argued that, article 5 of CEDAW and its scope especially in the Indian context is not limited to only bringing about change in the idea of superiority or inferiority of men and women (and their social roles) but is also concerned with putting an end to the structural reasons that are responsible for gender based discrimination against women. In short, India’s declaration to article 5(a) not only goes against ‘the right to gender-based equality but also the right against gender-based violence.’⁶⁵⁴

The Committee on CEDAW sought information from India on matters relating to stereotypes and harmful practices and the measures taken to prevent violence against women as part of the List of issues and question in relation to the combined Fourth and Fifth periodic reports (2013).⁶⁵⁵ Under para 8, the Committee with respect to stereotypes and harmful practices asked India to provide information related to the efficacy of various legislations that have been passed to prohibit harmful practices such as, devadasi, witch-hunting, honour killing and several others. The Committee also sought information on the measures taken to ‘modify gender stereotypes and cultural beliefs that portray women in a subordinate role in society, including

⁶⁵² Sonia Bhalotra, Rachel Brulé and Sanchari Roy, ‘Women’s Inheritance Rights Reform and the Preference for Sons in India’ (2020) 146 *Journal of Development Economics* 1, 4.

⁶⁵³ *Ibid* 3.

⁶⁵⁴ Vasudevan, A Gendered Refutation of Epiphenomenal Norms Through The Median Voter (n 647) 230.

⁶⁵⁵ Committee on the Elimination of Discrimination against Women, ‘List of Issues and Questions in Relation to the Combined Fourth and Fifth Periodic Reports of India’ (CEDAW/C/IND/Q/4-5, 28 October 2013) <<https://www.refworld.org/docid/52dd39f04.html>> accessed 30 March 2022.

in textbooks and the media.’⁶⁵⁶ In relation to violence against women, given its high prevalence, the Committee asked India to provide information on measures taken or planned to address violence against women and girls in its entirety in both public and private spheres including measures taken to help women who are victims of violence.⁶⁵⁷

In its reply to the List of issues, under para 8, India said that honour killings are reported from areas where the Khap panchayats are active and violence resulting from such killings are seen in both rural areas and in cities. Further, law enforcement has failed to provide necessary protection to the couples when they come forward and report a threat to their lives. India also said in its response that cases of honour killings are treated as murder under law [as per the provisions of the Indian Penal Code (IPC) 1860].⁶⁵⁸ With reference to the practice of devadasi, India stated that, since the practice has been in existence for a long time, awareness is the first step towards eradicating this system. India stated that, awareness campaigns have been carried out especially in front of temples through street plays etc., to educate people about this practice.⁶⁵⁹ Incidents of witch-hunting are generally localized and areas where such incidents are reported have enacted legislations to prevent the same.⁶⁶⁰

Note that, in its response to the Committee’s queries, India did not provide any information on the steps taken to modify gender stereotypes and cultural beliefs that portray women in a subordinate role in public and private sphere. Moreover, India said that it was wrong on part of the Committee to say that ‘there is a high prevalence of violence against women in India’ in the absence of any comparative international data.⁶⁶¹ Though, India did provide a list of legislations aimed at protecting women, but its response did not say anything on the efficacy

⁶⁵⁶ Ibid.

⁶⁵⁷ Committee on the Elimination of Discrimination against Women, ‘List of Issues and Questions in Relation to the Combined Fourth and Fifth Periodic Reports of India’ (CEDAW/C/IND/Q/4-5, 28 October 2013) <<https://www.refworld.org/docid/52dd39f04.html>> accessed 30 March 2022.

⁶⁵⁸ Committee on the Elimination of Discrimination against Women, ‘List of Issues and Questions in Relation to the Combined Fourth and Fifth Periodic Reports of India: Addendum Replies of India’ (CEDAW/C/IND/Q/4-5/Add.1, 23 January 2014) <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fIND%2fQ%2f4-5%2fAdd.1&Lang=en> accessed 30 March 2022.

⁶⁵⁹ Ibid.

⁶⁶⁰ Committee on the Elimination of Discrimination against Women, ‘List of Issues and Questions in Relation to the Combined Fourth and Fifth Periodic Reports of India: Addendum Replies of India’ (CEDAW/C/IND/Q/4-5/Add.1, 23 January 2014) <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fIND%2fQ%2f4-5%2fAdd.1&Lang=en> accessed 30 March 2022.

⁶⁶¹ Ibid.

of legislations in relation to witch-hunting and the devadasi system. India's response did not shed light on important issues such as the number of convictions/acquittals, pending cases etc. under each legislation considering the Committee had sought information specific to each crime.

The Committee in its concluding observations noted that, India's declarations regarding articles 5(a) and 16(1) of the Convention were incompatible with the country's own constitutional guarantees of equality and non-discrimination. The Committee also made an observation that, India had not taken necessary steps to eliminate stereotypes and harmful practices such as witch-hunting, honour killing and the devadasi system.⁶⁶² The Committee made the following recommendations based on its observations:

- '(a) That, India should review its declarations regarding articles 5(a) and 16(1) with a view to withdrawing them;
- (b) That, India should put in place without delay a comprehensive national campaign and strategy, with specific goals and timelines, to eliminate patriarchal attitudes and stereotypes that discriminate against women, in accordance with article 2(f) of the Convention;
- (c) That, India should strengthen its awareness-raising and educational efforts, targeting both women and men, with the involvement of civil society and community leaders, to eliminate all harmful traditional practices and to collaborate with the media to enhance a positive, non-stereotypical and non-discriminatory portrayal of women.'⁶⁶³

Further, in addition to the respective reports by the HRC and the Committee on CEDAW, the Working Group on the Universal Periodic Review also issued its report based on the review of India's national report submitted in 2017, wherein India was asked by the Working Group to examine the following recommendations: '1. To ratify the Optional Protocols to the International Covenant on Civil and Political Rights and to the Convention on the Elimination of All Forms of Discrimination against Women and 2. To consider withdrawing the remaining

⁶⁶² Committee on the Elimination of Discrimination against Women, 'Concluding Observations on the Combined Fourth and Fifth Periodic Reports of India' (CEDAW/C/IND/CO/4-5, 24 July 2014) para 21 <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fIND%2fCO%2f4-5&Lang=en> accessed 30 March 2022.

⁶⁶³ Ibid.

declarations to the Convention on the Elimination of All Forms of Discrimination against Women.⁶⁶⁴

Several non-governmental organizations also submitted reports to the Committee on CEDAW as part of the combined Fourth and Fifth review of India. These reports highlighted the harmful practices of witch-hunting and the devadasi system and recommended for stricter laws as well as recognizing and addressing the intersection of social and economic inequalities that result in stereotypes and prejudices against women.⁶⁶⁵ India's response to the Committee's queries in relation to the three crimes is reflective of the Indian society's failure to recognize violence against women as an outcome of long-established patriarchal values. By denying the existence of high prevalence of crimes against women or by treating wide-spread harmful practices as only localized incidents, India has allowed prejudiced social-cultural values to even influence institutional mechanisms (such as police) because of which women, especially, dalit women are unable to access them.

India is therefore, under an obligation to bring changes in its domestic practices and policies to combat violence against women being party to a number of international human rights conventions and treaties including CEDAW.⁶⁶⁶ But, the responsibility to bring about change is not only limited to enacting legislations, but it also encompasses bringing change in the beliefs

⁶⁶⁴ 'Report of the Working Group on the Universal Periodic Review: India' (*United Nations Human Rights Council A/HRC/36/10*, 14 July 2017) para 161 <<https://www.refworld.org/docid/59ba91e54.html>> accessed 30 March 2022.

⁶⁶⁵ Franciscans International, 'Alternative Report to the United Nations Committee on the Elimination of All Forms of Discrimination Against Women for the examination of the 4th and 5th periodic reports of India at the 58th CEDAW Session in July 2014' (*Committee on the Elimination of All Forms of Discrimination Against Women*, 58th Session, 27 May 2014) <https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/Ind/INT_CEDAW_NGO_Ind_17373_E.pdf> accessed 30 March 2022; Navsarjan Trust, the All India Dalit Mahila Adhikar Manch and the International Dalit Solidarity Network, 'Alternative Report to the United Nations Committee on the Elimination of All Forms of Discrimination Against Women for the examination of the 4th and 5th periodic reports of India at the 58th CEDAW Session in July 2014' (*Committee on the Elimination of All Forms of Discrimination Against Women*, 58th Session, June 2014) <https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/Ind/INT_CEDAW_NGO_Ind_17408_E.pdf> accessed 30 March 2022; Inter State Adivasi Women's Network of Mainland India, Indigenous Women's Forum of North East India and Asia Indigenous Peoples Pact, Chian Mai, Thailand, 'NGO CEDAW Shadow Report and Status of Adivasi/Tribal Women in India for the examination of the 4th and 5th periodic reports of India at the 58th CEDAW Session in July 2014' (*Committee on the Elimination of All Forms of Discrimination Against Women*, 58th Session, June 2014) <https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/Ind/INT_CEDAW_NGO_Ind_17414_E.pdf> accessed 30 March 2022.

⁶⁶⁶ Abdullahi Ahmed An-Na'im, 'State Responsibility Under International Human Rights Law to Change Religious and Customary Laws' in Rebecca J. Cook (ed), *Human Rights of Women: National and International Perspectives* (1st edn, University of Pennsylvania Press 1994) 167.

and practices based on religion and custom that are often implemented as ‘laws’ in communities (emphasis on the issue of legal pluralism).⁶⁶⁷ As shown in this thesis, especially with respect to the three crimes, fear of religious, customary and community sanctions play a significant role in the continuity of these social practices. Again, it should also be underlined that those implementing such religious and cultural orders are not State entities (i.e., they are not elected representatives or have any legal authority) but are groups of people who have taken upon themselves the role of governing their own communities. One reason for this is the disbelief in State machinery to solve ‘social issues’ that affect day to day lives of people. Nevertheless, it is still the duty of the State to bring domestic practices into conformity with its international human rights obligations.

The third Special Rapporteur on violence against women has emphasized that States should act with necessary due diligence so as to bring in changes in their domestic polices in order to effectively combat violence against women.⁶⁶⁸ Note that, State responsibility to act with due diligence in combating violence against women has been set out in the 2006 report by the UN Special Rapporteur on Violence against Women.⁶⁶⁹ The due diligence standard is used as a yardstick to evaluate the State’s efforts in preventing and responding to violence against women.⁶⁷⁰ Every human rights instrument is either based around a principle or a specific guideline that expects States to act with due diligence. This includes recognizing a problem, making changes to current practices and policies, repealing old laws, framing new laws to safeguard a particular right, providing support to victims etc.⁶⁷¹ The principle of due diligence has also been applied to prevent private acts of violence by the Inter-American Court of Human Rights (IACtHR) and the Inter-American Commission on Human Rights (IACHR).⁶⁷² The

⁶⁶⁷ Ibid; See also, United Nations Committee on the Elimination of Discrimination against Women, ‘General Recommendation No. 35 on Gender-Based Violence Against Women Updating General Recommendation No. 19’ (CEDAW/C/GC/35, 26 July 2017) para 9 <<https://digitallibrary.un.org/record/1305057?ln=en>> accessed 30 March 2022.

⁶⁶⁸ Lisa Grans, ‘The Concept of Due Diligence and the Positive Obligation to Prevent Honour-related Violence: Beyond Deterrence’ (2018) 22 (5) *The International Journal of Human Rights* 733, 733-734.

⁶⁶⁹ Yakin Ertürk, ‘Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences on the Due Diligence Standard as a Tool for the Elimination of Violence against Women’ (*United Nations Commission on Human Rights E/CN.4/2006/61*, 20 January 2006) <<https://www.refworld.org/docid/45377afb0.html>> accessed 30 March 2022.

⁶⁷⁰ Grans, *The Concept of Due Diligence and the Positive Obligation to Prevent Honour-related Violence* (n 668) 735.

⁶⁷¹ Rashida Manjoo, ‘State Responsibility to Act with Due Diligence in the Elimination of Violence against Women’ (2013) 2 (2) *International Human Rights Law Review* 240, 246.

⁶⁷² Grans, *The Concept of Due Diligence and the Positive Obligation to Prevent Honour-related Violence* (n 668) 735.

IACtHR in the *Velasquez Rodriguez v Honduras* case held that States are under an obligation to take ‘reasonable steps’ to prevent human rights violations which includes ‘all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts.’⁶⁷³ In relation to violence against children and women, the IACtHR has stated that State has the duty to adopt effective measures to ensure their protection.⁶⁷⁴ In the *Opuz* case, the European Court of Human Rights (ECtHR) required that States should take ‘all reasonable measures’ to address domestic violence.⁶⁷⁵

Under article 2 of CEDAW, ‘States parties agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women.’⁶⁷⁶ Though, there is no specific provision in CEDAW relating to a State’s responsibility to act with due diligence, the phrase ‘to pursue by all appropriate means’ can be equated with acting with due diligence. Further, article 2 obligates every State party to undertake key steps in ensuring an end to discrimination against women.⁶⁷⁷ Since, CEDAW did not have a specific provision relating to due diligence, the Committee on the Elimination of Discrimination against Women issued General Recommendation No. 19 in which it emphasized that ‘article 2(e) of the Convention calls on States parties to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise. Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.’⁶⁷⁸ The Declaration on the Elimination of Violence against Women (DEVAW) under article 4(c) also urges States to exercise due diligence in preventing, investigating in accordance with national legislation and punishing acts of violence against women, whether those acts are committed by the State or by private persons.⁶⁷⁹ Further, in

⁶⁷³ Inter-Am Ct. H.R. (Ser. C) No. 4 (1988).

⁶⁷⁴ ‘Advisory Opinion OC-17/2002, “Juridical Condition and Human Rights of the Child”’ (*Inter-American Court of Human Rights* OC-17/2002, 28 August 2002) <<https://www.refworld.org/cases,IACRTHR,4f59d6432.html>> accessed 30 March 2022.

⁶⁷⁵ *Opuz v Turkey*, Application No. 33401/02, 9 June 2009.

⁶⁷⁶ Convention on the Elimination of All Forms of Discrimination against Women 1979, art 2.

⁶⁷⁷ *Ibid.*

⁶⁷⁸ ‘CEDAW General Recommendation No. 19: Violence Against Women’ (*United Nations Committee on the Elimination of Discrimination*, 1992) <<https://www.refworld.org/docid/52d920c54.html>> accessed 30 March 2022.

⁶⁷⁹ Declaration on the Elimination of Violence Against Women 1993.

2010, the Committee on CEDAW through General Recommendation No. 28, reiterated that article 2 of CEDAW imposes a due diligence obligation on the States.⁶⁸⁰

5.3 The Public/Private Divide in International Human Rights Law

The primary reason often advanced for the lack of attention from human rights law towards the many violations of women's human rights is the distinction of public and private sphere maintained by international law which also plays a significant role in allocating State responsibility for human rights violations.⁶⁸¹ The scope of human rights law in relation to the functioning of international law (State to State interactions) involves both political as well as legal dimensions, since human rights law is seen as a powerful tool for influencing policies both at the domestic and the international level.⁶⁸² However, gender specific abuses are yet to be fully integrated into every State's policy on human rights because traditionally international law has only focused on those abuses which have been committed by the State against individuals.⁶⁸³

The following factors are often cited behind the traditional approach of international law which attributes responsibility to States in case of human rights violations. Firstly, international law, historically, is nothing but a set of rules intended to govern the relationship between two States.⁶⁸⁴ Secondly, the primacy of civil and political rights over social, cultural, and economic rights under international law with respect to human rights is believed to have disadvantaged women's issues.⁶⁸⁵ Thirdly, the duty to protect family and the privacy rights within the family, blocks any possibility of State intervention. Because family is considered sacred, most violations of women's rights that take place at the hands of family members automatically fall

⁶⁸⁰ 'General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women' (*United Nations Committee on the Elimination of Discrimination Against Women* CEDAW/C/GC/28, 16 December 2010) para 13 <<https://www.refworld.org/docid/4d467ea72.html>> accessed 30 March 2022 - 'Article 2 is not limited to the prohibition of discrimination against women caused directly or indirectly by States parties. Article 2 also imposes a due diligence obligation on States parties to prevent discrimination by private actors.'

⁶⁸¹ Donna Sullivan, 'The Public/Private Distinction in International Human Rights Law' in Julie Peters and Andrea Wolper (eds), *Women's Rights, Human Rights: International Feminist Perspectives* (1st edn, Routledge 1995) 126.

⁶⁸² Christine Chinkin, 'A Critique of the Public/Private Dimension' (1999) 10 (2) *European Journal of International Law* 387, 390.

⁶⁸³ Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85 (4) *American Journal of International Law* 613, 622.

⁶⁸⁴ Sullivan, *The Public/Private Distinction in International Human Rights Law* (n 681).

⁶⁸⁵ *Ibid* 127.

outside the purview of State scrutiny.⁶⁸⁶ Thus, the above mentioned three factors i.e., the State oriented nature of international law, primacy of civil and political rights over social, cultural and economic rights and the importance of the institution of family, account for the neglect of gender specific violations in the private sphere.⁶⁸⁷ The challenge, therefore, is not to completely shift the focus away from violations of civil and political rights by the State but to broaden the current framework of abuses in order to include abuses suffered by women from private individuals within the ambit of human rights violations.⁶⁸⁸

Note that, the public/private distinction in international law can be considered as one of the biggest barriers in overcoming the aforementioned challenge. Due to the public/private divide, the autonomy of women stands heavily compromised. The public/private distinction reinforces patriarchal beliefs in society which creates hurdles in the full implementation of laws relating to women. The artificial distinction of public and private coupled with the already existing gender specific roles for both men and women in most traditional societies, enables various forms of violence against women to not only persist, but often go unnoticed.

Further, as per most feminist scholars, the public/private divide for the purposes of international law reinforces existing power struggles in society which places women in a subordinate position.⁶⁸⁹ Power struggles, especially in traditional societies, which mostly centres around controlling gender and gender relations places certain activities within the public and certain other within the private realm.⁶⁹⁰ More importantly, preconceived notions of gender and gender roles play an important role in deciding which gender controls what activity in each sphere. Men tend to dominate both the public as well as the private sphere in society.⁶⁹¹ For instance, in India, men remain the decision makers even in the private sphere, as they dictate every aspect

⁶⁸⁶ Sullivan, *The Public/Private Distinction in International Human Rights Law* (n 681) 127.

⁶⁸⁷ *Ibid.*

⁶⁸⁸ Friedman, *Women's Human Rights* (n 578).

⁶⁸⁹ Celina Romany, 'Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law' (1993) 6 *Harvard Human Rights Journal* 87, 99-100; See also, Edwards, *Violence Against Women under International Human Rights Law* (n 575) 66 - 'On a practical level, the effect of distinguishing between the public and the private has 'rendered invisible', or at least less important, the many violations that women suffer in private. Excluding issues of violence against women from the international human rights agenda arose from a failure to see the oppression of women as political. In this way, it leaves the private or family realm, where the majority of women spend the bulk of their lives, unregulated, unprotected, and susceptible to abuse.'

⁶⁹⁰ Edwards, *Violence Against Women under International Human Rights Law* (n 575) 65; See also, Sullivan, *The Public/Private Distinction in International Human Rights Law* (n 681) 128 - 'In many societies, participation in formal structures of governance and public sector employment are viewed as quintessentially public activities, and relations in marriage and in child rearing are defined as core of private life.'

⁶⁹¹ Edwards, *Violence Against Women under International Human Rights Law* (n 575) 65.

of the family life including how young girls and women in family shall conduct themselves. This is a major reason why violations of women's rights often go unnoticed. As noted by Bunch, 'female subordination runs so deep that it is still viewed as inevitable or natural rather than as a politically constructed reality maintained by patriarchal interests, ideology, and institutions.'⁶⁹²

Although the boundary between the public and private sphere acts as a restriction for State intervention in matters related to private life, States have exercised control over the private sphere in order to provide protection to vulnerable groups.⁶⁹³ For instance, in India, matters pertaining to marriage and married life are generally considered to be part of the private sphere, however, the State has intervened into the private sphere from time to time to protect the rights of married women. The Protection of Women from Domestic Violence Act is one such legislation which was passed in 2005 to protect the rights of women who are victims of violence within the family.⁶⁹⁴ However, such State interventions are exception to the rule of non-intervention in matters related to family life. For example, as mentioned earlier, India has made a declaration to article 5(a) of CEDAW declaring that 'it shall abide by the said provision in conformity with its policy of non-interference in the personal affairs of any Community without its initiative and consent.'⁶⁹⁵ Note that, several human rights treaties often require States parties to take appropriate actions for elimination of discrimination against women. Such actions are not restricted to the public sphere but also touch upon the private sphere.⁶⁹⁶ For example, as per article 2(e) of CEDAW, States parties 'agree to pursue by all appropriate means a policy of eliminating discrimination against women and, to this end, undertake, to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise.'⁶⁹⁷ Further, as per General Recommendation No. 19, the Committee on CEDAW states that, the discrimination as mentioned under the Convention is not restricted to actions by or on behalf of the State but it also stretches to actions by private individuals. States may be

⁶⁹² Bunch, Transforming Human Rights from a Feminist Perspective (n 562) 14-15.

⁶⁹³ Sullivan, The Public/Private Distinction in International Human Rights Law (n 681) 128.

⁶⁹⁴ The Protection of Women from Domestic Violence Act 2005.

⁶⁹⁵ Convention on the Elimination of Discrimination against Women, 18 December 1979 (*United Nations Treaty Collection*) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=_en> accessed 30 March 2022.

⁶⁹⁶ Sullivan, The Public/Private Distinction in International Human Rights Law (n 681) 130.

⁶⁹⁷ Convention on the Elimination of All Forms of Discrimination against Women 1979, art 2(e).

held responsible for acts committed by private individuals if they fail to act in due diligence and prevent violations of women's rights.⁶⁹⁸

Hence, due to the public/private distinction, family life is generally made immune to State intervention. It can very well be argued that, as long as the family structure remains a model which oppresses women, the private sphere will continue to mirror patriarchal thinking which will allow the State to largely remain neutral to violations of women's rights (emphasis on India's declaration to article 5(a) of CEDAW).

5.4 India - Violence Against Women, Human Rights and Domestic Laws

India has signed and ratified a number of international treaties; however, these international treaties and conventions are not self-executing in India unless there is a corresponding domestic legislation to that effect.⁶⁹⁹

Further, even in situations where domestic law is silent or ambiguous on any given subject-matter, the Supreme Court of India has accepted and incorporated provisions of international conventions.⁷⁰⁰ For example, in the case of *Kesavananda Bharati v State of Kerala*, the Supreme Court said that article 51 of the Constitution (promotion of international peace and security) which is a municipal law has to be interpreted keeping in view the aims and objectives of the Charter of the United Nations.⁷⁰¹ Similarly, in the absence of a domestic legislation against sexual harassment of women at workplace, the Supreme Court in the case of *Vishaka and Others v State of Rajasthan*, while addressing a writ petition filed for the enforcement of fundamental rights of working women under articles 14, 19(1)(g) and 21 of the Constitution made the following observation:⁷⁰² in the absence of a domestic law to curb the menace of sexual harassment of working women everywhere, 'the contents of International Conventions

⁶⁹⁸ 'CEDAW General Recommendation No. 19: Violence Against Women' (*United Nations Committee on the Elimination of Discrimination*, 1992) <<https://www.refworld.org/docid/52d920c54.html>> accessed 30 March 2022.

⁶⁹⁹ M P Jain, *Indian Constitutional Law* (7th edn, Lexis Nexis 2016) 1440.

⁷⁰⁰ *Ibid.*

⁷⁰¹ AIR 1973 SC 1461.

⁷⁰² *Vishaka and Others v State of Rajasthan*, AIR 1997 SC 3011; See also, The Constitution of India, art 14, 19(1)(g) and 21 - 'Article 14. Equality before law: The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India; Article 19(1)(g). Right to Freedom: to practise any profession, or to carry on any occupation, trade or business; Article 21. Protection of life and personal liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law.'

and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in articles 14, 19(1)(g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein. Any International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee.⁷⁰³ For this purpose, the Supreme Court referred to articles 11(1)(a), (f) and 24 of CEDAW in order to formulate guidelines on prevention of sexual harassment of women to be followed at all places of work and institutions in the country.⁷⁰⁴

The Fundamental Rights chapter when read with the chapter on the Directive Principles of the State Policy under the Indian Constitution are sufficient to encompass all the facets of gender justice (including the prevention of all forms of violence against women) under various international conventions and treaties. As the supreme law of the land, the Constitution is superior to all other laws in the country. In light of this, the higher judiciary in India while adjudicating in the absence of domestic laws has time and again read international conventions and norms into constitutional provisions to impart justice.

5.4.1 Witch-Hunting

There is no national legislation against witch-hunting and witchcraft accusations in India. However, several Indian states where such incidents are often reported have passed legislations to put an end to this practice. The state of Jharkhand which has the highest witch-hunting related deaths in the country legislated ‘The Prevention of Witch Hunting Practices Act, 2001’ to combat this social evil. The 2001 Act is the focus of this section because the state of Jharkhand reports the highest number of witch-hunting related deaths in India. The main objective behind the said legislation is ‘to provide for effective measures to prevent the witch practices and identification of a woman as a witch and their oppression mostly prevalent in

⁷⁰³ *Vishaka and Others v State of Rajasthan*, AIR 1997 SC 3011.

⁷⁰⁴ Convention on Elimination of All Forms of Discrimination Against Women 1979, art 11(1)(a), (f) and 24 - ‘Article 11(1). States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular: (a) The right to work as an inalienable right of all human being; (f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction. Article 24. States Parties undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the present Convention.’

tribal areas and elsewhere in the state and to eliminate the women's torture, humiliation and killing by the society.⁷⁰⁵ The following are some of the key provisions under the 2001 Act:

‘Section 3: Identification of Witch - Whoever identifies any person as witch and does any act towards identification either by words, actions or manner shall be punished with imprisonment for a term which may extend to 3 months or with fine of Rs. 1000 or with both.

Section 4: Damages for Causing Harm- Any person who cause any kind of physical or mental torture to any person by identifying her as a witch whether deliberately or otherwise shall be punished with imprisonment for a term which may extend to 6 months or fine of Rs 2,000 or both.

Section 5: Abetment in the Identification of Witch - Any person who intentionally or inadvertently abets, conspires, aids, instigates any other person or persons of the society whether in identification of any woman as a witch with an intention to cause by anyone harm to that person shall be punishable with imprisonment for a term which may extend to 3 months or with a fine of Rs 1,000/-or with both.

Section 6: Witch curing- Whoever does any act of so healing allegedly or purportedly and of curing any woman said to be witch by doing any act of ‘*jhadphook*’ or ‘*totka*’ and thereby causing any kind of physical or mental harm and torture to that person identified as a witch in any manner shall be punished with imprisonment for a term which may extend to one year with a fine of Rs 2,000/- or with both.’⁷⁰⁶

Though the objective of The Prevention of Witch Hunting Practices Act, 2001 is to provide effective measures to stop torture and humiliation of women in the name of witchcraft, the above mentioned provisions of the Act do not seem to reflect the same legislative intent.⁷⁰⁷ For example, under section 3 of the Act, the punishment prescribed for accusing another as a witch is only imprisonment of up to 3 months with a minor fine. As discussed in the previous chapter, the act of accusing or branding a woman as a witch not only destroys her entire life but also forces her to lead a life of isolation. She is not only subjected to mental and brutal physical torture but is humiliated and harassed for the rest of her life.⁷⁰⁸ The literal reading of section 3 of the 2001 Act shows that the serious consequences associated with the act of accusing or

⁷⁰⁵ The Prevention of Witch Hunting Practices Act 2001.

⁷⁰⁶ The Prevention of Witch Hunting Practices Act 2001.

⁷⁰⁷ The Prevention of Witch Hunting Practices Act 2001.

⁷⁰⁸ Roy, Sanctioned Violence (n 384) 144.

branding someone as a witch has not been taken into consideration while drafting the punishment for this offence. Further, the punishment for causing mental or physical harm by accusing someone as a witch under section 4 is only imprisonment of up to 6 months with a minor fine.⁷⁰⁹ As already noted in the previous chapter, once the witch-doctor ‘confirms’ the suspicion that a woman is a witch, she is made to go through nearly impossible tests to prove her innocence in front of the whole community. While undergoing these tests, women not only end up with serious bodily injuries but often die.⁷¹⁰ Section 4 of the Act, therefore, does not appear to take into account the serious threat to life which results when a woman is either beaten mercilessly or subjected to undergo series of tests on account of being accused of practicing witchcraft. The reason for the sentences under the 2001 Act being less could stem from a possible lack of understanding and acknowledging the harm associated with the practice of witchcraft and due to the wider acceptance/normalization of this practice which again relates to influence of social-cultural values and traditions (as highlighted in chapters 3 and 4).

The 2001 Act is silent on issues such as compensation and rehabilitation for the victim. Furthermore, the Act does not either mention or equate witchcraft accusations with customary practices that are prejudicial to interests of women. The 2001 Act also fails to instruct the local administration to take appropriate steps to suppress witch-hunting and educate people about this social evil. Note that, despite the 2001 Act being a ‘special law’ (which is applicable to a particular subject matter), the Act is also silent on the issue of accountability of local administration if they fail to protect women from being branded as witches or fail in their obligation to provide assistance to the victim in seeking justice.

Out of the 59 judgments (of the High Courts and the Supreme Court) related to witch-hunting that were studied as part of a report by an NGO in 2014, 31 of those judgments belonged to the state of Jharkhand.⁷¹¹ Further, out of the 31 cases (in Jharkhand), in 26 cases, crimes occurred before the state law (The Prevention of Witch Hunting Practices Act, 2001) was passed and

⁷⁰⁹ The Prevention of Witch Hunting Practices Act 2001, s 4.

⁷¹⁰ Mathur, Witchcraft, Witches and Social Exclusion (n 17) 291.

⁷¹¹ Anuja Agrawal and Madhu Mehra, ‘Contemporary Practices of Witch Hunting: A Report on Social Trends and the Interface with Law’ (*Partners for Law in Development*, 2014) 1, 120 <https://www.academia.edu/15475888/Contemporary_Practices_of_Witch_Hunting_A_Report_on_Social_Trends_and_the_Interface_with_Law_2015_> accessed 30 March 2022. A total of 10 states were considered for this study namely, Jharkhand, Bihar, West Bengal, Chhattisgarh, Assam, Odisha, Maharashtra, Rajasthan, Gujarat and Kerala.

only 5 cases occurred after the state law was passed. Moreover, out of those 5 cases that came to light after the 2001 Act, only in 3 cases charges were framed.⁷¹² The NGO report also highlighted large number of acquittals in cases where serious charges of murder had been framed. Out of the 59 convictions in 59 cases by the trial courts, in 22 cases, the accused were acquitted by the appellate courts.⁷¹³ In one such case, *Krishna Oraon v State of Jharkhand*, the deceased was branded as a witch by the appellant who alleged that the deceased had ‘eaten away’ the appellant’s wife. The victim (deceased) was dragged out of her house, assaulted and then killed. The trial court had convicted the accused appellant under section 302 Indian Penal Code (IPC), 1860 (i.e., punishment for murder) to rigorous imprisonment for life, however, the High Court reversed the trial court’s decision to eight years imprisonment under section 304(2) IPC (i.e., punishment for culpable homicide not amounting to murder).⁷¹⁴ In its decision, the High Court made the following observation (which is debatable considering most cases of witchcraft accusations generally result in the brutal death of the victim which is always intentional):

‘The Doctor also admitted that these injuries can be caused by fall on the rock and admittedly none of the injuries suffered by the deceased was on vital part of her body. In the circumstances, it cannot be held that the appellants can be clothed with the knowledge that the injury caused by them are likely to cause death or such bodily injury is likely to cause death. Had there been intention on the part of the appellants to cause death, they would have finished her in their house itself. So, there was no intention for killing.’⁷¹⁵

The above report also sheds light on the fact that, only a handful of cases reach the courts, whereas, as per various newspaper reports, post 2001, there have been several instances of witchcraft related deaths in Jharkhand. According to one such report in a national daily, a total of 123 women were branded as witches and killed between 2016 and 2019.⁷¹⁶ But, despite numerous newspaper reports highlighting witchcraft related deaths, the Jharkhand State Government has not taken concrete steps to put an end to this social evil. This is evident from

⁷¹² Ibid 129.

⁷¹³ Agrawal and Mehra, Contemporary Practices of Witch Hunting (n 711) 129-130.

⁷¹⁴ [2003 (3) East Cr C 396 (Jhr)].

⁷¹⁵ *Krishna Oraon v State of Jharkhand*, [2003 (3) East Cr C 396 (Jhr)].

⁷¹⁶ Mukesh, ‘Witch-hunts: Superstition kills more than naxals in Jharkhand’ *The Times of India* (Ranchi, 23 July 2019) <<https://timesofindia.indiatimes.com/city/ranchi/witch-hunts-superstition-kills-more-than-naxals-in-jharkhand/articleshow/70336295.cms>> accessed 30 March 2022.

the State Government's inability to provide data regarding witchcraft related deaths in the state to the High Court of Jharkhand since 2015. Note that, the High Court of Jharkhand in its order dated 10 August 2015 taking cognizance of newspaper reports on witchcraft incidents in the state, asked the government to give a detailed report on the matter with additional information on the registration of cases in the state.⁷¹⁷ Again, in its order dated 29 June 2016, the High Court of Jharkhand once more asked the State Government to provide data about the cases registered with regard to witch-hunting till May, 2016 (although, the State Government did provide a number of 3854 cases being registered from 2007 to September 2015 as part of an annexure, but the court was not entirely convinced).⁷¹⁸ In the same order the High Court noted that, the State Government has not taken any effective corrective measures by making the people aware of the evils of witchcraft. Quoting a newspaper report, the High Court said that, the witch hunt awareness vans which were flagged off by the Chief Minister of the State in August 2015 have failed to make an impact as they are no longer functional due to lack of funds (note that, there was no follow-up news/report made publicly available on why this initiative failed or if the government was planning to continue with this initiative at a later date).⁷¹⁹ The High Court also ordered the Jharkhand Social Welfare Department to co-ordinate with the Jharkhand State Legal Service Authority to come up with effective awareness programmes in relation to witch-hunting.⁷²⁰

Pursuant to the High Court's order dated 29 June 2016, the Social Welfare Department, filed a status report stating that a joint meeting was held to prepare an action plan against witch-hunting with the Jharkhand State Legal Service Authority on 1 July 2016. The High Court, in its order dated 27 July 2016, however, made an observation that there was no action taken after the action plan was made to curb the menace of witch-hunting in the state.⁷²¹ The High Court's order copies in relation to this case have not been updated on its website from the period 2016 - 2018. The last relevant order posted on the High Court's website is dated 22 February 2019,

⁷¹⁷ *Court On Its Own Motion v State of Jharkhand*, W.P (PIL) No. 3684 of 2015.

⁷¹⁸ *Court On Its Own Motion v State of Jharkhand*, W.P (PIL) No. 3684 of 2015. Order No.16/Dated: 29th June 2016.

⁷¹⁹ *Court On Its Own Motion v State of Jharkhand*, W.P (PIL) No. 3684 of 2015. Order No.16/Dated: 29th June 2016.

⁷²⁰ *Court On Its Own Motion v State of Jharkhand*, W.P (PIL) No. 3684 of 2015. Order No.16/Dated: 29th June 2016.

⁷²¹ *Court On Its Own Motion v State of Jharkhand*, W.P (PIL) No. 3684 of 2015. Order No.17/Dated: 27th July 2016.

in which, the High Court had given a period of two weeks to the State Government to provide information disclosing the number of pending cases related to witchcraft in the entire state.⁷²²

As per a recent newspaper report in December 2020, the Rural Development Department, Government of Jharkhand is soon going to start a project which will focus on helping women who have been subjected to torture because of witchcraft accusations. This project is going to cover over 2668 villages in the state for a period of three years. As part of the project, the government is going to organize street plays, other awareness programmes and also educate the local community about various government schemes that have so far not reached women who have been accused of witchcraft. The government through this project will also ensure that such schemes reach women who have been harassed and tortured in the name of witchcraft. The government for this purpose has already identified 1149 such women from 450 villages in the last two years. This particular step by the government shows its intention to work towards putting an end to this social evil.⁷²³

Nevertheless, as shown through the above discussion, the domestic implementation of anti-witchcraft laws has failed to achieve the desired results. For instance, despite having an anti-witchcraft legislation, the state of Jharkhand, has the highest witch-related deaths in the country.⁷²⁴ Once again, the issue here is not solely concerned with having a legislation against social evils but is related with having an effective legislation and ensuring its timely implementation.

5.4.2 Honour Killing

There is no national or state legislation against honour killing in India, although, injury, death etc., resulting from honour killing are dealt as separate offences under the Indian Penal Code,

⁷²² *Court On Its Own Motion v State of Jharkhand*, W.P (PIL) No. 3684 of 2015. Order No.24/Dated: 22nd February 2019.

⁷²³ Palak Agrawal, 'Jharkhand Govt To Launch Scheme To Help Women Accused of Witchcraft' (*The Logical India*, 09 December 2020) <<https://thelogicalindian.com/ruralindia/jharkhand-govt-scheme-witchcraft-victims-25325>> accessed 30 March 2022.

⁷²⁴ Adrija Bose, 'Not Naxals, This is Dayan Zone: Inside a Jharkhand Village That Came Together to Kill Four Witches' (*News18*, 10 December 2019) <<https://www.news18.com/news/india/not-naxals-this-is-dayan-zone-inside-a-jharkhand-village-that-came-together-to-kill-four-witches-2415425.html>> accessed 30 March 2022.

1860.⁷²⁵ The Law Commission of India has, however, drafted a bill to tackle the issue of honour killings, titled ‘The Prohibition of Interference with The Freedom of Matrimonial Alliances Bill’ in 2011.⁷²⁶

But, even to this day, the bill is only at its drafting stage awaiting comments from various stakeholders.⁷²⁷ The following are some of the key provisions of the proposed law: Section 2(1) of the bill defines ‘Unlawful Assembly’ (but the bill does not mention the term ‘khap’ or ‘khap panchayat’ or equate ‘khap panchayat’ with ‘unlawful assembly’) in the following manner: ‘No person or any group of persons shall gather, assemble or congregate at any time with the view or intention of condemning any marriage, not prohibited by law, on the basis that such marriage has dishonoured the caste or community tradition or brought disrepute to all or any of the persons forming part of the assembly or the family or the people of the locality concerned.’⁷²⁸ The punishment prescribed under this section for either participating directly or indirectly in such assembly is ‘imprisonment for a term of not less than six months but which may extend to one year and shall also be liable to fine up to ten thousand rupees.’⁷²⁹ Section 3(1) of the bill defines ‘Endangerment of Liberty’ as, ‘the members of such unlawful assembly who in furtherance thereof individually or collectively counsel, exhort or bring pressure openly or otherwise upon any person or persons to prevent or disapprove of the marriage which is objected to by the said members or to generate an environment of hostility towards such couple or either of them or their relatives or supporters shall be deemed to have acted in endangerment of their liberty.’⁷³⁰ The punishment prescribed for such an act of endangerment is ‘imprisonment for a period of not less than one year and extending upto two years and fine

⁷²⁵ Law Commission of India, ‘Prevention of Interference with the Freedom of Matrimonial Alliances (in the name of Honour and Tradition): A Suggested Legal Framework’ (*Government of India*, August 2012) <<https://lawcommissionofindia.nic.in/reports/report242.pdf>> accessed 30 March 2022.

⁷²⁶ *Ibid.*

⁷²⁷ Krishnadas Rajagopal, ‘Protecting couples from mobs’ *The Hindu* (09 March 2018) <<https://www.thehindu.com/opinion/op-ed/protecting-couples-from-mobs/article22986400.ece>> accessed 30 March 2022; See also, *Shakti Vahini v Union of India and Others*, Writ Petition (Civil) NO. 231 OF 2010 – ‘In an affidavit dated 16th January, 2014, the Union of India contended that as on the said date, 15 States/UTs have sent their positive responses, while responses from other remaining States/UTs were awaited. The Union of India filed an additional affidavit on 25th September, 2014 wherein vide paragraph 4 it is averred that six more States/UTs have sent positive responses in favour of ‘The Prohibition of Interference with the Freedom of Matrimonial Alliances Bill’ and that reminders have been sent to the remaining States/UTs whose responses are awaited. Further, it has been submitted that after receiving comments from the remaining States/UTs, necessary action shall be taken by the Union of India in the matter.’

⁷²⁸ The Prohibition of Unlawful Assembly (Interference with Freedom of Matrimonial Alliances) Bill 2011, s 2(1).

⁷²⁹ The Prohibition of Unlawful Assembly (Interference with Freedom of Matrimonial Alliances) Bill 2011, s 2(2).

⁷³⁰ The Prohibition of Unlawful Assembly (Interference with Freedom of Matrimonial Alliances) Bill 2011, s 3(1).

extending to twenty thousand rupees.⁷³¹ The proposed bill provides an explanation for the term ‘Endangerment of Liberty’⁷³² and also mentions the offence of criminal intimidation under section 4 of the bill (which is also an offence listed under section 503 Indian Penal Code).⁷³³ Note that, the state of Rajasthan passed ‘The Rajasthan Prohibition of Interference with the Freedom of Matrimonial Alliances in the Name of Honour and Tradition Bill, 2019’ in August 2019.⁷³⁴ The 2019 bill, however, contains the exact same provisions of the 2011 draft bill by the Law Commission of India. But, more importantly, the Rajasthan bill is yet to become an official law. In the absence of a domestic legislation against honour killings, the Supreme Court in 2018 while deciding the case of *Shakti Vahini v Union of India and Others*, issued certain preventive, remedial and punitive measures to be adhered to by the executive and the police administration of the states in which honour killings are often reported.⁷³⁵

In order to understand why the Supreme Court stepped in to issue guidelines on honour killings, it is important to highlight the influence of ‘caste, class and status considerations that determine the action or inaction of community members in a male dominated society.’⁷³⁶ In rural societies, it is still believed that, going to court to resolve personal issues especially the ones related to caste is not advisable.⁷³⁷ For the rural community, the judicial system is not ‘equipped’ with its numerous rules to either resolve caste related issues or reach a suitable compromise acceptable to both parties.⁷³⁸ Even if, recourse to law is taken, it is done so in extreme circumstances (for example, when any illegal step has been taken resulting in injury or death) which also invites larger community displeasure. Again, state agencies like the police and local administration which often comprise of people belonging to dominant caste groups

⁷³¹ The Prohibition of Unlawful Assembly (Interference with Freedom of Matrimonial Alliances) Bill 2011, s 3(1).

⁷³² The Prohibition of Unlawful Assembly (Interference with Freedom of Matrimonial Alliances) Bill 2011, s 3 - ‘Endangerment of liberty’ shall include the acts calculated to lead to social boycott or enforcement of social sanctions and in particular the following acts:

‘(i) Bringing to bear pressure on the couples or their family or relatives to leave the village or area of residence concerned;

(ii) Indulging in any conduct which will impede or is likely to impede, access to markets, community facilities, places of worship or any other necessities of life.

(iii) Divesting or dispossessing the couple or their family of any land or property belonging to them.

(iv) Any other act of harassment whether physical or mental.’

⁷³³ The Prohibition of Unlawful Assembly (Interference with Freedom of Matrimonial Alliances) Bill 2011, s 3(2) and s 4.

⁷³⁴ ‘Rajasthan Legislative Assembly’ <<https://rajassembly.nic.in/LegislationGovernmentBills.aspx>> accessed 30 March 2022.

⁷³⁵ Writ Petition (Civil) NO. 231 OF 2010.

⁷³⁶ Chowdhry, Caste Panchayats and the Policing of Marriage in Haryana (n 459) 31.

⁷³⁷ Ibid 33.

⁷³⁸ Chowdhry, Caste Panchayats and the Policing of Marriage in Haryana (n 459) 33.

either discourage victims from seeking justice or favour members from their own community over the victims.⁷³⁹

The following are some of the guidelines issued by the Supreme Court in the *Shakti Vahini* case on honour killings (Shakti Vahini, a social services organization based in New Delhi filed a petition before the Supreme Court asking the court to issue directions to State Governments and the Central Government to take appropriate measures to curb honour killings):⁷⁴⁰ (a) The State Governments need to immediately identify areas where honour killings have been reported in the last five years; (b) The local police administration shall be issued directives to remain extra vigilant if any inter-caste or inter-religious marriage is brought to their notice; (c) If information of any gathering of Khap members is brought to the knowledge of any local police officer, he shall immediately inform his superiors in the administration and shall also immediately interact with the members of the Khap and convey them that such gathering of Khap members is not permissible under the law. Further, if the Khap members decide to go ahead with the meeting, the local police administration will stay vigilant and deploy additional police personal to prevent such gathering; (d) If the meeting of Khap members is conducted despite warnings from the local police administration, it shall be conveyed to the Khap members that they cannot take any decision to cause harm to the couple or family members of the couple in the meeting. If they do so, they will be liable for criminal prosecution. Such gathering of Khap members is also required to be video recorded so that the law enforcement agencies can take suitable action; (e) If there is reason to believe that the gathering of the Khap members is likely to cause harm to the couple or members of their family, a proposal to the District Magistrate/Sub-Divisional Magistrate of the District/Competent Authority of the concerned area is to be submitted for issuing orders to take preventive steps including arrest of the participants in the assembly; (f) The Ministry of Home Affairs, Government of India must also take initiative and work in coordination with the State Governments for sensitizing the law enforcement agencies and by involving all the stakeholders to identify the measures for

⁷³⁹ Ibid 35 - 'The traditional leadership considers the judiciary, run by people who have no knowledge of rural culture and customary practices, to be working against the caste and community's norms. Anyone taking recourse to it is similarly condemned and stereotyped as 'westernised', 'urbanised' and 'modernised' and out of touch with rural realities. The state and its laws are blamed for all marriages that go against traditional norms and customary practices.'

⁷⁴⁰ *Shakti Vahini v Union of India and Others*, Writ Petition (Civil) NO. 231 OF 2010.

prevention of such violence and to implement the constitutional goal of social justice and the rule of law.⁷⁴¹

But, both the proposed law as well as the guidelines by the Supreme Court either fail to address or adequately highlight the reasons behind honour killings in India or take into account instances of ‘honour based abuse’ (see Annexure-II for a proposed law on ‘honour based abuse’). The researcher was not able to find information with respect to whether or not the states in India have acted upon the Supreme Court guidelines.

5.4.3 Devadasi System

As mentioned under chapter 4, the continuity of the devadasi system is influenced by social, cultural, economic and religious factors. These factors force families belonging to the dalit community to offer their daughters as devadasis to temples in India.⁷⁴²

The dedication process is used as an alternative to give away girls whose marriage prospects are thought to be low due to any illness.⁷⁴³ Further, there is the added pressure from the dominant castes and the community to follow the long tradition of dedication.⁷⁴⁴ Superstition also plays a role, since it is strongly believed that failure to dedicate girls as devadasis would invite the wrath of the local gods on the families. Note that, girls that are given away as devadasis have no say in the matter and have no opportunity to raise objections of any kind against the dedication.

In light of the above, states where this practice is prevalent have brought in legislations to prohibit dedication but, this step has only led to dedications getting hidden from the eyes of the authorities.⁷⁴⁵ One of the important reasons behind the prevalence of this practice despite legislations is the lack of accurate data on the number of devadasis. The National Commission for Women (NCW) in its Annual Report (2017-18) also acknowledged that there exists no

⁷⁴¹ *Shakti Vahini v Union of India and Others*, Writ Petition (Civil) NO. 231 OF 2010.

⁷⁴² Uma Chakravarti, ‘Conceptualising Brahmanical Patriarchy in Early India: Gender, Caste, Class and State’ (1993) 28 (14) *Economic and Political Weekly* 579, 580.

⁷⁴³ Shewli Kumar, ‘Dalit Women at the Intersections: Voices from the Margins’ (2008) 69 (2) *The Indian Journal of Social Work* 159, 164.

⁷⁴⁴ *Ibid.*

⁷⁴⁵ Harishankar and Priyamvada, *Exploitation of Women as Devadasis and Its Associated Evils* (n 28) 142.

official statistics on the number of devadasis in India.⁷⁴⁶ The lack of official data on devadasis is also a big hindrance in the proper implementation of the various state legislations against this social evil.

The devadasi system exists mainly in the Indian states of Maharashtra, Karnataka, Andhra Pradesh, Telangana and Tamil Nadu. The state of Karnataka passed The Karnataka Devadasis (Prohibition of Dedication) Act in 1982. Under section 3, of the Act, the dedication of young girls as devadasis is unlawful.

‘Notwithstanding any custom or law to the contrary, the dedication of a woman as a devadasi, whether before or after the commencement of this Act and whether she has consented to such dedication or not, is hereby declared unlawful, void and to be of no effect and any woman so dedicated shall not thereby be deemed to have become incapable of entering into a valid marriage.’⁷⁴⁷

Under section 5 of the Act, the penalty prescribed for a person who ‘performs, permits, takes part or abets the performance of any ceremony or act of dedication’ is imprisonment of up to three years and a fine of two thousand rupees.⁷⁴⁸ The proviso to section 5 states that, if the person mentioned under this section happens to be the parent or guardian or any relative of the woman so dedicated then such person will be liable to be punished with imprisonment of five years and a fine of five thousand rupees.⁷⁴⁹ Further, section 7 of the Act gives power to the state of Karnataka to make rules for carrying out the purpose of the Act. The rules under this section may provide a) for the manner of investigation of offences under this Act and b) for custody, care, protection, welfare and rehabilitation of devadasis.⁷⁵⁰ However, the state government has not framed any rules for the implementation of the Act.⁷⁵¹ Note that, there is no data available in the public domain with respect to the number of cases filed, the number of convictions or the number of acquittals under the 1982 Act.

⁷⁴⁶ ‘Annual Report 2017-18’ (*National Commission for Women New Delhi*) 1, 23 <<http://ncw.nic.in/reports/annual-reports/annual-report-2017-2018>> accessed 30 March 2022.

⁷⁴⁷ The Karnataka Devadasis (Prohibition of Dedication) Act 1982, s 3.

⁷⁴⁸ The Karnataka Devadasis (Prohibition of Dedication) Act 1982, s 5.

⁷⁴⁹ The Karnataka Devadasis (Prohibition of Dedication) Act 1982, s 5.

⁷⁵⁰ The Karnataka Devadasis (Prohibition of Dedication) Act 1982, s 7.

⁷⁵¹ Jayna Kothari and others, ‘Intersections of Caste and Gender: Implementation of Devadasi Prohibition Laws’ (*Centre for Law and Policy Research Bangalore*, 2019) 1, 25 <<https://clpr.org.in/wp-content/uploads/2019/11/Policy-Brief-on-Devadasi-Legislations.pdf>> accessed 30 March 2022.

In addition to the 1982 Act, there are various welfare schemes introduced by the Karnataka government for the upliftment of the devadasis. Under the ‘Devadasi Rehabilitation Programme’, the government is providing counselling services, involving the devadasis in income generating activities, providing shelter homes, subsidies, loans through banks and also giving them pensions.⁷⁵² As per a report prepared by The Centre for Child and Law (CCL), National Law School of India University, Bengaluru in 2018, the Karnataka State Women’s Development Corporation is responsible to provide rehabilitation and pension schemes to devadasis. But, when information was sought from the department under The Right to Information Act, 2005 regarding the number of devadasis availing such benefits under the different schemes in the last five years preceding 2018, there was no response given by the corporation.⁷⁵³ CCL in its report also highlighted that when devadasis were asked (via interviews) about the various schemes provided by the government (though, 80 per cent of them knew about either one or two schemes) only 4 per cent of them said that they were getting benefits.⁷⁵⁴ Another important issue highlighted in the report is with respect to the lack of implementation of the scheme mostly because of corrupt officials at the local level who despite taking bribes from these women do not put their names under the beneficiary list so that they can avail benefits.⁷⁵⁵ Further,

‘The community is also aware of the schemes available for Devadasis. They are aware of the documents required to avail the schemes like requirement of age-proof, ID proof etc. They are mostly aware of the pension scheme and the presence of middlemen to facilitate this process. They know that Devadasi women below the age of 35 are not availing pension and most of them feel that they need pension as they have to take care of their children without support from their partners. Even though the community is aware of the schemes available to the Devadasis, they do not help them to avail the benefit under the schemes, due to fear of being identified as a locality where Devadasi dedication persists and repercussion from the law enforcement agencies for permitting dedication within their village.’⁷⁵⁶

⁷⁵² Ibid.

⁷⁵³ Bincy Wilson, Anuroopa Giliyal and Shruti Raman, ‘A Qualitative Study of The Legal Dimensions of Devadasi Dedication Phenomenon’ (*Centre for Child and the Law-National Law School of India University Bengaluru*, 2018) 1, 55
<https://www.researchgate.net/publication/332141651_A_QUALITATIVE_STUDY_OF_THE_LEGAL_DIMENSIONS_OF_'DEVADASI'_DEDICATION_PHENOMENON> accessed 30 March 2022.

⁷⁵⁴ Ibid.

⁷⁵⁵ Wilson, Giliyal and Raman, A Qualitative Study of The Legal Dimensions of Devadasi Dedication Phenomenon (n 753).

⁷⁵⁶ Ibid.

Additionally, due to the age limit of 45 years, many younger devadasis are also barred from benefiting from the pension scheme.⁷⁵⁷ Because women below the age of 45 years are also asked to leave the temple premises as they are no longer considered 'fit' for service, devadasis have been demanding that the age limit be brought down to 25 years for availing the pension benefits.⁷⁵⁸

The state of Tamil Nadu passed The Tamil Nadu Devadasis (Prevention of Dedication) Act in 1947. Note that, this legislation has not been reviewed or amended since.⁷⁵⁹ Under section 3 of this Act, the dedication of a woman as devadasi irrespective of her consent is declared unlawful.⁷⁶⁰ However, under section 4 of this Act, any woman who is dedicated as a devadasi and is of sixteen years of age can be punished for dancing with imprisonment of up to six months and a fine of five hundred rupees.⁷⁶¹ It is interesting that, though section 3 of the Act acknowledges that a woman can be dedicated without her consent, under section 4, any woman who is a devadasi and is of sixteen years of age can be punished if she dances in the temple premises even to this day. Section 4 does not take into account the fact that devadasis are dedicated at a young age often without their consent and therefore, even when they are of sixteen years of age or more they continue to dance and serve the temple as they have no choice in the matter mostly because they continue to be bound to the goddess.

The provisions under The Andhra Pradesh Devadasis (Prohibition of Dedicated) Act, 1988 are similar to the provisions under The Karnataka Devadasis (Prohibition of Dedication) Act, 1982 in relation to penalties. Also, under section 5 of the Andhra Pradesh Act, devadasis are exempted from punishment.⁷⁶² The Maharashtra Devadasi System (Abolition) Act, 2005 is also similar to the above mentioned legislations.

⁷⁵⁷ Shilpa Shaji and Yogesh S, 'Devadasis in Karnataka Fight Back' (*NewsClick*, 25 January 2019) <<https://www.newsclick.in/devadasis-karnataka-fight-back>> accessed 30 March 2022.

⁷⁵⁸ *Ibid.*

⁷⁵⁹ Kothari and others, *Intersections of Caste and Gender* (n 751) 26.

⁷⁶⁰ The Tamil Nadu Devadasis (Prevention of Dedication) Act 1947, s 3.

⁷⁶¹ The Tamil Nadu Devadasis (Prevention of Dedication) Act 1947, s 4.

⁷⁶² The Andhra Pradesh Devadasis (Prohibition of Dedicated) Act 1988, s 5.

Due to the non-implementation of the above-mentioned legislations, the Ministry of Home Affairs, India, in 2015, issued an advisory to states where this practice persists to ‘initiate special drive to identify all victims and suitably rehabilitate them by providing proper counselling, medical treatment, guidance, support and motivation to lead a dignified life.’⁷⁶³ But, despite the advisory, there has been no improvement in the implementation of laws. This is also evident from the 2016 ruling of the Supreme Court in the case of *S.L. Foundation*. In *S.L. Foundation v Union of India*, the Supreme Court held that the dedication of dalit girls in a temple in the Bellary district of Karnataka was unconstitutional and in violation of several articles of the Constitution including article 21 which guarantees the right to life.⁷⁶⁴ The court in this case also passed the following directions:

‘(a) complaints can be filed in specific instances of violation of the provisions of the Acts which have been brought into force in the States of Karnataka, Tamil Nadu, Andhra Pradesh, Telangana, Maharashtra as well as in any other States before the police authorities or by bringing it to the notice of the concerned Secretary of the State who is in charge of Women Development and it will be incumbent upon them to invoke the statutory provisions prevailing in the respective States and proceed against the culprits in accordance with law; (b) The Union of India is at liberty to approach the Court if its Advisory dated 22nd December, 2015 to all the States as well as Union Territories to stop the Devadasi practice was not implemented and (c) The court also allowed any future petitions to be filed against the concerned State Government for extending the rehabilitation measures to such victims in the event of any such instances being brought to the notice of the respective States Governments/Union Territories with specific details and State Governments to take appropriate steps for their rehabilitation by providing all supportive rehabilitation measures.’⁷⁶⁵

Therefore, similar to the case of witch-hunting and honour killing, the devadasi system too continues to prevail in the Indian society mostly because legislations that were brought in to put an end to the practice have failed to address the primary reasons behind the existence of such practice in the first place.

⁷⁶³ ‘Abolition of Devadasi System’ (*Ministry of Home Affairs Government of India*, 22 December 2015) <https://mha.gov.in/sites/default/files/DevdasiSystem_231215_0.PDF> accessed 30 March 2022.

⁷⁶⁴ *S.L. Foundation v Union of India*, (2014) W.P.(Civil) 127/2014.

⁷⁶⁵ *S.L. Foundation v Union of India*, (2014) W.P.(Civil) 127/2014.

5.5 Concluding Remarks

As noted in this chapter, in all the three crimes, although there is an issue of either no laws or insufficient laws to protect women from gender based violence, the larger issue that is more apparent is with respect to poor implementation of existing laws.

The intent behind, especially, the above mentioned domestic legislations was to mainly broaden the perception of human rights in India and make it more inclusive by highlighting the gendered nature of violence which subordinates women both inside and outside of their homes. However, these legislations have failed to either fight the distinction based on sex that is often responsible for violence against women or demolish the institutionalization of oppression of women. Note that, due to the prevalence of gender discriminatory norms in society, women in India continue to be subjected to physical and/or sexual violence by their own family or by the community. In addition, India's delayed response in submitting reports as part of its obligation being party to international conventions such as CEDAW is also a cause for concern, especially, in light of the declarations to articles 5(a) and 16(1) of CEDAW which raise questions over India's domestic and international commitment to stop violence against women. Furthermore, though, India recognizes violence against women as a serious violation of their right to dignity and has made efforts to eradicate this menace mainly through legislations, it has, however, neither addressed the reasons for violence against women in those legislations nor ensured their effective implementation. More importantly, India has yet to take concrete preventive steps on the issue of gender based stereotypes and stop harmful practices as has already been pointed out by the Committee on CEDAW. This particular observation by the Committee is also an indication of India's poor performance at the international level in ensuring the elimination of gender based violence.

In light of the above, the researcher in the next chapter by way of conclusion identifies certain areas that India needs to focus in order to recognize and eradicate harmful social-cultural practices of witch-hunting, honour killing and the devadasi system.

Chapter 6: Conclusion

Using a socio-legal methodology, this thesis set out to examine what role does law and social-cultural norms play in the understanding of violence against women in the Indian setting in light of domestic and international human rights law. The thesis addressed this through the following research question: to what extent has harmful social-cultural practices of witch-hunting, honour killing and the devadasi system against women and girls been recognized as part of gender based violence in India and how effective are the existing measures to combat such harmful practices in light of international human rights instruments and India's own constitutional and legislative framework?

The thesis has examined the harmful practices of witch-hunting, honour killing and the devadasi system as case studies because these practices continue to be justified and legitimized in the name of custom and tradition despite constitutional and legislative safeguards. More importantly, an analysis of these harmful practices has helped in understanding the overlap and the resulting push and pull between legal norms on one hand and social-cultural reality on the other in India's pluralistic society. The analysis has also shed light on the respective role of law and social-cultural norms in both defining and understanding violence against women in a domestic setup. As shown in this thesis, the three practices are often considered 'normal' and condoned by the larger society because of the argument that these practices only mirror the prevailing social relationship between men and women. However, this so-called social relationship is not based on the principles of equality but is the result of several social factors such as caste, religion including the patriarchal mindset prevalent in the Indian society that gives legitimacy to a social structure that normalizes oppression of women. With this in mind, the study of the three crimes is undertaken within a broader intersectional framework due to the existing and continuing association of custom and tradition (apart from the gender variable) that separates these three crimes from offences such as rape.

The analysis in chapters 3 and 4 has shown that India's complex social-cultural setup plays a significant role not only in the discourse on violence against women but also in the relationship between formal human rights protections and informal grassroots practices. This relationship is shaped by factors of caste, gender, religion etc. that often suit or work in favour of informal grassroots practices rather than formal human rights norms especially in matters concerning

access to justice. The study of the three crimes further highlights the importance of various social-cultural factors that affect the decision-making process of both State and society in relation to either acknowledging harmful social practices as legal harms through comprehensive and effective criminal legislation or taking transformative steps at the local/regional level in rooting out gender biased social norms. Through the study of the three crimes within the context of violence against women, the researcher concludes that practices of witch-hunting, honour killing and the devadasi system against women and girls has not been duly recognized as part of gender based violence in India due to the influence and impact of varied social-cultural factors and India has not done enough in terms of transforming societal values that gives rise to gender inequality which leads to such violent social practices and, it has also not undertaken effective measures or strengthened existing mechanisms in order to eliminate violence against women.

Societal transformation is important especially to break free from the social-cultural cycle that gives strength to and ensures the continuity of gender stereotypes in society. There is, however, no one route towards ensuring speedy transformation of gender biased societal values. The researcher here is laying emphasis upon taking the legal route i.e., 1.) adopting new stringent legislations which recognizes harmful social practices as serious crimes and 2.) amending existing legislations keeping in mind India's pluralistic environment to ensure effective implementation. These steps are essential in providing an opportunity to victims to access justice. In the opinion of the researcher unless harmful social practices are recognized as serious crimes they will continue to be considered 'normal' day to day practice by the society in the name of protecting and promoting custom and tradition. Again, it must be underlined that there is a need to create awareness firstly about recognizing harmful social practices as violative of human rights of women at the local/regional level and then secondly about legislations that prohibit such practices in society which in the opinion of the researcher is one of the many steps towards breaking free from the gender biased social-cultural cycle. Adopting stringent legislations, bringing in amendments and creating awareness can help give momentum to transforming traditional social-cultural norms that result in structural violence against women in India.

The following sections elaborate upon the above points that in the opinion of the researcher should form part of India's strategy in elimination of violent practices against women, especially the three crimes.

6.1 India's Obligation to Transform Societal Values

The obligation to transform societal values in order to effectively combat gender based violence emanates from the State responsibility to act with due diligence.⁷⁶⁶ As discussed in the later part of chapter 5 (under section 5.2.2), there can be several measures that can form part of the due diligence standard and this can include legislation, awareness-raising campaigns etc. The meaning of State responsibility to act with due diligence was also examined by the second Special Rapporteur on violence against women in the 2006 report.⁷⁶⁷ In her report, the second Special Rapporteur made the following observation,

‘the due diligence standard has focused primarily on violence against women as an isolated act and failed to take into consideration the connections between violence and the violation of other human rights, including general principles of gender equality and non-discrimination. There is a need to move away from a public/private dichotomy in viewing violence against women because the categorisation of some forms of violence against women as part of the private sphere tends to have a normalizing effect, and it makes States' intervention seem to be different in such situations, as opposed to where there are “public” incidents of violence. Due diligence until now has been limited to responding to violence against women when it occurs and in this context it has concentrated on legislative reform, access to justice and the provision of services. There has been relatively little work done on the more general obligation of prevention, including the duty to transform patriarchal gender structures and values that perpetuate and entrench violence against women.’⁷⁶⁸

More importantly, the third Special Rapporteur on violence against women, its causes and consequences has said that, the responsibility of States to act with due diligence needs to be

⁷⁶⁶ Grans, *The Concept of Due Diligence and the Positive Obligation to Prevent Honour-related Violence* (n 668) 735-736.

⁷⁶⁷ Ertürk, *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences on the Due Diligence Standard as a Tool for the Elimination of Violence against Women* (n 669).

⁷⁶⁸ Rashida Manjoo, ‘Report of the Special Rapporteur on violence against women, its causes and consequences’ (*United Nations Human Rights Council A/HRC/23/49*, 14 May 2013) paras 18-19 <<https://www.refworld.org/docid/51b86a684.html>> accessed 30 March 2022.

further discussed by developing a framework under which the due diligence standard is divided into: ‘individual due diligence’ and ‘systemic due diligence’.⁷⁶⁹ Individual due diligence refers to the obligation that States have towards an individual or a group of individuals to ‘prevent, protect, punish and provide effective remedies’ on an individual level. Individual due diligence allows room for being flexible in adoption and implementation of procedures since they are done to suit individual needs.⁷⁷⁰ For instance, a State can fulfil the individual due diligence obligation of protection by providing the facility of shelter homes to women who are victims of domestic abuse. Similarly, a State can take a number of measures as it deems necessary under its duty to fulfil the individual due diligence standard such as establishing counselling centres, providing economic aid.⁷⁷¹ Individual due diligence also places a duty on States to provide for the social and economic rehabilitation of victims. Under individual due diligence, States are also under an obligation to not only punish the perpetrators but also those who failed to perform their duty to prevent violation of human rights.⁷⁷²

Systemic due diligence refers to the obligation of States to adopt a more holistic approach to developing a model or a system to prevent, protect, punish and provide compensation for acts of violence against women.⁷⁷³ States can fulfil the requirement of systemic due diligence by ‘adopting or modifying legislation; developing strategies, action plans and awareness-raising campaigns and providing services; reinforcing the capacities and power of police, prosecutors and judges; adequately resourcing transformative change initiatives; and holding accountable those who fail to protect and prevent, as well as those who perpetrate violations of human rights of women.’⁷⁷⁴ In addition, States are under an obligation to initiate the overall societal transformation to address structural issues of gender based discrimination.⁷⁷⁵

India seems to be struggling in its responsibility to act with both individual due diligence as well as systemic due diligence considering the normalization of social practices such as witch-hunting and the devadasi system that affect women belonging to the marginalized communities. Further, India has also failed to legislate on the issue of honour killings and make its existing

⁷⁶⁹ Ibid.

⁷⁷⁰ Manjoo, Report of the Special Rapporteur on violence against women, its causes and consequences (n 768).

⁷⁷¹ Ibid.

⁷⁷² Manjoo, Report of the Special Rapporteur on violence against women, its causes and consequences (n 768).

⁷⁷³ Ibid.

⁷⁷⁴ Manjoo, Report of the Special Rapporteur on violence against women, its causes and consequences (n 768).

⁷⁷⁵ Ibid.

laws on witch-hunting and the devadasi system more effective. On the other hand, there is even less focus on the prevention of these social practices. As shown in chapters 3 and 4, violence against women in India is the result of a complex social structure that is based on stereotyped notions of gender and when women try to break free from such gender structures they are punished. Though, States are obligated to ‘take all appropriate measures’ or ‘act with due diligence (both individual and systemic)’ in eliminating discrimination against women, their actions have not always focused on transforming the patriarchal values that perpetuate violence against women.

Another issue is the lack of data collection and dissemination by the government. This is mainly because government agencies are extremely slow in compiling data and publishing reports relating to violence against women. Most reports only state the number of cases reported for certain crimes without giving any details such as current status of such cases, total number of convictions/acquittals in any given year. Therefore, there is a need to have separate detailed reports for at least certain heinous crimes against women that have not been given due attention by the government in the past. Further, as shown in this thesis, domestic legislations have failed to establish stringent rules to combat violence against women. Legislations, especially, relating to witch-hunting and the devadasi system have not been amended since the time they were legislated. Therefore, there is an urgent need to bring major amendments in these legislations to make them more effective.

The present challenge in combating violence against women is how best to implement the due diligence standard to ensure that the structural reasons responsible for violence against women are eliminated.⁷⁷⁶ In the Indian context, an intersectional approach towards understanding violence against women and applying this approach to implement the due diligence standard is required to eliminate all forms of violence against women. As explained in chapter 4, multiple factors intersect at different levels to give rise to the three crimes and the same factors also act

⁷⁷⁶ Manjoo, State Responsibility to Act with Due Diligence in the Elimination of Violence against Women (n 671) 253 - ‘Despite the existence of interpretative guidelines and monitoring on violence against women, through the Committee on the Elimination of Discrimination against Women and universal periodic review processes, the limitations of a large and varied monitoring mandate, coupled with time constraints when examining State party reports, results in the insufficient interrogation of the information relating to violence against women, its causes and consequences, and the insufficient assessment of effective compliance with existing standards. Thus, these challenges, among others, have an impact on assessing the efficacy of measures developed for addressing all forms of violence against women.’

as major obstacles in providing victims access to justice. For example, caste-difference between the young couple is one of the reasons behind the crime of honour killing in India and caste also becomes a hindrance when the victim tries to get justice as he/she is pressured not to register a complaint by people belonging to the dominant castes in the community.

As shown in this thesis, despite the Constitution of India guaranteeing equal rights to all its citizens including the right to life with dignity; the three crimes continue to exist as social-cultural practices in society because of the State's failure to a.) eliminate gender oriented prejudices and, b.) bring in effective legislations to abolish discriminatory practices and customs. Further, India's declaration to article 5(a) to CEDAW also acts as a hindrance in its obligation to abide by the principles set out in the Convention.⁷⁷⁷

One of many effective measures towards transforming societal values that are responsible for continuity of violence against women is to recognize and prevent social cultural practices that are harmful to women. Though, these three crimes have often been termed as violative of human rights of women in various academic work, government reports, court decisions etc., not much has been done either at the national or at the state level to eliminate these practices, especially, in terms of passing stringent legislations that act as a strong deterrent against these crimes (see discussion in chapter 5).

The researcher has emphasized upon adopting new stringent legislations and amending existing legislations to recognize and eliminate harmful social practices of witch-hunting, honour killing and the devadasi system, however, as mentioned earlier this is only one of many steps towards ensuring transformation of societal values. Therefore, there is scope for further research in identifying measures to change gender biased social-cultural norms, especially through a bottom-up approach which involves community-based systems.

The next section attempts to bridge the legislative gaps highlighted in chapter 5 regarding the three crimes by suggesting draft provisions that may prove helpful in effectively combating the three crimes. The draft provisions in the next section are formulated by taking into account the

⁷⁷⁷ See discussion on Convention on Elimination of All Forms of Discrimination Against Women 1979, art 5(a) in Chapter 5.

discussion on State responsibility to act with individual due diligence and systemic due diligence. (Refer to, **Annexure-I**: Proposed suggestions to the law on Witchcraft; **Annexure-II**: Proposed suggestions for drafting the law on Honour Based Abuse, and **Annexure-III**: Proposed suggestions to the law on the Devadasi system).

The structure of Annexures I, II and III are based on the general format of legislations in India, as a result, certain provisions appear throughout all the three annexures.

6.2 Effective Measures in Eliminating Violence Against Women: Taking the Legal Route

6.2.1 Witch-Hunting

As mentioned under chapter 5, there is no national legislation against witchcraft in India. However, several states such as Jharkhand, Odisha, Assam, Chhattisgarh, Rajasthan have passed legislations to combat the practice of witchcraft. Annexure-I to the thesis lays down key provisions that may strengthen the law on witchcraft in India. Some of the main points proposed under Annexure-I are as follows:

1. The practice of witchcraft in any form is to be forbidden. [Note: Witchcraft is an expression of superstition. People are superstitious and believe in the existence of witches who have supernatural powers. However, as noted under chapter 4, women are accused of practising witchcraft mainly to subordinate them. Superstitious beliefs are used as an excuse to label a woman as a witch. Though, superstition is used as an excuse for labelling a woman, the accusations gain strength/acceptance in society due to existing superstitious beliefs among people. The intent behind forbidding the practice of witchcraft, therefore, is not to reinforce the belief that witches exist in society but to root out superstitious beliefs and any practice related to witchcraft including witchcraft accusations. The proposal to forbid the practice of witchcraft is an attempt to put an end not only to superstitious beliefs but to ensure that women are not targeted due to beliefs in witches and the practice of witchcraft in any form]
2. The punishment for identifying an individual as a witch or for performing witch-hunting should be in proportion to the offence committed. As noted under chapter 4, an individual who is accused as a witch is not only publicly humiliated but also forced to undergo inhuman trials as a test to ascertain his/her innocence or guilt. It is not only the

case of an individual dehumanising another but a whole community coming together to name and shame a person because of superstitious beliefs and fear.

3. The definition of witch, witchcraft and witch doctor needs to take into account all forms of superstitious beliefs and practices associated with witchcraft accusations. As noted in chapter 4, witchcraft accusations are based around belief in the supernatural or evil power and this belief cuts across all communities and religion in India. Therefore, a legislation intending to abolish the practice of witchcraft should make stringent provisions for punishing individuals who accuse others of having any evil power, black magic, evil eye or any other power or claim themselves of having magical powers to identify a witch or cure anyone of supernatural ailments.
4. Since ostracization from society is one of the main punishments for indulging in witchcraft, each State Government should take measures to ensure that an individual who is accused of being a witch is both socially and economically rehabilitated. More importantly, each State Government should take measures to educate the society about this social evil.

6.2.2 Honour Killing

There is no national or state legislation against the crime of honour killing in India. But, as mentioned under chapter 5, there is however, the draft bill of 2011 by The Law Commission of India titled ‘The Prohibition of Interference with The Freedom of Matrimonial Alliances Bill’ and the guidelines issued by the Supreme Court of India in *Shakti Vahini v Union of India and Others* in 2018 on honour killings. Nevertheless, both the draft bill and the Supreme Court guidelines fail to acknowledge certain fundamental issues associated with honour killings in India.

Annexure-II to the thesis lists certain fundamental provisions that may prove effective in drafting a more comprehensive law on combating honour based abuse in India. Some of the main points proposed under Annexure-II are as follows:

1. Despite there being varying views over defining the term ‘honour’; in the India scenario, words such as pride, dignity, reputation and similar other words in different languages are often used to represent ‘honour’. A law aiming to put a stop to honour

based abuse in India needs to acknowledge this association. The term 'honour' and how it is generally understood among people should form part of the law or at least the issue regarding its characterization needs to be acknowledged. Though, it is impossible to provide an exhaustive definition of the term 'honour', it is however, important to not leave it completely undefined. In short, the law should, as far as possible, mark out the boundaries within which the term 'honour' is to be understood for the purpose of drafting a legislation.

2. Much of the debate surrounding honour killings in India has remained focused on the brutality of the killings and the illegality of the orders passed by the Khap panchayats, especially in the northern states, but there is less discussion on understanding various forms of honour based abuse. As noted in Annexure-II, honour based abuse also involves coercion etc., and is done against an individual mostly by his/her family members. Khap panchayats are not always involved in cases of honour based abuse. It is, therefore, important to draw a distinction between honour based abuse and honour crimes. Though, honour crimes still fall within the ambit of honour based abuse, the scope of understanding honour based abuse should not be limited to situations in which grievous offences such as murder are committed but it should be wide enough to include situations in which there is no apparent violence. For instance, situations wherein, an individual is placed under an immense mental pressure to only act in a particular manner so as to safeguard the family's so-called honour is also a form of honour based abuse.
3. It is important to exclude honour based abuse from crimes of passion or crimes committed in a fit of fury so that the accused cannot use these as a defence in a court of law.
4. Khap panchayats are to be declared as unlawful and any individual or group of individuals taking part in such a gathering are to be punished.

6.2.3 Devadasi System

Annexure-III to the thesis lays down key provisions that may prove beneficial in strengthening the law on devadasi system in India. Some of the main points proposed under Annexure-III are as follows:

1. The practice of dedication of a woman as devadasi is to be prohibited and declared unlawful.
2. As noted in chapter 5, one of the main reasons often cited for poor implementation of existing laws/schemes regarding devadasis is the lack of data on the number of devadasis in the country. Therefore, it is important that appropriate amendment is made to existing legislations in which each State Government shall identify and maintain records of districts, sub-divisions and/or villages from where instances of practice of devadasi system are often reported and take appropriate steps to prevent such practice.
3. No devadasi should be penalised, regardless of her age, for performing any dance either in the premises of any temple or religious institution.
4. Each State Government should also take such measures through which children of devadasis have equal access to proper health, education and employment opportunities.
5. Each State Government should also ensure that devadasis who are no longer serving in any temple or religious institution are given adequate support to sustain their livelihood through employment.

Annexures I, II and III act as suggestions in the form of draft provisions on preventing and eliminating witchcraft, honour based abuse and the devadasi system in India. The annexures contain draft provisions based on the specific needs and requirements of the victims affected by the three crimes. The draft provisions are also in line with the conclusions/recommendations drawn by the third Special Rapporteur on violence against women, its causes and consequences in relation to the responsibility of States to act with due diligence, especially, ‘individual due diligence’ and ‘systemic due diligence’. For example, the annexures contain provisions such as, establishing special courts. Proposal to establish special courts in relation to the three crimes is done with the intent to provide speedy trial. Special courts so constituted will have power to directly take cognizance of offences related to the three crimes. Further, it is proposed that the proceedings before these courts shall take place on a daily basis and the cases shall be disposed within a period of six months as far as possible. The special courts so established will be different to existing fast track special courts that are set up only to reduce pending cases of rape

and Protection of Child from Sexual Offences (POSCO) Act.⁷⁷⁸ The special courts so established will exclusively handle cases related to the three crimes.

⁷⁷⁸ ‘Over 51,600 Rape Cases Disposed Through 660 Fast Track Special Courts: Smriti Irani’ (*NDTV*, 05 August 2021) <<https://www.ndtv.com/india-news/smriti-irani-says-over-51-600-rape-cases-disposed-through-660-fast-track-special-courts-2502881>> accessed 30 March 2022 - ‘As per the Ministry of Women and Child Development, India ‘since the setting up of fast track special courts (FTSC) in 2019, over 51,600 cases of rape and Protection of Child from Sexual Offences (POSCO) have been expeditiously disposed through 660 FTSCs in 26 states.’; See also, Devika Sharma, ‘1023 Fast Track Special Courts will be set up for Speedy disposal of Rape and POCSO Act Cases’ (*SCC Online*, 10 January 2020) <<https://www.sconline.com/blog/post/2020/01/10/1023-fast-track-special-courts-will-be-set-up-for-speedy-disposal-of-rape-and-pocso-act-cases/>> accessed 30 March 2022 - ‘Recent incidents of rape and gang rape of minor girls below the age of twelve and similar heinous crimes against women shook the conscience of the entire nation. To prevent such crimes, stricter laws were introduced through the Criminal Law (Amendment) Act, 2018. It strengthened the relevant provisions of Indian Penal Code (IPC), Criminal Procedure Code (Cr.PC), Evidence Act and Protection of Children Against Sexual Offences Act (POCSO) and provided for stringent punishment for rape of children and women. The key motive behind introducing harsh punishment is to create deterrence against such crimes. However, it is only possible if the trial in the court is completed within the time frame and justice is delivered expeditiously to the victims.’

ANNEXURE-I

Proposed suggestions to the law on Witchcraft: The following are some suggestions (keeping in mind the existing state legislations on ‘witch-hunting’ in India) in the form of key provisions, that may prove beneficial in drafting a comprehensive law protecting the rights of victims against the practice of witchcraft in India.

THE PROHIBITION, PREVENTION AND PROTECTION AGAINST WITCHCRAFT ACT

An Act to provide for the prohibition and prevention of the practice of witchcraft and witch-hunting; and the protection of victims of witchcraft accusations and witch-hunting and for matters connected therewith or incidental thereto.

CHAPTER I PRELIMINARY

1. Short title, extent and commencement.—(1) This Act may be called the Prohibition, Prevention and Protection Against Witchcraft Act.

(2) It extends to the whole of India.

(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2. Definitions.—In this Act, unless the context otherwise requires,—

(a) “abettor or identifier” means an individual who either identifies, calls, stigmatises, defames or accuses any other individual as a ‘witch’ or instigates, aids or abets such an act by his/her words, or by signs or indications or by conducts, resulting in prompting other individuals to do the same or causes a reasonable apprehension in the mind of the individual so identified, called, stigmatised, defamed or accused as a ‘witch’ that there may be any harm caused to him/her or his/her relatives;

(b) “criminal force” means criminal force as defined under section 350 of the Indian Penal Code, 1860;

(c) “harm” includes physical, sexual, mental and economic harm and harm to dignity and reputation;

- (d) “safe houses” means any safe house as may be notified by the State Government to be a safe house for the purposes of this Act;
- (e) “special court” means a Court of Session specified as a Special Court in section 13 under this Act;
- (f) “special public prosecutor” means a Public Prosecutor specified as a Special Public Prosecutor or an advocate referred to in section 15;
- (g) “victim” means any individual who is made to suffer any physical, sexual, mental or economic harm or harm of any other kind or who is ostracized from his/her home or society or is killed or executed as a result of being accused of being a witch or practicing witchcraft. Victim also includes his/her dependents (relatives, legal heirs) and legal guardian;
- (h) “witch” means any individual who has been identified, called, stigmatised, defamed or accused as a *dayan*, *dakan*, *dakini*, *chudail*, *bhoot*, *bhootuni*, or any other such name in any language by an individual or group of individuals believing that the individual so identified, called, stigmatised, defamed or accused is in possession of or having, any evil power, black magic, evil eye or any other power and intends to cause harm to any individual or group of individuals, animal or society at large;
- (i) “witchcraft” means the supposed use of any evil power, black magic, evil eye or any other power to call upon spirits or cast spells or indulge in similar practices with the intention of causing harm to any individual or group of individuals, animal or society at large;
- (j) “witch-hunting” means any act, omission or commission or any conduct by an individual or group of individuals which involves violence, threat of violence, intimidation, coercion or any physical, sexual, mental or economic harm or harm of any other kind to an individual on the assumption that such individual is in possession of or having, any evil power, black magic, evil eye or any other power and intends to cause harm to any individual or group of individuals, animal or society at large;
- (k) “witch doctor” means an individual who is known as *ojha*, *tantrik*, *kalisi* or any other such name in any language and claims to have supernatural or magical powers to either identify, control or cure a witch or cure any ailment or perform rituals to free an individual from evil spirits, evil eye or bless a woman with a child or perform rituals on behalf of an individual with an intention to harm others or perform rituals for any other purpose.

CHAPTER II
WITCHCRAFT

3. Prohibition of witch-hunting and practice of witchcraft.—(1) No individual shall identify, call, stigmatise, defame or accuse anyone as a witch by words, or by signs or indications or by conducts or actions or any other manner or instigate, aid or abet such an act or commit witch-hunting.

(2) The practice of witchcraft in any form is forbidden.

4. Punishment for identifying as a witch.—Whoever with any malicious intention (including blaming anyone of any misfortune, illness or natural disaster) or otherwise,

(i) identifies, calls, stigmatises, defames or accuses anyone as a witch by words, or by signs or indications or by conducts or actions or any other manner or;

(ii) instigates, aids or abets others to do any such acts mentioned in clause (i) above, shall be punishable with imprisonment for a term of not less than three years but which may extend to five years and shall also be liable to fine up to one lakh rupees, but which may extend to three lakh rupees.

5. Punishment for using criminal force in identifying as a witch.—Whoever in identifying, calling, stigmatising, defaming or accusing an individual as a witch uses criminal force against that individual and/or instigates or provokes others to use criminal force with the intent of causing harm and/or to displace that individual from his/her house, place or property lawfully occupied or owned by him/her or interferes with his/her right to freely use public property or coerce him/her to vacate the area of which he/she is a rightful owner, resident or a visitor or prohibit him/her from carrying on his/her occupation, shall be punishable with imprisonment for a term of not less than five years but which may extend to seven years and shall also be liable to fine up to three lakh rupees, but which may extend to five lakh rupees.

6. Punishment for using criminal force to outrage the modesty.—Whoever in identifying, calling, stigmatising, defaming or accusing an individual as a witch uses criminal force to remove clothes from his/her body and/or parade him/her semi-naked or naked thereby outraging his/her modesty and/or instigate or provoke others to do such an act, shall be punishable with imprisonment for a term of not less than five years but which may extend to

seven years and shall also be liable to fine up to three lakh rupees, but which may extend to five lakh rupees.

7. Punishment for cruel and inhuman treatment.—Whoever in identifying, calling, stigmatising, defaming or accusing an individual as a witch,

(1) subjects an individual to any cruel and inhuman treatment including acts of stoning, stripping, parading semi-naked or naked, hanging, dragging, forcefully shaving/cutting hair, public beating, blackening of face, whipping, branding of body parts with hot metal objects, forcing to perform tasks resulting in grave bodily injury, or;

(2) forces an individual to perform any public acts of humiliation including drinking urine, eating human excrement, eating inedible or obnoxious substances, or curtail his/her movements in public, or prohibit him/her from taking part in auspicious occasions, religious ceremonies, or prohibit him/her from seeking employment, shall be punishable with imprisonment for a term of not less than seven years but which may extend to ten years and shall also be liable to fine up to five lakh rupees, but which may extend to ten lakh rupees.

8. Punishment for causing death.—Whoever in identifying, calling, stigmatising, defaming or accusing an individual as a witch, subjects that individual to any cruel and inhuman treatment or uses criminal force which results in the death of that individual, shall be punished in accordance with section 302 of the Indian Penal Code 1860.

9. Punishment for practicing witchcraft.—Whoever practices witchcraft or other similar practices shall be punishable with imprisonment for a term of not less than three years but which may extend to five years and shall also be liable to fine up to one lakh rupees, but which may extend to three lakh rupees.

10. Punishment for witch-doctor.—Whoever performs any practice or ritual as witch-doctor knowing that such practice or ritual is likely to cause harm upon whom it is being performed, shall be punishable with imprisonment for a term of not less than three years but which may extend to five years and shall also be liable to fine up to one lakh rupees, but which may extend to three lakh rupees.

11. Presumption as to offences.—Any individual or group of individuals, unless the contrary is proved, shall be presumed to have committed the offences under this Act.

12. Cognizance.—Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the offences under this Act shall be cognizable and non-bailable.

CHAPTER III SPECIAL COURTS

13. Special Court.—(1) For the purpose of providing speedy trial, each State Government shall, with the concurrence of the Chief Justice of the High Court, by notification in the Official Gazette, establish a Special Court for one or more Districts:

Provided that the Courts so established shall have power to directly take cognizance of offences related to witchcraft under this Act.

(2) It shall be the duty of each State Government to establish adequate number of Special Courts to ensure that cases under this Act are disposed of within a period of six months, as far as possible.

(3) In every trial in the Special Court, the proceedings shall be continued from day-to-day until all the witnesses in attendance have been examined, unless the Special Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded in writing.

14. Appeals.—(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), an appeal shall lie, from any judgment, sentence or order, not being an interlocutory order, of a Special Court, to the High Court both on facts and on law.

(2) Notwithstanding anything contained in any other law for the time being in force, every appeal under this section shall be preferred within a period of ninety days from the date of the judgment, sentence or order appealed from:

Provided that the High Court may entertain an appeal after the expiry of the said period of ninety days if it is satisfied that the appellant had sufficient cause for not preferring the appeal within the period of ninety days:

Provided further that no appeal shall be entertained after the expiry of the period of one hundred and eighty days.

(3) Every appeal preferred under sub-section (1) shall, as far as possible, be disposed of within a period of three months from the date of admission of the appeal.

15. Special Public Prosecutor.—For every Special Court, each State Government shall, by notification in the Official Gazette, specify a Public Prosecutor or appoint an advocate who has

been in practice as an advocate for not less than ten years, as a Special Public Prosecutor for the purpose of conducting cases in that Court.

CHAPTER IV PROTECTION OF VICTIMS AND WITNESSES

16. Rights of victims and witnesses.—(1) It shall be the duty and responsibility of each State Government to make arrangements for the protection of victims, their dependents (including relatives, legal heirs) and witnesses against any kind of intimidation or coercion or inducement or violence or threats of violence.

(2) A victim or his/her dependent shall be treated with fairness, respect and dignity and with due regard to any special need that arises because of the victim or his/her dependent's age or gender or educational disadvantage or poverty.

(3) (i) It shall be the duty of the police officer in-charge to record the complaint of victim, their dependents, informant or witnesses against any kind of intimidation, coercion or inducement or violence or threats of violence whether given orally or in writing and a photocopy of the First Information Report shall be immediately given to them at free of cost.

(ii) Upon receiving the complaint of victim, their dependents, informant or witnesses, it shall be the duty of the police officer in-charge to take all appropriate action (including arrest) for the protection of victim, their dependents, informant or witnesses. Even if an incident is reported to a police officer belonging to an area outside the jurisdiction of the area where the incident has taken place, the said officer shall record the First Information Report and take all necessary steps till the case is transferred to the police station having jurisdiction in the case.

(iii) Any failure to do the above shall amount to a cognizable offence against the concerned police officer and shall be dealt with under the Indian Penal Code, 1860.

(4) Each State Government shall ensure that the victim or his/her dependent, is provided legal aid under the Legal Services Authorities Act, 1987 (39 of 1987) and make available free of cost the prescribed form in which a complaint is to be made.

(5) A victim or his/her dependent shall have the right to reasonable, accurate and timely notice of any Court proceeding and each State Government shall inform the victim or his/her dependent about any proceedings under this Act.

(6) A victim or his/her dependent shall have the right to apply to the Special Court to summon parties for production of any documents or material, witnesses or examine the individual or group of individuals present.

(7) A victim or his/her dependent shall be entitled to be heard at any proceeding under this Act in respect of any and all matters connected to proceedings or arguments and file written submission on conviction, acquittal or sentencing.

(8) Each State Government shall provide to a victim, his/her dependent, informant or witnesses complete protection during investigation, inquiry and trial. For this purpose, the State Government shall make available to them a safe house, if they so request and immediately notify the Special Court of the location of such safe house. The location of such safe house and any details regarding the safety and security either of the victim, his/her dependent, informant or witnesses shall not be disclosed to any third party.

(9) Each State Government shall inform the concerned Special Court about the protection provided to any victim or his/her dependent, informant or witnesses and the Court shall periodically review the protection being offered and pass appropriate orders.

(10) It shall be the right of the victim or his/her dependents, to take assistance in seeking justice from the non-governmental organizations, social workers or advocates.

CHAPTER V MISCELLANEOUS

17. Preventive action to be taken by the law and order machinery.—(1) Each State Government shall identify and maintain records of Districts, Sub-Divisions and/or Villages from where instances of witchcraft and/or witch-hunting are often reported.

(2) The Secretary, Home Department of the concerned States shall issue appropriate directions/advisories to the Superintendent of Police of the concerned Districts for ensuring

that the officer in-charge of the Police Stations of the identified areas remain extra cautious and take appropriate action, if necessary.

(3) The provisions of Chapters VIII, X and XI of the Code of Criminal Procedure, 1973 (2 of 1974) shall, so far as may be, apply for the purposes of sub-section (2).

(4) Each State Government may, by notification in the Official Gazette, make one or more schemes specifying the manner in which the officers referred to in sub-section (2) shall take appropriate action specified in such scheme or schemes to prevent instances of witchcraft and/or witch-hunting.

18. Section 438 of the Code of Criminal Procedure, 1973 not to apply to individuals committing an offence under the Act.—Nothing in section 438 of the Code of Criminal Procedure shall apply in relation to any case involving the arrest of any individual or group of individuals on an accusation of having committed an offence under this Act.

19. Act to override other laws.—Save as otherwise provided in this Act, the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any custom or usage or any instrument having effect by virtue of any such law.

20. Punishment for non-payment of fine.—An offender, wilfully or otherwise, failing to pay the fine ordered by the Court, shall be liable to undergo imprisonment as provided under section 64 of the Indian Penal Code, 1860.

21. Fines to be paid as compensation to the victim.—(1) The fine levied as punishment for an offence under the Act, shall be paid to the victim or his/her dependents as compensation by following the procedure as may be prescribed.

(2) The compensation paid under sub-section (1) shall not be compounded with any other compensation or financial assistance which each State Government may decide to pay as immediate relief to the victim or his/her dependents.

22. Duty of Government to ensure effective implementation of the Act.—(1) Subject to such rules as the Central Government may make in this behalf, each State Government shall take the measures listed under this section including those that it may deem necessary for the effective implementation of this Act.

(2) In particular, and without prejudice to the generality of the foregoing provisions, each State Government shall take measures which include,—

(i) the provision for adequate facilities, including legal aid and safe house, to the victims of witchcraft and/or witch-hunting to enable them to avail themselves of justice;

(ii) the provision for travelling and maintenance of expenses to witnesses, including the victims of witchcraft and/or witch-hunting, during investigation and trial of offences under this Act;

(iii) the provision for the social and economic rehabilitation of the victims of witchcraft and/or witch-hunting;

(iv) the appointment of officers for initiating or exercising supervision over prosecutions for the contravention of the provisions of this Act;

(v) the setting up of committees at appropriate levels by each State Government to assist that Government in formulation or implementation of various measures as may be necessary for the effective implementation of this Act including those listed under this section;

(vi) provision for undertaking public awareness campaigns and other appropriate measures against witchcraft and/or witch-hunting through the combined efforts of the State Human Rights Commission, non-governmental organizations, social activists, educational institutions etc. Further, each State Government shall, every year, submit a report to the Central Government on the various measures undertaken, such as, public awareness campaigns, to raise awareness in society regarding the Act.

(vii) a report on the steps undertaken by the local administration including police officials, officers appointed for initiating or exercising supervision over prosecutions [as per section 22 (2)(iv) of this Act], the working of the various committees [as per section 22 (2)(v) of this Act] shall, every year, be submitted by each State Government to the Central Government.

(viii) provision for a periodic survey of the working of the provisions of this Act with a view to suggesting measures for the better implementation of this Act.

(3) The Central Government shall take such steps as may be necessary to co-ordinate the measures taken by each State Government under sub-section (1).

(4) The Central Government shall, every year, place on the table of each House of Parliament a report on the measures taken by itself and the various reports of each State Government submitted to the Central Government in pursuance of the provisions of this section. The Central Government shall, make available online all such reports tabled before each House of Parliament on the Ministry of Home Affairs website within fifteen days of tabling the reports before each House of Parliament.

23. Power to make rules.—(1) The Central Government may, by notification in the Official Gazette, make rules for carrying out the purposes of this Act.

(2) Every rule made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

ANNEXURE-II

Proposed suggestions for drafting the law on Honour Based Abuse: The following is a proposed law against “Honour” Based Abuse, containing key provisions that may prove beneficial in drafting a comprehensive law protecting rights of victims against all forms of “Honour” Based Abuse in India.

THE PROTECTION AGAINST “HONOUR” BASED ABUSE ACT

An Act to provide for effective protection of victims against all forms of “Honour” Based Abuse and for matters connected therewith or incidental thereto.

CHAPTER I PRELIMINARY

1. Short title, extent and commencement.—(1) This Act may be called the Protection Against “Honour” Based Abuse Act.

(2) It extends to the whole of India.

(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2. Definitions.—In this Act, unless the context otherwise requires,—

(a) “honour” is loosely understood as pride, dignity, reputation, virtue, morals etc., of an individual, family or community or any other such word in any language;

(b) “honour” based abuse has the same meaning as assigned to it in section 3(1);

(c) “honour” crime has the same meaning as assigned to it in section 3(2);

(d) “khap panchayat” means an assembly, gathering or congregation of group of men having same lineage or caste which often meet to discuss problems affecting the group and/or members of the community.

(e) “safe houses” means any safe house as may be notified by the State Government to be a safe house for the purposes of this Act;

(f) “special court” means a Court of Session specified as a Special Court in section 9 under this Act;

(g) “special public prosecutor” means a Public Prosecutor specified as a Special Public Prosecutor or an advocate referred to in section 11;

(h) “victim” means any individual who has suffered or experienced any physical, sexual, psychological, emotional or economic harassment, harm or injury or harm or injury of any kind as a result of “Honour” Based Abuse as defined under this Act. Victim also includes his/her dependents (relatives, legal heirs) and legal guardian.

CHAPTER II “HONOUR” BASED ABUSE

3. Definition of “Honour” based abuse.—(1) For the purposes of this Act, “Honour” based abuse is understood as: any act, omission or commission or any conduct by an individual or group of individuals which involves violence, threat of violence, intimidation, coercion or any physical, sexual, psychological, emotional or economic harassment, harm or injury or harm or injury of any kind to any other individual or his/her relatives, legal guardian and legal heirs or both.

Explanation I.—For the purpose of determining whether any act, omission or commission or any conduct by an individual or group of individuals constitutes “honour” based abuse under this section, such act, omission or commission or conduct must have been committed to protect or defend the “honour” of an individual, family and/or community against an alleged or perceived breach of that “honour”.

(2) **“Honour” crime.**—(i) For the purposes of this Act, any offence carried out by an individual or group of individuals against any other individual or his/her relatives, legal guardian and legal heirs or both in order to protect or defend the “honour” of an individual, family and/or community is called a “honour” crime.

(ii) “Honour” crimes include but are not limited to the following criminal offences: Attempt to Murder; Murder; Criminal Intimidation; Forced Marriage; Causing Miscarriage; Kidnapping; Abduction; Wrongful Confinement and Rape.

(iii) “Honour based abuse” is the genus and “Honour” crime is a part of it.

4. “Honour” crimes are different from crimes of passion.—For the purposes of this Act, any offence carried out by an individual or group of individuals in the name of “Honour” shall not be treated as a crime of passion or crime committed in a fit of fury.

5. Prohibition against unlawful gathering.—(1) No individual or group of individuals shall gather, assemble or congregate at any time either with the intention of condemning any marriage not prohibited by law, or take any action against the married couple or their relatives,

legal guardian and legal heirs or force anyone else to take any action, on the basis that such marriage has violated the “honour” of an individual, family and/or community.

Explanation I.—‘Marriage’ shall include a proposed or intended marriage.

Explanation II.—The words ‘gather’, ‘assemble’ or ‘congregate’ includes an online presence through the use of any technological means or mediums.

Explanation III.—For the purpose of this section, khap panchayats are included within the meaning of unlawful gathering.

(2) Such gathering, assembly or congregation shall be treated unlawful and any individual or group of individuals convening or organizing such gathering, assembly or congregation and every individual participating either directly or indirectly therein shall be punishable with imprisonment for a term of not less than five years but which may extend to seven years and shall also be liable to fine up to one lakh rupees but which may extend to three lakh rupees.

(3) An individual or group of individuals who either condemns or takes any action openly or otherwise upon any other individual or group of individuals to prevent or disapprove of a marriage not prohibited by law or exert pressure in any form on others to either condemn or take any action towards such couple or their relatives, legal guardian and legal heirs or both shall be punishable with imprisonment for a period of not less than seven years and extending up to ten years and shall also be liable to fine up to five lakh rupees but which may extend to seven lakh rupees.

6. Prohibition against Khap panchayats.—(1) Khap panchayats or any assembly, gathering or congregation similar to a khap panchayat in any form is forbidden and is considered unlawful.

(2) Whoever participates, convenes, or organizes such assembly, gathering or congregation shall be punishable with imprisonment for a term of not less than three years but which may extend to five years and shall also be liable to fine up to one lakh rupees, but which may extend to three lakh rupees.

7. Presumption as to offences.—Any individual or group of individuals, unless the contrary is proved, shall be presumed to have committed “honour” based abuse (including “honour” crime) under this Act.

8. Cognizance.—Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the offences under this Act shall be cognizable and non-bailable.

CHAPTER III
SPECIAL COURTS

9. Special Court.—(1) For the purpose of providing speedy trial, each State Government shall, with the concurrence of the Chief Justice of the High Court, by notification in the Official Gazette, establish a Special Court for one or more Districts:

Provided that the Courts so established shall have power to directly take cognizance of offences related to “honour” based abuse (including “honour” crime) under this Act.

(2) It shall be the duty of each State Government to establish adequate number of Special Courts to ensure that cases under this Act are disposed of within a period of six months, as far as possible.

(3) In every trial in the Special Court, the proceedings shall be continued from day-to-day until all the witnesses in attendance have been examined, unless the Special Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded in writing.

10. Appeals.—(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), an appeal shall lie, from any judgment, sentence or order, not being an interlocutory order, of a Special Court, to the High Court both on facts and on law.

(2) Notwithstanding anything contained in any other law for the time being in force, every appeal under this section shall be preferred within a period of ninety days from the date of the judgment, sentence or order appealed from:

Provided that the High Court may entertain an appeal after the expiry of the said period of ninety days if it is satisfied that the appellant had sufficient cause for not preferring the appeal within the period of ninety days:

Provided further that no appeal shall be entertained after the expiry of the period of one hundred and eighty days.

(3) Every appeal preferred under sub-section (1) shall, as far as possible, be disposed of within a period of three months from the date of admission of the appeal.

11. Special Public Prosecutor.—For every Special Court, each State Government shall, by notification in the Official Gazette, specify a Public Prosecutor or appoint an advocate who has been in practice as an advocate for not less than ten years, as a Special Public Prosecutor for the purpose of conducting cases in that Court.

CHAPTER IV
PROTECTION OF VICTIMS AND WITNESSES

12. Rights of victims and witnesses.—(1) It shall be the duty and responsibility of each State Government to make arrangements for the protection of victims, their dependents (including relatives, legal heirs) and witnesses against any kind of intimidation or coercion or inducement or violence or threats of violence.

(2) A victim or his/her dependent shall be treated with fairness, respect and dignity and with due regard to any special need that arises because of the victim or his/her dependent's age or gender or educational disadvantage or poverty.

(3) (i) It shall be the duty of the police officer in-charge to record the complaint of victim, their dependents, informant or witnesses against any kind of intimidation, coercion or inducement or violence or threats of violence whether given orally or in writing and a photocopy of the First Information Report shall be immediately given to them at free of cost.

(ii) Upon receiving the complaint of victim, their dependents, informant or witnesses, it shall be the duty of the police officer in-charge to take all appropriate action (including arrest) for the protection of victim, their dependents, informant or witnesses. Even if an incident is reported to a police officer belonging to an area outside the jurisdiction of the area where the incident has taken place, the said officer shall record the First Information Report and take all necessary steps till the case is transferred to the police station having jurisdiction in the case.

(iii) Any failure to do the above shall amount to a cognizable offence against the concerned police officer and shall be dealt with under the Indian Penal Code, 1860.

(4) Each State Government shall ensure that the victim or his/her dependent, is provided legal aid under the Legal Services Authorities Act, 1987 (39 of 1987) and make available free of cost the prescribed form in which a complaint is to be made.

(5) A victim or his/her dependent shall have the right to reasonable, accurate and timely notice of any Court proceeding and each State Government shall inform the victim or his/her dependent about any proceedings under this Act.

(6) A victim or his/her dependent shall have the right to apply to the Special Court to summon parties for production of any documents or material, witnesses or examine the individual or group of individuals present.

(7) A victim or his/her dependent shall be entitled to be heard at any proceeding under this Act in respect of any and all matters connected to proceedings or arguments and file written submission on conviction, acquittal or sentencing.

(8) Each State Government shall provide to a victim, his/her dependent, informant or witnesses complete protection during investigation, inquiry and trial. For this purpose, the State Government shall make available to them a safe house, if they so request and immediately notify the Special Court of the location of such safe house. The location of such safe house and any details regarding the safety and security either of the victim, his/her dependent, informant or witnesses shall not be disclosed to any third party.

(9) Each State Government shall inform the concerned Special Court about the protection provided to any victim or his/her dependent, informant or witnesses and the Court shall periodically review the protection being offered and pass appropriate orders.

(10) It shall be the right of the victim or his/her dependents, to take assistance in seeking justice from the non-governmental organizations, social workers or advocates.

CHAPTER V MISCELLANEOUS

13. Preventive action to be taken by the law and order machinery.—(1) Each State Government shall identify and maintain records of Districts, Sub-Divisions and/or Villages from where instances of “honour” based abuse (including “honour” crime) and/or assembly of khap panchayats are often reported.

(2) The Secretary, Home Department of the concerned States shall issue appropriate directions/advisories to the Superintendent of Police of the concerned Districts for ensuring that the officer in-charge of the Police Stations of the identified areas remain extra cautious and take appropriate action, if necessary.

(3) The provisions of Chapters VIII, X and XI of the Code of Criminal Procedure, 1973 (2 of 1974) shall, so far as may be, apply for the purposes of sub-section (2).

(4) Each State Government may, by notification in the Official Gazette, make one or more schemes specifying the manner in which the officers referred to in sub-section (2) shall take appropriate action specified in such scheme or schemes to prevent instances of “honour” based abuse (including “honour” crime) and/or assembly of khap panchayats.

14. Section 438 of the Code of Criminal Procedure, 1973 not to apply to individuals committing an offence under the Act.—Nothing in section 438 of the Code of Criminal Procedure shall apply in relation to any case involving the arrest of any individual or group of individuals on an accusation of having committed an offence under this Act.

15. Act to override other laws.—Save as otherwise provided in this Act, the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any custom or usage or any instrument having effect by virtue of any such law.

16. Punishment for non-payment of fine.—An offender, wilfully or otherwise, failing to pay the fine ordered by the Court, shall be liable to undergo imprisonment as provided under section 64 of the Indian Penal Code, 1860.

17. Fines to be paid as compensation to the victim.—(1) The fine levied as punishment for an offence under the Act, shall be paid to the victim or his/her dependents as compensation by following the procedure as may be prescribed.

(2) The compensation paid under sub-section (1) shall not be compounded with any other compensation or financial assistance which each State Government may decide to pay as immediate relief to the victim or his/her dependents.

18. Duty of Government to ensure effective implementation of the Act.—(1) Subject to such rules as the Central Government may make in this behalf, each State Government shall take the measures listed under this section including those that it may deem necessary for the effective implementation of this Act.

(2) In particular, and without prejudice to the generality of the foregoing provisions, each State Government shall take measures which include,—

(i) the provision for adequate facilities, including legal aid and safe house, to the victims of “honour” based abuse (including “honour” crime) to enable them to avail themselves of justice;

(ii) the provision for travelling and maintenance of expenses to witnesses, including the victims of “honour” based abuse (including “honour” crime) during investigation and trial of offences under this Act;

(iii) the provision for the social and economic rehabilitation of the victims of “honour” based abuse (including “honour” crime);

(iv) the appointment of officers for initiating or exercising supervision over prosecutions for the contravention of the provisions of this Act;

(v) the setting up of committees at appropriate levels by each State Government to assist that Government in formulation or implementation of various measures as may be necessary for the effective implementation of this Act including those listed under this section;

(vi) provision for undertaking public awareness campaigns and other appropriate measures against “honour” based abuse (including “honour” crime) through the combined efforts of the State Human Rights Commission, non-governmental organizations, social activists, educational institutions etc. Further, each State Government shall, every year, submit a report to the Central Government on the various measures undertaken, such as, public awareness campaigns, to raise awareness in society regarding the Act.

(vii) a report on the steps undertaken by the local administration including police officials, officers appointed for initiating or exercising supervision over prosecutions [as per section 18 (2)(iv) of this Act], the working of the various committees [as per section 18 (2)(v) of this Act] shall, every year, be submitted by each State Government to the Central Government.

(viii) provision for a periodic survey of the working of the provisions of this Act with a view to suggesting measures for the better implementation of this Act.

(3) The Central Government shall take such steps as may be necessary to co-ordinate the measures taken by each State Government under sub-section (1).

(4) The Central Government shall, every year, place on the table of each House of Parliament a report on the measures taken by itself and the various reports of each State Government submitted to the Central Government in pursuance of the provisions of this section. The Central Government shall, make available online all such reports tabled before each House of Parliament on the Ministry of Home Affairs website within fifteen days of tabling the reports before each House of Parliament.

19. Power to make rules.—(1) The Central Government may, by notification in the Official Gazette, make rules for carrying out the purposes of this Act.

(2) Every rule made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the

case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

ANNEXURE-III

Proposed suggestions to the law on the Devadasi System: The following are some suggestions (keeping in mind the existing state legislations on ‘devadasi system’ in India) in the form of key provisions, that may prove beneficial in drafting a more comprehensive law protecting the rights of women against the practice of dedication of women as devadasis.

THE PROHIBITION, PREVENTION AND PROTECTION AGAINST THE PRACTICE OF DEVADASI SYSTEM ACT

An Act to provide for the prohibition and prevention of the practice of dedication of women as devadasis to Hindu deities, idols, objects of worship, temples or religious institutions of any kind and to protect the rights of women so dedicated and for matters connected therewith or incidental thereto.

CHAPTER I PRELIMINARY

1. Short title, extent and commencement.—(1) This Act may be called the Prohibition, Prevention and Protection Against The Practice of Devadasi System Act.

(2) It extends to the whole of India.

(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2. Definitions.—In this Act, unless the context otherwise requires,—

- (a) “abettor” means an individual who either identifies any woman to be dedicated as a devadasi, or permits the performance of any ritual or ceremony of any kind towards dedicating any woman as devadasi either in his/her own premises or in the premises of any temple or religious institution or any other place, or takes part in any ritual or ceremony of any kind towards dedicating any woman as devadasi, or instigates, aids or abets such an act by his/her words, or by signs or indications or by conducts, resulting in prompting others to do the same;
- (b) “criminal force” means criminal force as defined under section 350 of the Indian Penal Code, 1860.

- (c) “dedication” means the performance of any ritual or ceremony of any kind to either devote, offer, marry etc., a woman to a Hindu deity, idol, object of worship, temple or religious institution of any kind as a devadasi;
- (d) “devadasi” means any woman dedicated to a Hindu deity, idol, object of worship, temple or religious institution of any kind, identified or called as *devadasi*, *jogini*, *mathammas* or any other such name in any language;
- (e) “safe houses” means any safe house as may be notified by the State Government to be a safe house for the purposes of this Act;
- (f) “special court” means a Court of Session specified as a Special Court in section 11 under this Act;
- (g) “special public prosecutor” means a Public Prosecutor specified as a Special Public Prosecutor or an advocate referred to in section 13;
- (h) “temple” means a place by whatever designation known, dedicated to, or used as a place of religious worship;
- (i) “victim” means any woman who has been dedicated as a devadasi. Victim also includes her dependents (relatives, legal heirs) and legal guardian;
- (j) “woman” means a female human being of any age.

CHAPTER II DEVADASI

3. Prohibition against dedicating as devadasi.— (1) Notwithstanding any custom, usage or law to the contrary whether before or after the commencement of this Act, dedication of a woman as devadasi is prohibited and is hereby declared unlawful and to be of no effect.

(2) No individual shall either identify any woman to be dedicated as a devadasi, or permit the performance of any ritual or ceremony of any kind towards dedicating any woman as devadasi either in his/her own premises or in the premises of any temple or religious institution or any other place, or take part in any ritual or ceremony of any kind towards dedicating any woman as devadasi, or instigate, aide or abet such an act by his/her words, or by signs or indications or by conducts, resulting in prompting others to do the same.

(3) No devadasi to be punished by reasons only of such woman being a devadasi.

4. Punishment for identifying as a devadasi.—(1) Whoever with any malicious intention or otherwise,

(i) identifies any woman to be dedicated as a devadasi by words, or by signs or indications or by conducts or actions or any other manner or;

(ii) instigates, aids or abets others to do any such act mentioned in clause (i) above, shall be punishable with imprisonment for a term of not less than one year but which may extend to three years and shall also be liable to fine up to one lakh rupees, but which may extend to three lakh rupees.

(2) If the offence under this section is committed by the relatives (including parents), legal guardian of the woman, the offender or offenders, shall be punishable with imprisonment for a term of not less than three years but which may extend to five years and shall also be liable to fine up to three lakh rupees, but which may extend to five lakh rupees.

5. Punishment for using criminal force in identifying as a devadasi.—Whoever in identifying any woman to be dedicated as a devadasi uses criminal force against that woman or her relatives, legal guardian, or coerces her in any manner or her relatives, legal guardian in order to dedicate her as a devadasi and/or instigates or provokes others to do the same, shall be punishable with imprisonment for a term of not less than five years but which may extend to seven years and shall also be liable to fine up to three lakh rupees, but which may extend to five lakh rupees.

6. Punishment for abusing a devadasi.—(1) Whoever abuses any woman dedicated as a devadasi in any manner, either in his own premises or in the premises of any temple or religious institution or any other place, or instigates, aids or abets others to do the same, shall be punishable with imprisonment for a term of not less than seven years but which may extend to ten years and shall also be liable to fine up to five lakh rupees, but which may extend to ten lakh rupees.

(2) “Abuse” includes physical, sexual, mental and economic abuse.

7. Punishment for performing the act of dedication.—Whoever performs any ritual or ceremony of any kind towards dedicating any woman as devadasi either in his own premises or in the premises of any temple or religious institution or any other place, or instigates, aids or abets others to do the same, shall be punishable with imprisonment for a term of not less than three years but which may extend to five years and shall also be liable to fine up to one lakh rupees, but which may extend to three lakh rupees.

8. Marriage of devadasi.—Notwithstanding any custom, usage or law to the contrary, no marriage contracted by a woman shall be invalid and no issue of such marriage shall be considered as illegitimate by reasons only of such woman being a devadasi.

9. Presumption as to offences.—Any individual or group of individuals, unless the contrary is proved, shall be presumed to have committed the offences under this Act.

10. Cognizance.—Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the offences under this Act shall be cognizable and non-bailable.

CHAPTER III SPECIAL COURTS

11. Special Court.—(1) For the purpose of providing speedy trial, each State Government shall, with the concurrence of the Chief Justice of the High Court, by notification in the Official Gazette, establish a Special Court for one or more Districts:

Provided that the Courts so established shall have power to directly take cognizance of offences related to devadasi system under this Act.

(2) It shall be the duty of each State Government to establish adequate number of Special Courts to ensure that cases under this Act are disposed of within a period of six months, as far as possible.

(3) In every trial in the Special Court, the proceedings shall be continued from day-to-day until all the witnesses in attendance have been examined, unless the Special Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded in writing.

12. Appeals.—(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), an appeal shall lie, from any judgment, sentence or order, not being an interlocutory order, of a Special Court, to the High Court both on facts and on law.

(2) Notwithstanding anything contained in any other law for the time being in force, every appeal under this section shall be preferred within a period of ninety days from the date of the judgment, sentence or order appealed from:

Provided that the High Court may entertain an appeal after the expiry of the said period of ninety days if it is satisfied that the appellant had sufficient cause for not preferring the appeal within the period of ninety days:

Provided further that no appeal shall be entertained after the expiry of the period of one hundred and eighty days.

(3) Every appeal preferred under sub-section (1) shall, as far as possible, be disposed of within a period of three months from the date of admission of the appeal.

13. Special Public Prosecutor.—For every Special Court, each State Government shall, by notification in the Official Gazette, specify a Public Prosecutor or appoint an advocate who has been in practice as an advocate for not less than ten years, as a Special Public Prosecutor for the purpose of conducting cases in that Court.

CHAPTER IV PROTECTION OF VICTIMS AND WITNESSES

14. Rights of victims and witnesses.—(1) It shall be the duty and responsibility of each State Government to make arrangements for the protection of victims, their dependents (including relatives, legal heirs) and witnesses against any kind of intimidation or coercion or inducement or violence or threats of violence.

(2) A victim or her dependent shall be treated with fairness, respect and dignity and with due regard to any special need that arises because of the victim or her dependent's age or gender or educational disadvantage or poverty.

(3) (i) It shall be the duty of the police officer in-charge to record the complaint of victim, her dependents, informant or witnesses against any kind of intimidation, coercion or inducement or violence or threats of violence whether given orally or in writing and a photocopy of the First Information Report shall be immediately given to them at free of cost.

(ii) Upon receiving the complaint of victim, her dependents, informant or witnesses, it shall be the duty of the police officer in-charge to take all appropriate action (including arrest) for the protection of victim, her dependents, informant or witnesses. Even if an incident is reported to a police officer belonging to an area outside the jurisdiction of the area where the incident has taken place, the said officer shall record the First Information Report and take all necessary steps till the case is transferred to the police station having jurisdiction in the case.

(iii) Any failure to do the above shall amount to a cognizable offence against the concerned police officer and shall be dealt with under the Indian Penal Code, 1860.

(4) Each State Government shall ensure that the victim or her dependent, is provided legal aid under the Legal Services Authorities Act, 1987 (39 of 1987) and make available free of cost the prescribed form in which a complaint is to be made.

- (5) A victim or her dependent shall have the right to reasonable, accurate and timely notice of any Court proceeding and each State Government shall inform the victim or her dependent about any proceedings under this Act.
- (6) A victim or her dependent shall have the right to apply to the Special Court to summon parties for production of any documents or material, witnesses or examine the individual or group of individuals present.
- (7) A victim or her dependent shall be entitled to be heard at any proceeding under this Act in respect of any and all matters connected to proceedings or arguments and file written submission on conviction, acquittal or sentencing.
- (8) Each State Government shall provide to a victim, her dependent, informant or witnesses complete protection during investigation, inquiry and trial. For this purpose, the State Government shall make available to them a safe house, if they so request and immediately notify the Special Court of the location of such safe house. The location of such safe house and any details regarding the safety and security either of the victim, his/her dependent, informant or witnesses shall not be disclosed to any third party.
- (9) Each State Government shall inform the concerned Special Court about the protection provided to a victim or her dependent, informant or witnesses and the Court shall periodically review the protection being offered and pass appropriate orders.
- (10) It shall be the right of the victim, her dependents, to take assistance in seeking justice from the non-governmental organizations, social workers or advocates.

CHAPTER V MISCELLANEOUS

- 15. Preventive action to be taken by the law and order machinery.**—(1) Each State Government shall identify and maintain records of Districts, Sub-Divisions and/or Villages from where instances of practice of devadasi system are often reported.
- (2) The Secretary, Home Department of the concerned States shall issue appropriate directions/advisories to the Superintendent of Police of the concerned Districts for ensuring that the officer in-charge of the Police Stations of the identified areas remain extra cautious and take appropriate action, if necessary.
- (3) The provisions of Chapters VIII, X and XI of the Code of Criminal Procedure, 1973 (2 of 1974) shall, so far as may be, apply for the purposes of sub-section (2).

(4) Each State Government may, by notification in the Official Gazette, make one or more schemes specifying the manner in which the officers referred to in sub-section (2) shall take appropriate action specified in such scheme or schemes to prevent instances of dedication of women as devadasis.

16. Section 438 of the Code of Criminal Procedure, 1973 not to apply to individuals committing an offence under the Act.—Nothing in section 438 of the Code of Criminal Procedure shall apply in relation to any case involving the arrest of any individual or group of individuals on an accusation of having committed an offence under this Act.

17. Act to override other laws.—Save as otherwise provided in this Act, the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any custom or usage or any instrument having effect by virtue of any such law.

18. Punishment for non-payment of fine.—An offender, wilfully or otherwise, failing to pay the fine ordered by the Court, shall be liable to undergo imprisonment as provided under section 64 of the Indian Penal Code, 1860.

19. Fines to be paid as compensation to the victim.—(1) The fine levied as punishment for an offence under the Act, shall be paid to the victim or her dependents as compensation by following the procedure as may be prescribed.

(2) The compensation paid under sub-section (1) shall not be compounded with any other compensation or financial assistance which each State Government may decide to pay as immediate relief to the victim or her dependents.

20. Duty of Government to ensure effective implementation of the Act.—(1) Subject to such rules as the Central Government may make in this behalf, each State Government shall take such measures as may be necessary for the effective implementation of this Act.

(2) In particular, and without prejudice to the generality of the foregoing provisions, such measures shall include,—

(i) the provision for adequate facilities, including legal aid and safe house, to women who have been dedicated as devadasis or are rescued from being dedicated to enable them to avail themselves of justice;

(ii) the provision for travelling and maintenance of expenses to witnesses, including the victims, during investigation and trial of offences under this Act;

(iii) the provision for proper rehabilitation of devadasis and their children;

(iv) special provision for the social, educational and economic upliftment of devadasis and their children, including guidelines on ensuring the proper health and nutrition of such children. Also, no devadasi shall be barred because of her age in accessing any economic benefit designed especially for their rehabilitation or upliftment;

(v) the appointment of officers for initiating or exercising supervision over prosecutions for the contravention of the provisions of this Act;

(vi) the setting up of committees at appropriate levels by each State Government to assist that Government in formulation or implementation of various measures as may be necessary for the effective implementation of this Act including those listed under this section;

(vii) provision for undertaking public awareness campaigns and other appropriate measures against devadasi system through the combined efforts of the State Human Rights Commission, non-governmental organizations, social activists, educational institutions etc. Further, each State Government shall, every year, submit a report to the Central Government on the various measures undertaken, such as, public awareness campaigns, to raise awareness in society regarding the Act.

(viii) a report on the steps undertaken by the local administration including police officials, officers appointed for initiating or exercising supervision over prosecutions [as per section 20 (2)(v) of this Act], the working of the various committees [as per section 20 (2)(vi) of this Act] shall, every year, be submitted by each State Government to the Central Government.

(ix) provision for a periodic survey of the working of the provisions of this Act with a view to suggesting measures for the better implementation of this Act.

(3) The Central Government shall take such steps as may be necessary to co-ordinate the measures taken by each State Government under sub-section (1).

(4) The Central Government shall, every year, place on the table of each House of Parliament a report on the measures taken by itself and the various reports of each State Government submitted to the Central Government in pursuance of the provisions of this section. The Central Government shall, make available online all such reports tabled before each House of Parliament on the Ministry of Home Affairs website within fifteen days of tabling the reports before each House of Parliament.

21. Power to make rules.—(1) The Central Government may, by notification in the Official Gazette, make rules for carrying out the purposes of this Act.

(2) Every rule made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

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