Unsafe In My Own Home: A Sociolegal Study of Violence against Women in India's Private Sphere

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Abstract

Given the influence of the social and legal public-private divide on the Indian legal framework, this research seeks to understand how current legal structures maintain and reinforce forms of violence against women in India's private sphere. In tackling this question, the research argument begins by observing that the Indian legal system does not sufficiently address acts of violence committed in the private social sphere. The manifestations and consequences of this insufficiency is studied in two different scenarios: marital rape, as a form of violence where no law exists, and dowry death, as a form of violence where the existing laws prove inadequate. Through a postcolonial feminist lens, the research argues that the legal insufficiency for both marital rape and dowry death can be explained, at least in part, by understanding the patriarchal and colonial power dynamics that create and maintain social scripts and perceptions surrounding gender roles, marriage, and violence in the private sphere. In turn, these private sphere narratives influence the creation, implementation, and reform of law in the public sphere as well. These dynamics are showcased in detail through the examination of marital rape and dowry death in India, and the social scripts and perceptions surrounding these forms of violence. The argument concludes by commenting on the consequences of social narratives in the private sphere on legal structures in the public which, in turn, continues to both maintain and reinforce marital rape, dowry death, and other private forms of violence against women. This argument allows the research to create an understanding of the patriarchal and colonial influence of the legal and social public-private divide, as an important first step towards a structural transformation of the Indian legal framework surrounding violence against women in India’s private sphere.

Dedication

‘*I can do all this through Him who gives me strength*.’

- Philippians 4:13

This research is dedicated to my mother, whose courage in the face of myths and perceptions changed my life. This research is as much inspired by her story as it is by the story of countless women across the nation, across the world.

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Thank you, God, for leading me to, and for leading me to through, this research journey.

Thank you to my dynamic supervisor, Yutaka Arai, without whom this research simply would not have been possible. He saw potential in me well before I did and stood by me even before this journey began – and every day since. I continue to be in complete awe of his vast knowledge. In addition to being a brilliant scholar, he is endlessly compassionate and considerate, and I feel incredibly blessed to have researched under his guidance. Yutaka, for everything that you have done, I cannot thank you enough.

Thank you to my incredible and selfless mother, Popsie Ebenezer. There is not a day that goes by where I do not learn something new from her. She has been my strength and support for as long as I can remember and longer still. From when this research was just an idea to what it is today, she has heard every thought, challenged every assumption, edited every draft, and encouraged every leap into the unknown. This research is as much hers as it is mine.

Thank you to the amazing Harm Schepel, for always encouraging me and challenging me with new perspectives and viewpoints that constantly enhanced my research. Thank you to my research colleagues at BSIS – both doctoral candidates and professors alike – for sitting through my countless presentations and providing both inspiration and motivation. Thank you to my yearly examiners at KLS for driving this research forward and always in a better direction than before. Thank you to the administration of both BSIS and LSSJ for providing such consistent structural support throughout this journey. It truly takes a village, and I am incredibly grateful that each and every one of you walked this journey with me. Thank You.

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List of Abbreviations

CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
Centre	The Government
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
DEVAW	Declaration on the Elimination of Violence Against Women
DPA	Dowry Prohibition Act
IC	The Indian Constitution
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IPC	Indian Penal Code
MRE	Marital Rape Exemption

PWDVA	Protection of Women from Domestic Violence Act
RPL	Religious Personal Law
SGBV	Sexual and Gender Based Violence
VAW	Violence against Women

Introduction

Achieving a substantive and sufficient legal framework surrounding violence against women is a complicated endeavour. Ever since its first reference, the legal understanding of violence against women has evolved in many ways. From pre-1979 international conventions detailing a broad right to equality and freedom from discrimination, to a specific instrument for gender equality with the Convention on the Elimination of all forms of Discrimination against Women (CEDAW).[1] From the lack of mention of violence against women within the main body of the CEDAW, to a dedicated provision on such violence with the Declaration on the Elimination of Violence Against Women (DEVAW).[2] From the non-binding nature of the DEVAW and the Beijing Declaration[3] to the binding and regionally applicable Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention).[4] International law on gender equality and sexual and gender-based violence has constantly been in flux. Indian law on violence against women tells a similar story. Following the creation of the Indian Constitution, and its inclusion of an equality and non-discrimination provision, the number of laws regarding violence against women have been on a constant increase. In fact, legally speaking, India has one of the most extensive framework on laws against sexual and gender-based violence – whether it be as signatories to international conventions or as creators of locally applicable legislation themselves.[5]

[1] Convention on the Elimination of All Forms of Discrimination against Women 1979.

[2] Declaration on the Elimination of Violence Against Women 1993.

[3] Beijing Declaration and Platform for Action 1995.

[4] Istanbul Convention on Preventing and Combating Violence against Women and Domestic Violence 2011.

[5] The protections and provisions that India boasts are detailed throughout the research, with particular attention to international conventions in Part Four.

Unfortunately, India is also known for its large and ever-increasing figures of violence against women, with official statistics estimated to be only a fraction of the actual violence occurring daily.[6] This stark discrepancy shows a clear disconnect between the evolution of laws on the one hand and their translation into action on the other. Moreover, India is particularly reluctant in the creation of, and ineffective in the application of, laws addressing violence against women in the home. Along with a continued marital rape immunity – which does not recognise rape when the perpetrator is also the husband, the National Crime Records Bureau relays how, in 2020, for crimes reported as 'Cruelty by Husband or His Relatives' under Section 498A of the Indian Penal Code, the conviction rate was a mere 18.1 per cent.[7] Known as a private form of violence, due to the intimate or familial relationship that the perpetrator and the victim share, this crime gains its immunity by occurring in a sphere which is socially deemed to be free from state interference – as opposed to the public sphere where the state resides. This includes a high level of immunity particularly from legal interference when it comes to dictating the roles, rights, and treatment of women in the private sphere. A clear example of this can be seen in the Indian government's reaction to a call for the criminalisation of marital rape, following a gang rape case that occurred almost exactly a decade ago.

[6] In 2018, Thomas Reuters reported how a poll of global experts found India to be the most dangerous country for women 'due to high risks of sexual violence and being forced into slave labour.' They also commented on how reported crimes against women increase by 83% between 2007 and 2016. Belinda Goldsmith and Meka Beresford, 'Exclusive: India most dangerous country for women with sexual violence rife – global poll' (*Thomas Reuters Foundation.* 2018). Additionally, Bhattacharya and Kundu write how, based on the National Family Health Survey (NFHS) 2015-2016 and the National Crime Records Bureau 2014-2016, 99.1% of sexual assault cases remain unreported. Pramit Bhattacharya and Tadit Kundu, '99% of Sexual Assaults Go Unreported, Govt Data Shows' (*Mint,* 2018).

[7] National Crime Records Bureau, 'Crime In India' (Ministry of Home Affairs 2020).

India's internationally infamous 2012 Nirbhaya gang rape case not only brought the country's dirty laundry under worldwide scrutiny but it also led to the creation of The Report of the Committee on Amendments to Criminal Law, also known as the Verma Report.[8] This extensive report recommended necessary additions and improvements to India's gender justice and equality laws and many of the report's recommendations were widely implemented into the current legal system – save its suggested improvements for gender equality in the private or domestic sphere of life. For example, detailed and well-researched recommendations to repeal the marital rape immunity and criminalise the act – which were laid out from clause 72 to clause 80 of this report[9] – were entirely rejected by the Indian government.[10] This is a prime example of the influence of the public-private divide on Indian laws, where the government adopts a hands-off attitude to instances of violence in the latter sphere – often to the detriment of women.[11] Having observed the differential treatment when it comes to private forms of violence against women, this research particularly addresses such forms of violence, the Indian legal framework in the light of this violence, and the role of the social and legal public-private divide. However, before delving into the research question and research argument, the following section briefly establishes a better understanding of what violence against women in the public or private sphere can look like.

Violence against Women

[8] Justice J.S. Verma, 'Report Of the Committee on Amendments to Criminal Law' (Committee on Amendments to Criminal Law 2018).

[9] *id.* at clause 72-80.

[10] Deborah Kim, 'Marital Rape Immunity In India: Historical Anomaly or Cultural Defence?' (2017) Crime, Law and Social Change.

[11] Ivana Radacic, 'Human Rights of Women and the Public/Private Divide in International Human Rights Law' (2007) Croatian Yearbook of European Law and Policy 3 Page 443.

Gender-based discrimination, which can be found in every single country in one form or another, is 'frequently justified as being in accordance with many of the cultures – including religious aspects of these cultures practiced in the world today.'[12] This discrimination commonly manifests itself in violence against women, which can include, but is not limited to; rape, acid attacks, sexual harassment, human trafficking, and so on. Forms of violence against women that particularly occur in the private sphere – which signifies a familial or intimate relationship between the perpetrator and the victim – include, but are not limited to; domestic abuse, dowry-related violence and death, honour killing, marital rape, femicide, child or forced marriage, and so on. Violence against women is widely attributed, at least in part, to the 'unequal power relations between men and women [that] are socially constructed and "historically justified" rather than "natural".'[13] This ties into India's 'deep-rooted male patriarchal roles and long-standing cultural norms that propagate the view of women as subordinates throughout their lifespan.'[14] Therefore, as opposed to arbitrary acts of sporadic violence, violence against women is a category of particular and intentional crimes where 'victims are chosen because of their gender' and to assert dominion over.[15] While holding the 'tensions between the awareness of violence against women on the one hand, and the social norms and culture that value women and men differently on the other,' Mary Shanti Dairiam writes that 'violence against women fits into this equation as a mechanism that maintains the traditional social order of male domination and female subordination, in both the private and

[12] Susan Moller Okin, 'Feminism, Women's Human Rights, and Cultural Differences,' (1998) 13 Hypatia 2, 33.

[13] Katerina Standish, 'Understanding Cultural Violence and Gender: Honour Killings; Dowry Murder; the Zina Ordinance and Blood-Feuds' (2014) 23 Journal of Gender Studies 2, 112.

[14] Ameeta Kalokhe and others, 'Domestic Violence against Women in India: A Systematic Review of a Decade of Quantitative Studies' (2017) 12 Global Public Health 4, 499.

[15] Charlotte Bunch, 'Women's Rights as Human Rights: Toward a Re-Vision of Human Rights' (1990) 12 Human Rights Quarterly, 490.

public spheres.'[16] She goes on to write how 'cultural norms endorsing male dominance, male authority in the family, and female economic dependency are predictors of high societal levels of domestic violence and rape.'[17] This proves to be true for violence against women in India as well.

In India, as with many other countries, sexual and gender-based violence against women is prevalent in spite of a host of national and international legal provisions that exist in order to address and penalise this form of violence. For private forms of violence in particular, this includes the Indian Protection for Women against Domestic Violence Act (PWDVA)[18] and articles in the Indian Penal Code,[19] as well as the international Convention on the Elimination of all forms of Discrimination against Women (CEDAW)[20] and the Declaration on the Elimination of Violence Against Women (DEVAW).[21] However, there remains a large gap between the legal provisions on violence against women in the private sphere and the on-ground reality – especially seen in both reporting violence as well as in legal convictions. While the low conviction rates were mentioned earlier, when it comes to reporting, the National Family Health Survey for 2019-2021 found that only 14 per cent 'of all women in India who have experienced any type of physical or sexual violence' have sought help.[22] This is despite the fact that the same survey details how 32 per cent of women who are or have been married,

[16] Mary Shanti Dairiam, 'CEDAW, Gender and Culture', *The Oxford Handbook of Transnational Feminist Movements* (2015) 15.

[17] *ibid.* Based on cross-cultural studies.

[18] Protection of Women from Domestic Violence Act 2005.

[19] Indian Penal Code 1860 – particularly 304B, 375 and 498A.

[20] Convention on the Elimination of All Forms of Discrimination against Women 1979.

[21] Declaration on the Elimination of Violence Against Women 1993.

[22] Ministry of Health and Family Welfare, 'National Family Health Survey (NFHS-5) 2019-2021 India Report' (Government of India 2022).

report that they have experienced violence at the hands of their husband or partner, while 29 per cent had experienced such violence in the 12 months preceding the survey.[23] Regardless of the ever-increasing Indian population – or perhaps because of it – these percentages are staggering. With such low reporting rates, there is clearly a discrepancy between a woman's experience of violence and the awareness or freedom to report the same.

The Research Question and Research Argument

This research seeks to understand why such wide discrepancies exist between the frequency of experiences of private forms of violence against women, and its reporting and conviction rates. To this end, the research question asks:

> Given the influence of the social and legal public-private divide on the Indian legal framework, how do current legal structures maintain and reinforce forms of violence against women in India's private sphere?

In tackling this question, the research argument begins by observing that the Indian legal system does not sufficiently address acts of violence committed in the private social sphere. The manifestations and consequences of this insufficiency is studied in two different scenarios: marital rape, as a form of violence where no law exists, and dowry death, as a form of violence where the existing laws prove inadequate. Through a postcolonial feminist lens, the research argues that the legal insufficiency for both marital rape and dowry death can be explained, at least in part, by understanding the patriarchal and colonial power dynamics that create and

[23] *ibid.*

maintain social scripts and perceptions surrounding gender roles, marriage, and violence in the private sphere. In turn, these private sphere narratives influence the creation, implementation, and reform of law in the public sphere as well. These dynamics are showcased in detail through the examination of marital rape and dowry death in India, and the social scripts and perceptions surrounding these forms of violence. The argument concludes by commenting on the effects of social narratives in the private sphere on legal structures in the public which, in turn, continues to both maintain and reinforce marital rape, dowry death, and other private forms of violence against women. This argument allows the research to create an understanding of the patriarchal and colonial influence of the legal and social public-private divide, as an important first step towards a structural transformation of the Indian legal framework surrounding violence against women in India's private sphere.

This research uses postcolonial feminist theory and a critical doctrinal legal analysis to address the research argument. In order to do so, it examines legal provisions and court cases by using existing literature under postcolonial feminist legal theory to 'stress the internal contradictions and indeterminacy of traditional, cosmopolitan and liberal doctrines and focus on their institutional biases.'[24] After laying out the legal framework for marital rape and dowry death as particular forms of violence against women in the private sphere, the research evaluates the implementation of these provisions by using case law. Such case law mainly consists of High Court and Supreme Court judgements. Postcolonial feminism serves as a useful analytical perspective that assists in dissecting the inadequacy of existing laws, including their scripts, their application, and their impact on change and reform in social reality.

[24] Martti Koskenniemi, 'International Legal Theory and Doctrine' (2007) Max Planck Encyclopaedia of Public International Law Paragraph 14.

Together, this allows for a detailed understanding of the hurdles that exist in getting the law to address forms of violence against women in the private sphere sufficiently and substantively.

The Elements of this Research

In defining the key elements, and scope, of this research argument, it is important to understand how this research will address (i) the public-private divide, (ii) social scripts and perceptions, and (iii) postcolonial feminist theory.

Public-Private Divide

An essential element of the research question is an understanding and analysis of the public-private divide in India. In the context of this research, the public-private divide is referenced in two distinct, yet inherently intersecting, ways.[25] Firstly, the research refers to the legal divide between public, criminal law, and private, civil law. Within the written legal public-private distinction, public law is concerned with 'the vertical relationship between the state and the individual, or between different State actors,' while private law applies to 'horizontal interactions between individuals in their capacities as private actors.'[26] However, in practice, the distinctions between the public sphere of law and the private sphere of law are never as clear. Rather than promoting or supporting the existence of such a binary distinction, the research seeks to criticise its continued explicit and implicit maintenance within the Indian

[25] While the distinctions are discussed in this section as well as later in the research, the inherent intersections between law and social constructs are particularly referred to near the end of Chapter One: Violence against Women in India's Private Sphere – An Introduction.

[26] Shyamkrishna Balganesh, 'The Constitutionalisation of Indian Private Law' *The Oxford Handbook of the Indian Constitution* (Oxford University Press 2016) 1.

legal system – especially when it comes to addressing forms of violence against women that occur within a household. This connects to the second reference of the public-private divide as a social – and often political – distinction between a public sphere of life and a private, domestic sphere of life. Within this distinction, the private sphere of life – involving matters such as familial and marital relations, gender roles, the practice of religion, and so on – is considered sacred and untouchable, and is often shaped by societal scripts and perceptions.

In connecting the social and legal references of the public-private divide, this research argues that the social public-private divide also seeps into the legal sphere, particularly in how criminal law (public sphere) refuses to, or is not able to, successfully intervene in domestic (private sphere) forms of violence against women, as they are considered private, family matters. As Devika and Mohan write, 'the locus of women's subordination is frequently the private and individual sphere - and this thus perceived as isolated and experienced in isolation. By denying that "personal is political", the state only endorses unequal practices which violate constitutional mandates of equality.'[27] This is further exacerbated by the fact that Indian civil law holds an amalgamation of both secular provisions as well as an extensive framework of religious personal laws. Due to the intricacy and political sensitivity of this civil legal framework, the Indian government often urges victims of violence in the private sphere to seek retribution within civil law, rather than public, criminal provisions. This is clearly seen, and discussed within this research, in the example of marital rape. However, even in cases where clear criminal provisions are present, such as dowry death, the influence of social myths and perceptions from the private sphere to the public sphere of law prevent the successful execution of such legal frameworks. Despite its criticisms of the public-private divide, this research does

[27] S Devika and T Mohan, 'Marital Rape and Criminal Law: Patriarchal Phantoms and Neutral Facades' (1991) 3 Student Advocate 18.

not seek to eliminate this distinction but, rather, to gain an acknowledgement and accommodation for its structural weaknesses – particularly when it comes to violence against women within the home.

The public-private divide is by no means a new concept within legal or postcolonial feminist research. In fact, Vasuki Nesiah points out that there is a 'long history of feminist scholarship interrogating the public-private distinction in a range of social and historical contexts associated with the Western liberal tradition.'[28] Acknowledging this history, this research interprets existing knowledge of legal scholars regarding the public-private divide and creates new knowledge by applying the existing research to particular forms of violence against women in India's private sphere, with the crucial inclusion of relevant social myths and perceptions. This process, conducted through a postcolonial feminist lens, results in an original and locally applicable critique of the detrimental immunity enjoyed by discriminatory discourses and perpetrators of sexual and gender-based violence within the private social sphere in India. Therefore, this research also contributes by shedding light, particularly and systematically, on the nature and contributing factors of sexual and intimate violence within a marriage – which is often left in the dark as it is deemed private in nature, and therefore immune to interference. As Bhat and Ullman write, research on 'the topic of marital violence often engenders strong cultural and family resistance due to the sensitive and intimate nature of marital violence.'[29] Despite such resistance, this research is important and necessary – and is further enhanced by discussions of the public-private divide as well as social myths and perceptions.

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[28] Nesiah V, 'Decolonial CIL: TWAIL, Feminism, and an Insurgent Jurisprudence', (2018) The American Society of International Law.

[29] Meghna Bhat and Sarah Ullman, 'Examining Marital Violence in India: Review and Recommendations for Future Research and Practice' (2014) 15 Trauma, Violence, & Abuse, 63.

Social Scripts, Perceptions and Culture

Within the parameters of this research, discussions of scripts,[30] myths, perceptions, or discourses are particularly limited to certain social norms surrounding marital rape and dowry death in India – as well as the colonial and patriarchal influence upon these social norms and how they, in turn, influence legal proceedings. Despite the countless other scripts and perceptions that can be drawn upon, the research limits its discussion to a particular few in order to conduct a detailed examination under the scope of the research question and argument. These scripts and perceptions have been chosen for their relevance to violence against women in the private sphere, and their capacity to illustrate the disadvantageous elements of the relationship that the public and the private sphere share.

Any discussion of social norms within India inevitably brings up the important dynamics between Indian culture and women's rights – which are often, incorrectly, treated as binary. Although the research does not pit Indian culture against women's rights, it does examine and criticise elements of India's culture, which are often used as an 'alibi[] for political choices and distributions.'[31] This necessary analysis also highlights the influence of such cultural elements on law, and the influence of law on culture, where many seemingly progressive laws have been drafted with the 'old logic of stereotyped gender roles and

[30] Kathryn M. Ryan defines scripts as 'prototypes for how events normally proceed' in Kathryn M. Ryan, 'The Relationship Between Rape Myths And Sexual Scripts: The Social Construction Of Rape' (2011) 65 Sex Roles 775.

[31] Cyra Choudhury, 'Beyond Culture: Human Rights Universalisms Versus Religious And Cultural Relativism In The Activism For Gender Justice' (2015) 30 Berkeley Journal for Gender Law and Justice 230.

patriarchal presumption'[32] in mind. Through an examination of social scripts and perceptions within Indian culture, the research further showcases how the execution of law is often influenced, and even prevented, by social interpretations of gender roles and relationships in the private sphere.[33] As Gadkar-Wilcox writes, 'deep-set cultural presumptions and attitudes regarding the position of women in families have also been impediments to [legal] reform.'[34] Relatedly, along with the reverence and immunity offered to the private sphere, the public and private sphere are disadvantageously kept separate on matters of violence against women in the home. Moreover, the public-private divide is constantly and relentlessly reinforced through gendered social perceptions that validate, and even uphold, private acts of violence against women.

This research also importantly highlights how culture and women's rights are not opposing concepts. Rather, they are often presented as such by the state to justify legal absences.[35] Maneesha Deckha illustrates the postcolonial feminist contention with binary interpretations of culture by stating:

> The skepticism that postcolonialists attach to cultural claims is in large part an effort to signal their disagreement with both modernist narratives that frame cultures as discrete

[32] Biswajit Ghosh, 'How Does the Legal Framework Protect Victims of Dowry and Domestic Violence in India? A Critical Review' (2013) 18 Aggression and Violent Behaviour, 416.

[33] Jane Rudd, 'Dowry-murder: An example of violence against women' (2001) 24 Women's Studies International Forum 5, 518.

[34] Sujata Gadkar-Wilcox, 'Intersectionality and the Under-Enforcement of Domestic Violence Laws in India' (2012) Penn. Law: Legal Scholarship Repository 461-462. The other impediment, according to Gadkar-Wilcox and discussed later in this research, is the 'unwillingness of local police to implement current legislation on domestic violence.'

[35] For example, the state gave particularities of Indian culture as a reason to prevent the criminalisation of marital rape.

> and unified sets of relatively static traditions and practices that distinguish the "primitive" tradition-bound inhabitants of non-Western societies from the reason-bound inhabitants of the West. Such critics see culture as a dynamic practice of making and remaking meanings that are provisional, shifting, and partial where participation in cultural acts and ongoing cultural contestation is something that all humans do.[36]

Moreover, there is clear evidence of external factors and values – outside traditional Indian culture – influencing behaviours and crimes in India's domestic sphere. An example of this can be seen with the transformation of the definitions and scope of dowry, as well as the escalation of dowry deaths since the then-foreign concept of consumerism began influencing Indian social relations. Yet, the present form of dowry is often socially defended even today as a facet of Indian culture and tradition. Therefore, it is clear that Indian culture, and its relationship with the roles of men and women in the private sphere, does not exist in a vacuum. Similarly, the utilisation of postcolonial feminism in this research highlights how colonial laws, scripts and culture have shaped and continue to affect women's rights in India's domestic sphere.[37]

Being able to address facets of Indian culture without presenting it as the antithesis to women's rights and progress is an important contribution that this research makes. As Cyra Akila Choudhury writes, 'it is an uncomfortable position to defend one's 'cultural' group from denigration from outsiders on one hand while critiquing the very same use of culture from within.'[38] The understanding that women do not have to choose one or the other can be significant in other regional and situational contexts as well, where the relationship between

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[36] Maneesha Deckha, 'Is Culture Taboo - Feminism, Intersectionality, and Culture Talk in Law', (2004) 16 Canadian Journal of Women an Law 25.

[37] This is extensively seen in India's response to marital rape and in the escalation of dowry requests.

[38] n 31 above

human rights and culture is shown as a binary. The values and assumptions challenged within this research will hopefully force readers to take a step back and examine issues of violence against women in the private sphere, and the public-private divide in general, more critically.

Postcolonial Feminist Theory

Mainstream feminist legal theory is often criticised for not leaving room for third world feminists, who are then 'obliged to communicate in the Western rationalist language in law, in addition to challenging the intensely patriarchal 'different voice' discourse of traditional non-European societies.'[39] Therefore, this thesis examines the influence of the public-private divide on the patriarchal Indian society, while simultaneously examining how this relationship is compounded upon by the colonial influence. This colonial influence is also particularly important to address as it institutionalised the public-private divide in India and locally embedded practices and policies that continue to be detrimental to gender equality.[40] Barn and Powers add that, 'although there have been some changes over the last few decades, Indian laws governing sexual assault are deeply embedded in the British colonial legacy of the 1860 Indian Penal Code.'[41] This reveals why a solely feminist interpretation of the Indian legal framework, violence against women, and the public-private divide cannot be sufficiently applied in the Indian context.

[39] Hilary Charlesworth, Christine Chinkin, Shelley Wright, 'Feminist Approaches To International Law' (1991) 85 The American Journal of International Law 619.

[40] Such as the impossibility thesis, discussed in Part Two, and compulsory dowry, discussed in Part Three.

[41] Ravinder Barn and Ráchael A. Powers, 'Rape Myth Acceptance In Contemporary Times: A Comparative Study Of University Students In India And The United Kingdom' (2018) 36 Journal of Interpersonal Violence 3516.

While feminist legal theory examines patriarchal biases within legal structures, postcolonial theory 'essentially revisits the narrative of colonialism, but revisits it using a different lens.'[42] Alpana Roy adds how, 'unlike colonial discourses, postcolonial theory does not privilege the colonial experience, but rather, retrieves this history from the perspectives of the formerly colonised (or the Other).'[43] However, postcolonial theory in and of itself does not place any special emphasis on gendered perspectives. In fact, Swati Parashar writes that, 'the postcolonial, in its temporal and spatial understandings celebrates anti-colonial nationalisms as the act of resistance and overlooks the internal orthodoxies, injustices, silences and marginalisations.'[44] An example of these overlooked internal injustices, given by Ania Loomba, can be seen in how Indian 'anti-colonial or nationalist movements have used the image of the Nation-as-Mother to create their own lineage, and also to limit and control the activity of women within the imagined community.'[45] She further showcases how, 'as national emblems, women are usually cast as mothers or wives, and are called upon to literally and figuratively reproduce the nation'[46] – which makes it that much harder for them to break free from these pre-independence characterisations. Finally, postcolonial theory also finds its weakness in the fact that 'colonisation has been used to categorise everything from the most evident economic and political hierarchies to the production of a particular cultural discourse about what is called the "third world."'[47] With these weaknesses of both feminist legal theory

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[42] Alpana Roy, 'Postcolonial Theory and Law: A Critical Introduction', (2008) 29 Adelaide Law Review 2, 321.

[43] *ibid.*

[44] Swati Parashar, 'Feminism and Postcolonialism: (En)gendering Encounters', (2016) 19 Postcolonial Studies 4, 371.

[45] Ania Loomba, *Colonialism/Postcolonialism,* Second Edition (Routledge 2005), 180. This exact consequence of India's nationalist movement is discussed in further detail within the chapter titled Violence against Women in India's Private Sphere – A Theoretical Framework.

[46] *ibid.*

[47] Chandra Talpade Mohanty, 'Under Western Eyes: Feminist Scholarship and Colonial Discourses, (1988) 30 Feminist Review 52.

and postcolonial theory, there is need for a third alternative that enhances the strengths of these theories while discarding or compensating for its weaknesses.

Postcolonial feminism, which this research primarily utilises, adopts elements of both feminist legal theory and postcolonial theory – while criticizing and compensating for their shortcomings. When it comes to postcolonial theory, Lewis and Mills write how postcolonial feminism 'exerts a pressure on mainstream postcolonial theory in its constant iteration of the necessity to consider gender issues.'[48] Similarly, in addressing feminist legal theory, postcolonial feminists 'acknowledge that feminism should be situated within communities, based in local knowledge, and not imposed by the west.'[49] Ratna Kapur stresses that, more than just a reaction to 'Western' feminism:

> Postcolonial feminism is in part a challenge to the systems of knowledge that continue to inform feminist understandings of women and the subaltern subject in the postcolonial world, and seeks to create a project of inquiry and interrogation that will better inform feminist projects that speak to and for these subjects.[50]

In adopting postcolonial feminism, this research also seeks to challenge the systems of knowledge that currently surround violence against women in India's private sphere and affect the existence and execution of provisions within the Indian legal framework. Feminist legal theory, postcolonial theory and postcolonial feminism are all discussed in detail – along with a nuanced discussion on how postcolonial feminism plays out in India both before and since

[48] Reina Lewis and Sara Mills, 'Introduction', *Feminist Postcolonial Theory: A Reader* (Routledge 2003) 2.

[49] Lena Zuckerwise, 'Postcolonial Feminism,' (2015) The Encyclopaedia of Political Thought 1.

[50] Ratna Kapur, *Erotic Justice: Law and the New Politics of Postcolonialism* (Glasshouse Press 2005) 4.

the British administration – within the chapter titled Violence against Women in India's Private Sphere – A Theoretical Framework.

Although postcolonial feminist theory provides a viable way to dissect the research question within the Indian context, it does not by itself accommodate for the diverse and intersectional experiences of violence that exist within this nation. Despite figures supporting the fact that much of the violence discussed within this research is experienced by a vast number of Indian women – including the statistic that 32 per cent of married women have reported an experience of violence[51] – this research does not deem to imply that it is the experience of all women. When blanket statements, such as 'marriage in India' or 'dowry in Indian society', are found, they should be read as applying to women across India rather than applying to every individual Indian woman. This research also acknowledges the particularised experiences of intersectional forms of violence experienced by women of various social backgrounds, economic backgrounds, education levels, and so on. Although intersectionality is only briefly touched upon within the chapters, this research hopes to create a foundational understanding of the various research elements so that further research may have the opportunity to delve into intersectional particularities – as elaborated on in the conclusion.

Chapter Overview

Part One

[51]Ministry of Health and Family Welfare, 'National Family Health Survey (NFHS-5) 2019-2021 India Report' (Government of India 2022).

This research is divided into four distinct parts. Within part one, chapter one, titled Violence against Women in India's Private Sphere – An Introduction, delves into the realm of violence against women in India to introduce the readers to the research question and argument.

Chapter One: Violence against Women in India's Private Sphere – An Introduction

This chapter provides definitions and distinctions to clearly specify what the research is referring to when it addresses sexual and gender-based violence. This chapter first spends time on general forms of violence against women found within the country and the extensive laws and protections they are afforded. Following that, it draws a stark contrast between these well protected crimes in the public sphere – referring to the perpetrator of the crime as a stranger – and the barely protected or often completely unprotected forms of violence that occur in the private sphere – where the perpetrator is a family member of the victim. Within the Indian context, it first looks at the legal public-private divide – with the division of criminal law and civil law – followed by the social public-private divide and a particular examination of social perceptions of gender roles and relations in the private that also affect the public. Finally, this chapter explores the way in which the legal sphere is shaped and affected by the social.

Chapter Two: Violence against Women in India's Private Sphere – A Theoretical Framework

Chapter two, titled Violence against Women in India's Private Sphere – A Theoretical Framework, serves the important purpose of introducing postcolonial feminism as the theory that this research will be working with – and connects this theory to the public-private divide.

This chapter introduces postcolonial feminism, specifically in the Indian context, as the theoretical backing for the analyses within the research. Through postcolonial feminism, the chapter then explores how colonialism and patriarchy played out and impacted the lives of women in colonial India – particularly with the sharp distinction of the public-private divide as well as the legal and social realities of the practice of sati. Finally, the chapter translates the learnings from colonial India to their continued prevalence in contemporary India.

While introducing a diverse range of abuses in part one, this research does not want to neglect the complexity and intersectionality of particular forms of violence against women. Therefore, part two and three delve into two specific manifestations of sexual and gender-based violence in India's private sphere. Part two, consisting of chapters three and four, provides a closer look at marital rape in India and part three, consisting of chapters five and six, addresses dowry death.

Part Two

Within part two, dissecting marital rape in India, the research highlights the lack of a legal framework and the need for legal reform, while also discussing the colonial and patriarchal scripts and perceptions behind the maintenance and reinforcement of the marital rape exemption.

Chapter Three: Marital Rape – The Legal Framework and its Weaknesses

There is currently a marital rape exemption within the country's legal system – which means that a perpetrator cannot be charged with raping his wife. Additionally, as Mensah Adinkrah writes, 'marital rape is one of the least studied phenomena in sexual violence

research. This is particularly true for societies in the non-Western world.'[52] Therefore, after defining rape, chapter three – titled Marital Rape: The Legal Framework and its Weaknesses – examines the origin and consequences of the marital rape exemption within the Indian Penal Code. It then looks at what Indian civil law, case law, and the Indian Constitution reveal about the existence of and arguments around marital rape in India.

Chapter Four: Marital Rape – The Role of Scripts and Perceptions

Following this chapter, chapter four – titled Marital Rape: The Role of Scripts and Perceptions – critically assesses the values and assumptions behind the marital rape exemption and legal discussions to understand how they continue to be maintained and reinforced in an ever-changing India. It analyses how the public-private divide, and the colonial and patriarchal implications it holds, further entrenches the marital rape impossibility that is found in Indian law. To conduct this analysis, the chapter discusses rape myths, such as stranger rape and the misuse argument, the power of the impossibility thesis, and various other misconceptions that India falsely files under the issue of culture, in order to validate the marital rape exemption. The chapter concludes by laying out the consequences of these myths and perceptions surrounding marital rape, along with briefly discussing what the path towards substantive legal and social change could look like.

Part Three

[52] Mensah Adinkrah, 'Criminalizing Rape Within Marriage' (2010) 55 International Journal of Offender Therapy and Comparative Criminology 982.

Part three of the research examines dowry death as a form of violence that has been extensively criminalised by law – in contrast to marital rape – but still runs rampant in India. Despite laws prohibiting dowry, dowry-related violence, and dowry death within India's legal system, the practice is still thriving, and various loopholes or limitations in the law allow the perpetrators to get away with this crime.

Chapter Five: Dowry Death – The Legal Framework and its Weaknesses

Opening with a discussion of what dowry is, and the historical and cultural roots of this concept, chapter five, titled Dowry Death – The Legal Framework and its Weaknesses, examines how the definition and parameters of dowry have changed in recent decades. After discussing the social manifestations of dowry, the chapter delves into how dowry and dowry deaths are addressed within the Indian legal system, before utilising case law to analyse failures in the laws surrounding dowry.

Chapter Six: Dowry Death – The Role of Scripts and Perceptions

Chapter six, titled Dowry Death – The Role of Scripts and Perceptions, complements the previous chapter by providing a postcolonial feminist examination of the scripts and perceptions surrounding dowry and dowry-related crimes. It begins with a discussion of how marriage is perceived in Indian society – including social scripts that dictate a woman's role within a marriage as well as the permanence of marriage. Following this, the research examines Indian society's response to and acceptance of dowry-related marital violence, including the way women themselves perceive such violence. The chapter then transitions to a discussion on the effect that these social perceptions collectively have on the Indian legal system – which then renders multiple legal provisions highly ineffective. Part two and part three both follow

the overall research argument by going through the process of identifying relevant laws, critically assessing their assumptions, and then discussing how the presence of private, social scripts impact the creation and execution of criminal and civil law in the legal public and private sphere.

Part Four

Chapter Seven: Marital Rape and Dowry Death in Constitutional and International Law

Part four consists solely of chapter seven – titled Marital Rape and Dowry Death in Constitutional and International Law. With a continued focus on the examples of marital rape and dowry deaths, this chapter analyses avenues within the Indian constitution and international human rights law to address private forms of violence against women – as well as the structural deficiencies within, and in the process of utilising, such frameworks. Within Indian constitutional law, this chapter discusses the arguments and counterarguments for intervention into the private sphere under the banner of gender justice. It also highlights colonial and patriarchal biases of the Indian legal system itself. The chapter then moves on to examine direct and indirect calls for reformation of Indian laws regarding private forms of violence against women found in international provisions and frameworks – as well as the shortcomings of these provisions. Finally, the research briefly discusses due diligence and state responsibility, as applicable to violence against women in India's private sphere. The importance of studying Indian constitutional law and international human rights law is twofold. Firstly, in contrast to the zoomed in discussions in the earlier chapters of this research, an analysis of constitutional and international law allows the research to zoom out and discuss supporting or adjacent legal frameworks that should contribute towards a stronger framework addressing violence against women in India's private sphere. Secondly, and relatedly, examining such provisions, which

are often considered to be fundamental – in the case of the Indian constitution – or universal – in the case of many international provisions, also reveals the inherent shortcomings in the terminology of fundamental or universal laws, often to the detriment of women. This further supports the claim within the research question that current legal structures – including constitutional and international frameworks – fail to effectively address forms of violence against women in India's private sphere due to colonial and patriarchal perspectives that leave out women's distinct experiences and narratives.

Part One

Violence against Women in India's Private Sphere

'From cradle to grave, the violence, abuse, and exploitation that girls and women encounter, both in the private and public realms, remains unparalleled and largely unaddressed.'

Anuradha Saibaba Rajesh[53]

[53] Anuradha Saibaba Rajesh, 'Women in India: Abysmal Protection, Peripheral Rights and Subservient Citizenship' (2010) 16 New England Journal of International and Comparative Law 112.

Chapter One: Violence against Women in India's Private Sphere – An Introduction

An Introduction to Violence against Women in India's Private Sphere and the Legal and Social Public-Private Divide

Article One of the widely acknowledged Declaration on the Elimination of Violence against Women (DEVAW) defines violence against women as '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.[54] Within this definition, there are five key elements that help clarify the intent and scope of this article. These elements are that the violence (1) is based on gender, (2) is intended to result in physical, sexual or psychological harm or suffering, (3) is threatened or acted upon (coercively or otherwise), (4) is a positive (e.g., hitting) or a negative action (e.g., arbitrary deprivation of liberty) and (5) is in the public or private sphere of life. Of special note to this research is the final element, acknowledging forms of violence equally in public and private life. Supplementary to this definition, Article Two of the DEVAW provides an inexhaustive list of examples of violence against women, divided by forms of violence occurring in the family, in the community, and condoned by the state.[55] Despite the thoroughness of its definition, which provides a strong foundation for understanding violence against women, the scope of the DEVAW can be criticised for falling short of encompassing other forms of violence outside physical, sexual and psychological harm. With a diversified understanding of sexual and gender-based violence (SGBV) in the

[54] The Declaration on the Elimination of Violence Against Women 1993, General Assembly Resolution 48/104.

[55] *id.* at Article 2 – including dowry-related violence and marital rape.

three decades since the DEVAW, some jurisdictions and legal provisions have also come to include verbal and economic harm when defining violence against women.[56]

While such a broad understanding should be celebrated, it is also true that numerous countries have still failed to provide legal recourse for many forms of violence against women and that the 'the status of women as full legal, social, economic, and political entities is by no means a universal standard.'[57] This latter deficiency directly ties into the former, as the criminalisation of sexual and gender-based violence must be supplemented with substantive legal and social equality in order to work out its intended purpose. In India, despite many legal avenues for protecting women from violence,[58] there were 3,71,503 reported crimes against women in 2020.[59] This means that a reported gender-based crime occurred approximately every minute and a half. Therefore, despite criminal and civil laws protecting women from varied forms of violence, along with a constitutional mandate for gender equality, 'structural inequality continues in the spheres of personal and social life.'[60] This inequality can be attributed to the 'manifestation of the power imbalance between men and women, and a social mechanism which forces women into continuing subordination' – often invoking tradition, culture or religion to 'justify' such subordination.[61] Even looking solely at cases of sexual assault, the reported number of 83,042 shows that, in 2020, a sexual assault occurred

[56] Including the Protection of Women against Domestic Violence Act 2005.

[57] Katerina Standish, 'Understanding Cultural Violence and Gender: Honour Killings; Dowry Murder; the Zina Ordinance and Blood-Feuds' (2014) 23 Journal of Gender Studies 2, 122.

[58] Detailed later within this chapter and throughout the research.

[59] National Crime Records Bureau, 'Crime In India' (Ministry of Home Affairs 2020). – 378236 in 2018 and 405326 in 2019.

[60] Vineeta Palkar, 'Failing Gender Justice in Anti-Dowry Law' (2003) 23 South Asia Research 2, 183.

[61] Christine Chinkin, 'Violence Against Women: The International Legal Response' (1995) 3 Gender & Development, 24.

approximately every six minutes.[62] This indicates a clear discrepancy between the legal protection provided by this nation and the social reality. The problem is further exacerbated when considering research, based on the National Family Health Survey (NFHS) 2015-2016 and the National Crime Records Bureau 2014-2016, which shows how 99.1 per cent of sexual assault cases remain unreported.[63] This not only depicts an incredibly high rate of crimes against women, but it also exhibits an inefficiency of the current Indian legal system in approaching and resolving the issue. Additionally, certain categories of SGBV, such as those occurring in the private sphere of life, are given less legal protection and less social condemnation than others.

Violence against Women and the Private Sphere

An essential factor in the DEVAW's definition of VAW is its equal categorisation and condemnation of violence occurring in public and private life. However, this equality does not always carry over into the legal systems of individual nations. In India, public forms of violence – referring to violence by non-family members – are afforded a much higher level of protection from the law than violence perpetrated by family members. Private forms of violence against women – referring to sexual and gender-based violence 'generally between individuals who are related through intimacy, blood or law'[64] – include, but are not limited to, marital rape, dowry-related violence, honour killings, incest, battering, sexual abuse or slavery, child abuse,

[62] n 59 above – actually, 6.33 minutes.

[63] Pramit Bhattacharya and Tadit Kundu, '99% of Sexual Assaults Go Unreported, Govt Data Shows' (*Mint,* 2018).

[64] UN ECOSOC Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 1995/85.

female genital mutilation, forced marriage and so on.[65] They also include forms of violence faced by girls, such as child marriage and female infanticide. Although the terminology of private forms of violence and domestic violence can be used synonymously, it is important to note that an understanding of domestic violence is often incorrectly limited to violence by a male partner. In reality, domestic violence – and, consequently, acts of violence against women in the private sphere – can be committed by any member of the immediate or extended family.

Domestic Violence

Through Article Three of the 2005 Protection of Women from Domestic Violence Act, the Indian legal system provides the following definition for domestic violence;

> 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

[65] The Declaration on the Elimination of Violence Against Women 1993, The Convention on the Elimination of all Forms of Discrimination Against Women 1981, Vineeta Palkar, 'Failing Gender Justice in Anti-Dowry Law' (2003) 23 South Asia Research 2, 183 (forced prostitution, intentional sexual trafficking, sexual harassment, female infanticide, emotional abuse), and Charlotte Bunch, 'Women's Rights as Human Rights: Toward a Re-Vision of Human Rights' (1990) 12 Human Rights Quarterly, 498.

(a) or clause (b); or (d) otherwise injures or causes harm, whether physical or mental, to the aggrieved person.[66]

Significantly, this definition includes physical, sexual, verbal, emotional and economic abuse as forms of domestic violence – and Article Three goes on to further define each of these forms of violence in detail.[67] Karanjawala and Chugh commend this definition for being 'astonishingly expansive' – particularly in its inclusion of verbal, emotional and economic abuse, which 'distinguishes the Act from most other domestic violence legislation across over the world.'[68] India's definition of domestic violence also importantly includes a separate sub-clause for dowry related harms, showing both the contextual nature of this definition as well as the prevalence of the dowry issue.[69] In fact, Kaur and Byard identify dowry-related bride burning as one of the five 'major components' of domestic violence in India, with the other four being honour killing, sexual violence and rape, physical violence and emotional abuse.[70]

These components, as well as a host of other private forms of violence, work together to make domestic violence a major threat to the rights, safety, life, and liberty of many women across the nation.[71] Moreover, domestic violence – as an umbrella term – remains a startlingly prevalent category of crimes against women in India. Within the 2020 report of the National

[66] Protection of Women against Domestic Violence Act 2005 Article 3.

[67] *ibid.*

[68] Tahira Karanjawala and Shivani Chugh, 'The Legal Battle against Domestic Violence in India: Evolution and Analysis' (2009) 23 International Journal of Law, Policy and the Family 296.

[69] Protection of Women against Domestic Violence Act 2005 Article 3(b).

[70] Navpreet Kaur and Roger W. Byard, 'Bride Burning: A unique and ongoing form of gender-based violence' (2020) 75 Journal of Forensic and Legal Medicine, 1.

[71] Importantly, domestic violence and other forms of violence against women also have serious consequences on the mental and physical health of women.

Crime Records Bureau, almost one-third of all the cases under crimes against women fell under the category of 'Cruelty by husband or his relatives' (1,12,292 cases out of 3,71,503 total).[72] As large as these numbers may be, they only contain a fraction of the true statistics, with the earlier mentioned research on 99.1 per cent of unreported sexual assault cases further elaborating that the majority of this underreporting can be associated with instances where the perpetrator is the victim's husband.[73] Before discussing possible explanations for this discrepancy, this research provides a brief overview of the legal provisions in place to address domestic violence and its many forms in India.[74]

Indian Legal Protections

Indian Criminal Law: IPC and SLLs

Under its common law system, the Indian legal framework hosts a variety of criminal and civil laws on sexual and gender-based violence. Overall, India boasts of more than 50 laws and acts, with varying degrees of implementation, that have a 'direct or indirect bearing on the life of women and female children.'[75] Underpinning these laws, the Constitution of India sets a strong foundation for action against sexual and gender-based violence with articles such as the right to equality (Article 14), freedom from discrimination (Article 15) and the fundamental duty to 'renounce practices derogatory to the dignity of women' (Article 51A).[76] Such provisions, indirectly addressing violence against women, are fleshed out through direct

[72] Additionally, dowry deaths make up another 7,045 of the reported cases.

[73] n 63 above.

[74] A more in-depth discussion on legal provisions takes place in Marital Rape: The Legal Framework and its Weaknesses and Dowry Death: The Legal Framework and its Weaknesses.

[75] Biswajit Ghosh, 'How Does the Legal Framework Protect Victims of Dowry and Domestic Violence in India? A Critical Review' (2013) 18 Aggression and Violent Behaviour, 410.

[76] The Constitution of India 1950.

ordinances within the Indian Penal Code, which covers a plethora of violations; including human trafficking (Section 370), rape (Section 375) and sexual assault (Section 354).[77] However, when it comes to violence against women in the private sphere, the Indian Penal Code becomes surprisingly sparse. In fact, Section 375 on rape even includes a clause explicitly excluding marital rape from the scope of its applicability.[78] The two laws relating to domestic violence within the IPC can be found under Section 498A – on cruelty by husband or relatives of husband (domestic violence in general) – and Section 304B – on dowry death (detailed later in this research). Both these sections were added to the Indian Penal Code in the 1980s, following a wave of protests for legal reform due, in part, to a 'failure to remedy a situation of persistent legal and social inequality within the existing patriarchal structures.'[79]

Section 498A, as the main criminal legal provision against domestic violence, defines cruelty as '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 harassment of the woman for dowry.[80] Section 498A details imprisonment for up to three years and is a non-compoundable and cognizable offence. This means that any report under 498A results in an immediate arrest and that the case must be investigated and taken to trial. Despite the commendable elements of such a provision, reality shows that cases filed under Section 498A have an incredibly low conviction rate of 18.1 per cent.[81] Sujata Gadkar-Wilcox also argues that this provision 'does not go far enough' by highlighting – among other weaknesses – 498A's 'focus on adult women in relationships in the

[77] Indian Penal Code 1860.

[78] *id.* at Section 375.

[79] Shalu Nigam, *Women and Domestic Violence Law in India* (Routledge 2020), 1.

[80] Indian Penal Code 1860, Section 498A.

[81] n 59 above – for cases from 2019 and 2020 tried in 2020.

nature of marriage, leaving abused children and domestic servants without protection.'[82] In addition to the Indian Penal Code, the Indian legal framework also includes Special and Local Laws (SLL) that aim to address violence against women. While special laws refer to laws on a particular subject matter, local laws refer to laws that apply to a particular section of India. These include, but are not limited to, the Sexual Harassment of Women at the Workplace Act of 2013, the Criminal Law (Amendment) Act of 2013, the Commission of Sati Act of 1961 and the Immoral Traffic Act of 1956. For private forms of sexual and gender-based violence, the SLLs notably include the 1929 Child Marriage Restraint Act and the 1961 Dowry Prohibition Act. Between the IPC and SLLs, the Indian criminal framework hosts a small collection of laws relevant to violence against women in the private sphere. This is supplemented by legal provisions with Indian civil law, the majority of which are concentrated within the 2005 Protection of Women from Domestic Violence Act.

Indian Civil Law: PWDVA

The Protection of Women from Domestic Violence Act (PWDVA) was the first time that domestic violence was defined in Indian legislature – and it provides a definition that is commendable for its scope and inclusionary nature. This Act, as a whole, is also acclaimed for the length and breadth with which it discusses issues of private sexual and gender-based violence. Included at the start of this chapter, the definition of domestic violence notably recognises five different forms of abuse – physical, sexual, verbal, emotional and economic. This variety, and particularly the inclusion of economic abuse, clearly shows a deeper understanding of the context-specific definition of domestic violence in India, given the

[82] Sujata Gadkar-Wilcox, 'Intersectionality and the Under-Enforcement of Domestic Violence Laws in India', (2012) 15 University of Pennsylvania Journal of Law and Social Change 3, 460.

financial dependence of many Indian women on the men in their lives. In 2019, the World Bank showed that only 20.3 per cent of the female population of working age in India were participating in the workforce.[83] The PWDVA also importantly specifies that a case can be filed against a relative of her male partner, in addition to her partner himself.[84]

With the intent to 'simplify the process for making a domestic violence claim and to assist women who might find it difficult to leave a violent relationship,'[85] this legislation offers a variety of avenues for women to file a complaint. In addition to approaching a police station, women can also directly apply to a magistrate, contact a protection officer, or reach out to a service provider.[86] The role of a protection officer, detailed in Article Nine, includes assisting the magistrate in carrying out the procedures detailed within the PWDVA. Article Ten defines service providers as voluntary organisations, working for the rights and interests of women, who guide victims in recording a domestic incident, getting them medical help and assisting them in finding a shelter home if needed.[87] Despite these provisions, the PWDVA is not without flaws. Chiefly, the fact that it only offers civil remedies, and no criminal recourse, proves to be a huge disadvantage – especially given the potential of the PWDVA's wide definition of domestic violence. Through the PWDVA, a victim may seek protection orders, residence orders, monetary reliefs and/or custody orders. Although the cases can be tried in criminal courts as well as civil courts, a criminal penalty is only placed if the respondent violates any orders. This means that women are often forced to stay with their abuser or his family after

[83] World Bank 'Labor force, female – India' (*World Bank*, 2022). Interestingly, this data also showcases a steady decline of women's participation in the workforce since 2005 (26.4%).

[84] Protection of Women against Domestic Violence Act 2005. Article 2q.

[85] n 82 above, 459.

[86] Protection of Women against Domestic Violence Act 2005.

[87] *id.* at Article 10.

having filed a case against them. Moreover, the PWDVA also mandates counselling for the victim and the perpetrator, the compulsory nature of which misunderstands both the gendered power dynamics and the agency of the complainant. The PWDVA has also been criticised for 'problematic and vague' provisions with partial enforcement.[88] Importantly, despite the PWDVA, the IPC and other provisions, reported and predicted cases of violence against women in the private sphere continue to remain at a high.

The Public-Private Divide

The consistently high rates of domestic violence crimes in India despite a variety of legal frameworks against domestic violence clearly shows an inconsistency in the successful handling of such violations. In part, this can certainly be attributed to a reluctance many victims seem to have to report cases of sexual and gender-based violence in the private sphere. This nation-wide hesitation has a direct and significant connection with the categorisation of domestic violence as a private offence. With social implications dictating that matters within the household, as a private domain, must remain private and be resolved privately, women are often disinclined to or dissuaded from reporting the violence they face. Additionally, cultural attitudes dictating the role of women within the household as well as the rights of men over their family create further barriers to open reporting. Biswajit Ghosh is unerringly accurate in stating how 'it has been observed that gender inequality, abuse, and violence in India typically start with feticide and infanticide and then goes on to multiply the misery of those born through patriarchal institutions and practices like child marriage and dowry.'[89] However, this gender inequality, abuse and violence is also compounded by the social pressures and cultural

[88] n 82 above, 463.

[89] n 75 above, 410.

expectations that reside in the distinction of the public and private domain. As Ghosh mentions above, many private forms of sexual and gender-based violence are also inter-related, with child marriage leading to wife battering and marital rape or dowry pressures leading to female infanticide or forced prostitution.

Social and cultural understandings of the private domain also spill into the public sphere – affecting the investigations and trials of the crimes that are reported, as well as the nature and content of the laws themselves. The influence of the private domain on the public courts can be seen clearly in the statistics, with only a 28 per cent conviction rate for crimes against women in 2020.[90] Therefore, legal provisions within the Indian framework, as well as the manner in which they are administered, are clearly influenced by the public-private divide that endures within the nation. This division, which exists both individually and in an intersecting manner in India's legal and social sphere, creates a vicious cycle of reinforced patriarchy and abuse within the private sphere. Although the nature of this divide is further discussed within a following chapter,[91] the influence of this divide on the legal and social sphere needs to be understood to grasp the extent of damage it causes to the rights and protections of women facing violence in the private sphere. The following section briefly introduces and demonstrates how the public-private divide affects Indian law and society respectively. A more thorough discussion of the same is conducted later in the research, focusing on two particular forms of private violence against women.

Legal Frameworks

[90] n 59 above. Table 3A.7 – includes cases from 2019 and 2020 that were tried in 2020.

[91] Chapter titled 'Violence against Women in India's Private Sphere: A Theoretical Framework.

Under its common law system, the Republic of India hosts a wide variety of national, regional and community specific laws. The foundations of the Indian common law system clearly originate from English common law, including direct examples such as the colonial creation of the 1860 Indian Penal Code – which is still followed today.[92] This was also accompanied by more indirect influences during colonisation as the British, 'sought to preserve the religious beliefs and customs of the natives and hence refrained from interfering with them.'[93] Although the actual lack of interference is debatable, this campaign resulted in the existence of two separate legal spheres governing the nation: the public sphere and the private sphere. This division was formalised into criminal law, handling cases in the public sphere, and non-criminal or civil law, handling matters in the private. The private sphere was further divided, not only between law applicable nation-wide and regional law, but also because 'each community was governed by its 'own' religious laws, which were administered by the British courts.'[94] These codified religious laws are now known as Religious Personal Laws (RPLs). Mary Shanti Dairiam mentions that many postcolonial countries 'maintain a dual system of both civil and customary law, mainly in the area of the family and in access to economic resources such as land and inheritance, that operate to the detriment of women's right to equality.'[95] India is just one such case. The legal public-private divide in India maintains and reinforces forms of violence against women in the private sphere, with the continued existence of different system of laws governing matters deemed private, as well as a continued hesitancy from the government and the courts to modify laws in the private sphere. This problem is compounded by the fact that, given the diverse range of laws that exist within the private realm,

[92] n 82 above, 457.

[93] Saptarshi Mandal, 'The Impossibility Of Marital Rape' (2014) 29 Australian Feminist Studies, 259.

[94] *id.* at 260.

[95] Mary Shanti Dairiam, 'CEDAW, Gender and Culture', *The Oxford Handbook of Transnational Feminist Movements* (2015) 15.

India is known for having the 'most complex body of personal laws in Asia.'[96] The following section looks particularly at the category of Religious Personal Laws within India's civil legislations in order to give an example of how the legal public-private divide clearly affects the rights of women – and, consequently, the violence that they face – in the private sphere.

Religious Personal Laws

Personal laws are defined as 'statutory and customary laws applicable to particular religious or cultural groups within a national jurisdiction.'[97] In India, the applicability of personal laws vary according to religion, resulting in their categorisation as Religious Personal Law (RPL) – there is no uniform family law. Each of the legal frameworks within the larger category of RPLs, as well as the manner in which they are adjudicated upon, vary widely.[98] Specifically, RPLs contain four main groupings with various acts and legislations under each; Christian Personal Law,[99] Hindu Personal Law,[100] Muslim Personal Law,[101] and Parsi Personal Law.[102] In addition to these provisions, RPLs include customary laws, which are codified through court judgements. Parashar mentions how the category of RPLs can also refer to 'religion related rules followed by communities outside of state regulation.'[103] Various

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[96] Dinusha Panditaratne, 'Towards Gender Equity in a Developing Asia: Reforming Personal Laws Within a Pluralist Framework' (2007) 32 N.Y.U. Review of Law and Social Change 86.

[97] *id.* at 84.

[98] Archana Parashar, 'Religious Personal Laws As Non-State Laws: Implications For Gender Justice', (2013) 45 The Journal of Legal Pluralism and Unofficial Law 10.

[99] Indian Divorce Act 1869 (amended 2001), Indian Christian Marriage Act 1872, Indian Succession Act 1925.

[100] Hindu Minority and Guardianship Act 1956, Hindu Succession Act 1956 (amended 2005), Hindu Adoption and Maintenance Act 1956, Hindu Marriage Act 1956 (amended 1976 + Marriage Laws Amendment Bill 2010).

[101] Muslim Personal Law (Shariat) Application Act 1937, Muslim Women (Protection of Rights on Divorce) Act 1986, Dissolution of Muslim Marriages Act 1986.

[102] Indian Succession Act 1925, Parsi Marriage and Divorce Act 1936.

[103] n 98 above, 5.

Religious Personal Laws govern various matters, such as marriage, divorce, inheritance, maintenance, and succession – all of which are matters deemed to belong in the private sphere. As women have historically interacted with the private sphere at a much greater level than the public sphere, provisions and protections within RPLs intimately affect women.[104] Unfortunately, 'all RPLs manage to discriminate against women to varying degrees and in different areas,'[105] making this element of the dual legal system problematic for gender equality.[106]

From a legal standpoint, Religious Personal Laws can be modified by the parliament, as well as through the application of constitutional provisions. However, in practice, the state has shown much hesitation in modifying the content of RPLs. Tanja Herklotz explains how, within the private legal sphere 'the state enjoys only restrained autonomy in this area and willingly splits its adjudicative authority with religious and societal actors and organizations.'[107] Therefore, decades or centuries old provisions remain relatively untouched or dangerously slow to change, despite the legal and political progress that has happened since. The State's hands-off approach and the independent functioning of RPLs are often celebrated as an act of legal pluralism, a label which 'legitimises the continued denial by the state of gender equality in the family law as a space outside constitutional conformity that is enforced

[104] Shalina A. Chibber 'Charting a New Path toward Gender Equality in India: From Religious Personal Laws to a Uniform Civil Code' (2008) 83 Indiana Law Journal 2, 698.

[105] n 98 above, 9.

[106] Although it is to be noted that the Muslim Personal Law (Shariat) Application Act 1937 and Dissolution of Muslim Marriage Act 1939 both had progressive elements for their time. This is further discussed in Pratibha Jain, 'Balancing Minority Rights And Gender Justice - The Impact Of Multiculturalism On Women's Rights In India', (2005) 23 Berkeley Journal of International Law.

[107] Tanja Herklotz, 'Law, Religion And Gender Equality: Literature On The Indian Personal Law System From A Women's Rights Perspective' (2017) 1 Indian Law Review, 251.

by the state.'[108] Along with creating barriers for reducing violence against women in the private sphere, the division of many personal laws along the line of religion also exaggerates and highlights differences and tensions between religious communities within the nation.[109]

Accompanying Religious Personal Laws, the private legal sphere also contains a handful of secular provisions that directly affect gender equality and freedom from violence – including the earlier mentioned Protection of Women from Domestic Violence Act 2005.[110] When it comes to an issue addressed by both RPLs and secular law, an individual can choose to utilise the secular provision instead of the relevant religious act. For example, the Special Marriage Act of 1954 is available to both those who marry between religions, as well as any couple who wants a civil marriage. Although this system is better than a total absence of alternatives, it is far from ideal. Firstly, choosing to utilise the Special Marriage Act remains rare in practice, as marriages are often categorised as 'occasions particularly given to reflecting cultural traditions and preferences of parents or other family members.'[111] As many gender-discriminatory provisions within the RPLs do not come into play until there are marital problems, women may feel that there is no need to deviate from tradition and invoke the Special Marriage Act at the time of marriage. Secondly, as a woman cannot unilaterally opt for the Special Marriage Act, problems arise in getting both parties to agree. With these realities, women are often unaware of or unable to utilise secular provisions such as the Special Marriage Act. Finally, Radhika Chitkara laments that even the secular Special Marriage Act is not truly

[108] n 98 above, 5.

[109] Pratibha Jain, 'Balancing Minority Rights And Gender Justice - The Impact Of Multiculturalism On Women's Rights In India', (2005) 23 Berkeley Journal of International Law.

[110] Also, Special Marriage Act 1954, Marriage Laws Amendment Bill 2010, Child Marriage Restraint Act 1929, Guardians and Wards Act 1980.

[111] n 96 above, 87.

secular as 'its contents were still reminiscent of upper-caste Hindu practices.'[112] Many minority communities, therefore, may choose instead to utilise provisions or acts that they feel to be more representative of their communal practices.

History of RPL

To sufficiently understand the influence of private RPLs on both India's legal public-private divide and the legal perception of women's rights and protections, it is important to understand how these laws entered the Indian framework. With its foundations established by the British during colonial rule, 'Indians came to a legal system in response to the needs of a very different society, that of England.'[113] Since then, British laws on gender-equality and violence against women in the private sphere have gone through many positive changes. However, India has lagged behind – renaming many discriminatory practices originating from the British as Indian tradition.[114] The structures of Religious Personal Laws were first established during the colonial era and were re-established post-independence. At the time of their creation, the codification of customary family laws as religious personal laws mimicked both the European's legal division between the public sphere and the private sphere, as well as their system of personal matters being decided by religious (Christian) laws.[115] It is important to note that both during and after colonisation, the decided content and implementation of RPLs 'subordinated the rights of women to other interests.'[116]

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[112] Radhika Chitkara, 'Pulling the Wool: The Indirect Reform of Religious Family Laws in India' (2015) 6 International Journal of the Jurisprudence of the Family, 51.

[113] Archana Parashar, 'Gender Inequality and Religious Personal Laws in India', (2008) 14 Brown Journal of World Affairs 2, 104.

[114] This is clearly seen in the example of marital rape, as explored in detail throughout this research.

[115] n 98 above, 7.

[116] n 96 above, 93.

Prior to the British encoding of the then abstract and malleable customary family laws in India, many religions existed within the subcontinent without a distinction between personal/private law and public law.[117] Therefore, it was 'the peculiarities of governance needs of the British that created a small island of laws that were dedicated as RPLS.'[118] These laws allowed the British to effectively govern the people in the public sphere, while showcasing a maintenance of their diversity and an acknowledgement of their customs in the private sphere – even though the implementations of RPLs essentialised and reinterpreted the true diversity that was found both within and across religions in India. Moreover, the particular practices that were to be included within the scope of a certain RPL was often decided at random.[119] Through colonial will, Religious Personal Laws emerged formally as a combination of acts, articles in colonial laws and court decisions – which then set precedents for future private cases.[120] Panditaratne also mentions how, 'within the diversity of these scripturally based and regional norms, colonial authorities habitually favored patriarchal norms over more pro-women customary norms.'[121] Examples of these favouritisms are discussed further in a later section within this chapter. Therefore, it is fair to say that the label of custom or religion for these laws is not entirely accurate, given how they were reformed and readjusted as they entered and moved through the British legal system that was imported into India.[122]

[117] n 98 above, 7.

[118] n 98 above, 7.

[119] n 113 above.

[120] n 96 above, 93 and n 98 above, 8.

[121] n 96 above, 97.

[122] n 98 above, 8.

The legal and social status of RPLs remain relatively unchanged since independence. If anything, RPLs have increased in strength and immunity. Prior to India's independence from the British in 1947, a Constituent Assembly was created and tasked with framing the constitution of India. Within the scope of their mandate, this assembly also discussed the existence and role of Religious Personal Laws in an imminently independent India. Upon failing to achieve consensus on if and how to amend existing RPLs, they instead implemented a directive principle within Article 44 of the Indian Constitution which promises a future uniform civil code to replace RPLs. However, 75 years later, Religious Personal Laws continue to govern the private sphere while any uniform civil code remains a distant promise. In this manner, the independent India has 'identified itself as an illegitimate intervenor in the RPL of communities, thereby placing itself in a situation of stalemate.'[123] Any state-led reform that does occur is often sporadic or subjective and is seen to prioritise considerations outside the rights of women.[124] Pratibha Jain highlights that, 'instead of moving towards a secular, equality-based legal system, the recognition of personal laws … helped institutionalise patriarchal traditional practices that disadvantage Indian women.'[125] This is not to say that reforms of RPLs have not taken place. A prominent example of an amended RPL occurred through the Hindu Succession (Amendment) Act of 2005, which gave sons and daughters equal rights in the inheritance of coparcenary property – a category of ancestral property.[126] Interestingly, Parashar notes how this reform was 'not informed by any theological concepts

[123] n 112 above, 62.

[124] n 113 above, 105.

[125] n 109 above, 212.

[126] Hindu Succession (Amendment) Act 2005. Although not covered in this research, other examples of RPLs and their amendments can be found in Dinusha Panditaratne, 'Towards Gender Equity in a Developing Asia: Reforming Personal Laws Within a Pluralist Framework' (2007) 32 N.Y.U. Review of Law and Social Change.

or actual social practices,'[127] showing that the state is fully capable of intervening in RPLs but chooses to remain almost entirely disconnected.

The maintenance of RPLs also reveals a constitutional tension between religious or cultural rights - the right to freedom of religion (Article 25) and the right to minority culture (Article 29(1)) – and gender equality – tying into the right to equality (Article 14) and freedom from discrimination based on gender or religion (Article 15). Article 51A(e) of the Constitution of India also reveals an unfulfilled fundamental duty 'to renounce practices derogatory to the dignity of women.'[128] However, incorrectly presenting the dialogue as one of religious or cultural freedom versus gender equality is also part of the problem. As previously detailed, many RPLs lost much of their scriptural connections due to constant amendments through the pre- and post-independence Indian judicial system. Rather than religious laws, RPLs can be better categorised as 'state actions that manage to justify selective gender discrimination in the guise of upholding religious/cultural autonomy of any community.'[129] This interesting criticism is supported by the fact that religious practices and community-based customs are selectively chosen to be included or amended from RPLs. Even at their conception, 'within the diversity of these scripturally based and regional norms, colonial authorities habitually favoured patriarchal norms over more pro-women customary norms.'[130] Moreover, codifying norms that were always meant to grow and evolve – as they had done in the past – hindered the natural progression of local perceptions regarding women, the private sphere, and women in the private sphere. Today, the label of custom or religion continues to hinder discussion and reform of these same socially constructed, and judicially edited, practices. Thus, Radhika

[127] n 98 above, 9.

[128] The Constitution of India 1950, Article 51A.

[129] n 98 above, 16.

[130] n 96 above, 97.

Chitkara writes how 'gender equity has been caught in the crossfire of these 'multiple patriarchies,' each of which seems to claim authority to govern women and children within the home.'[131] In the face of these patriarchies, the following section delves into some examples of the ways in which RPLs discriminate against women and hamper necessary legal protections from private forms of violences.

Discrimination by Religious Personal Laws

Despite the variety of topics covered by religious personal laws, a commonality that they share is 'the patriarchal dominance of men and the unequal treatment of women.'[132] A clear example of this inequality, as well as the influence of 19th century British values, is seen in the issue of conjugal rights. With British legal provisions mandating a restitution of conjugal rights, it is interesting to note that 'colonial judges chose ancient indigenous texts to justify [this remedy] for Hindu and Muslim men.'[133] Such a mandate also entered Christian Personal Law through the Indian Divorce Act 1869.[134] The inclusion of conjugal rights in personal laws ties directly into this research's in-depth discussion on marital rape[135] as India continues to uphold a marital right to sex. As another example, Muslim Personal Law even today allows a man to participate in polygamy and take up to four wives, even though polygamy has been outlawed in India.[136] Religious Personal Laws also speak loudly about their inequal treatment

[131] n 112 above, 45.

[132] n 104 above, 695.

[133] n 96 above, 97.

[134] n 96 above, 97. Until its recent amendment in 2011, this same act also gave extremely restricted avenues for a woman to seek divorce.

[135] With the chapters titled Marital Rape: The Legal Framework and its Weaknesses and Marital Rape: The Role of Myths and Perceptions.

[136] Mohammad Ghouse, 'Personal Laws and the Constitution in India' Islamic Law in Modern India, 52.

of women through the sheer absence of any provisions regarding violence against women by their partner or other members of the marital household. These stark absences are disheartening and often deeply political. Herklotz writes how personal laws have become a 'contested terrain where not only is religious freedom played out against gender equality, but these aspects are also intertwined with arguments around identity, nationalism, modernity and secularism.'[137]

Religious Personal Laws are not only discriminatory towards women within a religion, but they also discriminate between religions. Additionally, the grouping of these laws by religion does not allow for the recognition of diverse or localised practices within the belief system. Although an argument exists for the existence of amended RPLs,[138] Pratibha Jain counters that the RPLs are inherently against gender equality as the 'continued existence of this two-tier system reinforces patriarchal traditional practices, subjecting women to fixed gender roles based on pre-independence authoritarian structures.'[139] Legal and jurisdictional divisions between the public tier and the private tier, as well as the hands-off approach that the former has adopted towards the latter, leads to the normalisation of gender discrimination – and, consequently, violence against women – in the home. Additionally, the perceived immunity of unequal personal laws in the name of religion or customs hinders the government from viably introducing a replacement for this category of legal provisions. In fact, merely the continued existence and tolerance of a completely different and discriminatory legal system within the private sphere licenses a stark, and often unbreachable, divide of the public sphere of law and the private sphere of law. This makes it harder to implement criminal consequences, which are associated with the public sphere, for domestic offences, which are relegated to the

[137] n 107 above, 250.

[138] n 98 above, 17.

[139] n 109 aboove, 219.

private. As Shalu Nigam writes, 'the discrepancies between the constitutional rights and the limitations within the personal laws become more glaring when a married woman asserts her right to lead a violence-free life within her family.'[140] Deeply engrained and socialised, Religious Personal Laws serve as a perfect example of the negative consequences of the legal public-private divide on gender equality. This, in turn, not only affects freedom from sexual and gender-based violence, but also affects India's social, economic, and political progress[141] – inextricably linking the legal dealings of matters in the private sphere to the development of the nation in the public.[142]

Social Perceptions

Outside the law, the public-private divide also affects the social sphere and its discourses on violence against women. In India, social perceptions of gender roles within the private sphere – which also affect interactions in the public sphere – dictate what a woman can and should be, and sanction the punishment of any deviation from this 'ideal'. These perceptions are also strongly tied to patriarchally and selectively defined concepts such as tradition, culture, and honour. While tradition and culture are discussed throughout this research, it is important to understand the role of honour as well. Often, for the sake of the honour of the family or, more accurately, the honour of the men within the family, women are denied a range of basic rights, become victims of honour-related crimes, or are pressured into keeping silent about any violence that they do face. Relatedly, Biswajit Ghosh writes that 'a typical girl in India is socialised to suppress 'scandalous' incidences like molestation, sexual

[140] n 79 above, 4.

[141] n 96 above, 111.

[142] Detailed information of the history and structure of personal laws is also provided by author Dinusha Panditaratne in n 96 above, 103.

harassment, torture, and even rape.'[143] In a vicious cycle, such suppression further 'contributes to subordination and under-valuation of the role of women within and outside family.'[144] With their focus on reputation and social status, honour-based offences or silences are particularly affiliated with the family-centric private sphere.

Norms and perception of marriage, the rights of a husband and the role of a wife within Indian society are also closely associated with sexual and gender-based violence in the private sphere – especially where both the perpetrator and the victim belong to the same biological or marital family. This creates another catch-22 situation where, on one hand, 'marital violence in India can be partially attributed to stringent gender roles in marriage and patriarchal family dynamics in the household,'[145] while on the other, the 'glorification of the family undermines the violence women face every day.'[146] In order to better grasp these dynamics, it is important to understand how private forms of violence against women are sanctioned and how discriminatory social perceptions, such as those surrounding marriage, defend and nurture such violence. Although the rest of this research examines such factors in detail, the following paragraphs provide a brief glimpse of the discriminatory social discourses shadowing sexual and gender-based violence in the private sphere and dictating perception of marriage in India – as well as the connections between the two.

Social Perceptions on Gender Roles and Relations

[143] n 75 above.

[144] n 75 above.

[145] Meghna Bhat and Sarah Ullman, 'Examining Marital Violence in India: Review and Recommendations for Future Research and Practice' (2014) 15 Trauma, Violence, & Abuse, 70.

[146] n 79 above.

Although found across the globe, Katerina Standish shows how sexual and gender-based violence can adopt 'disparate cultural disguises.'[147] For instance, it is easier for violence against women to be 'culturally and legally sanctioned' when found in the context of 'existent inequalities' and unequal power dynamics.[148] Additionally, Vineeta Palkar adds how such power relations unveil within the family – in a reflection of society as a whole – to create and sustain a system of 'exploitation, humiliation and ill-treatment of women.'[149] Susan Moller Okin also articulates 'that many of the decisions that lead to the gender imbalance in population in some parts of the world, and other decisions that adversely affect girls' and women's well-being, are decisions made in families.'[150] In patriarchal societies like India, gendered power relations exhibit themselves in a culture of 'male dominance over women' and an accompanied perception of the decreased social value of the female sex.[151] As Charlotte Bunch writes, 'the message is domination: stay in your place or be afraid.'[152] This leads to a situation where both boys and girls are socialised by their family, their community or society at large to believe in the superiority and dominance of men and the inferiority and submissiveness of women. Avnita Lakhani articulates these dynamics accurately when she writes, 'from the moment she is born, a woman in India is considered a burden, an extra mouth to feed. Because of the caste system and the very narrowly defined roles of men and women, women are considered an economic liability.'[153] Along with a desire to avoid economic burden, the social preference for sons can

[147] n 57 above, 121.

[148] n 57 above, 112.

[149] n 60 above.

[150] Susan Moller Okin, 'Feminism, Women's Human Rights, and Cultural Differences,' (1998) 13 Hypatia 2, 41.

[151] n 57 above, 119.

[152] Charlotte Bunch, 'Women's Rights as Human Rights: Toward a Re-Vision of Human Rights' (1990) 12 Human Rights Quarterly, 491.

[153] Avnita Lakhani, 'Bride-Burning: The Elephant in the Room Is out of Control' (2005) 5 Pepperdine Dispute Resolution Law Journal 2, 253.

be seen in perception of the importance of sons carrying on the family name, heading the family after the death of the patriarch, performing religious rituals that women are not historically sanctioned to do, and so on.[154]

The combined perception of women as an economic liability as well as a social liability leads to widespread preference for sons and a situation of femicide, child negligence and child marriage – to name just a few forms of violence against the girl child. It is important to note that, as Bunch says, 'the most insidious myth about women's rights is that they are trivial or secondary to the concerns of life and death. Nothing could be farther from the truth: sexism kills.'[155] If she escapes death as a child, she is then left to face dowry-based violence, domestic violence, marital rape, dowry-death and honour-based crimes or death, and so on. Sujata Gadkar-Wilcox also comments on how 'victims of violence face numerous obstacles in a community where concepts of patriarchy, caste, community and honour have a direct impact on the discrimination perpetrated at the local level and contribute directly to a situation of impunity for perpetrators'[156] Therefore, a response to violence against women requires 'challenging cultural practices that are considered customary human behaviours.'[157] In order to do so, it is important to dissect the origins, prevalence and implications of discriminatory practices that pose as culture.

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[154] Bobbie Khanna, 'CEDAW and the Impact on Violence Against Women in India' (2013) UW Bothell Policy Journal, 37.

[155] n 152 above, 488. She goes on to add that 'in many countries, girls are fed less, breast fed for shorter periods of time, taken to doctors less frequently, and die or are physically and mentally maimed physically and mentally maimed by malnutrition at higher rates than boys.' (489).

[156] n 82 above, 472.

[157] n 57 above, 121.

Marriage in India

The institution of marriage in India serves as a clear example of how social perceptions affect the role and status of women in the private sphere. To this day, many Indian marriages continue to be arranged. Such marriages necessitate the involvement and decisions of not only the parents but often the wider joint or extended family as well.[158] Although arranged marriages do not directly connect to gender-based discrimination, it creates a situation where the very act of marriage goes beyond the relationship between two individuals or two families and is instead tied to social status, traditional obligations, and the society at large. Additionally, marriage is also incentivised for women as a mode of social validation and gaining status within society.[159]

However, once married, a woman's situation is more complicated than a simple change in social status. Gadkar-Wilcox depicts the situation for women within a marriage by writing how:

> Although the role of women is changing in India over time, many women are still forced into roles of inferiority and submission. Gender roles are clearly demarcated between male and female obligations. Women are often expected to fulfil the role of wife and mother. …. Women are often stigmatized when they cannot or choose not to become mothers.[160]

[158] Ravinder Barn, and Rachael A. Powers, 'Rape Myth Acceptance In Contemporary Times: A Comparative Study Of University Students In India And The United Kingdom' (2018) 36 Journal of Interpersonal Violence, 3526.

[159] n 145 above.

[160] n 82 above, 470.

Moreover, for a woman in India, marriage is often perceived as a necessary and permanent act. The perceptions of necessity and permanence within a marriage – along with the consequences of these perceptions – are elaborated in detail within the chapter titled Dowry Death – The Role of Myths and Perceptions.

Kim also highlights how, 'frequently, gender violence will be condoned as a matter of culture and religion, by both secular and religious leaders.'[161] Such roles, obligations and permissions create a situation where women 'become victims of their lack of social power within the husband's family and their own lack of resources and autonomy.'[162] With a brief glimpse of a particularly relevant social perception that influences and is influenced by gender inequality within Indian society, this section introduces how seemingly harmless attitudes and discourses in the private sphere can lead to very harmful consequences for women. Once again, the connection between sexual and gender-based violence in the private sphere and social perceptions on the institution of marriage, marital roles and marital violence are elaborated on and added to in the following chapters.

Legal and Social Public and Private Divide Intersecting

After introducing the legal and social spheres separately, this research now seeks to understand how these spheres intersect by specifically examining how social perceptions within the private sphere affect legal effectiveness in the public and private sphere. In examining intersections between the private social sphere and the public and private legal

[161] Deborah Kim, 'Marital Rape Immunity in India: Historical Anomaly or Cultural Defence?' [2017] Crime, Law and Social Change. This is also discussed in detail within the chapter titled 'Dowry Death: The Role of Myths and Perceptions'.

[162] n 82 above, 466.

sphere, it is important to first realise how law itself is a social structure. Legal structures constantly reproduce hierarchies and inequalities found within society itself. For example, Nigam observes that, 'while the law tries to bring order in the family, the law itself has been mediated by and enmeshed in a complex cultural framework of saving families rather than protecting the rights and dignity of women within the families.'[163] Moreover, Ghosh mentions how 'cultural behaviours often work their way around legal loopholes.'[164] On this note, Devika and Mohan add that 'the law's absence from the "private" sphere has contributed to male dominance and female subservience.'[165] These particularities can be seen in interactions with both the public legal sphere and the private legal sphere.

Within the private sphere of law, the continued existence of religious personal laws itself serves as a prime example of the overlay between the legal and the social. In this situation, while it is clear how social discourses are affecting the law, inequalities within religious personal laws also reproduce and reenforce a sanction of violence against women within the private sphere. Among other methods, this sanction occurs through the normalisation of inequality that can be found within such legal structures – as well as the protective status that religious personal laws garner within the state. MacKinnon elaborates on this final factor by writing how, 'in cases challenging sex inequality in personal laws, Indian courts appear paralyzed by the fear of being tarred by the brush of cultural insensitivity. Insensitivity to

[163] n 79 above, 5.

[164] n 75 above.

[165] Devika S, T Mohan, 'Marital Rape and Criminal Law: Patriarchal Phantoms and Neutral Facades' (1991) 3 Student Advocate 18.

minority women's sex equality rights, they appear able to live with.'[166] Given such attitudes, Lakhani highlights that the Indian government, as a state actor, is:

> complicit in the continuing deaths of thousands of women and young brides every year due to lax enforcement of the law, near non-existent prosecution and punishment of perpetrators, and by condoning cultural practices, such as dowry, that are precursors to human rights violations against these women.[167]

When it comes to the public sphere of law or other forms of law within the private sphere (such as the PWDVA), social perceptions embedded within or affecting the application of the law and the utilisation of legal loopholes can also be seen through the challenges women encounter in reporting crimes of sexual and gender-based violence in the private sphere.

Reporting Private forms of Violence against Women

Despite legal structures and provisions for victims of sexual and gender-based violence enumerated in both criminal and civil law, there exist 'prevailing institutional and cultural disincentives for women to report incidents of violence.'[168] While institutional disincentives can include the economic dependency that many women have on their marital family, cultural disincentives prominently include the inherent nature of occurrences within the private sphere as private. Standish clearly relays that 'the impetus to intervene in the "private" lives of others in most cultures is socially taboo and presents a significant obstacle to combating gender-based

[166] Catherine MacKinnon, 'Sex Equality Under The Constitution Of India: Problems, Prospects, And "Personal Laws" (2006) 4 International Journal of Constitutional Law 199.

[167] n 153 above, 264.

[168] n 82 above, 456.

violence.'[169] Moreover, even if women want to report the violence that they face, this 'culture of silence' surrounding the private sphere 'often leads to an apathetic insensitive criminal justice system response to victims.'[170] Kapur and Singh observe that 'society in general and the legal system at large prefer to believe that a woman with a black eye and broken ribs, rather than having been beaten by her husband simply fell down.'[171] Bhat and Ullman further highlight how a survivor's 'revictimization experiences are augmented through sociocultural practices and interactions with various institutions and agencies of the society' – such as family, religion, the community and the state.[172]

Social perceptions within the private sphere can also prevent reporting through a lack of recognition or acknowledgement of violence. Anuradha Saibaba Rajesh writes that 'violence against women is considered a vital component in many cultures necessary to "discipline" them.'[173] She adds how 'not only are men and boys across cultures actively encouraged to participate in violence, but their acts of abuse are often condoned and dismissed as a "normal" gesture.'[174] As violence is normalised and women are conditioned to expect and accept it, Sainabou Musa writes that 'many of India's women find their husbands' decision to "discipline" them through physical and verbal abuse to be completely appropriate. Furthermore, these women sometimes consider it their duty to "exonerate their husbands" of any blame for the

[169] n 57 above, 111.

[170] n 145 above, 63.

[171] Nina Kapur and Kirti Singh, 'Practicing Feminist Law: Some Reflections,' (1994) 6 Student Advocate 32.

[172] n 145 above, 63. They add how, 'due to cultural stigmatization associated with being a survivor of marital violence against women, women in India often experience secondary victimisation at the hands of family members, friends, and the community.'

[173] n 53 above.

[174] n 53 above.

harm they face as a result of the abuse.'[175] In turn, 'women who do not realistically perceive their abuse are less likely to seek help.'[176] Additionally, Gadkar-Wilcox also mentions intersectional challenges to reporting, where 'poor women and women of low status face an especially difficult burden of reporting incidents of domestic violence due to their marginalization as both women … and as members of a lower class or caste who often face discrimination from agency officials charged with ensuring their protection.'[177] Given the diverse and multifaceted challenges that already exist in the first step of reporting a crime, it is clear to see the negative ways in which social discourses in the private sphere surrounding gender-based abuses toy with the formulation and implementation of public and private law on the same.

The rest of this research aims to further understand the legal and social discourses and perceptions surrounding violence against women in the private sphere – both separately and together. Therefore, while beliefs, myths and perceptions surrounding and supporting sexual and gender-based violence in the private sphere are confronted, it is equally important to challenge 'legal structures that excuse or contribute to gender-based violence by institutionalizing traditions and values that reinforce it.'[178] To this end, this research delves into two particular forms of violence against women in the private sphere. Firstly, it examines marital rape – as a form of private violence that is not recognised by the law. Kim writes how 'it is considered that the concept of marital rape, as understood internationally, cannot be

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[175] Sainabou Musa, 'Dowry-Murders in India: The Law & Its Role in the Continuance of the Wife Burning Phenomenon' (2012) 5 Northwestern Interdisciplinary Law Review 1, 227.

[176] n 145 above, 68.

[177] n 82 above, 470. Srimati Basu also mentions that 'Women's chances of deploying the criminal-sanctioning power of the state vary depending on their class, caste, and religion.' in Srimati Basu, 'Sexual Property: Staging Rape and Marriage in Indian Law and Feminist Theory' (2011) 37 Feminist Studies, 194.

[178] n 57 above, 112.

suitably applied in the Indian context due to various factors, including level of education, illiteracy, poverty, myriad social customs, and values, religious beliefs, mind-set of the society, to treat marriage as sacrosanct.'[179] This research first seeks to understand the origin and legal status of the marital rape exemption before dissecting the aforementioned social customs, values, beliefs and mindsets to see how they actually play into the legal and social denial of this crime in both the public and private sphere. Secondly, the research examines dowry-related violence and dowry death – as a form of private violence that has a host of legal protections but occurs rampantly regardless. Gadkar-Wilcox attributes this discrepancy to the fact that 'women cannot overcome the combined effects of deep-seated presumptions about both their gender and class status.'[180] This research examines such presumptions and also looks at how social pressures by others in the community, along with a socially influenced police and judicial system, also play a part. However, after having examined an overview of violence against women in India's private sphere and before getting into the particular forms of violence, the following chapter introduces postcolonial feminism as the theoretical lens that this research utilises throughout.

[179] n 161 above.

[180] n 82 above, 457.

Chapter Two: Violence against Women in India's Private Sphere – A Theoretical Framework

An Introduction to How Postcolonial Feminism Provides a Theoretical Framework for Addressing Violence against Women in India's Private Sphere

Critical Theory in General

Feminist legal theory, post-colonial theory and postcolonial feminism, with their critical nature, share fundamental similarities with the overarching and encompassing field of critical legal studies.[181] Gaining momentum over the past few decades, critical legal theory contains an anti-mainstream discourse and is based on 'the assumption that both the observed objects and the observing subjects of science are socially constructed and therefore have to be analysed and interpreted within their historical-social context.'[182] Within this foundational principle of contextual analysis, critical legal scholars 'have insisted upon the necessity of recognising partial realities, subjugated knowledges, and subaltern positions.'[183] In doing so, the relationship between critical theory and law views the latter as a tool of the mainstream that it seeks to deconstruct, promoting novel analyses of legal frameworks in the context of social, anthropological, economic and other particularities.[184] Therefore, a final relevant facet shared by critical legal theories, particularly in their most recent iterations, is their prioritisation of

[181] Alpana Roy, 'Postcolonial Theory and Law: A Critical Introduction', (2008) 29 Adelaide Law Review 2, 320.

[182] Günter Frankenberg, 'Critical Theory', (2010) Max Planck Encyclopedias of International Law.

[183] n 181 above.

[184] n 182 above. Notably, the author also mentions how 'New Critical Theory scholars constantly transgress conventional boundaries such as public/private' as well.

including diverse and intersectional perspectives in the process of critiquing the current dominant systems and legal processes.[185]

In looking at the relevant arenas of analysis and engagement within critical legal studies, this chapter provides a brief overview of feminist legal theory and patriarchy before stepping into postcolonial theory and colonialism in order to create an extensive and in-depth discussion on postcolonial feminist theory. The second half of the chapter looks at the faces of colonialism and patriarchy in colonial India before highlighting the particularities of Indian postcolonial feminism, which will then take the research forward to an analysis of marital rape and dowry death as forms of violence against women in India's private sphere.

Feminist Legal Theory

In focusing on feminist legal theory, the major distinction from critical legal studies, as a whole, can be seen not only in the central focus being on gender equality but also in 'the conviction that it cannot be obtained under existing ideological and institutional structures.'[186] However, in its similarities to the critical legal movement, Trigunayat and Shreya emphasise its focus on 'experience construct'.[187] Combined with its criticism of existing systems, this showcases feminist legal theories emphasis on the real experiences of real women – rather than the dictation of such experiences by law or society. Charlesworth, Chinkin and Wright highlight that feminist legal theory works to expose how 'law functions as a system of beliefs that make social, political and economic inequalities appear natural' while constantly

[185] n 182 above. Including race, gender, society and so on.

[186] Deborah Rhode, 'Feminist Critical Theories', (1990) 42 Stanford Law Review 619.

[187] Samarth Trigunayat and Shreya, 'Feminist Understanding of Part III of Constitution of India' (2018) 7 Nirma University Law Journal 8.

generating and preserving gender-based inequality.[188] This is acutely harmful to the daily realities of women and embeds social myths, scripts and stereotypes on gender, and gender-based relations, into the legal and political system. As Cyra Akila Choudhury writes, 'ultimately, the decisions about how to live as a woman - whether consciously made or not - are bound up in a complex web of formal laws, societal norms and personal motivations.' Therefore, feminist theory's deconstruction of the law is central to both the discipline and, when implemented in practice, to women's daily lives. Arguing that reality itself is gendered, Judith Baer provides three key foundations that create the base of feminist legal theory: that conventional laws, as man-made creations, contain a 'fundamental male bias', that conventional theories, as man-made creations, cannot contain the realities of women, and that feminist legal theory 'requires that women produce theory from their own experience and perspective.'[189] Flowing as a response to the former two statements, this final call to create marks an important element of the methodological framework surrounding feminist legal theory. It also illustrates and encourages a diversity of theoretical by-products under the umbrella of feminist legal theory.

Deborah Rhode reiterates and broadens this methodological commitment by sharing an aspiration to 'describe the world in ways that correspond to women's experience and that identify the fundamental social transformations necessary for full equality between the sexes.'[190] An example of this methodological commitment in action can be seem within Chandra Mohanty's well known essay titled 'Under Western Eyes: Feminist Scholarship and Colonial Discourses,' where she emphasises the importance of distinguishing the real

[188] Hilary Charlesworth, Christine Chinkin, Shelley Wright, 'Feminist Approaches To International Law' (1991) 85 The American Journal of International Law 613.

[189] Judith Baer, 'Feminist Theory and the Law,' (2008) *The Oxford Handbook of Law and Politics* 2 and 3.

[190] n 186 above.

experiences of real women from a 'cultural and ideological composite' of Woman (Woman versus women) as a key distinction to be strived for by feminist scholarship.[191]

In addition to sharing the commitment behind feminist methodological frameworks, Deborah Rhode also puts forth the core political and substantive priorities of feminist legal theory.[192] Politically, feminists work towards gender equality and the recognition of rights.[193] This seemingly simple mandate causes many complications in practice. As mentioned by Celina Romany, one of these complications is caused by viewing the state as ungendered rather than patriarchal, which absolves the state of responsibility for continued substantive inequality.[194] Charlotte Bunch similarly emphasises how 'female subordination runs so deep that it is still viewed as inevitable or natural, rather than seen as a politically constructed reality maintained by patriarchal interests, ideology, and institutions.'[195] In response, and in order to satisfactorily address the political commitment of feminist legal theory, the need arises to 'confront the gender stratification embedded in the liberal state.'[196]

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[191] Chandra Mohanty, 'Under Western Eyes: Feminist Scholarship and Colonial Discourses', *Feminist Postcolonial Theory: A Reader* (Routledge 2003) 50. As detailed later, this essay contains important elements of postcolonial feminism – already showcasing the connections between feminist legal theories and postcolonial feminisms.

[192] These are also echoed in Hillary Charlesworth, 'Feminist Critiques Of International Law And Their Critiques' (1994) 1994-1995 Third World Legal Studies, as well as other authors.

[193] n 186 above (and Charlotte Bunch, 'Women's Rights as Human Rights: Toward a Re-Vision of Human Rights' (1990) 12 Human Rights Quarterly 493).

[194] Celina Romany, 'Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law', (1993) 6 Harvard Human Rights Journal 100.

[195] Charlotte Bunch, 'Women's Rights as Human Rights: Toward a Re-Vision of Human Rights' (1990) 12 Human Rights Quarterly 491.

[196] n 194 above, 100.

Finally, the substantive pillar of a critical legal analysis of gender aims to 'reconstitute legal practices that have excluded, devalued, or undermined women's concerns.'[197] Within feminism, the liberal branch carries out this analysis with equality as its chief concern and under the assumption that 'women and men are, for all legitimate purposes, the same.'[198] However, liberal feminism's definition of equality as being like a man is criticised for feeding into patriarchal and male conceptions of equality[199] without realising the realities of women and the particularities, as well as the ingrained nature, of the subjugation they face. Instead, Romany succinctly portrays how 'a feminist critique of human rights law must therefore challenge the logic which informs such a discourse; it must challenge the controlling metaphors, the notions, and the categories that develop and delimit the conceptions of truth and knowledge within the discourse.'[200] Similarly, Bunch details how a 'feminist transformation of human rights' must reconstruct law in response to the real experiences in women's lives and to counter their invisibility and silences.[201] In examining the political, substantive and methodological commitments of feminist legal theory, this section will provide a brief overview of the theory's key goals. The attention now shifts to understanding the key beliefs, challenges, and divergences within feminist legal theory – particularly in relation to patriarchy and the law.

Structural Patriarchy

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[197] n 186 above.

[198] Janet Halley, *Split Decisions: How and Why to Take a Break from Feminism* (Princeton University Press 2006) 79. Although the author highlights how 'liberal feminism has veered from equal treatment to special treatment; from formal equality to substantive equality; from empty theories of gender to particularized ones.'

[199] n 198 above, 80.

[200] n 194 above, 91.

[201] n 195 above, 487 and 496.

In understanding patriarchy, Hilary Charlesworth importantly notes that the concept is not an add-on or 'temporary imperfection' in a functioning system but rather it is inherently part of and strengthened by the system itself.[202] To highlight the embeddedness of the patriarchal system, Charlesworth further emphasises how 'contemporary power relations depend upon sustaining certain notions of masculinity and femininity notions of what is expected in regard to men's and women's lives.'[203] Additionally, an uneven power dynamic gets added to these relations when 'women are constituted as a group via dependency relationships vis-a-vis men, who are implicitly held responsible for these relationships.'[204] Patriarchy as a system affects women in multiple, intersecting ways across racial, national, religious, economic and numerous other boundaries.[205] In the context of feminist legal theory, patriarchy can be generally defined as 'a cultured construct that facilitates the production of gendered norms and creates a system of female exploitation'[206] while privileging the male figure. However, it is hard to create a more specific definition of the concept. This is because, as Ania Loomba writes, patriarchy in practice is 'highly variable because it always works alongside other social structures'[207] – such as colonialism. Using the terminology of patriarchy has been criticised for reenforcing a binary between men and women and treating itself as distinct from other 'power relations' within (and across) each gender.[208]

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[202] n 192 above.

[203] n 192 above, 3.

[204] n 191 above, 55.

[205] Jane Rudd, 'Dowry-Murder: An Example of Violence against Women'. (2001) 24 Women's Studies International Forum 513.

[206] Stacy-Ann Elvy, 'A Postcolonial Theory of Spousal Rape: The Caribbean and Beyond' (2015) 22 Michigan Journal of Gender & Law 1, 103.

[207] Ania Loomba, *Colonialism/Postcolonialism*, Second Edition (Routledge 2005), 21.

[208] Vrushali Patil, 'From Patriarchy to Intersectionality: A Transnational Feminist Assessment of How Far We've Really Come' (2013) 38 Signs: Journal of Women in Culture and Society 850.

Charlesworth, Chinkin and Wright state that, in practice, the patriarchal state works to both exclude women and legitimise this exclusion.[209] A prominent example of this exclusion can be seen in the oft cited division of women's rights and human rights as separate categories. The authors write how 'issues traditionally of concern to men become seen as general human concerns, while "women's concerns" are relegated to a special limited category.'[210] This prominently includes issues such as sexual and gender-based violence and other forms of discrimination based on gender. In a feminist response to this analysis, Bunch challenges the vanguards of human rights to 'move beyond its male defined norms in order to respond to the brutal and systematic violation of women globally.'[211] State legitimisation of gender-based exclusion is a political issue – which makes the exclusion of, or lack of substantive action against, sexual and gender-based violence a political issue as well. Laurel Pardee emphasises on how 'the patriarchal hierarchy dictates the relationships between men and women in society and the systematic oppression of women within it.'[212] Therefore, patriarchal structures of power work to sanction violence against women, making it 'central to maintaining those political relations at home, at work, and in all public spheres'[213] and making it 'very much a matter of state responsibility.'[214] Patriarchal exclusion and state legitimisation are often reiterated and intensified by national and international legal systems. The following section seeks to understand how feminist legal theory analyses the law – and the part that systematic patriarchal discrimination plays in this analysis.

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[209] n 188 above, 622.

[210] n 188 above, 625.

[211] n 195 above, 492.

[212] Laurel Remers Pardee, 'The Dilemma of Dowry Deaths: Domestic Disgrace or International Human Rights Catastrophe' (1996) 13 Ariz. J. Int'l & Comp. L. 517.

[213] n 195 above.

[214] n 212 above.

Patriarchy, Law and the Divergences of Feminist Legal Theories

If law is to be taken as a reflection of reality, that is all the more reason to state that law is gendered – as reality itself is gendered by patriarchy. Moreover, the relationship between law and patriarchy works both ways. Heather Wishik succinctly exemplifies this relationship by sharing how 'male-vision legal scholarship is to law what law is to patriarchy: each legitimates, by masking and by giving an appearance of neutrality to, the maleness of the institution it serves.'[215] Feminist lawyers and activists face many challenges due to the close ties that patriarchy and law share. Not least of these is the fact that, under a patriarchal state, many legal provisions and legal cases are more likely to succeed if shaped 'using the discourses of victimhood and protection to address practical gender interests, even while cognizant of contradictions and ironies that may arise in the process of decoding law in courts and cultural settings.'[216] Faced with a difficult choice, many feminists are forced to utilise patriarchal, protectionist discourses in order to advance legal provisions and justice for women. Unfortunately, most often, working with existing discourses and laws on gender relation does not work to the benefit of the woman. For example, with a patriarchal prioritisation of the preservation of marriage found throughout Indian law and judicial proceedings, 'even where a woman files for divorce on the basis of cruelty, irrespective of the damage done to her, the fact of her abuse would be secondary to preserving the marriage.'[217] The need, then, is to understand how the current legal and patriarchal frameworks can be altered.

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[215] Heather Wishik, 'To Question Everything: The Inquiries of Feminist Jurisprudence', (1985) Berkeley Women's Law Journal 68.

[216] Srimati Basu, 'Sexual Property: Staging Rape and Marriage in Indian Law and Feminist Theory' (2011) 37 Feminist Studies 207.

[217] Nina Kapur and Kirti Singh, 'Practicing Feminist Law: Some Reflections,' (1994) 6 Student Advocate 33. Kapur and Singh are particularly referring to India's civil procedure code in this context.

Within feminist legal theory, feminist jurisprudence goes a step beyond simply highlighting the gendered and negative effect of patriarchal laws as created by and for men.[218] Feminist jurisprudential inquiry seeks to promote long-term change beyond addressing the short-term effects of 'the law as it impacts women's lives'.[219] By methodologically drawing on the experiences of women and on the integral role of the state and the law in 'perpetuating patriarchal hegemony', feminist jurisprudential inquiry seeks to understand what law and legal systems might look like outside the influence of patriarchy.[220] Feminist jurisprudence also birthed the difference debate within feminist legal theory which, when pitted against sameness, 'demands the recognition of and adaptation to gendered realities like the childbearing function and women's economic disadvantages vis-à-vis men.'[221] The differences debate, key to feminist theory in the 80's, has since been criticised by other feminists for not recognizing the difference (ironically) within the experiences of women and has been labelled as 'simplistic, exclusionary, and illogical' in making its case for gender difference.[222]

Similar to the feminist jurisprudential goal to peel back the layers of the law, Katharine Bartlett explains how postmodern feminists critiquing foundationalism seek to deconstruct gender-based discriminations within the law which, 'despite its claim to neutrality and objectivity, masks particular hierarchies and distributions of power.'[223] An interesting example of the process of deconstruction is provided by Judith Baer. She shows how the legal concept of the 'reasonable person' contained patriarchal undertones as it did not fit the realities of

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[218] n 215 above, 66 and n 189 above, 3 and 7. Bowman and Schneider also discuss gender in law in n 230 above, 254.

[219] n 835 above.

[220] n 215 above 67, 68 and 69.

[221] n 189 above, 4.

[222] n 189 above, 5.

[223] Katharine Bartlett, 'Feminist Legal Methods,' (1990) 103 Harvard Law Review 4, 878.

women facing domestic violence, who often remained in abusive relationships.[224] Baer shows that 'this emphasis on the supposed unreasonableness of the victim's behaviour became a rationale for law enforcement agencies and prosecutors to trivialise violence against women' before feminist analyses were able to dissect and change the narrative.[225] One way that this change was achieved was through the conceptualisation of the 'battered woman syndrome' by feminist psychologist in 1984, which utilised women's experiences to understand how learned helplessness in long-term abuse can prevent action.[226] However, there is much more to be done when it comes to critically examining the role of patriarchy in legal systems and in replacing these gendered laws.

Formal Equality in Law

The issue of inequality begins with the legal definition of equality itself. Rhode comments how the traditional approach that law has taken towards issues of gender 'has allowed broad mandates of formal equality to mask substantive inequality.'[227] This formal equality is grounded on the belief that men and women should be treated equally and the Western notion that law, as an autonomous entity, is objective and stands apart from society and social norms.[228] By holding this misguided notion of neutrality, Charlesworth shows how formal equality 'fails to address the underlying causes of sex discrimination'[229] – such as an

[224] n 189 above, 10.

[225] n 189 above, 10.

[226] n 189 above, 10. However, the concept of the battered woman syndrome is also criticised by other feminists as falling under patriarchal traps of categorising women as passive and helpless and of removing their agency.

[227] n 186 above, 630.

[228] n 188 above.

[229] n 192 above.

oppressive patriarchal social and legal system.[230] Formal equality resides in national and international legal systems across the world even today and, as Charlesworth, Chinkin and Wright highlight, 'if women's interests are acknowledged at all, they are marginalised.'[231] The irrationality of formal equality to the cause of gender justice can clearly be seen within legal responses to physical violence against women. Evidence gathering in such cases often place weight on what is considered to be legally relevant under formal equality, rather than prioritising the lived and social experiences of the petitioner – which, as Kapur and Singh opine, 'will either obscure her gender specific reality or while it may protect her, refuse to change that reality.'[232] Stepping in in such situations, a feminist approach to formalism seeks to 'destabiliz[e] frozen versions of social life and human association that exclude women's experiences.'[233]

This relates back to the substantive commitment of feminist legal theory, which pairs deconstruction with a reconstruction of legal concepts and legal practices in a gender inclusive manner, based on the individual and lived experiences of women. For example, Bartlett even criticises the term 'feminist' for streamlining the experiences of women into a single category; a danger which she says 'obscures – even denies – important differences among women and among feminists, especially differences in race, class, and sexual orientation, that ought to be taken into account.'[234] This shows the prevalence and relevance of deep deconstruction to feminist theory. Archana Parashar suggests that 'this is the radical potential of feminist legal

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[230] Also shared by Cynthia Grant Bowman and Elizabeth M. Schneider, 'Feminist Legal Theory, Feminist Lawmaking, and the Legal Profession', (1998) 67 Fordham L. Rev. 252.

[231] n 188 above, 615.

[232] n 217 above, 32.

[233] n 194 above, 92.

[234] n 223 above, 834.

theory - it can reorient all legal to become more contextual and inclusive.'[235] One of the first steps towards this reorientation is recognizing the binaries that exist within discourses of oppression – such as women as victims and men as oppressors or women as powerless and men as powerful.[236] These generalisations do not allow for the recognition of particular historical or geographical contexts and, thus, cannot formulate context based responses.[237] It is vital to look beyond the binary in order to even understand how the categorisations within the binaries work in various regional contexts.

After acknowledging that there is a gender-bias in law, the solution is not a highly unrealistic and often patriarchal formal equality but rather substantive equality that acknowledges and compensates for the gender-bias towards women. One of the ways in which feminist legal theorists work towards the deconstruction of formal equality is through the anti-essentialism critique. Essentialist patriarchal discourses 'attribute to women fixed qualities' based on biological or 'natural' characteristics – such as reproduction – as an explanation for their subordination.[238] By itself and combined with formal equality, Charlesworth highlights how the absolute gender characteristics allocated by essentialism fails to recognise differences across cultures and 'confuses social relations with immutable attributes.'[239] This perceived immutability, in turn, creates further hinderances in the journey towards gender equality.

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[235] Archana Parashar, 'Gender Inequality and Religious Personal Laws in India', (2008) 14 Brown Journal of World Affairs 2, 107.

[236] n 191 above, 56 and 60.

[237] n 191 above, 60.

[238] n 192 above.

[239] n 192 above.

To counter the essentialist discourse, anti-essentialism challenges the concept of a universal woman and, instead, looks to the experiences of women and 'the need to account for the wide range of feminist perspectives that emerged from women of color, issues of ethnicity, problems of immigrant women, and cultural differences.'[240] There are a variety of critical feminist approaches that can be taken to advance this inclusion of women's perspectives into theoretical dialogues and legal constructions. As a further criterion, Ratna Kapur insists that 'feminist positions, including postmodern feminism, do not adequately interrogate the colonial trappings and hegemonic first world formations on which law is based, which continue to exploit women and the subaltern subject and exclude or ignore the non-West from their discussions.'[241] Therefore, addressing violence against women in India's private sphere through a postcolonial feminist approach grounds and contextualises biases within the existing law, and also allows for the reconstruction of the law. However, before understanding the theory of postcolonial feminism, it is important to understand the relevant basis of postcolonial theory.

Postcolonial Theory

The terminology of postcolonial literally and originally referred only to countries that were formally under colonial rule. However, used within the structures of postcolonial theory, this term expands to 'suggests resistance to "colonial" power and its discourses that continue to shape various cultures,' including both former colonies and non-colonised states.[242] Utilising

[240] n 230 above.

[241] Ratna Kapur, *Erotic Justice: Law and the New Politics of Postcolonialism* (Glasshouse Press 2005) 5.

[242] Ritu Tyagi, 'Understanding Postcolonial Feminism in Relation with Postcolonial and Feminist Theories' (2014) 45.

this terminology, postcolonial theory seeks to retrace colonial histories from the point of view of the (formerly) colonised in order to 'trace the contemporary condition of subjugation of the historically Othered' which, in turn, reveals how 'categories we consider as 'natural' have actually been culturally constructed in hierarchical structures of difference.'[243] In doing so, postcolonial studies cover not only the process of independence but also the lasting impact of 'enduring social relations of domination and submission, economic injustices, disruptions of the family and community structure, cultural erasure, and political paralysis' created by colonialism.[244] Postcolonial theory also insists that the consideration of certain groups as Others or as the object of the law is not natural, 'but rather as a result of manipulation that can be corrected through the gradual process of inclusion of these previously excluded groups.'[245] For example, colonial subjects were seen as 'different, infantile, primitive, and Other' and this categorisation was used as a justification for colonisation – as they were to be 'denied the benefits of liberalism until he or she was trained into civilisation.'[246] This shows a glimpse of both the power and the connotations attached to the process of Othering.

Similar to the patriarchal dynamics criticised within feminist legal theory, postcolonial theory also emphasises how 'colonization almost invariably implies a relation of structural domination and a discursive or political suppression of the heterogeneity of the subject(s) in

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In Daniel Vukovich, 'Postcolonialism, Globalisation, and the Asia Question,' (2013) The Oxford Handbook of Postcolonial Studies 1, Daniel Vukovich mentions how the People's Republic of China, which is not traditionally thought to have been colonised, is also 'deeply influenced by modern imperialism and neoliberalism.'

[243] n 181 above, 357.

[244] Lena Zuckerwise, 'Postcolonial Feminism,' (2015) The Encyclopaedia of Political Thought 1.

[245] n 241 above, 21.

[246] n 241 above, 25. In page 26, Kapur also adds that 'Exclusion is thus inherent to liberalism, while the terms of inclusion demand the erasure of difference. Both are based on assumptions based on racial, cultural, and civilisational criteria.'

question.'[247] This translates to the key features of postcolonial theory. Ratna Kapur highlights three of these as (1) 'the critique of the linear, progressive narrative of history that occupies the citadel of liberal doctrine' – or that society evolved from barbaric to enlightened, (2) 'the relationship between power and colonial knowledge production, and how assumptions about the Other have come to be produced' and (3) 'the question of agency and the resistive subject, produced in response to the pressures of the colonial encounter' – influenced by the later discussed subaltern studies.[248] Additionally, Kapur also stresses that postcolonial theory does not only address the past but also 'identifies the ways in which the devices and processes of Empire continue to inform our present.'[249] Foundational scholars of postcolonial theory include household names such as Frantz Fanon, Edward Said and Homi Bhabha. However, the following discussion on postcolonial theory, and its subsequent discussion on postcolonial feminism, focuses particularly on understanding the scholarship of postcolonial theorists who also engage with feminist issues – including, among others, Gayatri Spivak and Chandra Mohanty.

A central element of postcolonial theory that also informs its views on the feminist debate is the concept of the subaltern. While dichotomies within colonial discourse create a division between subjects of the law (the colonising men) and objects of the law (the colonised),[250] subaltern scholars take the understanding of this dichotomous position a step further, contributing to a conversation that allows for the analysis of differed and (at the very least) dual discrimination of colonised women. Roy contextually defines the general use of the term subaltern as a reference to 'the various hierarchies which existed within the colonised

[247] n 191 above, 49.

[248] n 241 above, 21.

[249] n 241 above, 21.

[250] n 206 above, 119.

world.'[251] This expands the coloniser/colonist binary to include the exclusion of the narratives and perspectives of specific groups of people within the latter (such as women). However, in her famous article titled 'Can the Subaltern Speak?', Gayatri Spivak argues that, in fact, the true subaltern – through its multiple subordination – cannot 'know and speak itself.'[252] As a response, insisting that 'the intellectual's solution is not to abstain from representation,' she advocates for the subaltern to be represented by the postcolonial intellectual – while warning the latter against essentialising the cause of the subaltern and also to acknowledge in their work when they do essentialise.[253]

Although Spivak's initial conclusion remains widely accepted in certain circles, Diana Brydon mentions that 'those committed to anti-colonial struggle or social justice initiatives argue on the contrary that alternative knowledges remain within reach.'[254] Brydon also provides examples of how such knowledge can be sought, including Spivak's own later encouragement to look within the particularities of 'precapitalist cultures'.[255] The concept of the subaltern specifically impacts women in the (formerly) colonised state – including both women as a gendered category and the various intersections of this gender with other factors such as caste, religion and socioeconomic status. Therefore, in learning from the research of postcolonial theory, it is important for feminist legal theory to also take into account the particularised plights of the most marginalised women within each cultural context.

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[251] n 181 above, 343.

[252] Gayatri Spivak, 'Can the Subaltern Speak?' *Marxism and the Interpretation of Culture* (1988) 67.

[253] *ibid.*

[254] Diana Brydon, 'Modes and Models of Postcolonial Cross-Disciplinarity', (2013) The Oxford Handbook of Postcolonial Studies 7.

[255] *ibid.*

Colonialism and Law

Law and legal systems often serve as key examples of colonisation and key tools for postcolonial scholars to highlight hierarchical power structures within colonial law – and its continued, and often reinforced, influence since. Subsequently, an identification of the colonial underpinning to postcolonial systematic inequality helps scholars argue for a sustainable and substantial restructuring of law and society. While highlighting the influence of colonialism on systems in the postcolonial world, it is important to also recognise that not all inequalities (or not all of their elements) can be attributed to the coloniser – whether that is to acknowledge a place for 'postcolonial agency'[256] or to acknowledge 'the similarities between colonial identities and the traditional norms and identities of the colonized.'[257] However, neither agency nor similarities preclude the need to understand and deconstruct where colonialism has impacted, and continues to impact, local legal and social narratives. While acknowledging the individual merits of both postcolonial theory and feminist legal theory, an analysis of the categorisation of women within India's social and legal system is contextualised and enhanced through the inclusion, and criticism, of both lenses through postcolonial feminist theory.

Postcolonial Feminism

Understanding violence against women in India's private sphere requires an understanding of the intersection of patriarchy and colonialism in both colonial and contemporary India. As Gita Mehrotra says, 'in contemporary interdisciplinary feminist scholarship, questions of how to understand issues of interlocking oppressions, multiple

[256] n 206 above, 98.

[257] n 206 above, 101.

identities, and social inequality in women's lives are of utmost importance.'[258] Additionally, Romany importantly writes that, 'any critique of rights discourse must be historicized'[259] and, by doing so through postcolonial feminist theory, feminist dialogues can move away from 'monolithic' interpretations of gender and towards intersectional accounts instead.[260] When it comes to the similarities between feminist and postcolonial theory, Leela Gandhi notices how both 'began with an attempt to simply invert prevailing hierarchies of gender/culture/race' and how iterations of both continue to 'refuse the binary oppositions upon which patriarchal/colonial authority constructs itself.'[261] Postcolonial feminism is one such iteration. Postcolonial feminism critically deconstructs colonialism, its aftermath, and its continued consequences for women.[262] In other words, it seeks to account for women's conditions of subordination within the conditions of postcolonialism.'[263] In this manner, postcolonial feminism draws from, counteracts and intercedes into both feminist theory and postcolonial theory.[264] Under postcolonial feminism, the 'double colonisation' that many women face is revealed, where they 'simultaneously experiences the oppression of colonialism and patriarchy'[265] as the 'forgotten casualty of both imperial ideology, and native and foreign patriarchies.'[266] With this disadvantage, Ritu Tyagi adds how 'her colonized brother is no longer her accomplice, but her oppressor' and even replaces her as the Object – by redefining

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[258] Gita Mehrotra, 'Toward a Continuum of Intersectionality Theorizing for Feminist Social Work Scholarship' (2010) 25 Affilia: Journal of Women and Social Work 4, 417.

[259] n 194 above, 96.

[260] n 208 above, 852.

[261] Leela Gandhi, *Postcolonial Theory: A Critical Introduction* (Allen and Unwin 1998) 83.

[262] n 244 above.

[263] n 241 above, 3. She adds that 'an awareness of who speaks for whom, how and where, as well as who is listening and to what end, informs the politics of postcolonial feminism.

[264] n 244 above, 2 and n 242 above.

[265] n 242 above. Similar descriptions are also shared by Spivak.

[266] n 261 above.

and remoulding as he sees fit to help fight the nationalist cause against his coloniser.[267] These dynamics are deconstructed in further detail within this research during a later examination of sati in India through the perspective of postcolonial feminism.

Intervening into both its parent theories, Lewis and Mills observe the dual goals of postcolonial feminism as a project to (1) 'racialize mainstream feminist theory' and to (2) 'insert feminist concerns into conceptualisations of colonialism and postcolonialism.'[268] Translating to the legal sphere, these goals work to 'highlights that the scope and operation of law assumes fixed gendered, racial, religious, linguistic and other social hierarchies.'[269] In action, patriarchal colonialism can be seen through the colonisers' belief and behaviour of superiority and control over the bodies and agency of women across their colonies – which led to legislation reflecting the same.[270] Revealing the origins of a colonial and patriarchal double subjugation of women within the British empire, Elvy writes how 'British colonizers viewed their identities as superior to that of colonized people, British common law viewed the masculine identity as superior to the feminine identity.'[271] It is this double subjugation that spills into the postcolonial world today and continues to perpetuate imperial and patriarchal narratives.

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[267] n 242 above. Additionally, 'Postcolonial feminist theorists have accused postcolonial theorists […] of obliterating the role of women from the struggle for independence' (46).

[268] Reina Lewis and Sara Mills, 'Introduction', *Feminist Postcolonial Theory: A Reader* (Routledge 2003) 3. These goals can also be found within n 244 above, 2.

[269] Arushi Garg, 'Consent, Conjugality And Crime: Hegemonic Constructions Of Rape Laws In India' (2018) 28 Social & Legal Studies 738.

[270] Once again, this can be seen in the British response to sati in India, as discussed later in this chapter.

[271] n 206 above, 119.

In many contexts, contemporary capitalist power structures also reiterate colonial discrimination against women. Mohanty remarks that 'it is especially on the bodies and lives of women and girls from the Third World/South […] that global capitalism writes its script.'[272] In order to reveal these capitalistic power structures and reconstruct a more equitable system, she prioritises 'looking at, naming, and seeing the particular raced and classes communities of women from poor countries as they are constituted as workers in sexual, domestic, and service industries; as prisoners; and as household managers and nurturers.'[273] Therefore, postcolonial feminist theory often encompasses a variety of discourses, systems of knowledge and power structures in its commitment to deconstruction and inclusivity.

Third World Feminism

With a particular focus on cultural and contextual differences, and in its fight against the reiteration of colonial discourses within feminist movements, the discourse of third world feminism embodies many elements of postcolonial feminist theory. In fact, certain scholars have also chosen to use postcolonial feminism and third world feminism interchangeably, while others mark them as distinct. Drawing on, and speaking out against, a variety of dialogues within feminist and postcolonial theory, third world feminists focused on 'the inability of mainstream feminist theory to accommodate women living outside the core of liberal society'[274] and sought to 'champion[] the cause of subaltern Third World women'.[275] Mohanty,

[272] n 191 above, 514.

[273] n 191 above, 526.

[274] Amalia Sa'ar, 'Postcolonial Feminism, the Poltics of Identification, and the Liberal Bargain', (2005) 19 Gender and Society 5, 687.

[275] Ranjoo Herr, 'Reclaiming Third World Feminism: or why Transnational Feminism Needs Third World Feminism', (2014) 12 Meridians 2. Although not directly relevant to this research, postcolonial feminism and

whose work lies as foundational to both postcolonial feminists and third world feminists, relays that 'it is only by understanding the contradictions inherent in women's location within various structures that effective political action and challenges can be devised.'[276] Third World feminism reacts strongly against much of the universalism that informed the second wave of feminism in the 60s and 70s.[277] Under this assumed universalism, the perspectives and values of Western feminists and systems are assumed to be superior[278] and 'legal, economic, religious and familial structures are treated as phenomena to be judged by western standards' rather than diverse and context-specific social relations.[279] This translates to the construction of the third world woman across political, legal, feminist and even media platforms as 'victim, exotic, not free.'[280] Mohanty further elaborates the categorisation of third world women, which produces the 'third-world difference' as;

> automatically and necessarily defined as: religious (read 'not progressive'), family oriented (read 'traditional'), legal minors (read 'they-are-still-not-conscious-of-their-rights'), illiterate (read 'ignorant'), domestic (read 'backward') and sometimes revolutionary (read 'their-country is-in-a-state-of-war; they-must-fight!').[281]

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third world feminism has also been used in reference to the causes of women from non-Western countries or of non-Western origin who currently reside in Western countries.

[276] n 191 above, 62.

[277] n 244 above and n 275 above.

[278] Maneesha Deckha, 'Postcolonial Feminism – Liberal Feminism's (Humanist) 'Sister'?, *Feminisms of Discontent* (Oxford University Press 2015) 179.

[279] n 191 above, 67.

[280] Abigail Stewart, Jayati Lal, and Kristin McGuire, 'Expanding the Archives of Global Feminisms: Narratives of Feminism and Activism' (2011) 36 Signs: Journal of Women in Culture and Society 907.

[281] n 191 above, 68.

These characteristics are often in contrast to those attributed by First World feminists towards themselves, thus feeding into a dominant and paternalistic attitude towards women in the Third World.

Third World feminists argue that, unlike western feminist theory's assumption that women in the third world suffer from the same or merely a more severe manifestation of the inequality experienced by the West – and require same or similar solutions, the actual discrimination they fight against is a different beast altogether. This applies not only to the definition of violence but also to the definition of liberation. For example, the supposedly universal want for sexual liberation among women in the 1960s was challenged by Muslim feminists as 'a degradation of women's sexuality and a misguided defining of women's freedom in terms of men's interests.'[282] Exploring this discord further, Cyra Akila Choudhury explains how, in recklessly promoting a Western definition of independence, 'how that autonomy is actually lived, operates in women's lives and reflects their experiences of relational entanglement remain a complexity that liberal feminists often gloss over.'[283] They give the example of the veil which, while criticised as a compulsion or blind adherence, can actually be a facet of the agency and autonomy of Third World women.[284]

Generalisations of the experiences and needs of women also create a dichotomous account of liberal norms versus culture or tradition, where the former is considered to always be superior – and seemingly grants permission for Western feminists to unilaterally 'rescue'

[282] n 268 above, 4.

[283] Cyra Choudhury, 'Beyond Culture: Human Rights Universalisms Versus Religious And Cultural Relativism In The Activism For Gender Justice' (2015) 30 Berkeley Journal for Gender Law and Justice 252.

[284] n 283 above.

third world women, while only understanding the dynamics from their limited perspective.[285] This logic leads to a hypocritical situation where 'practices deemed oppressive to women that are not commonly found in the West, such as clitoridectomy and sati, are explained as resulting from the barbarism of Third World peoples, while oppressive practices that are common in the West, such as rape, are explained in universalistic terms.'[286] A critical look at such consequences does not mean that clitoridectomy or sati should not be fought against, but rather that forms of violence or oppression against women should not be essentialised or given a hierarchical value judgement. The incoherency of such a binary is further highlighted in the fact that an estimated one in five women have been raped or sexually assaulted in England and Wales and five in six who are raped do not report the crime,[287] and yet the issue of an insufficient legal and social reporting structure surrounding rape is much more sensationalised within the Indian context.

This binary interacts with and plays into the overall binary of the average first-world woman and the average third-world women. Mohanty objects to such rigid classifications as the creation and contrasting of these two groups renders the former as the 'true subjects' of a feminist historical reconstruction, which leaves third world women misrepresented and further oppressed in their 'object status.'[288] This does not even begin to account for the differences 'within these geographies and temporalities as well.'[289] Interestingly, a similar reasoning of

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[285] n 244 above, 2.

[286] Christine Helliwell, '"It's Only A Penis": Rape, Feminism and Difference', (2000) 25 Signs: Journal of Women in Culture and Society 793.

[287] Rape Crisis England and Wales <https://rapecrisis.org.uk/get-informed/statistics-sexual-violence/>.

[288] n 191 above, 67.

[289] Swati Parashar, 'Feminism and Postcolonialism: (En)gendering Encounters', (2016) 19 Postcolonial Studies 4, 371. Tyagi also mentions how western feminists 'have not only failed to read gender issues at the cross sections

'protecting' women was also used to justify colonial occupation.[290] In fact, Mohanty labels the generalisations within western feminism as a kind of colonialism in itself.[291] In the face of these discriminatory power structures working within feminist and postcolonial theories as well, Charlesworth, Chinkin and Wright warn that addressing the issues that third world feminists advocate for would 'require a reorientation of feminism to deal with the problems of the most oppressed women, rather than those of the most privileged.'[292] Therefore, third world feminism's key goals revolve around doing just that.

In line with the Third World approach's dual objectives of resistance and reform,[293] Third World feminism also operates on two main – and related – commitments. Firstly, Ranjoo Herr declares the importance of historically situating any feminist deconstructions of 'oppression and resistance' towards and by third world women.[294] It is important to add that this should include an acknowledgement and dissection of the multiple forms of oppression these women may face. Secondly, Herr insists that 'Third World women's agency and voices should be respected.'[295] This helps undermine and replace narratives of universalism or essentialism. This latter commitment can often be a retrospective activity as, faced with the silenced voices and narratives of Third World women, Loomba suggests that 'we must look for them—both within discourses which seek to erase their self-representation and

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of race and class, they have also ignored the importance of socio-historical and cultural context in examining the condition of "Third World" women.' In n 242 above, 48.

[290] n 244 above, 2.

[291] n 191 above, 68.

[292] n 188 above, 621.

[293] Luis Eslava and Sundhya Pahuja, 'Beyond the (Post)Colonial: TWAIL and the Everyday Life of International Law' (2012) 45 Journal of Law and Politics in Africa, Asia and Latin America - Verfassung und Recht in Übersee 2, 199.

[294] n 275 above, 1 – also shared in n 244 above.

[295] n 275 above, 1 – also shared in n 268 above, 9.

elsewhere.'[296] Urvashi Butalia embarks on just one such project in her work to give voice to and expose the silences of women and their stories from the partition of India.[297] Relatedly, Raksha Pande cautions that 'a post-colonial view of feminism calls for thinking about agency in much more complex ways'[298] than a traditional, and often Western, perspective. Undertaking the commitments and ideologies of postcolonial and third world feminism, the following section delves further into how colonial and patriarchal discourses play out in the context of the Indian legal system and forms of Indian gendered violence.

Postcolonial Feminism and India

Colonialism, Patriarchy, Culture and Women's Rights

Before looking at an India specific context, it is important to understand how culture, and its interactions with colonialism and patriarchy, are addressed in postcolonial feminist theory. First world or liberal feminists are in danger of handling culture as a negative phenomenon that only occurs in the third world. Along with the risks of this 'othering' that often takes place when speaking of culture and the postcolonial world, Ann Shalleck warns against treating culture 'as a set of unchanging rituals that cement the subordination of women in a static system of social priorities.'[299] In reality, culture is ever-evolving and constantly influenced by changes and counter-changes in the many structures of power and influence that exist within a nation. Mary Diariam focuses on the diversity of precolonial culture in many

[296] n 207 above, 186.

[297] Urvashi Butalia, 'From "The Other Side of Silence",' (2007) 19 Manoa 1.

[298] Raksha Pande, ''I Arranged My Own Marriage': Arranged Marriages and Post-Colonial Feminism (2015) 22 Gender, Place and Culture 2, 182.

[299] Ann Shalleck, 'Feminist Inquiry and Action: Introduction to a Symposium on Confronting Domestic Violence and Achieving Gender Equality: Evaluating Battered Women &(and) Feminist Lawmaking by Elizabeth Schneider' (2002) 11 American University Journal of Gender, Social Policy and the Law 246.

countries – which included elements of both patriarchy and gender equality – by sharing how 'women had access to and the use of economic resources as well as land, and the rights of male members were accompanied by duties to other members of the family, including women.'[300] Therefore, colonial law had a clear hand in shaping culture and maintaining or even introducing patriarchal structures, no matter how much the former colonisers or former colonists may argue that their culture is entirely their own. For example, Patil highlights how current Islamic law that grants immunity to husbands who kill their wives for adultery was in fact 'borrowed' from the penal code of France in the 19th century – highlighting how discriminatory practices are 'reduced to timeless tradition or its frequent stand-ins, religion or culture.'[301]

Instead of creating a dichotomy where culture is pitted against liberalism, culture needs to be contextually deconstructed to reveal the errors and biases in its current interpretations – as well as the nuances and divergences within any given culture.[302] Faced with this task, postcolonial theory seeks to 'unravel[] dominant cultural stories implicating gender and its interactions with other social differences to examine the dynamics by which dominant cultural groups—nationally and globally—maintain their dominance.'[303] This contextual and intersectional analysis makes it possible 'to understand and discuss how violent acts against women can be committed in culturally specific ways, *without condemning an entire culture or just particular cultures* (emphasis mine).'[304] Within the lives of third world women, this dichotomy manifests in a 'contradiction between the emancipation of women and adherence to

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[300] Mary Shanti Dairiam, 'CEDAW, Gender and Culture', *The Oxford Handbook of Transnational Feminist Movements* (2015) 15.

[301] n 208 above, 851.

[302] n 283 above terms this as the feminist call for contextual analysis.

[303] n 278 above.

[304] n 299 above.

traditional values'[305] where individuals often feel pressured to choose one over the other – and live with the consequences of their choice. Additionally, with the intersectional and layered dynamics of gender discrimination, culture is also used by women from minority cultures as protection 'against majoritarian cultures and the laws generated by the values within those cultures.'[306] In the face of these varied interpretations and utilisations, the deconstruction of culture is not a simple task.

Constructed Culture

In today's society, forms of discrimination or violence against women are comfortably attributed to culture and 'claims that culture or religion prohibit the reform of gender-iniquitous laws are contested precisely as though those assertions were true.'[307] The analysis conducted within this chapter as well as the research as a whole seeks to disprove just such claims and, instead, show that 'the concept of culture that cultural protectionists would like to preserve is a fiction.'[308] Instead, the contemporary iteration of culture often results from conscious political and social – and even economic – manoeuvrings.[309] This can be seen in the fact that many countries with (elements of) a supposedly rigid religious legal system continue to amend or repeal various aspects of their laws, where the choice of which to 'modernise' is often a political consideration.[310] The reality of constructed cultures also applies to India. Chitwan

[305] n 188 above, 637.

[306] Maneesha Deckha, 'Is Culture Taboo - Feminism, Intersectionality, and Culture Talk in Law', (2004) 16 Can. J. Women & L. 14.
and n 283 above.

[307] n 283 above.

[308] n 306 above, 33.

[309] Kavita Krishnan, 'Rape Culture and Sexism in Globalising India' (2015) 22 SUR - International Journal on Human Rights 257.

[310] n 283 above.

Varma warns that, ‘it should not, after all, surprise us to discover that the sphere of culture is made not found, that traditions are in flux, and in general that a selective and patriarchal-historical process is always at work.’[311]

The creation of culture in India is depicted by Kavita Krishnan, in writing that, ‘when politicians and other powerful figures seek to define "Indian culture" in terms of misogynistic traditions, they are not expressing a pre-existing culture, they are trying to create and craft such a culture. It is a myth told for political purposes.’[312] As part of constructed culture in India, Dairiam highlights that ‘the weaker position of women and the relegation of women to the private sphere are defended and maintained as markers of cultural and religious identity and as essential for preserving social integrity and cohesion, and thus change is often prohibited.’[313] The various reasons behind such culture creation include maintaining and strengthening dominant power structures as well as building a ‘fictitious unity of men across classes’ by invoking their cultural responsibility to control their wives, sisters and daughters for the sake of honour.[314] Within this fictional context, ‘discrimination against women is seen as necessary for the wellbeing of the family and society.’[315] In such a manner, the misuse and manipulations of culture, whether in adopting non-traditional patriarchal customs or in freezing or modifying traditional ones, excuse and justify the subordination of women. Relatedly, Chitnis and Wright write how ‘gender reform in India was, and continues to be, motivated by a desire to strengthen

[311] Chitwan Varma, ‘Criminology and Socio-Cultural Aspects of the Anti-Dowry Law in India: A Feminist Critique’ (2014) 5 SHS Web of Conferences 4.

[312] n 309 above, 256.

[313] n 300 above, 5.

[314] n 309 above, 256.

[315] n 300 above, 5.

elite, patriarchal, and upper-caste political power.'[316] Once the constructed nature of misogynistic culture is understood within its country or community specific context, 'cultural identity and gender justice do not have to be antithetical values'[317] and advocating for both becomes possible if historic and social specificities are kept in the forefront of any discussion. This research hopes to do the same.

History of Colonialism and Law in India

Colonisers treated law and legal reform as an essential element to consolidate and maintain power in their colonies. In India, establishing a legal system under the British rule included, among novel ordinances and other practices, the duplication of existing laws from the homeland and the codification of select existing customs and practices from the colony into legal acts to govern the private sphere.[318] With the selection of the latter, Dairiam emphasises how 'colonialism either entrenched various customary practices as law or rejected them in line with European values regarding marriage, the male head of household, inheritance of property, and family support.'[319] The two-fold effect of this decision was the strengthening of local patriarchal practices and the erasure of local gender-neutral or gender-conscious ones.[320] The British approach to categorising law in India also limited women through the stark division between the public sphere and the private. In these ways, Indian women faced a double

[316] Varsha Chitnis and Danaya Wright, 'The Legacy of Colonialism: Law and Women's Rights in India', (2007) 64 Wash. & Lee L. Rev. 1319.

[317] n 235 above.

[318] Tamanaha elaborates on certain elements of the administrative practices of European colonisers in Brian Z. Tamanaha, 'Legal Pluralism across the Global South: Colonial Origins and Contemporary Consequences', (2021) 53 The Journal of Legal Pluralism and Unofficial Law 172.

[319] n 300 above.

[320] n 300 above. Author also comments on how many new constitutions in the postcolonial era still did not include equality for women with the excuse of cultural particularities.

subjugation under colonial law in India, where the colonisers were viewed as superior to the colonised and the colonised men were viewed as superior to the colonised women. This is not limited to the past. As Elvy states, 'the retention of gendered common law norms strips women of their sexual autonomy and facilitates the subjugation of women as "objects" under the law.'[321] In their classification as objects, women are stripped of their agency and legally given a status of less than.

Prior to the start of British direct rule in 1858, Indian legal structures were heavily based on custom and local adjudication – rather than state-led structures more familiar to the West – while the society consisted of a 'pluralistic and fragmented cultural, religious, and political structure' – containing diverse religious and sub-religious groups without monopoly.[322] While the upper-caste women of some regions were subjected to severe 'patriarchal Sanskritic customs', women in many Southern regions and those of a lower caste were governed by less rigid customs.[323] However, in delving any deeper, legal scholars issue a warning to be cautious of 'written evidence of pre-colonial custom because it was recorded by colonial officials and academics who lacked understanding of the practices and customs they were recording.'[324] This, once again, serves as an example of colonial dilution to local practices – whether patriarchal or otherwise. The following section examines some particularities of colonial rule in India before providing a concrete example of how colonial laws played out in action.

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[321] n 206 above, 167.

[322] n 316 above, 1316.

[323] n 316 above, 1320 – customs for women of lower castes were also forced to be less rigid as many were 'engaged actively in productive labor.' Furthermore, the author highlights how divorce and remarriage were common in certain communities and castes – naming the castes and communities as well.

[324] Erika Curran and Elsje Bonthuys, 'Customary Law and Domestic Violence in Rural South African Communities', (2005) 21 South African Journal of Human Rights 4, 611.

Fraternalist and Paternalist Approach

From the beginning of their dealings with India, the British utilised two separate approaches, which Christine Keating terms as the fraternalist and paternalist approach. Under the fraternalist approach, British Orientalists 'emphasized the racial brotherhood of British and upper-caste Hindu men and pursued policies that either were "hands off" in regards to matters dealing with gender relations or that tended to enhance masculinist control over women.'[325] In this manner, the customary practices that the British legislated were invariably those of the more patriarchal upper-caste and Northern interpretations but made applicable to all within a religion, and this newly-minted civil law was readily handed over to local and religious male authorities to govern.[326] Therefore, even while fighting for opposite causes, British men and Indian men 'often collaborated when it came to the domination of women.'[327] Under the paternalist approach, which has gained more scholarly attention, British Anglicanists 'highlighted a purported racial difference between Indians and the British and […] argued that women's subordination in India justified colonial intervention.'[328] To provide this justification, 'attention was directed at the most extreme cultural practices as evidence of the 'barbarity' of Indian society, and of its resulting need for foreign rule.'[329] Figuratively, the colonial state was depicted as the authoritative provider and protector – and discipliner – for the colony, much as

[325] Christine Keating, 'Framing the Postcolonial Sexual Contract: Democracy, Fraternalism, and State Authority in India,' (2007) 22 Hypatia 133.

[326] Chitnis also discusses the grouping of diverse religious sub-groups during this process. n 316 above, 1317.

[327] n 207 above, 142. Loomba gives the example of Rakhamabai who, after having been married to a much older man as a child, refused to live with him and was sued in 1887. Although the case promisingly failed under the British governed civil court, it was then tried under Hindu law and Rakhamabai was ordered to return to her husband's home.

[328] n 325 above.

[329] n 241 above, 30.

the British man of the time was depicted to be for his wife and children, also known as his dependents.[330]

In this paternalist approach, the British and Indian men did not collude but instead collided, with women suffering in the middle as it was their 'alleged degraded position' and 'the barbaric actions of Indian men' which provided a justification for British colonisation.[331] An example of this, explored in further detail within a later section, is the colonial discourses surrounding the practice of sati. However, Ratna Kapur argues that the legal changes implemented by colonial rule were not 'based in any sense on the argument for equal rights for women. They were purely protectionist, and articulated against a broader contest over the definition of the nation-state.'[332] As a legacy of this approach, 'even secular laws for women today are either protectionist and patriarchal, or else modern Indian women are not in a position to exercise their legal rights in meaningful ways.'[333] With a focus on justification, both the fraternal approach and the paternal approach promote colonial intervention and action despite their internal differences. Both these approaches also take severe legal decisions that affect the lives of women, without consulting women in the process.

Legal Reforms by the British Administration

Codification of Customs into Civil Law

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[330] n 208 above, 848 and n 207 above, 181. Patil also mentions how colonial hierarchies led to domestic patriarchies, such as this concept of 'natural authority' legitimising 'colonial attempts to create patriarchal households where none had previously existed.'

[331] n 316 above, 1318.

[332] n 241 above, 30.

[333] n 316 above, 1319.

When codifying versions of Indian customs into civil law, three major issues emerge to define how this process occurred during the British Empire and its impact today. Firstly, the British chose to define Indian private law along religious lines, rather than ethnicity, regional or any other divisions. However, instead of drawing sharp lines, Chitnis comments that 'it was not entirely clear whether the local customs and laws that the British authorities chose to recognize were actually religious in origin or were merely customs that, over time, took on the type of legitimacy that the British came to recognize as religious.'[334] Therefore, what is fiercely protected as religious personal law today also contains secular customary practices deemed religious by the British.

This ties into the second issue of confusion regarding the classifications and affiliations of cultural practices. Speaking specifically for the South African context, Curran and Bonthuys highlight how 'colonial rulers disregarded, replaced or reformulated certain aspects of customary law which they did not understand or regarded as `immoral'.'[335] Thirdly, by creating permanent civil law out of temporal practices, colonisers 'calcified indigenous patriarchal practices'[336] – a process which sacrificed its 'fluidity and openness.'[337] As an example of the fraternal approach within India, Keating highlights how the creation of personal law along religious divisions 'negatively affected women in that it elevated textual law over customary law' and 'made relatively fixed a tradition that had previously been fluid and shifting.'[338] This

[334] n 316 above, 1321.

[335] n 324 above, 612. They also mention how the understanding of customary law today is divided into official customary law – in courts – academic customary law – in textbooks – and living customary laws – in practice.

[336] Ania Loomba, 'Dead Women Tell No Tales: Issues of Female Subjectivity, Subaltern Agency and Tradition in Colonial and Postcolonial Writings on Widow Immolation in India', *Feminist Postcolonial Theory: A Reader* (Routledge 2003) 246.

[337] n 324 above.

[338] n 325 above, 133.

one example of the personal law system serves to highlight all three issues with the colonial creation of civil law. The influence of these issues even today can be seen in the prevalence of the social and legal public-private divide within India.

Public-Private Divide

The public-private divide has been an important element of feminist and postcolonial feminist theory. As Chitnis and Wright say, 'the history of most gender relevant law reform in India during the colonial period has been a tussle for determining the contours of the public and the private.'[339] This is a theme that is also explored throughout the remaining chapters of this research. To understand the impact of the public-private divide, it is important to realise how it evokes a binary logic – where the public is considered to be superior to the private – while maintaining a 'symbolic dependency' between the two.[340] Specifically in law, this plays out in a manner that, 'when a situation falls on one side of the line, it is actionable, or otherwise of consequence; when a situation falls on the other side of the line, it is unactionable, someone else's business, or inconsequential.'[341]

In both law and society, matters that are designated as part of the private sphere are treated as separate from the state or external interference and violence against women within this sphere is invariably categorised as an expected occurrence – often as a consequence of being thought of as unactionable. Here, Charlotte Bunch mentions how 'the distinction between private and public abuse is a dichotomy often used to justify female subordination in the

[339] n 316 above, 1345.

[340] Christine Chinkin, 'A Critique Of The Public/Private Dimension' (1999) 10 European Journal of International Law.

[341] Ann Scales, 'Feminist Legal Method: Not So Scary', (1992) 2 UCLA Women's Law Journal 20.

home.'[342] While colonial laws and realities were bombarding Indian men in the public sphere, 'they seized upon the home and the woman as emblems of their culture and nationality. The outside world could be Westernised but all was not lost if the domestic space retained its cultural purity.'[343] This distinction often marks private forms of violence against women with scripts that label them as less severe, not to be discussed but to be expected – and even to be somewhat deserved. With women residing primarily in the private, domestic sphere, this distinction and its consequences become particularly relevant for their lives and livelihood.

The stark public-private divide of India today was far from clear or codified in pre-colonial India. In fact, it was the colonial administration who imported this model into the Indian context, despite the reality that 'once one begins to move the analysis of the public-private sphere away from a concern with British middle-class women, the distinction becomes untenable.'[344] One of the major consequences of the public-private divide was the limitation of women's interaction and participation in the public sphere, where their voices were silenced and substituted with that of their father, brother or husband.[345] Another consequence was that of domestic violence being given less social and legal importance than other forms of violence. In fact, translating to international law, Garcia-Del Moral and Dersnah remind us that the first international legal provision to address domestic violence only emerged in the 1990s.[346]

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[342] n 195 above.

[343] n 207 above, 142.

[344] Sara Mills, 'Gender and Colonial Space', *Feminist Postcolonial Theory: A Reader* (Routledge 2003) 698.

[345] n 194 above.

[346] Paulina García-Del Moral and Megan Alexandra Dersnah, 'A feminist challenge to the gendered politics of the public/private divide: on due diligence, domestic violence, and citizenship', (2014) 18 Citizenship Studies 663.

Although the public-private divide has been 'thoroughly attacked and exposed as a culturally constructed ideology,' it still maintains a strong hold in many national and international contexts – including law and society in India.[347] In fact, culture is often misused to protect and preserve the public-private divide, where created scripts and hierarchies are defined as culture, and therefore not to be questioned or modified.[348] This excuse of culture pits women against their own social setting, where any questioning of their subordination is viewed as rebellion against the entire current and past society. The state also plays a role in sanctioning, perpetuating, and even creating this 'cultural' discrimination. Try as they might, the state cannot claim an absolute separation from the private sphere. According to Rhode, 'as an empirical matter, the state inevitably participates in determining what counts as private and what forms of intimacy deserve public protection.'[349] Though the excuse of privacy is often invoked for the state's hands-off approach, in reality the government is quick to intervene in many matters that were traditionally considered to be part of the private sphere.

Charlotte Bunch provides the example of how 'human rights activists pressure states to prevent slavery or racial discrimination and segregation even when these are conducted by nongovernmental forces in private or proclaimed as cultural traditions as they have been in both the southern United States and in South Africa.'[350] An understanding of the various players and histories within the discourse of the public-private divide allows postcolonial feminist scholars to deconstruct these legal and social structures within particular regional

[347] n 188 above, 627.

[348] Susanne Zwingel, 'From Intergovernmental Negotiations to (Sub)National Change: A Transnational Perspective on the Impact of CEDAW' (2005) 7 International Feminist Journal of Politics 3, 411.

[349] n 186 above, 631.

[350] n 195 above.

contexts. In the Indian context, Chitnis makes interventions into just such an analysis by holding:

> On the one hand, nationalist politics described the private sphere as a sphere of autonomy for the Indian male, which itself was a product of the colonial construction of the Indian space. On the other hand, the reformist interventions by the colonial state tried to bring into public scrutiny the problems of the private.[351]

With this tension at hand, women were often used as the blow with which to parry on either side, without giving any permission or being given any agency.

The Role of Women in Women's Rights

A major contradiction within the colonisation of India lies in the fact that it was widely justified by the British as an intervention to 'save' Indian women and yet these women themselves were not asked to – or were viewed as unable to – contribute to or clarify this narrative.[352] Loomba also reminds us that colonialism across the globe contributed to the increased subordination of, and even erased, 'matrilineal or woman-friendly cultures and practices' – including the modification of the matrilineal structure within the families of Nair's in Kerala into a patriarchal unit.[353] Unfortunately, Western feminists also played a role in the continued oppression of women in colonial, and then postcolonial, countries. This was partly

[351] n 316 above, 1345.

[352] n 316 above, 1346.

[353] n 207 above, 141. Romany also terms this as the 'state's recruitment of culture' – although it should be noted that not only the state but society also pushes such narratives. n 194 above, 121.

done in speaking for them without hearing from them[354] and partly by defining emancipation as being 'respectable middle-class English wives, dedicated to their families, running their homes, and guarding their chastity at all costs.'[355] Such behaviours carried over to the oppression of third world women by first world women in contemporary discourse.

Violence against Women in the Private Sphere of Colonial India

Without the self-representation of colonial women in colonial discourses, British laws transplanted into the Indian context to deal with issues regarding women, often did not play out as planned. Instead, differences were further entrenched and Indian women were raised as nationalist symbols in the colonialist struggle – once again without any choice or agency on their part. Part of this involved 'protecting' the sexuality of Indian women – which was only sanctioned within marriage and, even then, sparingly – from colonial intervention.[356] Busy being reconstructed for the nationalist struggle as an ideal of pre-colonial culture and tradition, any qualms these women may have had with the ever-strengthening patriarchy were not given room in the narrative.[357] This affected the fight against sexual and gender-based violence in the private sphere as it is precisely in this sphere that the impeccable, devoted and dutiful Indian woman resided with almost no agency – and where the agency of colonised men held strongest. Therefore, not only was state intervention for violence in this sphere considered a controversial matter, but what was considered to be violence itself was caught up in a political tug-of-war for territorial control. It is under this framework that the issue of sati emerges within colonial discourses.

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[354] Tyagi similarly talks about 'imposing silence' in n 242 above.

[355] n 316 above, 1336.

[356] n 269 above, 749.

[357] n 336 above and n 207 above, 142.

Colonial Interventions into Sati

The most prominent and famed colonial interventions into gender-based laws in India revolved around the issues of sati, child marriage, female infanticide and dowry.[358] Of these four, sati – as a widow's (self)-immolation on her husband's funeral pyre – has particularly emerged as a topic of legal and academic discussion in both the colonial and the postcolonial era.[359] Much of the practice's infamy and understanding under colonial law ironically emerged from a misunderstanding of its religious and customary import.[360] Interestingly, the word sati itself highlights colonial misinterpretation as, when translated, the term does not signify the practice but, instead, means 'good wife.'[361] The grave consequence of this error included the fact that '"good wifehood" becomes absolutely (and mistakenly) identified with self-immolation.'[362] Beginning as a caste-specific ritual for the wives of warriors killed in battle, Sati continued to exist within colonial India until the decision to address the practice created legislation in 1813 – which outlawed involuntary or forced sati.[363] Leading up to this legislation, Hindu priests were questioned about the mention of this practice within their scriptures, and their interpretation was further re-interpreted by the British as not only a

[358] n 219 above, 416.

[359] n 336 above, 241.

[360] Sandhya Shetty and Elizabeth Jane Bellamy, 'Postcolonialism's Archive Fever', (2000) 30 Diacritics 1, 40.

[361] n 198 above, 98.

[362] n 360 above, 43.

[363] n 336 above, 242 and 244. The Kshatriya caste containing rulers and warriors. Additionally, the 1813 legislation resulted in a rise in the practice, from 378 in 1815 to 839 in 1818.

religious sanction but a religious encouragement of the practice of sati.[364] This mistook an inconsistent social practice for an unalterable religious mandate.[365]

Legislation that allows for voluntary sati completely misunderstands the nature of the act as, given social – and often religious – pressures and expectations, 'voluntary' and 'sati' are a contradiction of terms that implicate the victim as the perpetrator. Cierpial also highlights the double-blind scenario that a widow faces as, 'regardless of her decision to perform or not to perform sati, there are consequences for her actions.'[366] Therefore, the colonial gambit of intervening into the Indian context for the protection of local women backfired in multiple, intersecting ways, and with resounding consequences to this date – including the creation of an illusion of choice and victim-blaming. Stanley Tambiah, in speaking of a cultural clash between Indians and the British, astutely comments that 'it is possible that both sides dialectically constructed and negotiated a colonial reality shot through with different emphases, interpretations, and misinterpretations.'[367] Unfortunately, in the construction of colonial reality by either side, it was women who were caught in the middle.

Another unintended consequence of the British response to sati was its interference into the private sphere, which the colonial administration itself had so clearly demarcated as a space where local and religious law prevailed. As a response, the act of sati became a symbol of nationalism and resistance to colonial power and law, where women who were burnt alive were

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[364] n 207 above, 141.

[365] n 336 above, 245. Loomba mentions how this process also 'made pundits the spokesmen for a vast and heterogeneous Hindu population, and thereby calcified in new and dangerous ways the existing hierarchies of Hindu society.'

[366] Cheyanne Cierpial, 'Interpreting Sati: The Complex Relationship between Gender and Power in India' (2015) 14 Denison Journal of Religion 2, 1.

[367] n 219 above, 414.

not only good wives but good Indian wives – and the men who created this discourse remained relatively unaffected. With renewed vigour, sati became an act of tradition, religion, Indian culture, and loyalty to the nation. Despite Indian women having had neither the agency that the colonial law supposed for them, nor the agency that nationalist movements presumed, they were assigned the role of either oppressed or anti-colonial figures – fulfilling the demands of each role in their death. Ania Loomba masterfully unpacks the struggle that widows faced in writing:

> The sati's experience is not limited to the pain of a death: a whole life is brought to the violence of that event, which, if unpacked, can be seen as constructed - not just crudely by her fears of a miserable life as a widow, not just by familial economic designs on her property, not even by male anxieties about her sexuality, but by social and ideological interactions, pressures and configurations that connect her immediate situation to the politics of her community, and indeed of the nation, and to the crucial articulations of gender within each of them.[368]

Additionally, Lewis and Mills comment on how the advocacy of British feminists for Indian women at the time on matters such as sati 'repositioned' this issue away from an act of oppression by 'newly inflecting them as traditional and religious practices symbolising the nationalist and anticolonialist movement.'[369]

Sati is only one example of how control over the bodies and lives of Indian women continued – and continues – to be considered as a symbol of power and authority. Charlesworth,

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[368] n 336 above, 255.

[369] n 268 above, 8.

Chinkin and Wright write how, 'while colonialism meant allowing the colonial power to abuse colonised women, resistance to colonialism encompassed reasserting the colonised males power over their women.'[370] Indu Agnihotri adds that 'in the context of imperialism, nationalist thought and practice sought to protect the family as an inner domain insulated from the outer domain, which was more visibly and directly ravaged by colonial subjugation.'[371] In native discourses of the time, women and their existence within the private sphere began to signify 'the pre-colonial, the traditional and the untouched domestic space.'[372] The private sphere itself was advanced as 'the space of Indian cultural values, a space that needed to be secured from colonial intervention.'[373] This ties into Roy and Dastidar's distinction of India's separation into the material sphere and the spiritual sphere as a product of nationalistic sentiments during colonialism.[374] They write:

> The argument followed that as long as India retained the spiritual distinctiveness of its culture, it would be able to maintain its unique identity amidst the changing material world. Thus emerged a new form of patriarchy where women were allowed to take up formal education but the maintenance of spiritual virtue inside the home rested on her alone. Regardless of her educational qualifications, the 'new woman' was required to develop feminine virtues such as self-sacrifice, chastity, submission and devotion. She,

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[370] n 188 above, 619.

[371] Indu Agnihotri, 'The Expanding Dimensions of Dowry' (2003) 10 Indian Journal of Gender Studies 2, 311.

[372] n 268 above, 3 and n 242 above, 46.

[373] n 241 above, 29.

[374] Sharanya Basu Roy and Sayantan Ghosh Dastidar, 'Why Do Men Rape? Understanding the Determinants of Rapes in India' (2018) 39 Third World Quarterly 8, 1439. The authors go on to write how 'While Indians accepted the science, technology and modern methods of statecraft from the advanced Western world, Indian nationalists argued that the East is superior to the West in the spiritual domain.

> as the symbol of Indian culture, must be always confined at home in order to be protected from Western influence.[375]

Ignoring any progress within or across the variety of traditional practices across the Indian subcontinent, the construct of a traditional pre-colonial – and often religious – sanction of behaviour became part of the anti-colonial struggle.

In contemporary India, nationalist and anti-imperialist discourses are often used to defend discriminatory practices against women, as is seen with marital rape within this research. Geetanjali Gangoli particularly remarks how, 'in spite of the nuances within feminist conceptualisations of Indian society, the rhetoric of 'westernisation' has been used consistently as a charge to embarrass and silence feminists.'[376] Today, the absolute prohibition against sati operates under The Commission of Sati (Prevention) Act, 1987[377] – with no known cases since the creation of this act. However, a multitude of other practices that were targeted by the colonial administration, including those of child marriage, female infanticide and dowry, continue to this day.

Violence against Women in the Private Sphere of Contemporary India

Many of the discourses and power struggles that informed the narratives of sati – such as control over women as a nationalist issue, the desperate retention of male dominance in the private sphere, and subjugation being a choice that Indian women willingly conform to for the

[375] *ibid.*

[376] Geetanjali Gangoli, *Indian Feminisms: Law, Patriarchies and Violence in India* (Routledge 2007), 7.

[377] The Commission of Sati (Prevention) Act 1987 – following the case of Roop Kunwar.

sake of 'culture' – have bled into post-independence India as well. A clear case of colonial influence on postcolonial Indian power structures is also seen in the popularity garnered by Hindu fundamentalism, which originated by having the difference between Indian religions highlighted through the colonial divide-and-rule strategy and the subsequent difference in institutionalised laws governing various religions.[378] In turn, this fundamentalism insists on traditional perceptions and behaviour for women within their religion.[379] When it comes to colonial influence and patriarchy; on one hand, Loomba writes how 'colonialism intensified patriarchal oppression, often because native men, increasingly disenfranchised and excluded from the public sphere, became more tyrannical at home.'[380] On the other, Parashar writes that, 'engendered by colonial encounters of the past, violence metamorphoses in the postcolonial context; deeply embedded in social structures and political life, violence enables and transforms self and community.'[381] This is most obviously depicted in Indian law through the retention and reinforcement of both religious personal laws to govern matters in the family sphere and the 1860 Indian Penal Code, created by the British governing body, as the main source of Indian criminal law. With such Indian legal particularities, a cookie cutter version of women's rights will not suffice for substantive change. Kapur writes that 'the search for universal solutions to women's concerns continues to ignore both the significance of the colonial encounter for the situation and understanding of women in the postcolonial world, and also how their struggles for rights are tethered to the legacy of this encounter in the contemporary moment.'[382] Therefore, a legal and social response constructed through a postcolonial feminist understanding provides a more promising way forward.

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[378] n 376 above, 11.

[379] n 376 above, 11.

[380] n 207 above, 142.

[381] n 289 above, 373.

[382] n 241 above, 4.

The legal realities of protected religious personal laws and colonial penal codes intimately affect Indian understanding of and structures around private forms of violence against women. As Hetu says, 'sexual violence against women is deeply entrenched in the feudal, patriarchal Indian society'[383] – to the point where it is regularly dismissed as a given occurrence. They go on to highlight how women are given negative power within Indian society, where her level of conformity to social values determine her perception and status within society, and any deviation 'can bring shame and dishonour to the male members of an entire community or lineage.'[384] This also showcases how the concept of honour – highly prevalent in Indian society today – is used as a trap to control and abuse instead of 'being a celebration of women's dignity and social importance.'[385] In this manner, any perceived deviations of women – deviating in maintaining the household, bearing children, obeying her husband, or anything else – are considered to be licenses or justifications for acts of violence against them. Therefore, speaking of the Indian woman, Kapur and Singh insist that 'in a tradition-bound society like ours, she will forever be faced with justifying her behaviour whether to parents, children, friends, relations, the police or the law.'[386] On the other hand, men in Indian society do not face any such systematic pressure to justify their behaviours and often benefit from a high level of social and legal immunity.

After enabling an understanding of the colonial and patriarchal influences affecting the rights and perception of women in India's past, this research – within its following chapters –

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[383] Vibha Hetu, 'Rape Or 'NOT' Rape: Analysis Of (Six) Case Studies And Narrative Of Victims' (2020) 3 Journal of Victimology and Victim Justice 237.

[384] *id.* at 238.

[385] *id.* at 238

[386] n 217 above.

deconstructs the various intersecting ways in which these influences play out in India's present. With justifications of discrimination that have both been carried over (such as the impossibility thesis) and been created anew (such as the misuse argument), the research uses postcolonial feminist theory to highlight gender-based forms of violence and ineffective legal addressal in India's private sphere. Given the marked differences in various postcolonial nations – as well as various forms of patriarchy – postcolonial feminism as a general theoretical field needs to be further delineated in order to apply to the Indian context without succumbing to generalisations or stereotypes. This research proposes a contribution to the literature through the utilisation of an Indian postcolonial feminist theoretical lens and framework, which may be expanded in scope to include other South Asian nations, formerly under British rule as well.

One main characteristic of this categorisation is its analysis of gender-based discrimination not only through colonial laws, but also through the acknowledgement and dissection of localised patriarchal wrongs. For example, while the practice of dowry was solidified and widely applied through the colonial administration as well as contemporary capitalism, the translation of dowry demands into dowry violence and dowry death is sanctioned by societal discourses – such as the worship of a husband or the expected discipline of a wife.[387] However, in turn, colonialism cannot be completely absolved of blame either as the translation and revival of the Manusmriti, which contained the aforementioned expectations of and rights towards women, was conducted by the British and even contributed to the creation of Hindu personal laws. With these complicated relationships in mind, it is important to realise that blame cannot be removed from, or completely given to, one side or the other. Rather, attention should be given to the process of understanding how patriarchy, colonialism, and all the particularities

[387] These dynamics and dowry in general is discussed in detail within the chapters on dowry death and bride burning.

within, marginalise the causes of women and the violence they face – in order to create effective strategies to work against such marginalisation.

This research seeks to particularly denaturalise violent practices towards women within India's private sphere through an examination of the myths and perceptions that, influenced by patriarchy and colonialism, work to naturalise such violence within society. In addressing the interactions between the legal and the social sphere, theory is used as a tool to critique constructed culture that continues to homogenise discriminatory practices across this vast and diverse nation – just as colonial and patriarchal powers strived to do during the British administration. Breaking the dichotomy between modern practices and traditional practices, western practices and local practices, and the public sphere and private sphere, Indian postcolonial feminism explains that true change can only emerge when an understanding of the ways that both these sides interact with each other, is achieved. In order to achieve these goals, the research particularly examines the issues of marital violence and dowry death through a contextualised Indian postcolonial feminist lens. How this plays out in action is seen within and throughout the part two and part three of this research.

Part Two

A Closer Look: Marital Rape

'All history attests that man has subjugated woman, to minister to his sexual pleasure, to be instrumental in promoting his comfort… he has done all he could do to debase and enslave her mind and now he looks triumphantly on the ruin he has wrought, and says the being he has thus injured is his inferior.'

Shrivastava, Jain and Hazra[388]

[388] Hidayatullah National Law University, Raipur, India and others, 'Marital Rape: A Legalised Sin' (2011) 3 Indian Journal of Applied Research 249.

Chapter Three: Marital Rape – The Legal Framework and its Weaknesses

An Examination of How the Public-Private Divide Shapes India's Current Legal Structure Surrounding Marital Rape

In comparison to unmarried women, many married women in India's private sphere face different forms of violence. Dowry deaths, bride burnings and sati are all forms of violence against women that remain exclusive to married women in the private sphere. Other violent acts, such as honour killings and forced marriages, are prevalent in the private sphere irrespective of marital statuses. However, there is a particular form of violence that transcends the public-private divide and affects women regardless of almost any other factor: rape. Despite being highly under-reported, rape is still known to be India's fastest growing crime. In 2016, there were 40,000 rape cases recorded[389] which breaks down to four rapes per hour. Moreover, statistics show that above and beyond this number, 71 per cent of rape cases go unreported.[390] Regardless of India's large population, the sheer volume of rapes occurring in India is overwhelming.

Even including the number of rapes that go unreported, the statistics are not accurate as none of them include the number of marital rapes that take place in India. As India maintains a marriage-based immunity, it does not acknowledge or criminalise rapes occurring within a marriage. The public and private dimension in India protects this marital rape exemption both

[389] The Independent Advisory Group on Country Information, 'India: Women Fearing Gender-Based Violence' (UK Home Office 2018, 8. More than 19,000 of these were rapes of minors.

[390] National Crime Records Bureau, 'Crime In India' (Ministry of Home Affairs 2006).

directly and indirectly and has been doing so for over a century. The public legal sphere of criminal law, which holds great authority in Indian legal culture, denies jurisdiction over matters surrounding marital rape (while denying it exists) and instead allocates responsibility over addressing this act to the private, civil sphere. Frameworks within civil law struggle to hold accountable a crime that the government denies the very existence of. Other frameworks within civil law hold on to the marital rape exemption even tighter than criminal law does, by pleading various aspects of culture, religion and tradition as their justification. By examining all these aspects, this chapter addresses how the public-private divide shapes India's current legal structure surrounding marital rape and prevents the recognition of and protection from this crime.

This is the first of two chapters within the section on marital rape. While this chapter discusses the legal framework around the issue, the following chapter provides a socio-legal analysis of the same. This chapter lays out the Indian legal framework surrounding marital rape before delving into its shortcomings and its impact on the continued subjugation of the rights of married women in Indian society. As marital rape itself is not criminalised, this chapter will strive to build an understanding of laws and cases on and around the immunity of marital rape - also known as the marital rape exemption (MRE). To do so, it will examine the Indian legal framework and existing laws on rape in general as well as important formal and informal mentions of marital rape in India's legal history. Following an examination of the marital rape exemption in Indian criminal law, this chapter will analyse mentions and absences of marital rape within India's civil law and case law. After looking at the relevant legal framework in its entirety within this chapter, the subsequent chapter addresses social scripts and perceptions that shape the marital rape exemption and allow its continued maintenance.

What is Marital Rape?

Before moving forward, it is important to establish an understanding of marital rape. It may make sense to look for a formal definition. Rath, for example, defines this form of rape as 'unwanted intercourse by a man on his wife obtained by force, threat of force or physical violence or when she is unable to give consent'[391] and elaborates that 'unwanted intercourse' includes any penetration 'against her will or without her consent.'[392] Yet there is also merit in not seeking out a separate definition, but rather stating that the definition of marital rape can be found in the definition of rape itself. This follows the belief that non-marital rape and marital rape, in essence, are the same crime regardless of the victim's marital status to the perpetrator. For this research, the reader is welcome to choose whichever line of thinking provides more clarity.[393] Either way, marital rape is an issue that needs to be discussed with utmost urgency. Bhat and Ullman write that 'marital rape and dowry-related violence are highly prevalent yet overlooked due to the sociocultural context and ideological construct of gender roles in India.'[394] In Indian law, the brutality of marital rape is not even recognised as a concept, let alone made an illegal or criminal offence. Instead, this grave crime is shielded by the legal relationship the perpetrator shares with his victim – and this very relationship makes the victims even more vulnerable and in need of sound legal protection.

Raveena Rao Kallakuru and Pradyumna Soni mention the theory of implied consent and the sanctity of the marital relationship as widely used justifications against criminalising

[391] Priyanka Rath, 'Marital Rape And The Indian Legal Scenario' (2009) 2 Indian Law Journal.

[392] *ibid.*

[393] These definitions and their differences will be analysed in the following chapter.

[394] Meghna Bhat and Sarah E Ullman, 'Examining Marital Violence in India: Review and Recommendations for Future Research and Practice' (2014) 15 Trauma, Violence, & Abuse 62.

marital rape.[395] In utilising the theory of implied consent, the state claims that 'an irrefutable presumption of consent' is created at the time of marriage that cannot be revoked upon.[396] This creates a blanket approval for sexual crimes committed by the husband upon his wife for the duration of their marriage. With a similar end result, the excuse of marital sanctity invokes non-interference from the state when it comes to marital affairs. The marriage is characterised as 'a private sphere which the law must not penetrate into.'[397] Both these defences work to both validate the crime of rape in a marriage and to remove the state from questioning this validation. These excuses, and their consequences, are clearly visible when examining the marital rape immunity in India.

Marital Rape and Indian Criminal Law

Origins: The Marital Rape Immunity and the Indian Penal Code

Within Indian criminal law, rape is thoroughly addressed, and rapists prosecuted, under the articles and sub-articles of Section 375 and 376 of the Indian Penal Code of 1860. Section 375 divides the definition of rape into sub-categories (A), (B), (C) and (D). These sub-categories cover the various forms of sexual intercourse that may qualify as rape.[398] The definition is accompanied by seven descriptions of the absence of consent, of which only one needs to be present for a rape to have occurred.[399] This section also provides two explanations and two exceptions to supplement its definition. The second of these exceptions' states that

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[395] Rao Kallakuru R, and Soni P, 'Criminalisation Of Marital Rape In India: Understanding Its Constitutional, Cultural And Legal Impact' (2018) 11 NUJS L. Rev. 122.

[396] *ibid.*

[397] *id.* at 123.

[398] Indian Penal Code 1860. Chapter 16, Article 375; Appendix A .

[399] *ibid*. and Appendix A.

'sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.'[400]

The History of the Indian Penal Code

Section 375 and 376 hold some interesting and peculiar specifications when it comes to what constitutes rape and who gets charged for the crime. To understand these particularities, which also include the marital rape exemption, it is important to first understand the history of the Indian Penal Code (IPC). Instated on the 6 November 1860, The Indian Penal Code serves as India's official criminal code and holds every person in the country accountable to the crimes within its ambit.[401] The punishments it allocates mainly consists of criminalisation and fines, along with the possibility of the death penalty for certain offences. These consequences can all also be found within the IPC's punishments for rape.[402] Initially, this cornerstone of Indian Criminal Law was known as the Macaulay Code, named after Lord Thomas Macaulay, who was a member of the Council of Governors of India. Macaulay, faced with fragmented laws and the threat of public disorder during the British administration of India, brought in the British law of the time with the claimed hopes of unifying the various factions within the nation to each other – including the British to the Indians.[403] Implementing his vision meant the replacement of an entire variety of Indian cultural and religious laws with a single English code. Not only did this fit into Macaulay's inclination towards universality but it also happened

[400] *ibid*. and Appendix A.

[401] Indian Penal Code 1860. Chapter 1, Preamble.

[402] *id.* at Chapter 16, Article 376; Appendix A.

[403] Deborah Kim, 'Marital Rape Immunity in India: Historical Anomaly or Cultural Defence?' (2018) 69 Crime, Law and Social Change 91.

to 'provide greater centralised control over [the] subcontinent and its many subjects.'[404] This colonial legal framework, which soon became known as the Indian Penal Code, is the same penal code that is used to this day.

The traditional laws that existed before British intervention did not disappear but were instead officially relegated to the private sphere, where religious and local leaders were given jurisdiction over civil matters. Providing a distinct example of the public-private divide within Indian law, the criminal code was created and is maintained in the public while religious or cultural laws are moved away from the state and into the private.[405] Although the penal code was considered forward thinking for its time when newly minted, the transplantation of a western code into a decidedly non-western environment had its consequences. Not only did this criminal code dismiss Indian culture and practices, but it also stunted Indian criminal law by preserving it within a certain period of time - which made it difficult to implement progress since. As the penal code did not come from within the nation to begin with and was not birthed through a process of national debate and situational sensitivity, it has since struggled to make necessary changes to reflect the particularities and progress of the Indian nation. One such relevant example is the continued preservation and protection of the marital rape exemption for more than a century and a half.

The Establishment of an Exemption

[404] *ibid.*

[405] While an elaborate analysis of the public-private divide and how it manifests in India can be found in prior chapters, the next chapter within Part Two of this research focuses on how the public private divide in India particularly affects marital rape law and the culture around this exception.

The marital rape exemption first came into English common law after Lord Matthew Hale – an English judge and jurist – stated in 1736 that 'the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.'[406] This statement created the conceptual impossibility of marital rape, which has been a huge obstacle for women ever since. Saptarshi Mandal writes how, at that point in time 'the irrelevance of the wives' consent/non-consent to sex with husbands was not exceptional but was linked to the legal status of wives in general.'[407]

In the two hundred and fifty years since this statement, English case law saw progressive exceptions being made to this marital rape immunity before the immunity was entirely removed in 1991. This was done through the landmark case of *R* v *R* where the defendant was convicted of attempted rape on his wife, who was living with her parents at the time. [408] The defendant, known as R, took the case to the Court of Appeals. The court judgement went over past exceptions made to the marital rape exemption in English case law before sharing three possible solutions that emerge from these decisions. These consist of 'the literal solution,' which continues to preserve the husband's immunity, 'the compromise solution,' which presumes consent at marriage with the exception of certain circumstances, and 'the radical solution'.[409] This so-called radical solution was a complete abolishment of the

[406] Sir Matthew Hale, 'History of the Pleas of the Crown' (1736) E. and R. Nutt and R. Gosling.

[407] Saptarshi Mandal, 'The Impossibility of Marital Rape: Contestations Around Marriage, Sex, Violence and the Law in Contemporary India' (2014) 29 Australian Feminist Studies 255.

[408] *R* v *R* [1991] UKHL 12; notably also mentioned in Justice J.S. Verma et. al., 'Report of The Committee on Amendments to Criminal Law' (Committee on Amendments to Criminal Law 2013) Chapter 3, Article 73; Appendix C.

[409] *R* v *R* [1991] UKHL 12.

marital rape immunity. Promisingly, the five-panelled court opted for the radical approach and dismissed the appeal. The appeals judgement mentions:

> There comes a time when the changes are so great that it is no longer enough to create further exceptions restricting the effects of the proposition, a time when the proposition itself requires examination to see whether its terms are in accord with what is generally regarded today as acceptable behaviour.[410]

Despite his failure at the Court of Appeals, R appealed once again – this time to the House of Lords. All the five Lords on the case unanimously agreed that '[i]t cannot be affirmed nowadays, whatever the position may have been in earlier centuries, that it is an incident of modern marriage that a wife consents to intercourse in all circumstances, including sexual intercourse obtained only by force.'[411] The outcome of this important case was later reinforced and implemented into statutory law within the Criminal Justice and Public Order Act by the removal of subclause (3) under rape – which had held the marital immunity.[412]

Even with the repeal of marital rape immunity in England and many other countries across the globe, India remains unwilling to discuss the possibility of such a stance. It instead maintains a written and strongly defended protection of the marital rape exemption that can be found within Section 375 of the Indian Penal Code. This explicit and absolute immunity, as

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[410] *ibid.*

[411] *ibid.*

[412] Criminal Justice and Public Order Act 1994; The United Kingdom's repeal of the marital rape immunity was also brought before the European Court of Human Rights by *CR* v *The United Kingdom* [1995] and *SW* v *The United Kingdom* [1995] to object the retrospective application of the consequences of this amendment. The court found these objects to not be valid given law's necessary evolution. These cases are further discussed when looking at international law and international case law in the following chapter.

well as other interactions with marital rape within Section 375 and Section 376, are discussed below.

Developments: Section 375 Then and Now

The crime of rape is mentioned under the section on Sexual Offences within the Indian Penal Code of 1860. Sexual Offences includes Section 375, which lays out the definition of rape, and Section 376, which mentions the associated punishments. There are many promising aspects of Section 375[413] and its contents – including the fact that the clauses within its definition of rape have morphed and evolved over the years in response to the changing times and public pressure. It is well worth noting that the text within Sections 375 and 376 that is seen today looks very different from how they were initially laid out under Macaulay. Although the IPC is now celebrated for its extensive recognition of acts that fall under the definition of rape, this was not always the case.

Criminal Law (Amendment) Act 1983

India's legal understanding of rape found its first significant evolution through an act of custodial rape which garnered widespread attention within the nation.[414] Known as the Mathura Rape Case, the circumstances involved the rape Mathura, a young tribal girl, by two policemen and within the compound of the police station.[415] This incident, occurring in 1972, was brought before the sessions court of Maharashtra in 1974. The court ruled that the defendants were not guilty as Mathura was not a virgin and was therefore deemed

[413] Indian Penal Code 1860. Chapter 16, Article 375; Appendix A.

[414] *Tuka Ram and Anr* v *State of Maharshtra* (1978) The Supreme Court of India.

[415] *ibid.*

'promiscuous' and 'habituated'[416] to sexual intercourse. This, by their reasoning, meant that her consent was implied, and rape could not be proved.[417]

Although the judgement was overturned by the Bombay High Court, the Supreme Court of India reversed the reversal by going back to the initial judgement in 1979. The Court tried to legally reason their decision by citing a lack of distinction between implicit and explicit consent within the definition of rape under Indian criminal law. They also said that the absence of a physical or verbal struggle mitigates the possibility of rape and even speculated whether Mathura had provoked the cops into intercourse as she had been sexually active.[418] This decision and its justifications caused a widespread public uproar, birthing an anti-rape movement in India that would be in effect for decades to come. It also led to the creation of the Criminal Law (Amendment) Act of 1983.[419]

Among the host of changes brought on by this Act, three in particular stand out. The first is the addition of Section 114(A) to the Indian Evidence Act, which states that if the woman says she did not consent, the court has to accept and cannot negate her claim.[420] Secondly, the Act introduced Sections 376 (A), (B), (C) and (D) to the Indian Penal Code, which host a variety of definitions and punishments on particular types of rape – including custodial rape.[421] The third addition states that after sexual intercourse has been proved within a rape trial, the

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[416] *ibid.*

[417] *ibid.*

[418] *ibid.*

[419] Criminal Law (Amendment) Act 1983.

[420] Indian Evidence Act 1872. Section 114(A).

[421] Today, specific punishments for forms of custodial rape can be found under sub-sections (2) and C within Section 376 of the Indian Penal Code 1860, Appendix A.

burden to prove that the act was not rape falls on the defendant.[422] All these provisions show India's initiative, albeit delayed, in working towards furthering the protection and rights of women.[423] Between the Criminal Law (Amendment) Act of 1983 and the next major reformation to rape law in 2013, a few notable court cases also helped slowly expand and progress the definition of rape.[424] Although these cases were not able to change the text of the IPC, they did affect subsequent cases due to the common law system that India utilises.

Criminal Law (Amendment) Act 2013

Despite intermediary steps towards progress and improvements upon laws, it was not until 2013 that the nation saw another thorough investigation into the state of India's rape laws. This amendment was also preceded by an infamous and tragic case in Indian history. In December 2012, a 23-year-old woman was gang-raped and tortured in a moving bus in Delhi. She was fatally injured and, as the nation watched in horror, died within fifteen days of the incident.[425] Named Jyoti Singh but widely known as Nirbhaya,[426] this woman's gruesome rape

[422] This act also made great stride in protecting the victim's identity and strengthening existing provisions.

[423] Progress was also made within legislation associated with the IPC, such as the Criminal Procedure Code. For example, the Criminal Procedure Code (Amendment) Act of 2008 created a three-month deadline for dealing with cases of child rape.

[424] *Madan Gopal Kakkad* v *Naval Dubey* (1992) Supreme Court of India – here, sexual intercourse is interpreted to include slight or partial penetration; *State of Uttar Pradesh* v *Babulnath* (1994) The Supreme Court of India and *Guddu* v *State of Madhya Pradesh* (2007) Supreme Court of India – the courts ruled that there is no need for hymen to be broken during rape; *State of Uttar Pradesh* v *Babulnath* (1994) The Supreme Court of India and *Fateh Chand* v *State of Haryana* (2009) The Supreme Court of India – there was recognition of the possibility of rape without external injury.

[425] *State Through Reference* v *Ram Singh & Ors* (2014) High Court of Delhi; *Mukesh & Anr* v *State For Nct Of Delhi* (2017) Supreme Court of India.

[426] Nirbhaya means 'braveheart' – in accordance with Indian law, her real name was not revealed while the case was ongoing to protect her identity.

incited great unrest amongst the Indian population. In response, the government called for a committee to address the current provisions for crimes against women within Indian criminal law – including rape – and to make recommendations for improvement.

This committee was informally known as the Verma Committee, after the committee's chairman – J.S. Verma. The committee received numerous suggestions from civil society,[427] and brought them together in a 600-page report submitted in March 2013. This was a dynamic and tumultuous time in India for all those invested in progress regarding the rights of women and laws on sexual and gender-based violence. Saptarshi Mandal writes how, 'between December 2012 and March 2013, popular and activist discourse around rape in India assumed spectacular dimensions with people going out on the streets, demanding security for women against violence and long-pending rape law reforms.'[428] After submitting their report, the committee's proposed changes were evaluated by the government – with some recommendations being turned into the Criminal Law (Amendment) Act in April 2013.[429]

Years earlier, a 1996 case known as *Smt Sudesh Jhaku* v *KCJ & Ors* had pushed for an expansion of the IPC's definition of rape to include more than just penile-vaginal penetration.[430] The petitioners of this case propagated to change the definition so that any kind of penetration, including an object, in any female body part could still be considered as rape.

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[427] Over 80,000 suggestions within 3-4 months

[428] n 407 above, 256.

[429] An important change made through the Verma Report and its consequent Amendment Act was the specification and expansion of the definition of rape within Section 375. This section initially just stated 'sexual intercourse' which was taken to mean penile-vaginal penetration alone. A change in India's understanding of the acts that can be defined as rape was well past due. As far back as 1971, the Law Commission of India had recommended expanding the definition of rape within their 42nd report.

[430] *Smt. Sudesh Jhaku* v *KJC & Ors* (1996) Delhi High Court.

At the time, the court rejected this proposition; claiming that it would be too confusing against the generic definition of rape in the IPC.[431] Following the atrocities of the Nirbhaya case, the 2013 Amendment Act expanded the definition of rape under Section 375 by specifying clauses (a) to (d), which provide definitions of what rape could constitute of and include both of the concerns mentioned above.[432] Since this 2013 Act, there have been a few other rulings and adjustments that led up to the sections on Sexual Offences within the IPC reading as they do today.[433]

The evolution of India's understanding of rape within its criminal law indicates a capacity for change and progress, albeit slowly and, at times, following great upheaval. However, it cannot be ignored that the government tends to wait until it has a metaphorical bullet to its head before making these advancements. In fact, Zoe Brereton observes how, despite the drafter's intentions for constant review of the IPC, 'reform of the sexual offence provisions has been characterised by knee-jerk legislative responses following public outcry in high-profile cases' – including the reforms within the amendment acts mentioned above.[434]

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[431] *ibid.*

[432] Indian Penal Code 1860. Chapter 16, Article 375. This act also added Section 53A to Indian Evidence Act to say that evidence regarding the victim's past sexual appearance or speculations about her character are inadmissible and made changes to the Indian Evidence Act, which works with the IPC.

[433] For example, as shared by The Independent Advisory Group on Country Information, 'India: Women Fearing Gender-Based Violence' (UK Home Office 2018), 'In April 2018, India's cabinet approved the death penalty for rapists of girls below the age of 12. The report added 'In cases of the rape of a girl below the age of 16, the cabinet increased the minimum punishment to 20 years from 10 years. The penalty for the rape of women was raised to 10 years from seven years.'

[434] Zoe Brereton, 'Perpetuating myths of women as false complainants in rape cases in India: culture v The law' (2017) 41 International Journal of Comparative and Applied Criminal Justice 1-2, 43 and 45.

For more growth to occur, it is important to look back upon how past progress in Indian rape laws came about, including what factors motivated the government towards change and where this progress fell short. With constant advocacy and thorough research, an understanding of change in the past can help replicate progress in the future without the need of a shocking catalyst. Despite having displayed occasional bursts of progress, the Indian Penal Code's rape laws are lagging well behind when it comes to making necessary changes to its marital rape exemption.

The Maintenance of Marriage Based Immunity

The marriage-based immunity is one of two exemptions within Section 375's definition of rape; the first of these exemptions being 'a medical procedure or intervention shall not constitute rape.'[435] The second exemption reads that 'sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.'[436] The text within this exemption states in such absolute terms that sexual interactions within a marriage cannot be rape that it leaves no scope for suggesting otherwise. It aims to invalidate the possibility of marital rape by making a clear and direct statement that, within its specified parameters for age, rape cannot exist within matrimony. Yet, in examining the barriers that this exemption and its following clauses present, there is a lot to learn about India's legal take on marital rape.

Age Discrepancies in the Marital Rape Exemption

[435] Indian Penal Code 1860. Chapter 16, Article 375; Appendix A.

[436] *id.* at Chapter 16, Article 376B; Appendix A.

It is important to understand both the mentions and the silences regarding marital rape under Section 375 and Section 376. To begin with, the age stipulation under the marital rape exemption[437] inversely implies that if the wife were more than fifteen years of age, her husband could force sexual intercourse without legal consequence. This is shocking for many reasons – not least of all the fact that the minimum legal age of marriage for women in India has been 18 years of age since 1978.[438] How then does this law get away with saying that women between the ages of fifteen and eighteen have no legal protection from unwanted sexual intercourse by their husbands when their marriage itself is against the law and their relationship as husband and wife a legal impossibility?[439] Promisingly, in October 2017 the Supreme Court of India ruled that this bridal age within rape law should be increased to 18 years of age, which would make all non-consensual sex within a marriage where the wife is between 15 and 18 years old, illegal.[440] While this ruling was taking place, the Centre (a synonym for the Government of India) had protested that the 15-year age specification exists in order to protect child marriages, which they claimed as a reality of India. They argued that this second exception exists 'so as to give protection to husband and wife against criminalising the sexual activity between them.'[441] Seemingly in response, the Supreme Court stated that 'exception 2 in Section 375 of IPC granting protection to husband is violative of constitution and fundamental rights of minor bride.'[442] Therefore this retort and insistence of rights to a 'minor bride' indicates that it is not sex but sex without consent – given the reality of child marriage in India – that the Supreme Court wishes to outlaw. Such a statement may indicate an indirect acknowledgement of the

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[437] *id.* at Chapter 16, Article 376B; Appendix A.

[438] Special Marriage Act 1954.

[439] It is worth noting that child marriage is not considered void but voidable in Indian Law.

[440] *Independent Thought* v *Union of India* (2017) The Supreme Court of India.

[441] Amit Anand Choudhary, 'Supreme Court: 'Sex With Minor Wife Is To Be Considered Rape', Says Supreme Court | India News - Times Of India' (*The Times of India*, 2017).

[442] *ibid.*

existence of marital rape from the Supreme Court of a country which has been adamantly denying the possibility of non-consensual spousal sexual intercourse.

The Centre's statement also contradicts its own laws as, given that the legal age for marriage in India is 18 for women and 21 for men, claiming to protect a husband and wife under this required minimum is undermining to the government's own protections and laws against child marriage. Unfortunately, despite this 2017 ruling, the Indian Penal Code remains unchanged – still claiming that sexual intercourse or sexual acts towards a wife 15 years or above cannot constitute of rape. This focus on the IPC's inclusion of wives between 15 and 18 showcases the intersecting and convoluted nature of this exemption, which can create much controversy and discussion over just one aspect of its wording.

Separate Crime for Separated Wives

The accepted rape of minors in a marriage is not the only place where discrepancies are seen within the little and indirect mention of marital rape in the Indian Penal Code. While Section 375 of the IPC provides the criteria for defining rape, Section 376 and all its sub-sections outline the punishments for the crime of rape. In this case, the word punishment is pluralised as this section lays out multiple punishments depending on various factors, such as the age of the victim, the job of the perpetrator (to determine level of authority), the state of the victim post-offence and, importantly, the marital status of the perpetrator towards the victim. Added to the IPC in 1983, Section 376B, titled 'Sexual intercourse by husband upon his wife during separation,' states that:

> Whoever has sexual intercourse with his own wife, who is living separately, whether under a decree of separation or otherwise, without her consent, shall be punished with imprisonment of either description for a term which shall not be less than two years but which may extend to seven years, and shall also be liable to fine.
>
> In this section, "sexual intercourse" shall mean any of the acts mentioned in clauses (a) to (d) of section 375.[443]

By stating that a husband who has non-consensual intercourse with his separated wife – separated legally or otherwise – can shall be subject to punishment, this provision simultaneously goes farther than before and yet not far enough.

At first glance, Section 376B seems to acknowledge the possibility of rape within a marriage, even if subject to the separation of the husband and wife. This acknowledgement would indicate the absence of implied and irrevocable consent by the bride at the time of matrimony – which is one of the cornerstones of the marital rape exemption in India.[444] This section also directly refers to Section 375 for a definition of sexual intercourse and mention clauses (a) to (d),[445] which also serve as the definition for rape – implicitly making these terms of non-consensual sexual intercourse and rape synonymous. However, what is curious about the provision for separated wives is that, despite being categorised under punishments for rape, it does not itself mention the word rape but instead refers to punishments for sexual intercourse without consent – skirting around creating the possibility of rape within a marriage.[446] Unlike

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[443] Indian Penal Code 1860. Chapter 16, Article 376B; Appendix A.

[444] The concept of implied consent is mentioned, among others, in n 395 above.

[445] Indian Penal Code 1860. Chapter 16, Article 375 and 376B.

[446] *ibid.*

countries that distinguish between rape and non-consensual sex in their legislation by stating that the former needs to be accompanied by violence or intimidation, India makes no such demands in its definition of rape. Therefore, one can only conclude that this difference in terminology – and the lack of an outright claim of rape when it comes to separated married women – only exists to protect the marital rape exemption prima facie. The differing wording serves as a wilful distinction so as not to jeopardise the marital rape exemption. Whether this is the reason or not, a change in terminology does not automatically make rape and non-consensual sexual intercourse two separate offences. Therefore, the IPC's addition of Section 376B can and should be considered as another step towards a legal acknowledgement of marital rape.

Another way in which this provision for separated wives does not go far enough is in the punishment it allocates towards the defendants. While under 'normal' circumstances the punishment for rape is set at seven years to life imprisonment,[447] the punishment under sub-section 376B lies at two to seven years of imprisonment. This reduced punishment, along with a refusal to use the term 'rape', formally places less gravity on the violence that a separated woman endures at the hands of her husband. Noticing this discrepancy, Rao Kallakuru and Soni call out the state's 'reluctance to classify marital rape as rape, but at best as a lower form of sexual misdemeanour.'[448] This example of 'loopholes in the law' words rape as non-consensual sex when it happens within a marriage and allocate it a smaller punishment[449] –

[447] Normal as defined by the IPC; this minimum is increased for particularities such as the victim being under 16 or the perpetrator being a figure of authority or state official; the minimum of seven years used to be 10 years but, unfortunately, was reduced in 2018.

[448] Raveena Rao Kallakuru and Pradyumna Soni, 'Criminalisation Of Marital Rape In India: Understanding Its Constitutional, Cultural And Legal Impact' (2018) 11 NUJS L. Rev. 126.

[449] n 394 above, 65.

even when the facts of the case remain nearly identical to other cases of legally recognised rape.

Yet, optimistically, and with great caution, progress can be found through the Supreme Court's aforementioned, and yet to be implemented, verdict changing the age from fifteen to eighteen within the marital rape exemption. As married women under eighteen would have access to protection under rape laws, such a verdict indicates an acknowledgment of the existence of marital rape. Furthermore, if this can be dismissed simply as a case of protecting minors, surely the clause on non-consensual sexual intercourse when the couple is separated steps in to insist that marital rape, in some form or the other, is not as mythical as the government believes it to be.

The Two Categories

Within the clauses, definitions and debates of the Indian Penal Code's text on rape and its punishments, only two categories of married women are protected by law. Firstly, the law protects married women under the age of fifteen – women who should not be legally married to begin with. Secondly, the Indian Penal Code protects women who are separated from their husbands, under a decree of separation or otherwise, but whose experience – which looks like rape but is not called rape – once again does not gain equal protection from the law. Outside Section 375 and its constituents, the only other related protection in criminal law for married women from their husbands can be found under Section 498A of the Indian Penal Code.[450] This section leaves room for the prosecution of the 'husband […] subjecting her to cruelty'.[451]

[450] Indian Penal Code 1860. Chapter 16, Article 498A; Appendix A.

[451] *ibid.*

Unfortunately, it has not and could not be used to create a valid case in court as long as marital rape itself is treated as an impossibility. Therefore, an entire landscape of married women above the age of fifteen, roughly 300 million,[452] find no protection in Indian criminal law from rape by their spouses.

Past Discussions on Criminalisation

While mourning the legal absence of marital rape in the pages of criminal law, examining past criminalisation attempts helps create an understanding of how and why reform has been thwarted for decades. There are two notable attempts that not only move the struggle to criminalise in the right direction but also reveal more about the challenges that criminalisation is facing.

Attempt Number One: The Law Commission

The first of these two attempts were made by the Law Commission of India. The Law Commission serves as an advisory body to the Indian Ministry of Law and Justice. It is an ad-hoc and term-based committee with the purpose of creating legal reform in India. Initially created under British rule to help codify a myriad of English and Indian legal practices, the first Law Commission existed as far back as 1834. It was this Commission that produced the Indian Code of Civil Procedure and the Indian Evidence Act, among other legal acts and provisions. Therefore, the Law Commission of India certainly had, and has, influence and power within the state. Given this, it is quite promising to see that the 42nd Law Commission Report, released

[452] India 2011 Census data; found at <https://censusindia.gov.in/2011census/C-series/c-6.html>.

in 1971, suggested the criminalisation of marital rape.[453] Unfortunately, this suggestion never went any further as, although the Commission is an Executive body, it is no binding power and can easily be superseded by the government. Eight years later, the Law Commission released their 84th report, which no longer favoured the criminalisation of marital rape.[454] In 2000, the Law Commission released its 172nd report titled 'Review of Rape Laws'.[455] In discussions leading to this report, when the marital rape exemption was brought to the table, it was argued that 'when other instances of violence by a husband toward wife was criminalised, there was no reason for rape alone to be shielded from the operation of law.'[456] However, the Law Commission refused to postulate this position in their report.[457] This sequence of events reveals the fragility and quick dismissal of any movement towards criminalisation. This interaction also encapsulates the tension between the legal sphere and the government on the question of the marital rape exemption.

Attempt Number Two: The Verma Report

The criminalisation of marital rape was also proposed within the government commissioned Verma Report – the report which led to the 2013 Criminal Law (Amendment) Act. During the protests and calls for reform following the Nirbhaya gang-rape, 'the issue of marital rape emerged as one of the key points of contention between feminists and the state and also as a subject of popular debate and discussion, in a manner that had not happened

[453] Law Commission of India, 'Forty-Second Report' (Government of India, Ministry of Law 1971); n 388 above, 250.

[454] *ibid.*

[455] Law Commission of India, 'Review Of Rape Laws' (Government of India, Ministry of Law 2000).

[456] n 448 above.

[457] Law Commission of India, 'Review Of Rape Laws' (Government of India, Ministry of Law 2000).

before in contemporary history.'[458] Within the Verma Report, clauses 72-80 of chapter three, titled Rape and Sexual Assault, particularly mentioned marital rape and went into extensive detail on why it should no longer be treated as an exemption in Indian law. The report also laid down action steps, calling not only for the exemption to be repealed and the act criminalised, but also for equal punishment for marital rape and stranger rape alike.[459] After resoundingly rejecting all of the report's clauses relating to marital rape, the government mentioned their justifications for this rejection. Mandal proficiently divides these justifications into three main points, with the government saying:

> (1) that marriage in India was viewed differently from that in several Western countries which had repealed the MRE; (2) that allowing wives to bring rape charges against husbands was prone to 'misuse' by wives seeking to settle scores with their husbands on other accounts and (3) that even if marital rape was not criminalised, wives did have legal remedies in the civil law domain of domestic violence, and hence were not without legal protection.[460]

Discussed in detail within this research, the government's response clearly invokes culture, social myths and perceptions and the public-private divide in order to avoid tackling the marital rape exemption. These excuses reflect a superiority of national ideologies and practices that are seemingly threatened by or incompatible with the criminalisation of marital rape, rather

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[458] n 407 above, 257.

[459] Justice J.S. Verma et. al., 'Report of The Committee on Amendments to Criminal Law' (Committee on Amendments to Criminal Law 2013) Chapter 3 Article 72-80; Partially found in Appendix C.

[460] n 407 above, 257. These very three excuses were utilised as a justification as recently as 2021 by Supreme Court advocate Monika Arora in Pratiksha Baxi and Monika Arora, 'Times Face-Off: Should It Be a Crime for A Man to Rape His Wife?' *Times of India* (2021) <https://timesofindia.indiatimes.com/india/times-face-off-should-it-be-a-crime-for-a-man-to-rape-his-wife/articleshow/86470717.cms>.

than the protection of women's equality and gender justice. Before conducting a detailed postcolonial feminist examination of the government's justifications for the marital rape exemption, it is important – and fairly simple – to address whether the government's claim that enough legal remedies exist within civil law is valid.

Indian Civil Law

India's criminal justice system not only refuses to prosecute marital rape, but it also protects the legal immunity and denies the existence of this crime. This provides an extended complication for the cause of criminalisation, as the task ahead requires getting the possibility of marital rape acknowledged before advocating for criminal sanctions. To understand the hurdles involved in each of these steps, it is important to supplement the discussion on criminal law with how civil law in the private sphere reacts to the concept of marital rape. Although the marital rape exemption first came from the British, it is now internally reinforced by the public and private sphere, who constantly pass the responsibility for the continuation of this immunity between each other.

The Perfect Loophole

The Indian government claims that civil law satisfactorily provides for victims of marital rape. Yet, the most relevant piece of civil law, known as the Protection of Women from Domestic Violence Act (PWDVA) of 2005, fails to include marital rape within its ambit as the government itself is still to acknowledge the existence of this offense. In turn, the government and the public sphere hesitate to remove the marital rape exemption as they do not wish to interfere with the privacy associated with the domestic sphere or to offend any cultural or

religious particularities found under another form of civil law, known as Religious Personal Laws (RPLs). These messy relations serve as a seemingly perfect loophole for the government to keep making excuses regarding its regressive stance on this aspect of the rights of married women. This section begins by arguing that – contrary to what the government claims – the PWDVA does not hold sufficient legal remedies for wives who are the victims of marital rape. Following that, the section will briefly mention indirect references to marital rape within Religious Personal Laws before analysing a few cases from the small selection that make up India's court cases on marital rape to see if and how the supposedly existing provisions play out.

Provisions on Sexual Abuse and the Multiple Abuse Argument[461]

The Protection of Women from Domestic Violence Act, also known as the PWDVA, is the foremost civil legislation for married women in India. Created in 2005, this act provides for wives, female live-in partners, and female relatives living in the household. The PWDVA was celebrated for its scope of recognition regarding domestic abuse. Providing an unprecedented definition of domestic violence within Indian legislature, this Act recognises physical, emotional, verbal and sexual abuse as categories of domestic violence. The purpose of the act is stated as:

[461] This section will focus solely on legal provisions. An examination of various cases resulting from these provisions will take place in the section after.

> An Act to provide for more effective protection of the rights of women guaranteed under the Constitution who are victims of violence of any kind occurring within the family and for matters connected therewith or incidental thereto.[462]

Defining Sexual Abuse

Under Chapter Two on Domestic Violence, Article Three Sub-Section (a) includes sexual abuse as one of the forms of violence.[463] Within the section, Article I(ii) further defines sexual abuse as 'any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman'.[464] Although the recognition of and response to sexual abuse is promising, it is a stretch to assume that such a recognition applies to marital rape as well. The definition within this document does not include specific acts and this omission serves as a double-edged sword. On one side, the vagueness could be supposed to benefit women as it allows the inclusion of all forms of sexual abuse. On the other side, and how it plays out in reality, the lack of a recognition of marital rape makes it highly unlikely that this vagueness can be utilised to the favour of complainants who would like to include rape within the sexual abuse clause.[465] In fact, there is no mention of the word rape in the PWDVA; neither in this clause nor anywhere else in the entire document. Such an omission is not only detrimental to marital rape but also affects the rape of children and relatives through its lack of acknowledgement within a cornerstone legislation on domestic violence.

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[462] Protection of Women from Domestic Violence Act 2005. Introduction.

[463] *id.* at Chapter Two, Article Three, Sub-section (a).

[464] *ibid.*

[465] n 403 above.

Unacceptable Standards and Dangerous Assumptions

The government's solution here is no solution at all. In order for a victim of marital rape to invoke clauses under the PWDVA, the violent act of rape would need to have been accompanied by other more conventionally recognised elements of domestic abuse; such as bleeding, bruises or other wounds. As a result, 'non-consensual sex in marriage, even when it has legal consequences, is not recognised for what it is. Instead, couched in a broad understanding of domestic violence, an act of non-consensual sex derives its legal significance from other accompanying acts of violence.'[466] This requires and reinforces the misconception that rape cannot occur without physical evidence of brutality and also supposes that non-consensual sex is not an act of violence in itself. Given an absence of mention and the need for multiple abuses, statements claiming that civil law sufficiently counteracts the marriage-based immunity in criminal law are simply not true. Substituting legal acknowledgement for adjacent provisions both devalues the crime of marital rape and misrepresents the definition of this crime by implying that accompanying acts of physical or other abuse need to appear along with the rape.[467] Furthermore, the government's reliance on a loophole – where marital rape is allocated to civil law without any legal acknowledgement of the crime itself – is quite dangerous, as it allows the state to get away with claiming that there is no need to acknowledge or criminalise marital rape at all.

The Scope of Remedies within the PWDVA

[466] n 407 above, 265.

[467] This had not been required within rape law since *Fateh Chand* v *State of Haryana* (2009) The Supreme Court of India; which recognised the possibility of rape without external injury.

Even if the PWDVA were to acknowledge marital rape as a standalone offence, the remedies this Act offers are not akin to what criminalisation would provide. Firmly placed in civil law, the remedies within the PWDVA include protection orders, separate residences or right to remain in the matrimonial home, payment of maintenance and compensation or custody orders.[468] These short-term solutions leave aggrieved women with only two options. The first is to stay married under the hope that whatever the protection orders or payments provided are enough to stop the recurrence of rape. The second is to file for a divorce which, in the small chance that it is accepted, leave many women shunned and destitute. Repealing the marital rape immunity in criminal law would help create a viable and necessary third option of criminalisation so that women facing marital rape do not have to choose between safety or shame.

Case Law on Marital Rape

Having discussed the presence, and absences, of marital rape in laws governing the public sphere and those governing the private, this section seeks to understand the ways in which mentions of marital rape appear in court cases across the nation – both directly or indirectly. Given the vocal and often reinforced exemption, not many cases directly cite marital rape as the charge. Moreover, courts often easily dismiss the issue by stating that 'such aspects are better left to the domain of the Legislature and the decision thereon is not for the courts.'[469] For example, in the 2015 case of *Rihana* v *Azzimuddin*, as a case among many, the Delhi district

[468] Protection of Women from Domestic Violence Act 2005.

[469] *Anil Dutt Sharma* v *Union of India & Ors.* (2015) Delhi High Court; n 403 above. This is the same argument that was made by the Supreme Court during the Mathura case in reference to implicit and explicit consent – referenced within this research under Developments: Section 375 Then and Now.

court dismissed the complainants claim of repeated rape by her husband by simply stating that marital rape is not recognised under India's criminal justice system.[470]

The marital rape immunity and the perception of marital norms also affect cases where the rapist is not the husband. In 2005, Imrana, a married woman, was raped by her father-in-law. Following the rape, her village council ruled that Imrana should now leave her husband, marry her rapist and consequently treat her husband as her son. The panchayat declared that, in light of her rape, her current marriage was now void.[471] In defiance of this judgement, Imrana took the case to a secular court, who found her rapist to be guilty.[472] Although the All India Muslim Personal Law Board was in favour of the court ruling, many Muslim clerics, including the chairman of the Shariat court of Muzzaffarnagar, stated that Imrana's husband should leave her.[473] In another and more recent case, a village council forced a 19 year old to marry her rapist, following his arrest for the rape, so that he would be cleared of charges in the legal case. After the marriage, she was harassed by her in-laws, who were asking her to pay the legal costs of the rape case. She committed suicide seven months later.[474] Aside from making a farce out of the law, this case paints the perfect picture of the absurdity of the marriage-based immunity as a rape case in full session was suddenly considered null and void after the production of marriage photos.

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[470] *Rihana* v *Azzimuddin Ors* (2015) Delhi District Court.

[471] The Economic Times, 'Imrana's Father-In-Law Found Guilty - The Economic Times' (2006).

[472] By Districts and Session court judge R D Nimesh (case not found in archives).

[473] The Economic Times, 'Imrana's Father-In-Law Found Guilty - The Economic Times' (2006).

[474] Shehab Khan, '19-Year-Old Forced To Marry Her Rapist Kills Herself' (*The Independent*, 2016) <https://www.independent.co.uk/news/world/asia/rape-survivor-kills-herself-forced-marriage-india-a7380536.html>.

In March 2022, the Karnataka High Court took a step in the right direction during the case of *Hrishikesh Sahoo* v *State of Karnataka* when they refused to drop the charges of marital rape against the defendant.[475] While doing so, the judge insisted that 'if it is punishable to a man, it should be punishable to a man albeit, the man being a husband.'[476] Regarding the current state of Indian criminal law on marital rape, the judge also said that the exemption, 'in the peculiar facts and circumstances of this case, cannot be absolute, as no exemption in law can be so absolute that it becomes a license for commission of crime against society.'[477] Although this is promising on an individual level, it does not create a substantive change in the system.[478] Firstly, the judgement itself specified that its recognition of marital rape does not constitute a striking down of the exemption. Secondly, though the judge writes how no exemption is absolute, lawyer Rebecca John, an expert on the marital rape exemption, insists that the language of the MRE is absolute – along with other absolute provisions scattered throughout criminal law.[479] Finally, and perhaps most disappointingly, this decision by the Karnataka High Court cannot be used as a precedent due to the court's own specification of allowing the consideration of marital rape because of 'the peculiar facts of this case.'[480] Therefore, without a clearer set of guidelines – which the court is not qualified to make in the continued existence of a marital rape exemption – this order 'cannot be directly applied to other cases with different factual circumstances.'[481] However, this case remains important as a

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[475] *Hrishikesh Sahoo* v *State of Karnataka* (2022) Karnataka High Court.

[476] *id.* at Article 29.

[477] *id.* at Article 31.

[478] *Hrishikesh Sahoo* v *State of Karnataka* (2022) Karnataka High Court.

[479] Rebecca John quoted by Vakasha Sachdev, 'Karnataka HC's Marital Rape Order May Sound Great – But Is 'Legally Untenable' (*The Quint,* 2022). This includes provisions such as the prohibition against prosecuting a child under seven years of age.

[480] *Hrishikesh Sahoo* v *State of Karnataka* (2022) Karnataka High Court, Article 31.

[481] Vakasha Sachdev, 'Karnataka HC's Marital Rape Order May Sound Great – But Is 'Legally Untenable' (*The Quint,* 2022).

potential indication of a change in judicial sentiment, and it deserves continued attention as the trial proceeds and a verdict is reached. Following this chapter's thorough examination of the legal facets regarding marital rape and its immunity, the next chapter delves into an analysis of how, against growing odds, the marital rape exemption is firmly maintained and constantly reinforced.

Chapter Four: Marital Rape – The Role of Scripts and Perceptions

An Examination of How the Public-Private Divide, Theories and Perceptions Shape India's Current Legal and Social Structures Surrounding Marital Rape

An analysis of the complex legal systems surrounding crimes against women in India often raises more questions than it answers. As seen in the previous chapter, this is also true for marital rape. Therefore, this chapter aims to provide some answers – especially to the prominent question of how the marital rape exemption (MRE) continues to exist with close to total immunity.[482] It will do so by examining legal and social perceptions surrounding marital rape in India to understand the maintenance and reinforcement of this crime. The previous chapter began by tracing the history of the marital rape exemption within the Indian Penal Code (IPC). The IPC maintains an exemption created by the British and explicitly mentions that any form of sexual intercourse within a marriage cannot be categorised as rape.[483] Despite including provisions for victims of marital rape who had been separated from their husbands, the IPC refuses to categorise this form of rape within Section 375.[484] Therefore, it is clear to see that, even though criminal law has a 'regulatory function of influencing and controlling individual and social behaviour,' the IPC contains almost negligible parameters when it comes to domestic forms of sexual violence.[485] Saptarshi Mandal highlights how, instead, 'the criminal law itself is regulated by the culturally valued notion that marriage must be shielded from

[482] As a reminder, the previous chapter adopted the definition of marital rape as, 'unwanted intercourse by a man on his wife obtained by force, threat of force or physical violence or when she is unable to give consent,' as found within Hidayatullah National Law University, Raipur, India and others, 'Marital Rape: A Legalised Sin' (2011) 3 Indian Journal of Applied Research 249.

[483] Discussed in the previous chapter under Origins: The Marital Rape Immunity and the Indian Penal Code.

[484] Indian Penal Code 1860. Chapter 16, Article 375.

[485] Saptarshi Mandal, 'The Impossibility Of Marital Rape' (2014) 29 Australian Feminist Studies 258 and 259.

public scrutiny and its continuance must be ensured at all costs.'[486] More often than not, the party made to bear the cost is the victim.

The government's priorities within the Indian Penal Code were made clear through their response to the 2013 Verma Report.[487] Reacting to a section requesting the criminalisation of marital rape, the government provided three main justifications for why the exemption would continue to exist. In this chapter, these justifications, as well as the social and legal norms that surround them, will be explored in further detail. This allows us to build a detailed, if highly patriarchal, understanding of how and why a culture of impunity continues to thrive in India; where husbands are given 'a "license to rape" without fear of repercussion.'[488] The government's justifications for the MRE includes the argument that, (1) marriage is different in India, (2) women will misuse any additional provisions, and that (3) there are enough civil remedies that already exist on the issue of marital rape.[489] Although briefly mentioned below as well, this final argument was addressed and disproved in the previous chapter, where civil legal remedies were shown to be insufficient, misunderstood, and even proponents of a patriarchal ideology themselves.[490] Moreover, none of these remedies have a preventive capacity, as, due to the nature of the system, 'a victim is unlikely to seek a decree nisi of divorce, separation order, or a separation agreement before being raped where there is no prior

[486] *id* at 259.

[487] Discussed in the previous chapter under Attempt Number Two: The Verma Report.

[488] Deborah Kim, 'Marital Rape Immunity in India: Historical Anomaly or Cultural Defence?' [2017] Crime, Law and Social Change.

[489] n 485 above, 257. Other common justifications include the argument that marital rape is not a widespread issue and that the physical and mental damage from marital rape is less severe. The author hopes that this chapter will also help address these other arguments. These arguments are mentioned, among other sources, by P K Chaturvedi, 'A Legal History of Marital Rape: The Erosion of Anachronism' (2010) 1 Indian Journal of Law and Justice 122.

[490] Discussed in the previous chapter under Civil Law and the Requirement of Multiple Abuses.

history of marital disagreements or mental or physical abuse.'[491] Therefore, despite the government's attempt to characterise marital rape as a private matter for the private sphere, it is plainly evident that the existing civil remedies are not enough.

This chapter focuses mainly on the social and cultural acceptance of the first two justifications of sacred Indian marriages and the misuse argument – as well as the legal influence of such (mis)understandings. These unsubstantiated arguments were not only cited by the government as a response to the 2013 Verma Report but are still continually being cited by those opposed to the criminalisation of marital rape. As recently as September 2021, Monika Arora, a Supreme Court advocate, shared in a Times of India article that 'criminalising sexual acts in marriage will impact the family system and the social fabric of this country, and is prone to gross misuse.'[492] The particularities of marriage in India and the misuse argument can be better understood by examining the cultural idolisation of marriage, the impossibility thesis and its lasting influence, as well as widespread rape myths and the misinformation they spread. Each of these factors, both separately and together, shape and allow the maintenance of the marital rape exemption. While an understanding of marriage in India through a social and legal lens contextualises the marital rape exemption, the impossibility thesis serves as one of the primary legal arguments to maintain this exemption. Similarly, various rape myths construct a social argument that shapes the marital rape exemption outside law. By utilising a feminist and post-colonial lens, this chapter also showcases how all these factors influence and are influenced by the social and legal public-private divide.

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[491] Stacy-Ann Elvy, 'A Postcolonial Theory of Spousal Rape: The Carribean and Beyond' (2015) 22 Michigan Journal of Gender & Law 1 117.

[492] Arora in Pratiksha Baxi and Monika Arora, 'Times Face-Off: Should It Be A Crime For A Man To Rape His Wife?' *Times of India* (2021) <https://timesofindia.indiatimes.com/india/times-face-off-should-it-be-a-crime-for-a-man-to-rape-his-wife/articleshow/86470717.cms>.

In addition to addressing the justifications made as a response to the Verma Report, the social arguments examined within this chapter are also vital in creating an understanding of marital rape that will eventually, hopefully, lead to its criminalisation. Such future criminalisation would be a two-step process wherein, firstly, the exemption must be removed and, secondly, positive legislation must be made. In this chapter, an analysis and discreditation of the impossibility thesis helps remove the exemption, while dissecting rape myths highlights the necessity of creating positive laws that address the issue. Finally, this chapter also aims to tackle many patriarchal, and often colonial, ideologies that influence the marital rape exemption. As an example, Stacy-Ann Elvy remarks that 'British patriarchy provoked the development of four justifications for affording husbands freedom from prosecution if they engaged in forced sexual intercourse with their wives: (1) the implied consent theory, (2) the unities theory, (3) the property theory, and (4) the privacy and reconciliation theories'[493] All four of these theories find a place within various sections of this chapter, where they are explained and examined.[494] This chapter will critically assess the social values and assumptions that surround the marital rape exemption, and affect related laws, to understand how such an exemption continues to be maintained and reinforced.

Legal and Social Perceptions of Marriage in India

The first section of this critical assessment is prompted by a question raised and left unanswered by the previous chapter; despite its legal provisions, however superficial, for other

[493] n 491 above, 103.

[494] Implied consent and property in impossibility thesis; unities and privacy/reconciliation in rape myths.

forms of violence against women, why does India refuse to remove its marital rape exemption?[495] Deborah Kim shows a similar frustration in saying:

> While many countries have responded to demands for gender equality and changing societal norms by repealing the marital rape immunity, commentators have expressed concern that India remains trapped in a 'time capsule', clinging to the immunity as an outdated legal inheritance from the British colonial era.[496]

To understand how this explicit immunity continues to exist, it is first necessary to examine the delegation of legal responsibility, particularly regarding marital matters, between the public sphere and the private sphere – and the impact of this division on society. Srimati Basu marks this division, and its discrimination towards women, by explaining how 'the Indian Constituent Assembly produced a postcolonial legal code where gender equality was asserted as a fundamental right in the constitution but was undermined by systems of "Personal" law governing families which retained blatant legal subordination [of women].'[497] In this manner, the provision for equality within the Indian Constitution was almost immediately undermined by the preservation of Religious Personal Laws (RPLs) within the Indian Legal Framework.

A discrepancy in the laws on marriage and marital violence between the public, criminal sphere and the private, civil sphere also reinforced the idea that issues within the family are private matters and should be dealt with by the family themselves, rather than by

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[495] This does not refer to the effectiveness of other legal provisions, just their existence.

[496] n 488 above.

[497] Srimati Basu, 'Sexual Property: Staging Rape and Marriage in Indian Law and Feminist Theory' (2011) 37 Feminist Studies 202.

any outside party.[498] This 'culture of silence' surrounding domestic or marital violence often results in 'an apathetic insensitive criminal justice system response to victims.'[499] The prioritisation of religious personal laws over constitutional provisions, and the consequences of this prioritisation on Indian culture, is a clear example of the legal and social public-private divide at play. Similarly, although the government argues that marital rape has enough civil provisions for the protection of women, socio-cultural perception of women and marriage within India's private sphere creates many obstacles in building a viable defence against marital rape. Many of these perceptions are discussed both in this chapter as well as further in the thesis.[500] Ironically, these are often the same arguments – such as the argument that marriage is different in India – that make it harder to move marital rape from the private, civil sphere into the public, criminal one. Therefore, the division of the Indian legal framework and the prevailing social perceptions of marriage, marital roles and marital violence often go hand in hand.

The argument that the nature of marriage in India is different from marriage in other, mostly Western, nations, claims to draw from an understanding of India's religion(s), culture, and traditions. However, when dissecting each of these elements and their interaction with the Indian legal system on the subject of marriage, the picture that emerges is anything but black and white. This section fills in parts of the picture by looking at the relationship between the law, its various actors, and social perceptions of marriage. Additionally, a subsequent chapter discussing the roles of scripts and perceptions on dowry death and bride burning provides a more detailed analysis on the origins and influence of the myths and scripts surrounding

[498] Meghna Bhat and Sarah Ullman, 'Examining Marital Violence in India: Review and Recommendations for Future Research and Practice' (2014) 15 Trauma, Violence & Abuse 1.

[499] *ibid.*

[500] Dowry Death and Bride Burning – The Role of Social Scripts and Perceptions.

marriage itself.[501] The analysis within this section showcases the power of the private sphere. Such power is witnessed in the private sphere's influence on laws – and the absence of laws – both in its own civil jurisdiction as well as within criminal provision, such as the Indian Penal Code. This section particularly focuses on the role that religious laws that govern marriages,[502] and traditional gender roles that govern marital relationships, play in strengthening the private sphere and maintaining a patriarchal culture. Subsequently, this section will briefly examine the widespread consequences of these roles for women, such as limited access to existing provisions and revictimization.

Marriage in India and Religious Personal Laws

India, and the functioning of the Indian society, often contains surprising contradictions. For example, India is well known as a nation where goddesses are worshipped and yet, paradoxically, 'many of India's oppressive societal practices affecting women are attributed to religion, which in turn are reinforced and legitimated by the patriarchal society.'[503] However, it is of vital importance to note that, though these practices are often attributed to religion, they are not necessarily a tenet of the religion itself. Despite this distinction, which will be showcased throughout the research, the invocation of religion is often used as a shield when possible legal reforms of the patriarchal elements within India's criminal and civil system are discussed. The immunity surrounding the private sphere is further strengthened because, despite a secular Constitution, 'for many Indians, religion is regarded as inseparable from local

[501] Dowry Death and Bride Burning – The Role of Social Scripts and Perceptions.

[502] Often disguised as religion itself.

[503] n 488 above, also mentioned in Shalu Nigam, *Women and Domestic Violence Law in India: A Quest for Justice* (Taylor and Francis 2020) 31.

customs, law and world views.'[504] Therefore, when a traditional or customary practice or point of view is termed as religious, the difficulty in changing such behaviour increases exponentially. Religious Personal Laws play a big role in this struggle. Although RPLs are attributed to inherent practices of various religions, and legalise religious practices within civil and family law, the edicts of the religion and the articles of the religious personal law do not necessarily match. Instead, RPLs refer to the practices held by various religions or sects within a certain moment of history – and their codification in law makes it harder for these practices to evolve in the way that they organically would have. In this manner, religion is once again used as a shield to justify the maintenance of certain patriarchal practices at the expense of women.

To understand these dynamics better, it is worth looking into the origins of the now well-known RPLs. Prior to the British rule in India, the sub-continent held a wide variety of local laws and customs that governed the population within, which often included judgements made by a religious leader or a similar authority figure.[505] When the British introduced the Macaulay Code, which eventually became the Indian Penal Code, all the existing local laws were not eradicated. Instead, they found a second life in the realm of civil law under the name of Religious Personal Laws. Through this process, many of these laws were also written and codified for intranational use for the first time.[506] Although RPLs have seen some reforms over the years,[507] the free reign that the British gave these private religious laws centuries ago is fiercely upheld by both the apprehensive government as well as the the

[504] n 488 above.

[505] This is true even today with the presence of khap panchayats, Sharia courts and others.

[506] However, there were written legal codes prior to this process – most notably the Laws of Manu (Manusmriti) – although they did not cover the entire nation.

[507] As discussed in previous chapters.

protective religions. Interference in or modernisation of these laws are strongly criticised as a violation of religious freedom. Today, despite an Indian Constitution which remains secular and equality-driven, these legal structures continue to exist in the private sphere alongside secular provisions and dictate, among other things, the terms of marriage and divorce.[508] The legal issues within the categories of marriage and divorce include property, guardianship, legitimacy, and rights, and are regulated and governed upon by family courts across the nation.[509] Bhavana Rao specifies that 'the courts apply the law of the land and do not refer to any religious texts, except when interpreting personal laws for doing justice.' This showcases a distinct separation between secular law and religious personal law being utilised for cases within the same court. Unfortunately, such a separation can be detrimental for women facing cases under RPLs, as they do not benefit from the support of secular provisions.

Within a social setting where 'marriage for a woman is built up to constitute her validation in society,'[510] understanding the legal framework surrounding marriage 'is particularly important in the analysis of inequality because it is the point at which gender

[508] There is also a secular marriage and divorce law known as The Special Marriage Act (1954). Moreover, 'alternative' legal structures within the Indian private sphere – such as khap panchayats (quasi-judicial community based bodies more prevalent in northern India and often affiliated with a particular caste) or Sharia courts – are supposedly compelled to follow the Indian Constitution and its principles, although, as seen below, that obligation is seemingly waved when it comes to the rights of women. Additionally, judgements given in these alternative legal structures do not influence the law of the land, unlike judgements in formal court rooms under the common law system. These distinctions are also mentioned in Bhavana Rao, 'Reservations Based on Personal Laws to CEDAW: A Study of Effect on the Status of Equality of Women in India by Comparing it with Afghanistan' (2016) ILI Law Review Winter Issue 62.

[509] Bhavana Rao, 'Reservations Based on Personal Laws to CEDAW: A Study of Effect on the Status of Equality of Women in India by Comparing it with Afghanistan' (2016) ILI Law Review Winter Issue 62.

[510] n 488 above.

inequalities are negotiated and the division of labour is defined.'[511] Therefore, there are grave and overarching consequences to the government's claim that marriage in India is different than the West. This claim is often associated with Hinduism, where marriage is considered as a sacrament rather than a contract, 'and thus immune from regulation by secular law.'[512] The claim of marriage as sacred, and not just marriage as different from the West, is also directly used as a reason why marital rape cannot be recognised within Indian law.[513] This argument was reiterated and supported in September 2021 by Supreme Court advocate Monika Arora, who said that, contrary to the marriage contract in Western society, 'marriage in Indian society is considered to be a 'sacred' relationship with the aim to procreate and lead a happy married life.'[514] Arora also classified the Western system of marriage, in contrast to the Indian, as an 'individual choice,' implying, quite rightly but also seemingly positively, that marriage is not a choice in the Indian context.[515] A consequence of this distinction is that a marital sacrament provides 'rights and obligations of spouses in conjugal relations' which, supposedly, cannot be contained within the ambit of criminal law.[516] In practice, this results in a problematic inequality, providing extensive rights for the husband and extensive obligations for the wife. Furthermore, propagating a traditional Hindu definition of marriage as the Indian definition – through the categorisation of marriage as sacred[517] – undermines various religions and

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[511] Jane Rudd, 'Dowry-murder: An example of violence against women' (2001) 24 Women's studies international forum 5, 513.

[512] n 488 above, also mentioned in n 485 above, 259.

[513] Mentioned, among other places, in a quote within Flavia Agnes, 'Section 498A, Marital Rape and Adverse Propaganda' (2015) L Economic and Political Weekly 23, 12. Here, a minister who called marriage a 'sacred union' in 2015, cites this definition as a reason why marital rape cannot be recognised.

[514] Arora in Pratiksha Baxi and Monika Arora, 'Times Face-Off: Should It Be A Crime For A Man To Rape His Wife?' *Times of India* (2021).

[515] *ibid.*

[516] n 485 above, 259.

[517] Arora in Pratiksha Baxi and Monika Arora, 'Times Face-Off: Should It Be A Crime For A Man To Rape His Wife?' *Times of India* (2021).

communities within India that hold a different, often contractual, definition of marriage.[518] In relaying their justification of a rite-based marriage, the Indian government also seems to forget that, regardless of how different marriage may be, rape is still rape.

A Wife's Duty[519]

With these tensions as a background, indirect references to marital rape can be seen in Religious Personal Laws – particularly through their glorification of certain characteristics and behaviours within marriages.[520] Prior to the Macaulay code and the delegation of religious laws to the private sphere, law in India was largely carried out based on an individual's status in society.[521] Within this structure, 'women in India were treated as "perpetual minors", considered as being incapable of functioning as a member of society without the protection of a male figure.'[522] In addition to this categorisation, ancient Indian laws, such as the Laws of Manu, also relayed the duties that a woman was bound to, including the duty to 'uphold her husband as "her god"; obey all his commands, whether or not those deeds were thought evil

[518] n 485 above, 259. Notably, this includes Islam and various indigenous communities.

[519] This section is further elaborated in much greater detail within Dowry Death and Bride Burning - The Role of Scripts and Perceptions.

[520] The author would like to note that this section and any criticism of religious personal laws within does not reflect the author's view on the religions themselves. It is an analysis of the legal system known as Religious Personal Laws.

[521] n 488 above.

[522] n 488 above. Scholars often trace this inferior status of women to the Laws of Manu, compiled between 200 BC and 200 AD, which heavily influenced and continues to influence Hindu Laws within the RPL system and 'still shape the contemporary gender socialization process.' Aysan Sev'er, 'Discarded Daughters: The Patriarchal Grip, Dowry Deaths, Sex Ratio Imbalances and Foeticide in India' (2008) 7 Women's Health and Urban Life 1, 70.

and self-destructive; and foster her children and family.'[523] This duty to obey their husband's demands also extends to 'having sex when husbands demand it.'[524] Although many of these concepts seem antiquated, they remain relatively preserved in the discussion within and around prominent RPLs. As an example, Bhat and Ullman identify an emphasis within Hindu law 'that it is the wife's duty to submissively obey her husband and stay under his protection.'[525] This births a perception that the ideal wife will grin and bear, rather than separate from her husband or get divorced.[526] Such stress placed on a 'wife's duty' puts pressure on women to submit and not speak out, especially when it comes to lodging complaints about unacknowledged crimes.

The Indian government has also refused to criminalise marital rape on the basis that this change would first require modifications to RPLs. This indicates a fear that the recognition of marital rape would result in a devastation of the traditional norms of marriage as known in India and, subsequently, affect the entire private system.[527] However, it is worth wondering if such an overhaul is something to be afraid of after all. RPLs exist as part of a system where 'traditional norms and societal expectations embedded in the roles of the submissive wife and dominant husband in India both serve to condone marital sexual violence.'[528] The taught and

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[523] n 488 above. Adnikrah also mentions similar patriarchal ideologies and cultural expectations in the context of Ghanaian society in their article - Mensah Adinkrah, 'Criminalizing Rape Within Marriage' (2010) 55 International Journal of Offender Therapy and Comparative Criminology 982 and 987.

[524] Pallavi Bhattacharya, 'Fighting Marital Rape In India' (2017) *Herizons* 22.

[525] n 498 above, 65.

[526] Also mentioned in Mudita Rastogi and Paul Therly, 'Dowry and its Link to Violence against Women in India' (2006) 7 Trauma, Violence and Abuse 1, 70.

[527] n 488 above.

[528] n 498 above, 65. These dynamics are also relayed in n 526 above, 74 where a combination of 'the man's assumed authority in his home and/or marriage, the subservient role of his wife, and society's acceptance of the husband's right to discipline his wife' condones and gives opportunity for violence. These dynamics are extensively detailed and explored in a subsequent chapter, titled Dowry Death and Bride Burning – The Role of Social Scripts and Perceptions.

celebrated submissive nature, as well as the enforcement of certain wifely duties, 'may be conceptualized as socially instigated and/or approved psychopathology because they may eventually cost the woman her life.'[529] Recognising and modifying the role that RPLs play in these dangerous dynamics would be a necessary and healthy next step towards a constitutionally mandated equality.

Religious and secular marriage laws do provide for aggrieved spouses by including cruelty as a ground for divorce under each marriage acts' provision. Therefore, an argument could be made that women facing sexual violence can find a case within the clauses on cruelty.[530] There are two particular shortcomings with such an expectation. Firstly, 'while the term 'cruelty' is not defined by the law, judicial interpretation of the term in concrete cases has given it a wide range of meanings, from refusal to have a child to false allegation of adultery against a spouse to the wife not serving tea to the husband.'[531] This wide interpretation does not leave room for the sufficient understanding of particular crimes. Secondly, as mentioned in the previous chapter, it is quite unreasonable to expect a successful invocation of marital rape under a clause within RPLs when, according to the government, these laws themselves are one of the reasons that the Centre hesitates to criminalise marital rape.

Preserving Patriarchal Traditions

Patriarchal traditions in the private social and legal sphere are extensively preserved with the help of the overarching Indian legal system, often as a result of its colonial history. In

[529] n 526 above, 73.

[530] n 485 above, 258.

[531] n 485 above, 263 and 264.

her research on the Caribbean, Elvy writes how justifications for marital rape exemptions, found across common law countries, show that they 'traditionally favored a "socially embedded notion of masculinity" that facilitates the continued oppression of women.'[532] Elvy uses post-colonial theory to relay the 'dualistic opposition between subject and object' in common law during the colonial times, where the subjects of the law were British men and the objects were women and those colonised.[533] In India's current common law system, this translates to Indian men as the subject and Indian women as the object. Given this context, the Indian legal framework chooses to showcase and preserve patriarchal traditions of women as inferior and of family matters as private matters. In fact, Shroff and Menezes state that, 'when a woman says 'no' to sex. it is considered as a challenge to the very notion of manhood around which the society is centered.'[534] The preservation of patriarchal traditions that specifically affect the criminalisation of marital rape – such as a sacred notion of marriage – is widely defended 'on the basis of culture, tradition and the sacrosanctity of Indian marriage.'[535] Through this defence, the issue of marital rape is delegated to, and its immunity preserved, within the private sphere of personal and civil laws.

When it comes to marriage, divorce and other domestic issues that disproportionately affect the lives of women, it is clear and disheartening to see how the public sphere of criminal law almost always wash their hands of these matters. Moreover, they willingly transfer jurisdiction of personal laws, in the name of religion, and gender roles, in the name of tradition,

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[532] n 491 above, 119.

[533] *ibid.*

[534] Aditya Shroff and Nicole Menezes, 'Marital Rape as a Socio-Economic Offence: A Concept or a Misnomer' (1994) 6 Student Advocate 67.

[535] Zoe Brereton, 'Perpetuating myths of women as false complainants in rape cases in India: culture v The law' (2017) 41 International Journal of Comparative and Applied Criminal Justice 1-2, 48.

to the private sphere of family law. This is clearly seen in the case of the marital rape exemption. Mandal mentions how the Government's argument against acknowledging marital rape does not just appeal to the 'age-old theme of sanctity of marriage and family', but they also 'posit the family itself as the pre-eminent dispute settlement body to address sexual violence within marriage.'[536] Such a transfer of accountability, and authority, from the public sphere to the (notoriously private) private sphere creates further hurdles in demanding justice and reforming laws. With its – often misguided – defences of religion, culture, and tradition to contend with, an understanding of and accountability for marital rape is hard to achieve within the private sphere. Interestingly, Baxi claims that the very notion 'that marital rape is a "controversial" idea itself reflects patriarchy in law and society.'[537] This research wholeheartedly agrees.

Although subsequent chapters[538] go into further detail on the role of the private legal and, especially, social sphere in preserving patriarchal traditions, the analysis within this section already creates an important realisation. Even though religious personal laws are named after and said to be based on religions, it is more accurate to categorise them as traditional laws, which preserved and generalised certain religious practices that existed for a particular group during a particular time in history. Therefore, religious laws cannot be synonymised with the religion that they refer to. Such an understanding can and should invalidate the invocation of a religious defence to maintain discriminatory practices within religious personal laws.

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[536] n 485 above, 263. Mandal also cites Sumitra Mahajan, a female legislator who, during the Amendment Bill debate in the Lower House of the Parliament, said that 'We have our own peculiar family system and the counselling is done within the family. The counselling should be done within the four walls of the house'.

[537] Baxi in Pratiksha Baxi and Monika Arora, 'Times Face-Off: Should It Be A Crime For A Man To Rape His Wife?' *Times of India* (2021).

[538] Particularly Dowry Death and Bride Burning – The Role of Social Scripts and Perceptions.

The Consequences of these Perceptions

The delegation of 'family' matters into the private sphere, and the replication of patriarchy through selective 'customs' and 'traditions' within this sphere, carry a host of consequences. Firstly, the very categorisation of certain discriminatory practices as traditional or religious creates a strong aversion to changing these behaviours, even at the expense of equality. On this categorisation, Elvy says:

> From a postcolonial perspective, colonial principles like the common law death penalty rile and spousal rape exemption may be so ingrained in the political, legal, and social structures of postcolonial states, that postcolonial states view these principles as traditional national rules or values rather than colonial rules.[539]

This is certainly true of India, who fervently, and ironically, defends the Western import of marital rape under the justification that marriage in India is understood differently than in the West. Another consequence can be attributed to the widely social and legal characterisation of women as inferior to men, especially within the private sphere. The extensive acceptance of this inferiority is deeply rooted in myths, scripts and perceptions that have a firm hold on Indian society.[540] Given this supposed inferiority, 'male dominance within the society is legitimated through the superior rights, privileges, authority and power that men claim to possess.'[541] A woman's subservient status is not only experienced in and of itself, but it also begets and

[539] n 491 above, 132 and 133.

[540] Further discussed in Dowry Death and Bride Burning – The Role of Social Scripts and Perceptions.

[541] n 488 above.

sanctions violence within India's patriarchal culture. In turn, the patriarchal culture within the nation, 'which governs the framework in which gender relations within the family are constituted,'[542] reinforces the inferiority of women. As an example, Kim remarks upon how, 'the failure of a wom[a]n to perform her expected womanly duties were often claimed by males to be 'triggers' to instances of domestic violence.'[543] Moreover, to add to a bad situation, 'the defence that the Institution of marriage is unavoidable and the state's posture of non-interference in this private realm, only serve to reinforce the guilt that keeps the woman in this vicious, emotionally and physically dangerous situation.'[544] A further exploration of these, along with many other, relevant consequences is conducted within the remainder of this chapter as well as the subsequent chapters.[545]

The Impossibility Thesis and its Impact

After a broader look at the intersection between patriarchy, culture and tradition in India – and how it affects marriage and the role of married women – this chapter now focuses on two particular manifestations of India's patriarchal culture which create barriers for the recognition and criminalisation of marital rape. Fighting for this criminalisation is a distinctly two-fold process as the government must first repeal the marital rape exemption they have put in place before creating any positive legislature in favour of the victims of this crime. Removing the exemption within Article 375B would acknowledge that marital rape does indeed exist as a concept, but this only gets us so far.[546] It is after the exemption is removed that the matter of

[542] Indu Agnihotri, 'The Expanding Dimensions of Dowry' (2003) 10 Indian Journal of Gender Studies 2, 311.

[543] n 488 above.

[544] n 534 above, 68.

[545] Particularly Dowry Death and Bride Burning – The Role of Social Scripts and Perceptions.

[546] Indian Penal Code 1860. Chapter 16, Article 376B.

criminalisation, or even sufficient civil protection, can be tackled. Therefore, while this section addresses the challenge of removing the marital rape exemption by contending with the impossibility thesis, the next section will examine rape myths in India that not only contribute to this exemption but are also used as reasons to prevent positive legislature and criminalisation.

The impossibility thesis is both a singular concept and an umbrella term that covers a variety of different theories on the marital relationship. These theories, in turn, feed back into and reinforce the perceived impossibility of marital rape. Like the interactions between the public legal sphere and the private legal sphere on the issue of marital rape, this cyclical relationship between the impossibility thesis and dominant marital theories creates a self-sustaining dialogue which is always justified by one side, for the other. In this case, the dialogue overlaps with the definition of the impossibility thesis to say that, as it is impossible for a man to rape his own wife, the marital rape exemption remains justified. Any argument to the contrary would simply have to look at either the thesis itself, or the theories within, to be invalidated. To look at it another way, Mandal writes how, 'quite naturally, if the legal category of rape implies sex without consent and the legal understanding of marriage entails compulsory sex, then the two will be considered mutually exclusive and the very notion of 'marital rape' a contradiction and an impossibility.'[547]

If the thesis and the theories continue to support each other in validating the marital rape exemption, the way to break this toxic cycle would be to invalidate the impossibility thesis itself and the theories within. To do so, it is important to first understand where the theories

[547] n 485 above, 255.

that make up the impossibility thesis come from and what influence they have over the Indian legal system and social dialogues today. Once valid questions about the legitimacy of this thesis are raised, it opens the door towards acknowledgement of the existence of marital rape. This makes understanding and contending with the impossibility thesis a very important first step towards lasting change. Given that India is a common law nation, a system which finds its origins and influence from British colonial rule, the dominant narrative of the impossibility thesis, which is still used today, can be traced back to the legal conception of the marital rape exemption in 18th century England by chief justice Lord Matthew Hale.[548] In fact, this theory of impossibility, which was created without any prior case law, legal theory or argument for criminalising marital rape,[549] is also known as the Lord Hale doctrine.[550] Despite the novelty of Hale's doctrine, this 'new rule found broad support among parliamentarians and subsequently influenced legal developments in the British colonies and in the United States.'[551] Since then, in a continuous echo of Hale's words, India has held that it is impossible for a husband to rape his wife. Two major theories that were and are used to support this thesis of impossibility are the implied consent theory and the property theory.

Theory of Implied Consent

[548] Hale's claim is connected to the marital rape exemption and the impossibility thesis in the works of many authors, including Jennifer A. Bennice and Patricia A. Resick, 'Marital Rape' (2003) 4 Trauma, Violence, & Abuse 229, n 488 above, Katie M. Edwards and others, 'Rape Myths: History, Individual and Institutional-Level Presence, And Implications for Change' (2011) 65 Sex Roles 764.

[549] P K Chaturvedi, 'A Legal History of Marital Rape: The Erosion of Anachronism' (2010) 1 Indian Journal of Law and Justice 123.

[550] Jennifer A. Bennice and Patricia A. Resick, 'Marital Rape' (2003) 4 Trauma, Violence, & Abuse 229.

[551] Michele Goodwin, 'Marital Rape: The Long Arch of Sexual Violence against Women and Girls' (2015-2016) 109 AJIL Unbound 328.

The theory of implied consent is mentioned within Lord Hale's own justification of marital rape, which clearly exposes this theory's colonial roots. In his treaties, Hale stated how it is impossible for a husband to rape his wife because 'by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.'[552] Therefore, Hale's claim of impossibility is justified through a statement of permanent consent at the time of marriage – which would manifest as implied consent throughout the matrimonial relationship. Implied consent is not only the first but also the 'most commonly endorsed justification' when speaking of a marital rape exemption.[553] In addition to its colonial roots, this is also a firmly patriarchal theory. This theory of implied consent explicitly favours men as, even when speaking of marriage as a contract, it makes it clear that the parties are not on equal terms – with the woman at the mercy of the man once she enters a marital contract, which is said to imply irrevocable sexual consent. The fact that the implied consent theory, a direct importation from the British colonisers, is still well and alive in India, proves that this view of masculine superiority is also rife among the perception of sexual and marital rights in today's India. It is also worth noting that there lies no legal obligation, neither back then nor today, to mention this permanent consent at the time of marriage – despite women being held accountable to it for the rest of their married life.

Although the United Kingdom has since repealed the marital rape exemption[554], India still holds on to this colonial legacy but, interestingly enough, cites its difference from the West

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[552] Matthew Hale, *The History of the Pleas of the Crown* (Professional Books, London 1736).

[553] n 491 above, 103. The theory of implied consent is also discussed by Pallavi Bhattacharya, 'Fighting Marital Rape In India' (2017) *Herizons* 23.

[554] This was done through the 1991 case of *R* v *R*, where the Court of Appeal declared that a rapist is a rapist regardless of the relationship he had with the victim. *R* v *R* [1991] UKHL 12. Also mentioned in Philip Rumney, 'When Rape Isn't Rape: Court Of Appeal Sentencing Practice In Cases Of Marital And Relationship Rape' (1999) 19 Oxford Journal of Legal Studies 243.

as a justification for doing so. Whereas marriage is viewed as a contract in the West, Maneka Gandhi, a member of the Indian Parliament, claims that the concept of marital rape cannot be applied in India as this country views 'marriage as a sacrament,'[555]. Along with the exploration of this reasoning carried out earlier in the chapter, it also makes an interesting argument for this thesis as it was the contractual nature of marriage that Hale claimed made marital rape impossible. However, here Gandhi postulates that as Indian society views marriage as a sacrament, as opposed to a contract, marital rape cannot exist. Despite this discrepancy, consent is conveniently implied in both marriage contracts and sacraments, and it is the woman who is placed at a disadvantage. Countries that stand by the impossibility thesis, and the implied consent theory within, also hold 'an irrational distinction between spousal rape and other acts of violence that occur within the context of marriage.'[556] While implied consent covers marital rape, 'a wife is not presumed to have given irrevocable consent to her husband for other acts of violence, such as beatings, that may occur during marriage.'[557] Even though it is a positive that the implied consent theory has not stretched to protect perpetrators of marital abuse outside rape, this distinction carries a dangerous misunderstanding of what rape actually is. Separating the act of rape from other forms of violence in a marriage and allowing laws only for the latter seems to assume – and share the assumption with the general population – that rape itself is not an act of violence. Such harmful misconceptions have resounding effects on cases of rape in the court, whether marital or otherwise, as well as the society's, and a victim's, own understanding of the characteristics of rape.

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[555] ''Concept Of Marital Rape Can't Be Applied In Indian Context': Maneka Gandhi' (*The Indian Express*, 2016) <https://indianexpress.com/article/business/budget/imarital-rape-concept-maneka-gandhi-indian-context/>.

[556] n 491 above, 120; When speaking of this distinction, the author is referring to Commonwealth countries in general.

[557] *ibid.*

The Property Theory

Along with the theory of implied consent, another facet of the impossibility thesis is covered by the property theory. Although the property theory contains many similarities to the implied consent theory – including their colonial heritage and patriarchal nature – they become distinct in where they choose to place their emphasis. Implied consent emphasises the marital contract, or marital sacrament, and a women's permanent and irrevocable consent within. The property theory, on the other hand, focuses on a woman's position as her husband's property to state the impossibility of marital rape. These theories feed into each other, especially as the property theory also removes the need for consent, and both theories decrease the agency of women as wives and instil the view of women as inferior. Categorising women as the property of certain men is neither new nor limited to a marital relationship. In fact, rape laws in general were borne from the understanding that the act of rape violates the honour of the family and is therefore a crime against the father or husband – or, more specifically, against their property – instead of a violation towards the woman or her bodily integrity.[558] Within this conceptualisation, 'women were chattel, and men had a property interest in their wives' and daughters' sexuality.'[559] Detailing this 'property interest,' Elvy writes that 'prior to marriage, a woman was the property of her father; rape laws thus existed to protect both a father's interest in his daughter's virginity, as well as a husband's interest in his wife's fidelity.'[560] Therefore, it would follow that a marriage would consist of the rights to a woman, as a piece of property,

[558] n 550 above, 229. The view of rape as a family honour violation is also mentioned in Shraddha Chaudhary, 'Reconceptualising Rape in Law Reform' (2017) 13 Socio-Legal Review 156.

[559] n 549 above.

[560] n 491 above, 105.

being transferred from the father to the husband.[561] Taking this into account, 'a husband was no more capable of raping his [own] wife than an owner was of stealing his own property.'[562] The property theory also played right into the public-private divide as, even though women almost exclusively resided in the private domain, they were subject to the unrestrained power of their husbands, as their property, and the husbands risked minimal chances of being imprisoned.[563] The situation does not seem to have changed much since then. In fact, Abeyratne and Jain write how Indian society still contains 'a widespread belief that a woman is her father's, and later her husband's, property.'[564]

Although the concept of a woman as property may not be seen explicitly in today's legal structures, it is still seen implicitly – through a feminist and postcolonial analysis of the law. It is seen in legal exceptions, such as the MRE in Indian criminal law, and legal silences, such as the PWDVA under Indian civil law failing to mention rape at all. In Trinidad and Tobago, a fellow postcolonial state following common law, the Attorney General clearly stated how the MRE today 'is based on the fact that the husband has a proprietary right over the wife and that she is a sexual object.'[565] In India, the property theory also influences legal decisions surrounding rape and marriage – such as cases where the rapist marrying his victim absolves

[561] Marriage as the transference or sale of property is also seen in India's traditional, and highly prevalent, dowry system. The dowry system is discussed at length within Part Three of this research – A Closer Look: Dowry Deaths.

[562] n 491 above, 105.

[563] n 550 above, 229.

[564] Rehan Abeyratne and Dipika Jain, 'Domestic Violence Legislation in India: The Pitfalls of a Human Rights Approach to Gender Equality' (2012) 21 American University Journal of Gender, Social Policy and the Law 2, 336.

[565] n 491 above, 138.

him of the crime[566] or, on the other hand, where sex is seen as a contract if a man coerces a woman into sexual relations with the false promise to marry her in the future.[567] The court's dealing with such cases reveals many Indian judge's views of both rape as a violation of family honour and marital rape as an impossibility. In these cases, marriage not only overrides the crime but also restores the violation; the rapist now owns the 'property' he committed the crime against – the woman – and has no longer affronted the previous owner of this 'property', whether that was her father, brother, or any other male relative.[568] With far-reaching implications, this also creates a narrative that does not allow for any 'discursive space to distinguish between sexual activity and rape other than through the shadow of marriage, which acts as the proxy for consent and future security.'[569] For a woman in such a society, sex is not allowed at all while she is her father's property and is fully allowed without restrictions, at least for her husband, once she gets married and becomes his property.[570] It is worth noting that there is a further arbitrary distinction that is often made between arranged and love marriages, where 'consensual sex is [socially] criminalised when women choose their partners across class, caste, religion, or nationality.'[571] Additionally, in cases where marriage absolves the crime of rape, rape itself is seen as an act of sex – which can be sanctioned through a future marriage – rather

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[566] 'Man Accused Of Rape Gets Bail To Marry Victim' (*Hindustan Times*, 2011) <https://www.hindustantimes.com/mumbai/man-accused-of-rape-gets-bail-to-marry-victim/story-41ugEYcStxcowaTroeDMkN.html>.

[567] 'Sex On False Promise Of Marriage Is Rape: Supreme Court' (*The Hindu*, 2019) <https://www.thehindu.com/news/national/sex-on-false-promise-of-marriage-is-rape-supreme-court/article26831183.ece>.

[568] This view is also explained in n 497 above, 195.

[569] n 497 above, 200.

[570] The understanding of sex and sexual activity in India (excluding rape) is a fascinating research topic but not within the scope of this dissertation beyond what is mentioned here.

[571] Baxi in Pratiksha Baxi and Monika Arora, 'Times Face-Off: Should It Be A Crime For A Man To Rape His Wife?' *Times of India* (2021).

than an act of violence, an error which misrepresents the entire definition of rape.[572] This erroneous definition has also been used in the case of *State of Rajasthan* v *Shri Narayan* in 1992.[573] While determining if the victim was raped by her sister-in-law's brother-in-law, the court said her injuries could not have been caused by her husband instead as 'when a married woman has sex with her husband in the privacy of their bed-room she would suffer abrasions on her body and the vaginal walls.'[574] Shroff and Menezes comment on how this depicts the court's view that 'forced sex without violence will not be accepted, and more perplexingly, violent sex in marriage is not possible.'[575] Although the court's distinction might have been promising for the case at hand, it was not a supportive or accurate argument for rape laws in general, and marital rape in particular.

The concept of property influencing the marital rape exemption is also criticised within the Report of the Committee on Amendments to Criminal Law, also known as the Justice Verma Report. Chapter Three, Article 72 explicitly mentions that 'the exemption for marital

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[572] n 497 above, 195 and 196. Basu also relays how this misrepresentation is seen through the courts using visual pieces of evidence (such as love letters or wedding pictures) to indicate consent, which plays into the misconception of stranger rape as real rape, as discussed under the section within this chapter titled Pervasive Rape Myths.

In one, particularly disturbing, case (outside court) shared by Vibha Hetu, a family married their elder daughter, then 17, to her rapist in order to save their reputation and her honour. Four years later, the younger daughter, at the age of 16, was raped by the same rapist – now her brother-in-law. Despite the horror of this situation, the parents still did not report the offender and, instead, presented the case as one of stranger rape. When questioned on why he did not report the rape of his elder daughter, the father replied that 'the social status of a woman is judged based on her marital status. Being a victim of rape, she loses a golden opportunity to marry, the only set standard to establish her social identity.' (Translated by Hetu from Hindi). Vibha Hetu, 'Rape Or 'NOT' Rape: Analysis Of (Six) Case Studies And Narrative Of Victims' (2020) 3 Journal of Victimology and Victim Justice 249 and 250.

[573] *State of Rajasthan* v *Shri Narayan* (1992) The Supreme Court of India.

[574] *ibid.*

[575] n 534 above, 69.

rape stems from a long out-dated notion of marriage which regarded wives as no more than the property of their husbands.'[576] Yet, the government seems to believe that its defensive statement of marriage being different in India is enough to cover the fact that it defends a theory and thesis that showcases one gender as the property of another. When it comes to sexual property, '[m]en's relationship to marriage in these cases is one of either shirking full value or paying up on such property, and women embody forms of property while needing to claim marriage as the seemingly sole form of socioeconomic sustenance.'[577] When the power relations are defined as such, it is easier to understand how marital rape is erroneously viewed as impossible. It is also interesting to note that considering women as property is initiated by and relies on assumptions of the 'inherently weak, emotional, and infantile' nature of this gender.[578] This leads to a perception that it is important for women to be guided by the men in their life. Such a reasoning is surprisingly similar to 'one of the major justifications for European colonialism [which] was the alleged infantile and primitive nature of indigenous populations.'[579] This comparison not only highlights the colonial and patriarchal nature of the property theory and the impossibility thesis but it also showcases the double subjugation of Indian women – once as primitive and then once again as weak.[580]

Consequences of the Impossibility Thesis

[576] Justice J.S. Verma et. al., 'Report Of The Committee On Amendments To Criminal Law' (Committee on Amendments to Criminal Law 2013) Chapter 3, Article 72.

[577] n 497 above, 202.

[578] n 491 above, 105.

[579] n 491 above, 105.

[580] This concept of double subjugation and the postcolonial theory surrounding it is mentioned in detail within a prior chapter that discusses the theoretical and methodological framework of the research.

Unlike the explicitly discriminatory laws in the past, the implicit manifestations of the implied consent and property theories in today's India make them harder to highlight and eradicate. As Mandal points out; 'formally speaking, rape is no longer a crime of male property violation. Similarly, marriage is no longer an indissoluble sacrament that determines the legal status of women.'[581] Yet, hiding within existing laws and silences – and across the perception of judges, victims and the general society – both the property theory and the implied consent theory feed into and reinforce the impossibility thesis. After having analysed the nature of these theories and what they entail, this chapter will now look at how they appear within India's public and private legal spheres.

Criminal Law and the Public Sphere

It is worth repeating that repealing the marital rape exemption is the first barrier to cross when moving towards criminalisation – and the impossibility thesis is the biggest hurdle that stands in its way. This hurdle manifests itself in different ways throughout the Indian legal system. Within the public sphere of criminal law, the impossibility thesis is reproduced and strengthened to maintain a spousal rape immunity. As a well-discussed example, when the government rejected the Verma report's bid to criminalise marital rape, it mentioned (among other reasons) that marriage in India was different from marriage in the West.[582] When this is studied alongside Maneka Gandhi's earlier mentioned claim that marriages in India are considered to be a sacrament that makes marital rape an impossibility,[583] it shows how the

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[581] n 485 above, 256.

[582] These reasons have been outlined and discussed in my previous chapter under Attempt Number Two: The Verma Report.

[583] ''Concept Of Marital Rape Can't Be Applied In Indian Context': Maneka Gandhi' (*The Indian Express*, 2016) <https://indianexpress.com/article/business/budget/imarital-rape-concept-maneka-gandhi-indian-context/>.

impossibility thesis has been directly transferred from its initial application within contractual marriages to now apply within sacramental marriages. During colonisation, when a Western legal formulation of marriage was applied in India, marital rape was not prosecuted. Today, as India distances itself from the Western concept of marriage, marital rape still is not prosecuted. This clearly shows the strength of the impossibility thesis as well as its ability to reproduce despite changing circumstances and dialogues.

Phrasing marriage as a sacrament also impedes the possibility of acknowledging marital rape at all because removing the contractual relationship from the legal concept of marriage opens the door for the involvement of religious personal laws within the private sphere. Therefore, as mentioned in detail earlier in this chapter, any requests made to the public sphere for criminalisation or repeal can and have been thwarted by allocating responsibility to the private sphere and religious laws instead.[584] This seemingly shows a consideration of constitutional articles protecting religion and culture but, in the case of the MRE, such a consideration is taken at the expense of other rights within the same constitution – namely the right to equality and non-discrimination.[585] Once again, the public sphere is confronted by the strength of the impossibility thesis, as well as its intersection with India's patriarchal culture, through the government's strong unease in discussing the marital rape exemption in any terms but defence.

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[584] This includes the government's response to the Verma report as mentioned in both this chapter and the previous chapter.

[585] n 488 above; This tension mentioned by Kim has been quoted in the previous chapter:

> 'These controversies signal there remains unresolved conflict between the two distinct constitutional commitments: on the one hand, the right to equality and non-discrimination (art 14, 15, 21, 51A(e)), and, on the other hand, the right to preserve and protect local culture and religion (art 25, 29 and 51A(f)).'

However, Indian criminal law also undermines this impossibility of marital rape in two specific ways. Firstly, by creating a section within the Indian Penal Code's clauses on rape which criminalises non-consensual sexual intercourse between a husband and his separated wife,[586] the law initiated a space for the overall possibility of rape within a marriage. This has already been discussed within the previous chapter,[587] including the fact that even though the forced sexual intercourse is not termed as rape, it looks to the exact definition of rape within clauses (a) to (d) of Section 375 to provide a definition for sexual intercourse.[588] Such a provision also generates a scenario in which women experience degrees of ownership. As distinct categorisations, rape is a crime if the woman is not married, and it is not a crime if she is married to her rapist. The degrees of ownership are most clearly seen in this third categorisation of partial acknowledgement – where the rape of a wife by her separated husband is understood to be a criminal offence, but not understood to be rape. Beyond playing into the property theory, drawing such distinctions also creates a patriarchal scenario in which, 'married women only become worthy of additional protections under the law when steps are taken to remove a woman from her husband's protection by dissolving the marriage.'[589] Such a distinction strengthens the public-private divide and defends the perception that family matters should be dealt with privately.

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[586] Indian Penal Code 1860. Chapter 16, Article 376B: Whoever has sexual intercourse with his own wife, who is living separately, whether under a decree of separation or otherwise, without her consent, shall be punished with imprisonment of either description for a term which shall not be less than two years but which may extend to seven years, and shall also be liable to fine. In this section, "sexual intercourse" shall mean any of the acts mentioned in clauses (a) to (d) of Section 375.

[587] Under the section titled Separate Crimes for Separated Wives.

[588] Indian Penal Code 1860. Chapter 16, Article 376B.

[589] n 491 above, 124.

The second way in which India's blind support of the impossibility thesis is diluted is through the country's own referral to provisions in the private sphere as one of its justifications for retaining the marital rape exemption. Such a statement challenges the Indian government's belief in the impossibility of marital rape, as it is hard to claim that marital rape is not a crime while arguing that there are already sufficient provisions for this crime.

Civil Law and the Private Sphere

The government's declaration of sufficient civil remedies for the offense of marital rape can quickly be put to rest. Women struggle to bring marital rape as a valid accusation in civil cases and will continue to do so until this form of rape is recognised as a crime by the Indian public. As legal acknowledgment would contribute to public recognition, and vice versa, the absence of a marital rape argument in civil court cases can also be attributed to the impossibility thesis. Affecting and affected by the absence of legal discourse, 'the impossibility thesis is reproduced and sustained in contemporary discourses around marriage, sex and violence.'[590] For example, the Protection of Women from Domestic Violence Act (the PWDVA) is admired for its provisions and protections of the rights of married women. Yet, the act does not once mention the word rape within its many clauses. This once again highlights India's lack of acknowledgement of rape as a form of violence. Such a distinction allows for the continued maintenance of the implied consent of married women due, in part, to the wrongful separation of rape and violence.[591] This distinction also leaves women without the promised provisions in

[590] n 485 above, 257.

[591] The World Health Organisation's global campaign on preventing violence includes rape within the definition of sexual violence; World Health Organisation, 'Violence Info – Sexual Violence – Sexual Violence' (*World Health Organisation*, 2017) <https://apps.who.int/violence-info/sexual-violence/>.

civil law, which strongly lean towards recognised forms of violence against women. When referring to legal cases, Mandal writes;

> The extremely small number of judicial decisions that acknowledge forced sex by husbands upon wives as harms with legal consequences suggests that it is not a ground usually taken by wives while seeking divorce or judicial separation. This could be either due to their own perception that forced sex by husbands does not amount to rape or any significant harm entailing legal redress. Or it could be owing to a pragmatic concern that their allegation of forced sex by husbands will not be taken seriously by the judges and that it would weaken their petition for divorce.[592]

Additionally, relying solely on civil law categorises sexual violence within a marriage as 'a lesser separate crime' and 'inadvertently relegate[s] wives to a second-class status.'[593] Whether it be the victims' own perceptions, social taboos on women discussing sex, or concerns for the standing of her case, it is clear to see how both the implied consent and the property theory come into play in the private sphere and fortify the impossibility of marital rape among Indian women, Indian judges and the greater Indian society.

Removing the Exemption

After seeing how entrenched the impossibility thesis is within India's legal spheres and social dialogues, it is easier to understand why advocating for the removal of the marital rape

[592] n 485 above, 265.

[593] n 550 above, 231. Written in reference to past marital rape laws in certain US states that afforded them as a less severe crime.

exemption has been such an arduous process. Yet, this examination of the manifestations of the implied consent theory and the property theory also showcases the urgency with which India needs to repeal the marital rape immunity. The marital rape exemption is repeatedly shown to be a patriarchal relic of colonial times. Moreover, only removing the exemption and doing nothing more would be equivalent to merely acknowledging that it could be raining outside rather than providing an umbrella during a downpour. Acknowledgement is a necessary step in the right direction, but sufficient progress will not take place until there are positive laws that penalise perpetrators and provide legal avenues for the victims of marital rape. With its colonial origins, Elvy shows that 'by codifying the spousal rape exemption, Commonwealth Countries continue to perpetuate the misogynistic rationales used during the colonial period to justify the common law spousal rape exemption.'[594] The fact that the impossibility thesis has remained rooted in Indian law and social spheres despite a colonial inception – and has even gained culturally specific roots – highlights how urgently this immunity needs to be withdrawn. It is important to eliminate the marital rape exemption before its social and legal arguments get further embedded in Indian society and structures.

The path towards removing the exemption begins with acknowledging that the impossibility thesis has no place in today's legal language – whether in India or elsewhere. When removing the marital rape exemption in the United Kingdoms, Lord Keith shared on behalf of the court that 'marriage is in modern times regarded as a partnership of equals, and no longer one in which the wife must be the subservient chattel of the husband.'[595] In the three decades since this British reversal, India should surely have taken into account a similar evolution in the concept of marriage within the nation, or at least the option of subscribing to

[594] n 491 above, 94.

[595] *R* v *R* [1991] UKHL 12.

an evolved definition of marriage for those who choose to do so. Despite being a Western citation, this quote by Lord Keith has also been mentioned in the Verma Report while sharing how India should follow most major jurisdictions by removing the marital rape immunity.[596] It is also noteworthy that, within the single sentence of this quote, the court has negated both the implied consent theory (while mentioning a partnership of equals) and the property theory (while stating that the wife is no longer 'subservient chattel').

Along with realising the outdated nature of the impossibility thesis and its contents, another strong argument towards removing this immunity is understanding that the MRE goes directly against the Indian Constitution itself. Part III, Article 14 of the Indian Constitution enshrines the Right to Equality by saying that 'The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.'[597] In addition to the examination of this article within the previous chapter, the analyses in this chapter have made it clear that the marital rape immunity is tied to the impossibility thesis which, in turn, is tied to the theories of implied consent and property. Working in reverse, as the post-colonial and feminist examinations above lay out the unequal nature of these theories, it follows that the MRE is not equitable either. A similar case can also be made for the constitutional article that guarantees Indian citizens freedom from discrimination.[598]

By intervening in the relationship between the impossibility thesis and its theories – through raising valid concerns and conducting analyses such as those above – one can hope to create dents in this seemingly infallible cycle of justification. After this sizeable task lies the

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[596] Justice J.S. Verma et. al., 'Report of The Committee On Amendments To Criminal Law' (Committee on Amendments to Criminal Law 2013) Chapter 3, Article 73; Appendix C.

[597] The Constitution of India 1950. Part III, Article 14.

[598] *id*. at Part III, Article 15.

next hurdle of creating specific laws and positive action that address marital rape within the Indian legal structures. The Verma Report also acknowledges these two clear steps as part of the journey towards creating a society that penalises perpetrators of rape regardless of their relationship to the victim. In Article 79, they first recommend the removal of the MRE before outlining what the law should clearly specify regarding marital rape.[599] Additionally, the report recognises that working only in the legal sphere is not sufficient and 'changes in the law therefore need to be accompanied by widespread measures raising awareness of women's rights to autonomy and physical integrity, regardless of marriage or other intimate relationship.'[600] Therefore, along with crossing this first barrier and removing the marital rape immunity, it is also necessary to understand other local dialogues or cultural (mis)conceptions that are associated with marital rape in India. Examining the discourses that might hinder the formation of marital rape laws helps create a smooth and efficient transition from the repeal of the MRE to the effective and context-based criminalisation of the act. The following section studies particular myths surrounding both marital rape and the process of criminalisation to gain insights on hurdles that would arise between the removal of the MRE and the addition of successful and effective criminal provisions.[601]

Pervasive Rape Myths

Along with a cultural idolisation of marriage and the influence of the impossibility thesis, a third factor that plays against legal and social acceptance of marital rape is that of rape

[599] Justice J.S. Verma et. al., 'Report Of The Committee On Amendments To Criminal Law' (Committee on Amendments to Criminal Law 2013) Chapter 3, Article 79.

[600] *id.* at Chapter 3, Article 78.

[601] As these myths tie into India's current understanding of marital rape, their examination also contributes back to the first step of abolishing the marital rape immunity.

myths. As contemporary beliefs stemming from a patriarchal system, rape myths are defined by Lonsway and Fitzgerald to be 'attitudes and beliefs that are generally false but are widely and persistently held, and that serve to deny and justify male sexual aggression against women.'[602] Rape myths also tend to 'operate implicitly rather than explicitly'[603] and work 'at both a descriptive and prescriptive level.'[604] This means that many rape myths are subconsciously internalised and that they include what rape supposedly looks like as well as how to 'evade' the risk of rape. However, its prescriptive use often works to 'trivialise and justify sexual aggression in circumstances that do not meet its restrictive requirements.'[605] Within these definitions, it is important to note that these myths are neither rare nor easily dismissed and that they are multi-faceted in the ways in which they provide justification for rape.

Guidelines and Scripts for Rape

A key characteristic of rape myths is that they are 'used mainly to shift the blame of rape from perpetrators to victims.'[606] Known as victim blaming, rape myths are used to find perceived faults in the victims' behaviour in order to blame them for the rape and justify the

[602] Kimberly A. Lonsway and Louise F. Fitzgerald, 'Rape Myths' (1994) 18 Psychology of Women Quarterly 134. Although much of the current literature on rape myths centres around the West in general and the United States of America in particular, this is slowly but surely beginning to change. Many of the sources within this section intentionally focus on rape myths in the Indian context, if not the consequences for the Indian context.

[603] Katie M. Edwards and others, 'Rape Myths: History, Individual And Institutional-Level Presence, And Implications For Change' (2011) 65 Sex Roles 763.

[604] Rebecca Chennells, 'Sentencing: The Real Rape Myth' (2009) 23 Agenda 25.

[605] *ibid.*

[606] Eliana Suarez and Tahany M. Gadalla, 'Stop Blaming The Victim: A Meta-Analysis On Rape Myths' (2010) 25 Journal of Interpersonal Violence 2010.

assailant.[607] This shift often 'protects individuals, and society, from confronting the reality and extent of sexual assault.'[608] This is usually achieved through the guidelines and 'prototypical stories'[609] or 'likely behaviours and antecedents'[610] that myths create regarding what 'real rape' does or does not look like. Relatedly, rape myth acceptance 'occurs when individuals accept faulty beliefs about sexual assault such as she asked for it, or if she did not physically fight back it was not rape.'[611] These patriarchal guidelines prove to be dangerously disadvantageous to victims as 'the enormous gap between the 'real' rape template and rape in real life effectively works to exclude the majority of rape claims and exonerate perpetrators.'[612] For men, these guidelines dictate situations in which rape is presented as a 'permissible' act – such as when the woman is sexually active, has consumed alcohol or is dressed in a certain manner.[613] Through such guidelines, rape myths allow men to feel justified when engaging in acts of sexual violence.[614] Rape myths also let women feel secure and removed from the possibility of rape, but only if they follow similar scripts, dictating opposite behaviours[615] – such as dressing conservatively and not engaging in any sexual behaviour. Within India's patriarchal society, women are '"rewarded" when they adhere to traditional gender norms; however, when they do

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[607] Arathy Puthillam, Aneree Parekh and Hansika Kapoor, 'Who Are You To Me? Relational Distance To Victims And Perpetrators Affects Advising To Report Rape' [2021] Violence Against Women 2.

[608] n 602 above, 136.

[609] Kathryn M. Ryan, 'The Relationship Between Rape Myths And Sexual Scripts: The Social Construction Of Rape' (2011) 65 Sex Roles 774.

[610] D. J. Angelone and others, 'Does Sexism Mediate The Gender And Rape Myth Acceptance Relationship?' (2020) 27 Violence Against Women 750.

[611] Francesca Prina and Julie N. Schatz-Stevens, 'Sexism And Rape Myth Acceptance: The Impact Of Culture, Education, And Religiosity' (2019) 123 Psychological Reports.

[612] n 604 above.

[613] Ravinder Barn and Ráchael A. Powers, 'Rape Myth Acceptance In Contemporary Times: A Comparative Study Of University Students In India And The United Kingdom' (2018) 36 Journal of Interpersonal Violence 3515 and n 609 above, 775.

[614] n 606 above, 2011 and n 609 above, 775.

[615] n 606 above, 2011 and n 609 above, 775.

not, they are met with resistance, guilt, and blame for their sexual behavior.'[616] This allows for the enforcement and internalisation of rape myths along gender, race, and social differences.

Due to these misconceptions, when a woman is raped, she is often portrayed as 'socially transgressive, personally responsible, promiscuous, and a liar.'[617] Women are categorised – by legal structures, society and often themselves – as blameworthy rather than as victims. Additionally, the stereotypical rapist within these guidelines is presented as 'belonging to a lower stratum of society, as sexually starved, as biologically predisposed to have sex, and as men who are misled by women's sexual signals.'[618] This plays into the 'good victim/bad rapist dichotomy,'[619] where 'any deviation from these characteristics makes the commission of crime less credible or worthy of prosecution.'[620] Brereton perfectly relays this 'Catch 22' dilemma 'where a woman's testimony can only be believed if she is a "woman of honour", while maintaining that honourable women do not come to court complaining of rape.'[621] In this manner, rape myths make sure that victims are blamed and that many acts of rape are culturally or socially excluded from the popular definition. In fact, 'high rape myth acceptance is linked with a tendency to minimize a sexual assault experience and a lower likelihood of convicting a perpetrator.'[622]

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[616] n 610 above.

[617] n 613 above.

[618] *ibid.*

[619] Arushi Garg, 'Consent, Conjugality And Crime: Hegemonic Constructions Of Rape Laws In India' (2018) 28 Social & Legal Studies 745. With the victim as 'weak' and 'respectable.' The relationship between the 'chastity and character' of a woman and her claim of rape is also mentioned in n 509 above, 56.

[620] *ibid*. The author provides the example of dalit women in India being categorised as 'promiscuous', which creates discriminatory scepticism towards the much-too-frequent cases of dalit rapes. Also mentioned in Brereton (54) 44.

[621] n 535 above, 44.

[622] n 610 above.

Like guidelines, rape myths can also turn into rape scripts that are enacted in society. Kathryn M. Ryan defines rape scripts as 'beliefs about the nature of rape (e.g., the location, weaponry, sex of perpetrators), the roles of the sexes in rape, boundaries of vulnerability to rape, and the disposition of the victims.'[623] Rape myths affect individuals, communities, and the society as a whole – influencing social and legal structures that interact with the crime of rape[624]. With these elements in consideration, an example of a rape script is that real rape requires a 'sudden and physically violent attack on an unsuspecting woman, usually by a stranger.'[625] This commonly accepted real rape script is endorsed by both men and women alike.[626] Similarly, Chaudhary mentions that 'the rape script, which sees 'chaste' victims of rape, or women who physically resist an attack, as more deserving of justice compared to 'unchaste' victims, or women who did not resist enough, is still religiously adhered to.'[627] Rather than losing their hold, rape myths in India seem to have strengthened over time, especially as a backlash to the perceived challenge to patriarchy brought by the 'greater visibility of women in former "male spaces"'.[628] In fact, myths and perceptions citing sex as a constant biological necessity for men and defining women as blame worthy continue to thrive in India and 'uphold systems and structures of gender oppression.'[629] Although rape myths and

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[623] n 609 above, 775. Ryan also writes about sexual scripts, saying that 'sexual scripts are culturally determined, they create sexual meaning and desire, and they enable individuals to interpret their own and their partner's behavior.' She also adds how 'sexual scripts include predictable patterns of behavior (e.g., male persistence), methods of consent (usually clear and direct), and methods of non-consent (often polite and indirect).'

[624] n 613 above.

[625] n 609 above, 776. Additionally, a victim's physical resistance is also often perceived as a criterion.

[626] Suarez and Gadalla (n 606 above) and Barn Powers (n 613 above, 3526) mentioned that men are more likely to accept rape myths while Ryan (n 609 above, 777) says that women are.

[627] Shraddha Chaudhary, 'Reconceptualising Rape in Law Reform' (2017) 13 Socio-Legal Review 166.

[628] n 613 above, 3527.

[629] *ibid.*

their consequences are influenced by sociocultural contexts,[630] there is a surprising similarity in the most prominent myths, which exist and thrive across social, cultural, national, and legal boundaries. This includes the aforementioned myth that women ask to be raped or that they enjoy being raped.[631] On the latter, Angelone et. al. also ties the issue of rape myths with sexism, writing that 'sexist beliefs can create an environment where individuals believe that women want to be forced into sex, given that they cannot directly state they want to engage in such behavior.'[632] The existence of these rape myths adversely affect the understanding of what rape is or what it can be.[633]

Within this research, the two central rape myths elaborated on are (I) that a husband cannot rape his wife or that rape only occurs between strangers and (II) that women tend to lie about being raped. Through the prior discussion of the impossibility thesis, the argument that a husband cannot rape his wife is, at this point, quite familiar. However, while the impossibility thesis creates legal obstacles in recognising marital rape, the myth that only strangers can be rapists – known as stranger rape – also creates social and cultural barriers in this recognition. Similarly, the unsupported and widespread belief that women lie about being raped – known as the misuse argument – further prevents victims from accessing the few legal remedies that might be utilised in relation to sexual violence within a marriage. As Prina and Schatz-Stevens write, sexism and rape myth acceptance 'set in place a belief system that create a culture of victim blaming and likely contribute to both the lack of reporting by the victims and the

[630] n 606 above, 2011.

[631] n 603 above, 761 and 765.

[632] n 610 above.

[633] Unsurprisingly, Kathyrn M. Ryan mentions that rape myth acceptance also correlates 'with other "isms," such as racism, heterosexism, classism, and ageism.' n 609 above and Suarez and Gadalla in n 606 above, 2010.

subsequent problematic post reporting experience that many victims share.'[634] The following section explains and elaborates on the concept of stranger rape and the misuse argument by discussing both the characteristics and the consequences of these rape myths.

The Stranger Rape Myth

The myth of stranger rape, which contributes to the belief that marital rape is not 'real rape'[635] is both widely spread and widely erroneous. In fact, in around 94 per cent of rape cases examined in 2019 and around 96 per cent of cases examined in 2020, the perpetrator was known to the victim.[636] Despite such statistics, the prevalent ideology holds that rape is an act carried out by a stranger. The model states that real rape 'is based on one-off violent incidents with strangers, and a victim who promptly seeks to report the crime to authorities,' completely denying even a remote involvement of intimate partners or family members.[637] With this misconception, many victims struggle with even recognising that they have been raped. Without this recognition, women are unable to access necessary help, support, and resources. Another misconception associated with the myth of stranger rape is that it is 'more traumatic than "marital rape," due to sexual intimacy expected among married couples that leads to minimising effects of rape in marriage.'[638] This lends to a harmful tendency in society to belittle the experiences of marital rape victims,[639] once again decreasing their chances of accessing

[634] n 611 above.

[635] n 550 above, 231.

[636] National Crime Records Bureau (2019) and National Crime Records Bureau (2020) Table 3A.4. Similarly, in 2016, in 94.6% of the cases the accused was known to the victim according to The Independent Advisory Group on Country Information, 'India: Women Fearing Gender-Based Violence' (UK Home Office 2018).

[637] n 535 above, 52.

[638] n 498 above.

[639] n 498 above.

legal or social support. Contrary to the stranger rape myth, it is very likely that marital rape is more prevalent than stranger rape, due to almost unrestricted access to the victim and an increased likelihood of repeated rape.[640] Moreover, research has found that a victim of marital rape 'may suffer insomnia, posttraumatic stress disorder (PTSD), depression, substance abuse, she may have suicidal impulses, chronic physical health problems and be exposed to varying degrees of victimization.'[641] Research also suggests that sexual violence in marriage is often accompanied by physical and psychological abuse[642] - although the absence of either, certainly does not undermine any victim's report of marital rape.

Origins of the Stranger Rape Myth and the Unities Theory

The presence of the stranger rape myth in India has both colonial and patriarchal origins, which can be understood better through the unities theory and elements of property theory. Emerging from William Blackstone in the 18th century and imported through colonial India, the unities theory established the husband and wife as one legal entity, with the wife's separate legal existence having merged into that of her husband's.[643] In the Commentary on the Laws of England, Blackstone held that 'husband and wife are legally one person. The legal existence of the wife is suspended during marriage, incorporated into that of the husband.'[644]

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[640] Found in n 550 above, 238 as well as Itunu Kolade-Faseyi, 'Spousal Rape in a Globalized World' (2018) 9 Nnamdi Azikiwe U J Int'l L & Juris 110, and Mensah Adinkrah, 'Criminalizing Rape Within Marriage' (2010) 55 International Journal of Offender Therapy and Comparative Criminology 983.

[641] Itunu Kolade-Faseyi, 'Spousal Rape in a Globalized World' (2018) 9 Nnamdi Azikiwe U J Int'l L & Juris 110.

[642] Mensah Adinkrah, 'Criminalizing Rape Within Marriage' (2010) 55 International Journal of Offender Therapy and Comparative Criminology 983.

[643] n 550 above, 229 and n 491 above, 104.

[644] William Blackstone, *Commentary on the Laws of England* (Clarendon Press 1765), also quoted in n 550 above, 229. Blackstone even goes on to say this legal unity means that even if a woman is injured, she is not allowed to act without her husband's permission.

In this manner, under the 'legal unity' theory, the husband was now in charge of 'his wife's civil identity and was given wide-ranging control over her.'[645] Calling this theory one of unity is surely a misnomer as it is only the wife's autonomy and rights which are given over. [646] Given that the husband and wife were one legal entity, the argument made against the existence of marital rape was that it is not possible for a man to rape himself. Bennice and Resick write that, in the United States 'the unities theory became the basis for domestic violence victims being ineligible to file civil suits for physical and/or psychological damages,' though this has since been reversed.[647] While this argument is not explicitly carried out in India's legal system today, its influence clearly shines through. Most prominently, the influence of stranger rape, and the unities theory within, is seen with the continuing existence of the marital rape exemption. However, even if the legal impossibility of marital rape were to be removed, this theory – and the myth it influences – is very probable to keep shaping society's misconceptions of rape.

The Property Theory and the Stranger Rape Myth

For a thorough understanding of the stranger rape myth, it is also important to understand the property theory. As detailed in a previous section, this theory also plays out within the impossibility thesis,[648] but it affects the stranger rape myth in different and exacting ways. Sharing parallels with the unities theory, the property theory considers a wife to be the property of her husband. This then negates the existence of marital rape, as a man cannot rape

[645] n 491 above, 104.

[646] n 642 above, 998 and 999.

[647] n 550 above, 229. This is also mentioned by n 603 above, 764.

[648] See section The Impossibility Thesis and its Impact.

his own property.[649] Legally, the influence of the property theory in promoting the stranger rape myth is seen in an Indian woman's legal protection from rape directly corelating with her marital status to her rapist. While an unmarried or divorced woman has explicit and extensive protection from the law, women who are separated receive a lower level of protection – where the rape is acknowledged but given a lesser punishment and a different name.[650] Finally, women currently in a marriage receive no protection from marital rape by the criminal legal system.[651] This, along with the fact that a married woman's rape is still acknowledged if the perpetrator is anyone else, clearly shows the existence of the property theory. A man has the right to rape his 'property', while the legal system turns a blind eye, but if anyone else were to do the same, the law is suddenly involved. Even though the current rape provisions within the nation should surely be celebrated, there should be no compromise in highlighting and criticizing the biased and patriarchal absences within the current system – where perpetrators of marital rape are explicitly exempt from criminal prosecution.

The Consequences of the Stranger Rape Myth

The property theory's strong social presence is seen in the increased likelihood of repeated violence and rape within a marriage 'as the married perpetrator is more likely to humiliate, punish and take 'full' ownership of their partners.'[652] Therefore, the role that the property theory plays in maintaining the stranger rape myth has incredibly dangerous results

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[649] This is further elaborated on in the previous section, titled The Property Theory.

[650] Indian Penal Code 1860. Chapter 16, Article 376B.

[651] A similar distinction is also made in some Commonwealth countries, such as Antigua and Barbuda and the Bahamas. Stacy-Ann Elvy writes how the lack of any legal mention of marital rape, 'indicates that spousal rape is not viewed as "legitimate" rape, or is simply a less serious crime than stranger rape,'. n 491 above, 122.

[652] Hidayatullah National Law University, Raipur, India and others, 'Marital Rape: A Legalised Sin' (2011) 3 Indian Journal of Applied Research 250.

for married women across India. As a more wide-reaching consequence, both the property and the unities theory also contribute to a social view of women as inferior to their male counterpart (in this case, their husband). This is a treacherous social position as, in the words of Deborah Kim,

> The perception of women as lesser human beings sustains a patriarchal culture conducive of gender discrimination, which reinforces the powerlessness of women, and opens up room for violence as an extension of the belief that grants men the power to control women's bodies and their behaviour.[653]

Similarly, the social influence of the stranger rape myth can also be observed through an opinion survey titled the International Men and Gender Equality Survey, which was conducted by the International Centre for Research on Women.[654] In the survey, 20 per cent of Indian men reported that they had engaged in 'acts of sexual violence against a female partner.'[655] This percentage was higher than any other country that the survey had covered.[656] It is clear to see that the stranger rape myth is not simply a relic of India's colonial or cultural past, but rather a very pertinent and thriving belief in the nation today. It is also strengthened by adjacent myths and perceptions, such as the myth that 'wives secretly wish to be overpowered and dominated by their husbands.'[657] Unlike the impossibility thesis, which would lose its hold if the law was to change, the stranger rape myth has the potential to continue adversely affecting social change

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[653] n 488 above.

[654] International Center for Research on Women, 'International Men And Gender Equality Survey' (International Center for Research on Women 2011). Also mentioned in n 488 above.

[655] *ibid.*

[656] The other countries were Brazil, Chile, Croatia, Mexico and Rwanda.

[657] n 491 above, 125.

despite any positive legislation that might be created for holding marital rape accountable. In fact, other countries that have criminalised rape regardless of marital status have found that the perpetrator often receives a lower sentence if he had a previous sexual relationship with the victim.[658] For example, Mandal writes that 'British courts are found to pass lower sentences in cases of marital/relationship rape, than in other cases of rape, on the ground that the harm involved in the former is lesser than that in the latter.'[659] Moving forward, Rumney states how 'on the contrary, the existence of such a relationship should be viewed as an aggravating factor.'[660] This is worth noting for India's own potential repeal of the marital rape immunity and the need for additional legal provisions.

Adjacent to a lack of recognition of marital rape in India's legal or social system, the stranger rape myth also decreases the victim's likelihood of receiving assistance and increases her chances of facing physical and psychological trauma. Puthillam, Parekh and Kapoor found that 'reporting is less likely when victims and perpetrators are acquaintances, relatives, or partners, than when they are strangers.'[661] This is not only true for India; studies in the US found that victims of sexual assault who knew their assailant are less likely to seek help and more likely to be blamed by others.[662] This shows a clear misunderstanding of marital rape in

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[658] Philip Rumney, 'When Rape Isn't Rape: Court Of Appeal Sentencing Practice In Cases Of Marital And Relationship Rape' (1999) 19 Oxford Journal of Legal Studies 257. The Verma Report also mentions this phenomenon and cites South Africa as an example. Justice J.S. Verma, 'Report Of The Committee On Amendments To Criminal Law' (Committee on Amendments to Criminal Law 2018).

[659] n 485 above, 256.

[660] Philip Rumney, 'When Rape Isn't Rape: Court Of Appeal Sentencing Practice In Cases Of Marital And Relationship Rape' (1999) 19 Oxford Journal of Legal Studies 257.

[661] n 607 above, 3.

[662] n 550 above, 240 and 241. The blame increases with the level of intimacy that the victim previously shared with the perpetrator. Additionally, highlighting the important role that support systems play, this research also found that 'if a marital rape victim has experienced being belittled or blamed in the past by clergy, police, or others, then she may decide not to disclose the abuse or seek help in the future.'

judicial systems as well. Due to the influence of the stranger rape myth and its narrow understanding, many women in India may struggle to understand their own experiences as rape which, in turn, hinders their ability to seek help.[663] While conducting interviews on litigants of cases under the Protection of Women from Domestic Violence Act (PWDVA), Manjeet Bhatia relays how 'the interviews confirmed that it was not easy for complainants to accept sexual assault in marriage and to recognise it as violence. It was even more difficult for women to accept that they had been victims of such violence.'[664] They go on to write:

> it was an uncomfortable experience for the research team to learn that the patriarchal value of treating a woman's body as an object is so deeply entrenched that even some educated women took it as the norm to be sexually assaulted in marriage. This confirms that sexual violence is probably seriously underreported, as complainants were not ready to accept victimhood in this respect. One of the complainants even said that this is normal in marriage (aisa to hota hi hai).[665]

The lack of a legal and social label for marital rape also makes it harder for victims to recognise or safely address the physical and psychological repercussions that accompany this violation.

Combined with the disadvantages of the stranger rape myth, the reality that marital rape victims face extended and severe trauma – which has been proved by research – is often countered by 'the historical myth that rape by one's partner is a relatively insignificant event

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[663] n 609 above, 777. Ryan also writes that 'some women do not label their personal experience as rape [even] when it clearly matches the legal definition of rape.'

[664] Manjeet Bhatia, 'Domestic Violence in India: Cases Under the Protection of Women from Domestic Violence Act, 2005' (2012) 32 South Asia Research 2, 118.

[665] *ibid.*

causing little trauma.'[666] This myth does not affect the victim alone. Kim writes that, 'the trauma and psychological aftermath suffered by the victims of marital rape is further trivialised primarily by the society at large, but also secondarily, at the hands of family members, friends, and the community.'[667] Considering that victims of marital rape often experience repeated abuse,[668] this lack of acknowledgement for the prolonged consequences of their victimisation is a grave and urgent issue. Shrivastava, Jain and Hazra agree that, along with the extended abuse, a 'lack of recognition and ability to share the pain' and 'the profound sense of a betrayal of trust' could itself result in more severe physical and psychological trauma.[669] Therefore, the stranger rape myth not only prevents access to resources for addressing abuse, but it also contributes towards increasing a victim's trauma. Given its multitude of adverse effects, the legal and social consequences of the stranger rape myth, on both an immediate and a longer timeline, are vital to understand before hypothesising on how to create change.

The Misuse Argument

Origins of the Misuse Argument

Along with an analysis of the stranger rape myth, it is necessary to examine the argument – and the consequences – of the myth that women lie about being raped. Also known as the misuse argument, this myth presents the idea that 'women tend to "misuse" laws meant

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[666] n 652 above, 249. Regarding the trauma victims face, the authors share extensive examples of physical trauma, which may include internal and external injuries, infections and reproductive complications, as well as psychological trauma, which may include anxiety, depression, eating disorders and sexual disfunction. This myth has also been found at play in Christine Ferro, Jill Cermele and Ann Saltzman, 'Current Perceptions Of Marital Rape' (2008) 23 Journal of Interpersonal Violence 773 and n 603 above, 764.

[667] n 488 above.

[668] Mentioned within Stranger Rape.

[669] n 652 above, 249.

for their protection to harass and intimidate hapless husbands.'[670] Therefore, it propagates the harmful view of vulnerable victims as vicious liars. The creator of the misuse argument is a familiar figure to this research. Speaking of rape, Lord Matthew Hale stated that it is 'an accusation easily to be made, hard to be proved, and harder yet to be defended by the party accused, tho' never so innocent.'[671] This statement, known as the 'Hale warning', was directly used in many court cases in the United State of America for more than a century after to cast doubt on the testimonies of victims.[672] Medico-legal textbooks of the time, cited by Zoe Brereton, added to this argument and 'cautioned doctors to be wary as the vagina could be manipulated with any number of hard objects in order to "substantiate a false charge of rape".'[673] Indian women in particular faced a double burden as the misuse argument, which entered India through the British empire, was accompanied by a colonial perception that 'native' Indian witnesses were unreliable.[674]

Misconceptions about Misuse

In the context of marital rape, this 'abuse of law' argument presented itself by suggesting that there would be a 'potential for vengeful wives to make false charges against their husbands with the passage of marital rape legislation.'[675] Through the misuse argument, women facing marital rape, who do manage to reach the police or seek legal help, are often met with scepticism. This scepticism also exacerbates the effects of many other social stigmas

[670] n 485 above, 262.

[671] Matthew Hale, *The History of the Pleas of the Crown* (Professional Books, London 1736).

[672] n 603 above, 768.

[673] n 535 above, 47.

[674] *ibid.*

[675] n 642 above.

and rape myths that they must battle with. The misuse argument is neither new nor is it rarely applied, as it has been used for decades to cast shadows on many laws regarding violence against women. This popular patriarchal rape myth portrays men as innocent victims for all existing domestic violence laws, as well as likely victims for any future marital rape laws. Despite its ever-increasing proponents, the misuse argument, like most myths, has no empirical evidence to support its claims.[676] In fact, recent studies have shown that, instead of misusing rape laws, 'women are much more likely to suffer rape victimization and not report the crime to any authorities.'[677]

It is possible that at least some of the misconception regarding the prevalence of the misuse argument within Indian rape law comes from the actual misuse of this law by the parents of women who have married against the family's will. In these cases of elopement, or 'runaway marriages' it is not uncommon for a rape charge to be filed by the parents in order to find and jail their daughter's partner and to preserve her honour in a society where premarital sex is still widely considered taboo.[678] Unfortunately, these cases are mistakenly categorised as misuse by the woman herself, despite her choice and consent in eloping and her lack of awareness or agency in the rape charge.[679] Similarly, cases in which women withdraw their complaint –

[676] n 485 above, 262.

[677] n 602 above, 136.

[678] Such dynamics are extensively discussed by Vishwanath in Neetika Vishwanath, 'The Shifting Shape Of The Rape Discourse' (2018) 25 Indian Journal of Gender Studies 4.

[679] In her article, Vishwanath shares the story of just such a case, where the police themselves were blaming the woman for misusing the rape law but, when questioned by the author on the veracity of their statement, they agreed that it was not, in fact, the woman who was misusing the law. *ibid.*
Similarly, Hetu shares a case where the parents pushed their daughter into registering a case of rape against her partner because he was from a different caste. Vibha Hetu, 'Rape Or 'NOT' Rape: Analysis Of (Six) Case Studies And Narrative Of Victims' (2020) 3 Journal of Victimology and Victim Justice 246.

which they are often advised to do by the authorities[680] – or end up marrying their rapist are seen as cases where the woman has lied and misused the law.[681] In reality, withdrawals or marriages can stem from many different reasons, such as a bid to protect the family's honour and a 'culture of compromise',[682] as well as social pressure or legal discrimination.

The misuse argument is also supported and encouraged by men's rights lobbyists working against the women's rights movement. Shalu Nigam writes that 'utilizing cyber forums, public protests and print media, the anti-women groups are disseminating narratives of women wrecking destruction on the family and weakening family bonds through their alleged misuse of "gender-biases" laws.'[683] The success of these narratives hinders 'the process of accessing justice, whereby the state is also blindly repeating the facts without looking at the available data and statistics or without conducting any neutral research.'[684] Additionally, low conviction rates, which are also used as evidence for misuse by proponents of this myth, often stem from problems with the investigation, evidence or witnesses[685] rather than a court-declared innocence of the defence.

The 'notion of misuse'[686] has been active in Indian legal jargon since a series of cases before the Supreme Court in the 1980s, where the viewpoint of 'a woman's testimony as

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[680] Krina Patel, 'The Gap in Marital Rape Law in India: Advocating for Criminalization and Social Change' (2019) 42 Fordham International Law Journal 1533

[681] n 535 above, 42 and 52.

[682] *id.* at 51 and 52.

[683] Shalu Nigam, *Women and Domestic Violence Law in India: A Quest for Justice* (Taylor and Francis 2020) 235. Also mentioned in n 535 above, 46.

[684] *ibid.*

[685] n 680 above.

[686] n 485 above, 262.

inherently unreliable' emerged.[687] In fact, a prime example of the existing influence of the misuse argument can be seen through the conversation surrounding Section 498A of the IPC, which provides one of the few criminal provisions against domestic violence, under the heading of 'husband or relative of husband of a woman subjecting her to cruelty.'[688] Following cases where Section 498A was invoked during divorce settlements, a dialogue began to emerge, which stated that women were misappropriating Section 498A en masse to turn the case in their favour or gain more maintenance.[689] It is clear to see the patriarchal influence within this dialogue, which argues against criminal, or public, interference in matters historically deemed private – where men were historically able to operate with almost total impunity. Therefore, the misuse argument casts doubt on the validity of a woman's claim when she does enter the public realm of criminal law.

Although there is no evidence of a widespread misuse of Section 498A, the script that women lie about the abuse they face was reinforced. This script gained so much traction that 'the very invocation of this much-maligned provision [Section 498A] taints the case for judges and police undermining its stated intent of protection against domestic violence.'[690] In this manner, the misuse argument also creates barriers for victims hoping to utilise the limited existing legal provisions against violence in the private sphere. The rest of this section will focus on the misuse argument and cases of rape, particularly marital rape. The dynamics

[687] n 535 above, 44. This included the statement of assumptions such as that a 'reasonable woman' would have told her family if she had been raped.

[688] Indian Penal Code 1860. Chapter 16, Article 498A.

[689] n 497 above, 193.

[690] *ibid.*

between the misuse argument and domestic violence – outside marital rape – and case law showcasing the presence of this myth are further elaborated on in the following chapter.[691]

The Theory of Marital Privacy, Marital Reconciliation, and the Misuse Argument

Despite its modern application, the origins of the misuse argument go well beyond the 1980s. This myth can be traced back, at least in part, to the colonial concepts of marital privacy and marital reconciliation, which were integrated into the local patriarchy.[692] These theories promote the viewpoint that the law cannot interfere in matters between a husband and a wife and, if they do, they risk standing in the way of reconciliation – which is treated as paramount. Related to the unities theory of a husband and a wife as a single unit, marital privacy exempts the affairs between a married couple from the law as, historically, 'the law protected a husband's ability to exercise his legal right to control his wife within the confines of marriage' and expected him to sufficiently protect her interests as well.[693] The theory of marital privacy was propelled into prominence by the 18th century English juror Sir William Blackstone and it influenced the Indian legal structure – in its distinct legal division of the public sphere and the private sphere – through colonisation. Therefore, any interference on marital privacy by the state is met with resistance, reluctance, and scepticism. Such apprehension, in turn, makes it easier to create and believe rape myths – such as the misuse argument. As Shroff and Menezes write, 'the very fact that the law stays out of the family sphere considering it too private for its jurisdiction further reinforced male dominance and female subservience.'[694]

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[691] Dowry Death and Bride Burning – Legal Framework.

[692] These concepts are also mentioned in while referring to Trinidad's 'culture of reconciliation' and marital rape exemption. n 491 above, 139.

[693] n 491 above, 106.

[694] n 534 above 68.

The inclusion of a provision against marital rape in Indian criminal law is also deterred by the theory of marital privacy, as the possibility of such a law is treated as an undue intervention of the government by proponents of the theory. Therefore, an adoption of the misuse argument to discourage any potential marital rape provision allows marital privacy to continue while also undermining any impending interventions by 'lying' women. The efficacy of this tactic can be seen in the government's negative response to the Verma report's request for the criminalisation of marital rape. Mandal mentions how a law minister defended this response by stating that there first needed to be an analysis of (existing) laws and their absences in order to make sure that the laws cannot be misused.[695] This clearly shows the direct role that the misuse argument plays in preventing a marital rape provision.

Along with marital privacy, the theory of marital reconciliation also leads to the creation of the misuse argument in similar ways. This theory declares that a government's involvement in marital affairs can decrease the likelihood of reconciliation – which is treated as the goal of any violent or non-violent dispute.[696] Even when the police or judicial officers are involved, Kapur and Singh write how 'the focus [becomes] one of reconciliation no matter what the signs of abuse' and that 'every effort would be made to put the woman on the right path, i.e. back to the violent home.'[697] On this, Chaturvedi comments how 'it is indeed likely that a rape prosecution by a wife against her husband would destroy the possibility of

[695] n 485 above, 262, referring to an article in the Hindustan Times 2013.

[696] n 491 above, 106.

[697] Nina Kapur and Kirti Singh, 'Practicing Feminist Law: Some Reflections,' (1994) 6 Student Advocate 34. The authors particularly highlight how the Crimes Against Women's Cell continues to reflect this priority and comment that 'preserving the marriage had become the highest achievement for the law, the judges, the police and the girl's parents.'

reconciliation. However, the tenuousness of this argument lies in the assumption that a marriage of this type is worth saving.'[698] In this manner, it is once again clear to see the government's prioritisation of the institution of marriage, as it currently stands, over the plights and rights of a woman. Moreover, the reconciliation theory claims that 'one spouse should not be able to waive the right to marital privacy without the other spouse's consent.'[699] Having reconciliation as the goal ties to an earlier discussion on the historic and cultural categorisation of marriage as a sacred act, rather than a legal one, which limits the social and legal options that women have for leaving a marriage. Emphasising the cross-cultural influence of these theories, Stacy-Ann Elvy writes how, in the Caribbean, 'this emphasis on reconciliation and the protection of marital privacy has, in some instances, taken precedence over the right of women to be free from violence.'[700] Also known as the family preservation argument,[701] this skewed prioritisation ties into the reconciliation theory's contribution to the misuse argument, where women's narratives are questioned or denied for the sake of maintaining the sacred bond of marriage.

The reflection of the patriarchal and colonial theories of marital privacy and marital reconciliation within the misuse argument clearly displays a continued and active preservation of the public-private divide, even – and, often, especially – at the expense of women. However, the misuse argument itself clearly misrepresents the issue at hand as many Indian women do not even have proper access to the Indian legal system, let alone the ability to misuse this access.[702] To make matters worse, the snowballing effect of the misuse argument is such that

[698] n 549 above, 136.

[699] n 491 above, 106.

[700] n 491 above, 125.

[701] n 642 above, 999.

[702] This lack of access is also mentioned in n 485 above, 262.

'the very individuals charged with implementing statutes aimed at protecting women from sexual violence may attempt to dissuade women from using these laws.'[703] Police, lawyers, court officials and other important players on a woman's journey to justice are all susceptible to the misuse argument, along with society in general and the woman's own family.

The Consequences of the Misuse Argument

Primarily, this association between existing criminal provisions for domestic violence[704] and the misuse argument results in a heavier burden for a victim of providing proof of marital rape if a case does make it to court. Not only is it uncommon to adequately win the case or gain compensation, but 'at every stage in the legal process, women face innumerable hurdles and are constantly advised to withdraw their cases.'[705] These hurdles certainly include social and legal pressure to manage the disagreement outside the courtroom.[706] Therefore, the misuse argument, along with the underlying pressures created by the theories of marital privacy and marital reconciliation, clearly influences the Indian legal system – and will continue to do so even if marital rape is criminalised, unless it is sufficiently addressed. This influence is to such an extent that, for victims of marital sexual violence, the law only seems to intervene 'in cases when it is accompanied by extreme physical violence or when the health and safety of the wife is endangered, as in the case of minor wives.'[707] Yet, the misuse argument, especially in its unfounded nature, should not deter necessary change in criminal law. As Tan Cheng Han

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[703] n 491 above, 139.

[704] Such as Indian Penal Code 304B or 498A.

[705] n 485 above, 262. Many of these barriers are discussed within the chapters titled Marital Rape – Legal Framework as well as Dowry Death and Bride Burning – Legal Framework.

[706] This is seen in elements such as mandatory counselling and social perceptions that family matters must be dealt with privately.

[707] n 485 above, 259.

rightly says, 'if fear of false allegations were a valid reason for not criminalizing certain actions, the existence of the entire criminal law would be in doubt.'[708]

With an unfriendly and distrustful legal environment already in place, it is important to fully address and dispel the misuse argument if we hope to have a viable marital rape prohibition in India's future legal system. Currently, the misuse argument serves as a convenient excuse where, 'rather than recognise the cultural context that pressures women to recant or revise their complaints …, the focus of injustice is shifted to the accused, who is presented as a victim of a malicious and false complainant.'[709] The negative effects of this argument are also seen on the Indian police, especially when it comes to a push for reconciliation within India's domestic violence laws. When it comes to rape laws, Brereton writes how a police officer told her that, rather than evidence or testimonies, 'false complainants are often picked up by a "sixth sense" acquired over years of experience.'[710] Within a patriarchal society that already battles many obstacles in the fight for gender justice, it is disheartening to hear that the first point of contact for battered or abused women could be basing their judgements on something as finicky as a 'sixth sense.' Along with the myth of stranger rape, which stands in the way of recognising and criminalising marital rape, the misuse argument limits the influence of current legal provisions being used in lieu of a marital rape prohibition. This argument also pre-emptively limits the influence of any potential targeted law against marital rape. On a larger scale, the argument of abuse has further discriminatory and political connotations. Chaudhary highlights how misuse is often used as a 'Hail Mary argument against any law which seeks to protect a marginalised

[708] Tan Cheng Han, 'Marital Rape - Removing the Husband's Legal Immunity' (1989) 31 Malaya Law Review 126.

[709] n 535 above, 54.

[710] n 535 above, 52.

social class.'[711] This is also supported by Baxi, who states that 'the language of misuse is mostly used by the powerful when the socially powerless begin to use the law to challenge dominance.'[712] The argument of misuse is frequently, and often erroneously, brought up against laws protecting women from violence, while many other provisions that have a history of being abused are regularly treated with impunity.[713] Chaudhary goes on to clarify that 'this is not to suggest that the misuse of some laws justifies the misuse of others, but that the prevalent understanding of 'misuse' inevitably comes from a place of privilege, and ought not to be allowed to undermine legitimate legal efforts to solve social problems.'[714] As a next step, Shetty et. al. emphasise the importance of further studies to 'correct general misconceptions' on misuse.[715]

Addressing the various justifications provided by the Indian government for a continued marital rape exemption, this chapter traveled through the legal and social perceptions of marriage in India, the impossibility thesis, and pervasive rape myths. Throughout these discussions, the public-private divide, and the consequences that this division hold, play a key role in understanding the aversion to criminalising marital rape. Many of these consequences will most likely continue to plague the pursuit of justice for marital rape, even if this act is considered a crime or the current governmental justifications are re-considered. This reality is

[711] n 627 above, 163.

[712] Baxi in Pratiksha Baxi and Monika Arora, 'Times Face-Off: Should It Be A Crime For A Man To Rape His Wife?' *Times of India* (2021).

[713]Chaudhary gives the example of tax evasion and the 'frequent use of other provisions in the JPC during family or property disputes' in Chaudhary (76) 163.

[714] *ibid.* Baxi also comments on how the powerful 'have monopoly over the language of misuse' in Pratiksha Baxi and Monika Arora, 'Times Face-Off: Should It Be A Crime For A Man To Rape His Wife?' *Times of India* (2021).

[715] B Suresh Kumar Shetty et al., 'Legal Terrorism in Domestic Violence – An Indian Outlook' (2012) 80 Medico-Legal Journal 1, 37.

already experienced today as, in marital relationships that are currently defined as a contract, such as within Muslim law, the patriarchal society surrounding this relationship still does not guarantee a wife's agency and protection within the marriage. Often, this patriarchy expresses itself through many expectations, inappropriately categorised as tradition or religious, on the role of women across religions and states. In a move that politicises the private sphere, the patriarchal state dons the label of 'traditional' to many discriminating practices and beliefs, as a more convenient and socially accepted substitute for 'patriarchal'.[716] This increases the difficulty in changing such practices as ''Indian family and its traditions' had been cast as the bedrock of the social fabric by several government 'representatives' of society, the judiciary and academics.'[717] It is worth noting that even if certain practices or beliefs do truly fit their categorisation as religious or traditional, this does not serve as a justification for discrimination or violence against women.[718]

Unfortunately, reality does not currently operate on such ideals and, instead, society and the law stand in the side-lines and watch while women are raped by their husbands, in their own homes, with no legal redress. Moreover, given India's social and patriarchal rejection of marital rape as even a concept, 'the victim also has a feeling of helplessness as she may find it difficult, for cultural reasons, to define the other spouse's conduct as rape or identify someone she married and loves as a "rapist."'[719] Among those who do try and speak out, many find themselves revictimised, an experience which is amplified by 'sociocultural practices and

[716] Such as with the carpeting label of marriage in India as a sacrament, which leads to a maintenance of the discriminatory marital rape exemption.

[717] n 683 above, 52.

[718] Such sentiments are also echoed within n 488 above.

[719] n 652 above, 250.

interactions with various institutions and agencies of the society.'[720] A woman's disadvantageous position within Indian society is further exacerbated at the point where her gender intersects with other factors that face discrimination – such as her class, her race or her geographical location. This intersectional discrimination exhibits itself in many ways, including a lack of accessibility to the legal system[721] as well as an increased acceptance of rape myths.[722]

The Path Towards Change

Taking the discussed legal frameworks and social perceptions into consideration, this research briefly presents a few recommendations for future steps in creating a path towards change. This is by no means an exhaustive list. However, it aims to touch upon both legal and social actions that can help address marital rape. On the legal side, this chapter has consistently emphasised the need for removing the marital rape exemption as well as adding positive legislation. Similarly, the Verma Report recommends that:

> i. The exception for marital rape be removed. ii. The law ought to specify that: a. A marital or other relationship between the perpetrator or victim is not a valid defence against the crimes of rape or sexual violation; b. The relationship between the accused and the complainant is not relevant to the inquiry into whether the complainant consented to the sexual activity; c. The fact that the accused and victim are married or

[720] n 498 above. These institutions and agencies can include the family, religion, the health care system, media, the criminal justice system, and the state.

[721] n 485 above, 262.

[722] n 606 above.

in another intimate relationship may not be regarded as a mitigating factor justifying lower sentences for rape.[723]

This latter stipulation of amending the provision for rape to specify the irrelevance of the marital relationship particularly responds to and helps mitigate the hold of scripts and perceptions on marital rape.

Those who argue against criminalisation due to its 'undue' interference into the private sphere, need to take into account the reality that criminal law has always been a part of private relations – including violence and sex. When it comes to violence, husbands can be penalised for cruelty against the wife under Section 498A of the Indian Penal Code.[724] When it comes to sexual acts, husbands can also be penalised for 'carnal intercourse against the order of nature' under Section 377 of the Indian Penal Code[725] (this provision does not encompass marital rape due to the explicit exemption). Therefore, it is arbitrary and discriminatory that the state decides

[723] Justice J.S. Verma et. al., 'Report Of The Committee On Amendments To Criminal Law' (Committee on Amendments to Criminal Law 2013) Chapter 3, Article 79.

[724] Indian Penal Code 1860, 498A. Krina Patel also mentions how 'a husband can be held accountable for voluntarily causing hurt voluntarily causing hurt by dangerous weapons or means, voluntarily causing grievous hurt with the intention of outraging her sexual assault modesty, harassment, assault with the intent to disrobe, voyeurism, and stalking.' This is written in n 680 above, 1534.

[725] Indian Penal Code 1860, 377. Shroff and Menezes comment that 'Thus there is an inexplicable dichotomy in the state refusing to interfere in the situations where sex is obtained by force because the sex was natural, and on the other hand, it intervenes even if sexual relations were consensual. because they are unnatural. It is not logical to consider that law respects the public-private divide only in regard to the regulation of abortion and unnatural acts.' This is mentioned in n 534 above, 69.

Celina Romany also mentions how, in an international context, 'state intervention has acknowledged such qualifications in a variety of instances such as the basic rights of children. In fact, the state regulates the family in a number of contexts both indirectly and directly.' This is mentioned in Celina Romany, 'Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law' (1993) 6 Harvard Human Rights Journal 115.

to draw the line when it comes to sexual violence in the form of marital rape alone. Another prominent argument against criminalisation comes from many feminist scholars themselves, who claim that pursuing criminal justice for the assurance of women's safety 'locks women into a perpetual state of victimization, while preventing a positive articulation of sexual rights for women and other sexual minorities.'[726] This argument quite rightly objects against maintaining a discourse of women as the victims and the patriarchal state as their protector – therefore, once again feeding into the binary of a strong, superior male and a weak, inferior female. Similarly, postcolonial feminism also stresses the inherently colonial and patriarchal nature of India's justice system, including the fact that the Indian Penal Code itself is a product of the colonial administration.

Despite the validity of these feminist arguments, marital rape presents a unique case where the exemption must be repealed, and the act categorised as rape in criminal law, before effective non-criminal or extra-legal change can be made. This is because, currently, the act of marital rape itself struggles to be recognised as a violation in the legal or social sphere. This recognition, by interacting with and amending criminal law, is a vital first stage and an important part of fighting the currently prevalent scripts and perceptions – such as presumed consent in marriage or the impossibility of marital rape. In support, Randall and Venkatesh write that 'criminalising spousal sexual assault repudiates viewing women as men's property within marriage, and rejects traditional, patriarchal social norms conferring upon men unmitigated rights of sexual access to women who are their spouses.[727] Additionally, the symbolic importance of criminalisation can also be seen in 'articulat[ing] in the public sphere,

[726] n 619 above, 749.

[727] Melanie Randall and Vasanthi Venkatesh, 'Why Sexual Assault in Intimate Relationships Must Be Criminalized as Required by International Human Rights Law: A Response to the Symposium Comments' (2015-2016) 109 AJIL Unbound 347.

that sexual violence in the private sphere is not to be tolerated.'[728] Criminalisation is also important in its function as a 'deterrent to potential and repeat offenders'[729] and, despite the acknowledged shortcomings of the Indian criminal justice system, women who want to seek criminal recourse for marital rape should be able to do so. Finally, the acknowledgement of marital rape as a crime also helps initiate – and must also be accompanied by – social change.

There are numerous avenues for social change regarding the perception of and provisions for marital rape. These include, but are not limited to, social movements, state-driven initiatives, community-led programmes, personnel training, and awareness campaigns. This section particularly focuses on training relevant actors – such as police, lawyers, judges, and NGOs – in a postcolonial feminist manner. Constant gender-sensitive trainings that acknowledge and provide the tools to challenge patriarchal and colonial filters on both violence against women and the private sphere are vital in courtrooms and police stations.[730] Bhat and Ullman lament that, 'unfortunately, not all lawmakers and clinicians have been educated about marital violence, which leads to trivialising and minimising the prevalence and impact of marital violence in women.'[731] Intersectional and context-based trainings can help mitigate misconceptions among the police force, judicial officers and other relevant parties in order to correctly understand and proactively address marital rape, as well as other private forms of violence. Such training can also help change the focus of state agencies,

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[728] *ibid.*

[729] n 642 above, 993.

[730] Gender awareness training is also mentioned by Katerina Standish, 'Understanding Cultural Violence and Gender: Honour Killings; Dowry Murder; the Zina Ordinance and Blood-Feuds' (2014) 23 Journal of Gender Studies 2, 115 and anti-bias training is mentioned in Angela Carlson-Whitley, 'Dowry Death: A Violation of the Right to Life Under Article Six of the International Covenant on Civil and Political Rights' (1994) Seattle University 662.

[731] n 498 above, 70. This also applies to the important role of doctors within response and reporting structures.

> from that of protecting the husbands and in-laws against potential "misuse" of the laws of domestic violence, to that of implementing their real purpose – to recognise that such violence is a crime and to protect women who have the courage to file complaints against their abusers.[732]

This training, in turn, would help women gain safe and smooth access to the infrastructural and legal support that is their right.

Training and awareness is also vital for the public at large as, in the words of Zoe Brereton, 'a more open public discourse surrounding rape is extremely important in India, as social stigma remains one of the largest obstacles to sexual violence survivors' access to justice.'[733] Additionally, when speaking of rape in general, Angelone et al write how 'research has provided evidence that rape-supportive attitudes are adjusted immediately following sexual assault prevention programming,'[734] Therefore, education and awareness training on marital rape – and other private forms of violence – should not be limited to the police and the judiciary. Through these legal and social steps, India can begin moving on a path towards substantive and long-term change. After having discussed marital rape, as a form of violence that has no legal protection, the research now moves towards a discussion of dowry, dowry-related violence, and dowry death which, despite a considerable amount of criminalisation, continue to be on the rise.

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[732] n 715 above.

[733] n 535 above, 45.

[734] n 610 above.

Part Three

A Closer Look: Dowry Death

'A relic of a historical tradition no longer relevant, the institution of dowry is one of the most pervasive and damaging features of India's modern social fabric.'

Human Rights Law Network[735]

[735] Human Rights Law Network, 'Leading Cases on Dowry' (New Delhi 2011) 2.

Chapter Five: Dowry Death – The Legal Framework and its Weaknesses

An Examination of How the Public-Private Divide Shapes India's Current Legal Structure Surrounding Dowry Death and Bride Burning

India's Dowry System

What is dowry?

Dowry is an outlawed practice in India which revolves around the institution of marriage and consists of a payment in cash or kind by the bride's side of the family to the groom. Beyond this broad explanation, it is very difficult for individuals, scholars and activists alike to agree on one concrete definition of what dowry is and what it entails. In fact, the Indian legal system's definition of dowry provides an even broader description than the one above. The Dowry Prohibition Act (DPA) defines dowry as:

any property or valuable security given or agreed to be given either directly or indirectly:

a. by one to a marriage to the other party to the marriage; or
b. by the parents of either party to a marriage or by any other person, to either party to the marriage or to any other person; at or before or any time after the marriage in connection with the marriage of said parties[736]

[736] The Dowry Prohibition Act (Act No. 28) 1961, Article 2 – Appendix A.

Highly generic, this legal definition tries to account for all the multiple, and at times conflicting, manifestations of dowry within its all-encompassing wording. Yet, the broad strokes that the Dowry Prohibition Act uses leaves room for particular interpretations of dowry to argue themselves as exempted from the phrasing above.

In examining the definition provided by the DPA, there are three particular points to note regarding the practice of dowry. Firstly, this prohibited practice is not limited to a one-off payment but can easily flow into demands for property after marriage, both in general and 'during special occasions, such as religious ceremonies and the birth of children.'[737] This means that dowry is often a continuous obligation. This observation is important in order to build our understanding of dowry-related violence in the subsequent sections. Secondly, the Act separates the practice of dowry from any gift-giving that takes place in relation to the marriage.[738] Here, it is important to understand that while some concur with this distinction, others do not draw clear lines between dowry and gift-giving. This is also reflected in the literature surrounding dowry, with Sneh Yadav plainly stating that dowry 'does not consist of voluntary gifts given to the bride and bridegroom,'[739] while Virendra Kumar considers them to be synonymous. Kumar states that giving a dowry is an ancient Indian tradition which 'consists of an ongoing series of gifts both before and after the marriage to "appease" the husband and his family.'[740] The legal separation of dowry and gift-giving, as well as the social understanding of this distinction, is further discussed within this chapter.

[737] Sunil Bhave, 'Deterring Dowry Deaths in India: Applying Tort Law to Reverse the Economic Incentives That Fuel the Dowry Market' (2007) 40 Suffolk University Law Review 2, 296.

[738] The exception for presents is mentions under Clause 3 of the Dowry Prohibition Act.

[739] Sneh Yadav, 'Dowry Death and Access to Justice' (2015) 1 International Journal of Law 59.

[740] Virendra Kumar, 'Burnt Wives: A Study of Suicides' (2003) 29 Burns 31.

Lastly, the Dowry Prohibition Act considers dowry to be a transaction from one party to another – intimating that the transaction could go either way. Although the directionality of dowry might have been kept generic in acknowledgement of the past practice of bride price,[741] it does not accurately depict the realities of dowry today. It is important to understand that dowry is paid by the bride's family to the groom's family because this unidirectional transaction contains many power relations, and dowry cannot be eradicated until these dynamics are understood. Defining dowry as something that is given by either party of the marriage to the other, places both the bride and the groom's side on an imaginary equal footing. This misunderstanding can decrease the agency of the victim while increasing the agency of the perpetrator.[742] Along with this definition, the details and weaknesses of the other clauses within the Dowry Prohibition Act will be carefully discussed when delving into the Indian legal framework surrounding dowry and dowry deaths. The subsequent sections also spend time discussing the complexities of dowry and extracting the various sources of its other definitions. Given that the various – often incompatible – definitions of dowry are part of the problem, spending time analysing these definitions should work towards creating a thorough understanding of the issue as part of our solution.

While some argue that voluntary participation in the institution of dowry is not harmful, such participation is not possible as dowry is synonymous to 'property which has been obtained under duress, coercion or pressure.'[743] Even when, with the best of misguided intentions, the

[741] Bride price is an ancient practice where the groom's family pays the bride's family instead. This is discussed in detail under Origins: The Conception of Dowry.

[742] This is further elaborated under the section on Failures in the Law.

[743] n 739 above.

bride's family 'sell' their daughter for the sake of improving her life,[744] dowry is still an act of sale where the woman is reduced to an object that can be sold at the will of her family. Therefore, the system is and will remain 'a social practice that perpetuates the oppression, torture, and murder of women in India.'[745] Although proponents of the dowry system cling to the argument that it is part of India's tradition and culture, there is a big distinction between the practices that preceded dowry and the definition of dowry as we know and see it today. The following section discusses these ancient practices in detail. However, both the ancient and the modern versions of dowry are based on the idea that women are a burden to the household that they reside in. Traditionally, elements of dowry were given from the bride's father to her husband's household as a compensation for the burden the latter now bore in protecting her and ensuring her safety. Now, payment is demanded for the economic burden of providing for the bride – even if she is financially independent. It is interesting, and disappointing, to trace this notion of a woman as a burden all the way from 2500 B.C until today.

Origins: The Conception of Dowry

To understand the persistent hold that the practice of dowry has on many sections of Indian society, it is important to examine the ancient customs that people eventually translated into the concept of dowry. There are three main traditional practices that are often referred to as the origins of today's dowry system.[746] While some ascribe a single one of these practices

[744] n 737 above, 295. This consists of a sale as they are giving goods in exchange for no longer bearing the 'burden' of a girl child.

[745] Priya R. Banerjee, 'Dowry in 21st Century India: The Sociocultural Face of Exploitation' (2014) 15 Trauma, Violence and Abuse 1, 34.

[746] Although these practices were associated with the Hindu religion, the dowry system today can be found across many religions within the subcontinent.

as the predecessor of dowry today, others claim that the system is derived from a combination of two or all three of these ancient concepts.[747] These practices are *kanyadaan*, *vardakshina* and *streedhan*. Still others mention how 'the modern practice of dowry has no resemblance to the original concept contained in Hindu Law as it originated in ancient times.'[748] This chapter will elaborate on both the original intent of these practices as well as the relationship they share with today's notion of dowry. Although the following sections examine these traditional caste-based systems and upper-caste practices[749] separately, it should not be forgotten that each of these practices also relate to and intertwine with each of the others.

Dowry as Kanyadaan

Kanyadaan can literally be translated as the donation or charity (*daan*) to an unmarried girl or young woman (*kanya*). Authors have also shared the meaning of this term to be the 'gift of a virgin bride'[750] from her father to her groom.[751] In application, the gifts or donations under the concept of *kanyadaan* refers to the bride as a gift herself as well as material possessions that the bride brings with her into her marriage in order to contribute to her new household.[752] The view that a woman can be gifted by her father to her husband can be traced back to the

[747] For example, Rudd writes that dowry today is a combination of *streedhan* and *dakshina* in Jane Rudd, 'Dowry-murder: An example of violence against women' (2001) 24 Women's Studies International Forum 5.

[748] Rani Jethmalani and P.K. Dey, 'Dowry Deaths and Access to Justice' (1995) in Kali's Yug: Empowerment, Law and Dowry Death 3.

[749] Meghna Bhat and Sarah E. Ullman, 'Examining Marital Violence in India: Review and Recommendations for Future Research and Practice' (2014) 15 Trauma, Violence & Abuse 1, 64.

[750] Biswajit Ghosh, 'How Does the Legal Framework Protect Victims of Dowry and Domestic Violence in India? A Critical Review' (2013) 18 Aggression and Violent Behaviour 410.

[751] Jethmalani and Dey alternatively define it as 'the gift which the father of the bride gave to the father of the bridegroom' in n 748 above.

[752] This refers to material goods that are supposed to be voluntarily brought by the bride and not demanded of her.

Dharmashastras, which are the 'laws of behaviour for all social classes'[753] within the 1500 BC Hindu text known as the Manusmriti.[754] Within these laws, 'the practice of ''gifting'' or donating a bejewelled and expensively clothed daughter to a man in marriage is considered the highest type of donation and exalts the social and religious position of the father of the bride.'[755] It is also interesting to note that it is not just a daughter but a lavishly adorned daughter that earned her father a higher social status. These embellishments were similarly considered to be part of the material possession that a bride brought to her husband's house – along with other household goods and amenities. These possessions were 'considered sacred and gave [the bride] both power and status within the marriage.'[756] Applying such terminology reinforced the necessity of including more than just the virgin bride under the banner of *kanyadaan*.

Therefore, in conjunction with the gifting of the bride, *kanyadaan* also importantly referred to the material possessions that a bride brought during her wedding. Within *kanyadaan*, it is this element of material possessions – which enter the groom's household through the bride – that is translated to and maintained by the dowry system today. Sainabou Musa, considering *kanyadaan* and dowry to be synonymous,[757] holds that, 'given the social expectation that women should not work outside the household, the dowry represented the women's contribution to the start of a new marriage and family.'[758] Although this social

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[753] n 745 above, 35.

[754] Or the Laws of Manu.

[755] n 745 above, 35.

[756] Sainabou Musa, 'Dowry-Murders in India: The Law & Its Role in the Continuance of the Wife Burning Phenomenon' (2012) 5 Northwestern Interdisciplinary Law Review 1, 229.

[757] *ibid.* Musa writes how 'called kanyadaan, dowries played a vital role in Hindu marital custom.' Alternatively, Manchandia places *streedhan* and *(var)dakshina* under the larger banner of *kanyadaan* in Purna Manchandia, 'Practical Steps towards Eliminating Dowry and Bride-Burning in India' (2005) 13 Tulane Journal of International and Comparative Law 310.

[758] *ibid.*

expectation is not the absolute that it once was, women are still often considered to be an economic burden on their new household.[759] This discriminatory notion has helped solidify the expectation that a woman would bring goods into her marriage to ease the burden that the household now had to bear in sustaining her.

Dowry as (Var)dakshina

As gifts or donations (*dakshina*) to the groom (*var*) from the bride's father, the concept of *vardakshina* is seen as an act that honours the bridegroom[760] as well as an act of 'love and affection'[761] towards him. The giving of these voluntary gifts is related to the act of *dakshina* where 'when a gift or *dakshina* is given to a Brahmin priest, it is given without expecting in return, which blesses the giver and renders the gift sacred.'[762] Jane Rudd holds that the same principles applied to marital gifting,[763] as 'a father received no material gain when he properly dowered his daughter, but he did achieve status and family honour, along with blessings.'[764] In fact, details regarding *vardakshina* were also found in the ancient Hindu law texts known as the Dharamshastras.[765] Therefore, 'properly dowering' a daughter can be deduced to consist of providing gifts for the groom which are seen as a symbol of honour for both the father of the bride and the bridegroom.

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[759] The perception of women as a financial burden is further discussed when looking at the change in the definition of India's dowry system.

[760] n 739 above and Jyoti Belur et al., 'The Social Construction of 'Dowry Deaths' (2014) 119 Social Science and Medicine 2.

[761] n 739 above.

[762] n 747 above, 516.

[763] She uses the term dowry here, but it seems to refer to the ancient form of *vardakshina* rather than dowry as it exists today.

[764] n 747 above, 516.

[765] n 748 above.

Dowry, according to Sneh Yadav, is an 'unintended consequence' of *vardakshina*.[766] One clear connection can be seen in the fact that, traditionally, a share of the *dakshina* 'destined for the groom and his family … [is] given only on special occasions, after the marriage.'[767] The key phrase here is 'after the marriage,' which creates a continuity to an otherwise pre-marital ritual. Stemming from this, the practice of dowry as we know it today is also one that continues to exist after the marriage ceremony. This includes both the request for gifts on specific occasions and religion ceremonies[768] as well as a more ambiguous demand for additional dowry after deeming the initial pre-marital amount as insufficient.[769]

Dowry as Streedhan

Streedhan refers to the wealth (*dhan*) or property of a woman (*stree*), which she acquires through the voluntary gifts of relatives and friends during the time of her marriage.[770] It is postulated that a woman also receives *streedhan* as dowry 'in lieu of her share of the family wealth'.[771] In fact, it is even said that origins of the dowry system were for the benefit of young

[766] n 739 above.

[767] n 747 above, 516.

[768] n 737 above, 296.

[769] This second consequence is especially affiliated with dowry violence and dowry deaths as discussed in detail later in the chapter.

[770] n 750 above.

[771] Jyoti Belur et al., 'The Social Construction of 'Dowry Deaths' (2014) 119 Social Science and Medicine 2. However, Agnihotri writes that 'if given a choice, most girls would prefer a share in the inheritance rather than dowry. Interestingly, almost all who had no property stated that if they had some they would allocate daughters a share. Those holding property did not agree with the idea of giving a share to daughters.' This is mentioned in Indu Agnihotri, 'The Expanding Dimensions of Dowry' (2003) 10 Indian Journal of Gender Studies 2, 315.

brides who could not inherit family property.[772] The creation of dowry allowed the bride's family to be able to provide her with financial and material assets. Yet, although a woman's *streedhan* is her separate property which she is supposed to have control over,[773] this control is minimal and comes with strings attached. Most obviously, despite the registration of dowry as *streedhan* under the bride's name, the actual content was given to the groom to keep and spend if needed.[774] The bride could only access her dowry under the extreme circumstances of her husband's death, a divorce or an annulment.[775]

Despite their differences, *kanyadaan*, *vardakshina* and *streedhan* are all presented as gifts and voluntary donations rather than necessary or pre-defined requirements. Although it is possible that the reality of the ancient times might have turned donations into compulsions, these concepts are still conveyed as gifts to either the bride or the groom. Therefore, these ancient predecessors of dowry 'included the portion of wealth given to the bride for her materialistic comfort and to gain her societal status in the community, and the portion of wealth given to the groom and his family in the form of gifts on special occasions, usually after the marriage.'[776] Dowry today, on the other hand, although outlawed, still presents itself as a social necessity in many Indian societies. As the Dowry Prohibition Act[777] criminalises dowry but permits gifts, it is important to be careful in any direct lines we might draw connecting these

[772] n 737 above, 294 and Meghana Shah, 'Rights under fire: The inadequacy of international human rights instruments in combating dowry murder in India' (2003) 19 Connecticut Journal of International Law 212.

[773] n 739 above and Judith Greenberg, 'Criminalizing Dowry Deaths: The Indian Experience.' (2003) 11 American University Journal of Gender, Social Policy & the Law 2, 827.

[774] Although he is advised to spend only in times of necessity and has a moral obligation to restore the full amount.

[775] n 737 above, 294.

[776] RG Menezes et al, 'Deaths: Dowry Deaths' in *Encyclopaedia of Forensic and Legal Medicine* (Elsevier 2016) 67.

[777] The Dowry Prohibition Act (Act No. 28) 1961.

ancient gifting practices to dowry today. Viewing dowry and *kanyadaan*, *vardakshina* or *streedhan* as interchangeable concepts can be dangerous as, while the Vedic rituals originally consisted of donations, dowry, as we earlier defined, explicitly does not include voluntary gifts. The fact that dowry and gift-giving are at times treated alike creates unnecessary confusion for individuals today who encounter a legal prohibition against dowry along with a legal allowance for the giving of gifts.[778] Even though dowry today has originated from these gifting practices, it would not be helpful to have the practice of dowry continue under the guise of gift-giving.

The Seeds of Change

In the beginning, all three practices detailed above were rituals associated with upper-caste marriages. *Kanyadaan* and *vardakshina* were considered to be honourable and holy acts associated with religious prestige and were therefore reserved for members of the highest caste, known as the Brahmins.[779] Similarly, dowry as *streedhan* is said to have been created by the upper-caste families of India's past in order to provide for their daughter. Other castes in ancient India practiced a tradition known as bride price instead. [780] Bride price consisted of the groom's family presenting gifts or cash to the family of the bride 'to compensate [them] for the bride's absence and the loss of whatever income the bride would have brought her family had she not married.'[781] This almost exact inverse of dowry, which switched the roles of the giver and receiver, was considered to be inferior to the upper-class rituals.[782]

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[778] This tension is elaborated in detail further on.

[779] n 747 above, 516. It is even mentioned that this restriction was 'ordained by the ancient scripts of Manu (a holy text).'

[780] n 737 above, 294.

[781] n 737 above, 294.

[782] n 747 above, 516.

With time however, the traditional practices that preceded dowry spread, from an exclusively Brahmin practice, to other castes as well.[783] There are two main explanations for this expansion. Chronologically, the first explanation is related to the Muslim conquests in the Indian subcontinent during the thirteenth and fourteenth centuries. In an attempt to 'protect Hindu culture and religious customs,' members of this religion sought to strengthen their caste system by only marrying within their own caste or subcaste.[784] This meant that the number of brides or grooms available suddenly decreased drastically. Additionally, for the bride's parents, having the groom as a member of their caste did not guarantee that he was financially well off or could sufficiently provide for their daughter (due to the fixed nature of the caste system). Therefore, 'parents of daughters began to bid for bridegrooms in an effort to find a husband of sufficient economic and social standing.'[785] As many families in various castes were striving to inter-marry, this early version of a bridegroom market was not limited to the higher castes and dowry began entering other strata of society as well. The above events monumentally transitioned the sacred gift-giving rituals of *kanyadaan*, *vardakshina* and *streedhan* into the contract, settlement and arrangement-based transaction that we know dowry to be today.[786]

The second reason for the expansion of dowry across castes can be associated with the British rule in India from the mid-nineteenth to the mid-twentieth century. While bride price

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[783] In fact, even the aristocratic Rajputs only began practicing dowry in the Medieval period, according to Pramila B, 'A Critique on Dowry Prohibition Act 1961' (2015) 76 Indian History Congress 845.

[784] Avnita Lakhani, 'Bride-Burning: The Elephant in the Room Is out of Control' (20 05) 5 Pepperdine Dispute Resolution Law Journal 2, 255 and Anshu Nangia, 'The Tragedy of Bride Burning in India: How Should the Law Address It' (1997) 22 Brooklyn Journal of International Law 3, 642.

[785] Avnita Lakhani, 'Bride-Burning: The Elephant in the Room Is out of Control' (2005) 5 Pepperdine Dispute Resolution Law Journal 2.

[786] *ibid.*

and other rituals outside dowry were still practiced by members of various castes, the government under the British rule 'forced the dowry form of marriage by discouraging other forms of marriage and considered non-dowry marriages to be invalid.'[787] This clear statement of a marriage's validity being defined by the presence of dowry resulted in the thorough replacement of bride price with dowry across India. [788] During this period, the popularity of dowry also escalated for financial reasons. As British taxation resulted in many Indians having to pay more than they were able to, demanding a higher dowry helped with the financial security of many families at this time.[789]

In aiming to understand the origins of dowry, this section highlights the rituals of *kanyadaan, vardakshina* and *streedhan* before considering the historic events which led to a transition from these ancient gifting practices to the obligatory practice of dowry. This background contributes to a recognition of how the practices of dowry today, and the violence against women it frequently begets, are repeatedly and often inaccurately justified under the banner of religion and cultural tradition.[790] Keeping these origins in mind, the next section further traces the evolution of dowry and the severe modification it underwent in recent history.[791] It also mentions the detrimental practices that dowry contributes to, for women both before and during the discussion of marriage.

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[787] *id.* at 256, also mentioned in Judith Greenberg, 'Criminalizing Dowry Deaths: The Indian Experience.' (2003) 11 American University Journal of Gender, Social Policy & the Law 2, 828.

[788] Geetika Dang et al., 'Why Dowry Deaths Have Risen in India?' (2018) 3 ASARC Working Paper.

[789] n 747 above, 519.

[790] The follow chapter dedicates itself to a study of these relationships.

[791] Human Rights Law Network also attributes the spread of dowry in the past to the 'sanskirtization' of castes considered to be 'lower.' They mention how, 'under pressure to conform to the 'predominant' socio-cultural and economic predispositions of the ruling elite, many of the local customs of various rural groups have given way to the patriarchal ideas of the dominant class' which gave 'social legitimacy to the concept of dowry, making it an almost indispensable entity intricately woven into the existing social superstructure.' in Human Rights Law

Change in definition

What changed?

Although the institution of dowry began to morph and grow prior to the late 1900s, it was during the economic crisis in the 1970s that the popularity of dowry reached a peak. Rudd explains how 'on a family level, this crisis translated into an increased need for cash to keep up with inflation, fewer jobs for sons whose parents had paid high prices for education, and a general feeling of desperation to maintain present living standards.'[792] Suddenly, families could no longer afford the provisions that they relied on and the lifestyles that they had grown accustomed to. Such a change, accompanied by a nation-wide surge of consumerism and an increasingly cash-based economy, led to many Indian families looking for an extra income source to supplement their current finances.[793] They found this source by modifying the definition of and increasing the obligations of the dowry payment. In recent decades, this growing sense of materialism converted dowry into a 'mechanism of extortion and exploitation'[794] and strengthened the view of women as 'commodities'[795] that provide immediate economic relief or gain. Pardee explicitly says that, 'today, Indian families use dowry as a way of accumulating quick material wealth and raising their standard of living.'[796]

Network, 'Leading Cases on Dowry' (New Delhi 2011) 203, specified in *Bansi Lal* v *State of Haryana* (2011) 11 SCC 359, 296.

[792] n 747 above, 519.

[793] n 785 above, 254. and n 745 above, 37.

[794] n 745 above, 35.

[795] n 747 above, 516.

[796] Laurel Remers Pardee, 'The Dilemma of Dowry Deaths: Domestic Disgrace or International Human Rights Catastrophe' (1996) 13 Ariz. J. Int'l & Comp. L. 498.

This abusive and illegal get-rich-quick scheme is a modern phenomenon with loose ties to *kanyadaan*, *vardakshina* and *streedhan*. Despite this, tradition and culture are repeatedly and wrongfully provided as justifications for the 'modern monstrosity'[797] of dowry. To clarify, the ancient practices preceding dowry had faults and weaknesses of their own. Yet, placing the old and the new under the same banner is inaccurate and provides undue cultural justification for the harmful practices of the latter. A fundamental difference between the ancient rituals and dowry today lies in the fact that the former was strictly limited to rituals within castes and sub-castes while the latter is used as a 'way for an upwardly mobile family to demonstrate its wealth and make ties among higher social groups.'[798] Today, even within the caste system, a lower-caste bride has to make a payment to an upper-caste groom before she can marry into his family.[799]

Additionally, as a class system began to replace the caste system in India, the importance of attaining a higher class by increasing one's finances turned into a chief interest. The relationship between the inflation of dowry and the class system can be studied from both sides. On the women's side lies the concept of hypergamy, or women marrying above their social class,[800] which helps them attain a higher social status and what their family believes to be a better life.[801] This is not a new phenomenon. In fact, 'the mate selection system of India has long been characterized by hypergamy, with women from lower status families marrying

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[797] Srinivas in n 747 above, 516.

[798] n 747 above, 516.

[799] n 737 above, 295. This also raises an intersectional issue with dowry and the caste system – although neither of these institutions are legally allowed to exist today.

[800] n 788 above.

[801] Meghana Shah, 'Rights under fire: The inadequacy of international human rights instruments in combating dowry murder in India' (2003) 19 Connecticut Journal of International Law 214.

higher status men within the same caste.'[802] The desperate race for social mobility through marriage is further increased in today's society due to the 'lessening of caste restrictions,'[803] which allows for higher jumps in social status. The payment for this upward movement is dowry. On the man's side, receiving dowry is taken for granted and is used as a quick monetary increase, which allows him to further participate in the consumerist culture and better his standard of living. In fact, dowry has inflated to such an extent that the average demands are for 'three to six times the annual male wage in villages.'[804] Another study mentions that the demands range 'between 6 and 8 times the annual income of an average male.'[805] This means that most families have to spend years, if not decades, saving up for their daughter's dowry. In fact, among those of a lower economic class, it is frequent that 'a bride's parents and other siblings are deprived of their basic comforts, such as nutritious food and a proper education, to save enough for the dowry.'[806] Despite this, they are still not guaranteed to have the necessary amount. This often results in debt and causes grave economic problems for the family of the

[802] Padma Srinivasan and Gary R. Lee, 'The Dowry System in Northern India: Women's Attitudes and Social Change' (2004) 66 Journal of Marriage and Family 1109. Srinivasan and Lee go on to write how, 'this constrains the number of potential husbands available to women above the lowest status levels,' which, in turn, increases the amount of dowry demanded of these women. This resulting "marriage squeeze" is also mentioned by Rao in Vijayendra Rao, 'The Rising Price of Husbands: A Hedonic Analysis of Dowry Increases in Rural India' (1993) 101 Journal of Political Economy 4, 667.

[803] Linda Stone and Caroline James, 'Dowry, bride-burning, and female power in India' (1995) 18 Women's Studies International Forum 2, 127.

[804] n 756 above, 231.

[805] n 745 above, 35. This particular study, by Anderson, looked at the demands between 1960 and 1995 in Indian communities in both the north and the south. Nigam, more recently, also mentioned how common demands for cash range between 50,000 to 75 lakh rupees. (Shalu Nigam, *Women and Domestic Violence Law in India: A Quest for Justice* (Taylor and Francis 2020) 123) When seen that the average income in India, at its most optimistic measures, is a little more than one lakh, the demands remain as unrealistic today, if not more so.

[806] B.R. Sharma et al, 'Dowry – A Deep-Rooted Cause of Violence Against Women in India' (2005) 45 Medicine, Science and the Law 2, 165.

bride.[807] Yet, families still constantly choose to go beyond their means in fulfilling ostentatious dowry demands. This is partly because the families have no other choice if they want to see their daughter married, and partly because, if she is marrying into a family with a higher social status, 'the social status of [a woman's] natal family is associated with the social status of the family that she marries into.'[808] Jeyaseelan et. al. also agree that, 'giving away a large dowry is like a status symbol, which contributes to enhancing social status.'[809] Therefore, many families may consider the social benefit to outweigh the economic burden of dowry.

A combination of materialism, the caste system and greed have resulted in these unreasonable demands – and the collateral damage in this transaction turns out to be to the woman herself. If the bride's family is unable to meet the high dowry demands, their daughter is exposed to the possibility of dowry-related violence.[810] As Dang, Kulkarni and Gaiha write, 'the amount of dowry demanded has grown to a level that threatens destitution of daughter-only households and the constant harassment of brides.'[811] Even if the requested amount for dowry is provided, it is no guarantee of protection as 'when the supply of cash diminishes, they are in a tenuous position that can lead to criticism, abuse, and finally, dowry murder.'[812] After the marriage, having already tasted instant wealth, it is not rare for the groom's side to request more dowry than was originally agreed upon. The bride serves as their bargaining chip and is

[807] This frequency of debt is mentioned by several authors, including n 796 above and Visalakshi Jeyaseelan et al, 'Dowry Demand and Dowry Harassment: Prevalence and Risk Factors in India' (2015) 47 Journal of Bioscience 6, 731.

[808] Anshu Nangia, 'The Tragedy of Bride Burning in India: How Should the Law Address It' (1997) 22 Brooklyn Journal of International Law 3, 644.

[809] Visalakshi Jeyaseelan et al, 'Dowry Demand and Dowry Harassment: Prevalence and Risk Factors in India' (2015) 47 Journal of Bioscience 6, 730.

[810] n 756 above, 231.

[811] n 788 above.

[812] n 747 above, 516.

threatened with violence and abuse. Therefore, 'what might have been, in an earlier time, a means of economically empowering a woman at the time of marriage, has metamorphosed in many cases into an instrument of exploitation of the bride's family by the groom and/or his family.'[813] The element of greed is a constant thread throughout the acts and explanations surrounding dowry and dowry-related abuse today.

Expanding in scope

As the reasoning behind dowry shifted from a ritualistic practice in a religious society to a wealth attaining practice in a consumeristic one, the scope of dowry also changed. In this transition from a religious ritual to a social practice, dowry not only continued to spread across castes, but it even began to enter other religions. Highlighting this point, Yadav writes that 'the culture of conspicuous consumption has reached such frightening proportions that dowry has permeated even those communities and classes which traditionally did not accept dowry. They are now doing so in order to achieve social mobility and status.'[814] This means that religions and communities that previously had no interaction with the institution of dowry are now members of it – including Christians, Muslims and tribal communities.[815] Even the research of the Joint Committee creating the Dowry Prohibition Act 'found that dowry had permeated all classes, communities, and religious groups and castes'[816] as early as 1980 – only a few years after the commercialisation of modern dowry practices. This also means that it is still not only the lower or middle socioeconomic classes that participate in dowry, but the higher

[813] Jyoti Belur et al., 'The Social Construction of 'Dowry Deaths' (2014) 119 Social Science and Medicine 2.

[814] n 739 above, 59 and 60. This sentiment is also affirmed by Lakhani, in n 785 above, 254.

[815] R.V. Reddy, 'The Dowry Prohibition Act Needs Teeth' (1995) Kali's Yug: Empowerment, Law and Dowry Death 1 and n 750 above, 410.

[816] n 739 above, 60.

socioeconomic classes in India follow this institution as well.[817] Yet, it is to be noted that studies have found that the practice of dowry remains most widespread in Hindu communities.[818]

Expanding in amount

Along with expanding its reach, the amount of cash or goods demanded as dowry has also increased. Given that dowry can now be found across social and religious groups, it is no longer possible to set one fixed value as the required amount of dowry across the board. The lack of a standard amount allows the grooms family to set a price – which they can change and increase at will.[819] Alongside an increase in the amount, the types of goods expected or requested as dowry have also changed. *Kanyadaan* and *streedhan* generally consisted of jewels and clothes – which were still moderately associated with the bride herself. Dowry today, however, includes 'ostentatious displays of large cash gifts or consumer items.'[820] Such items have a tenuous connection to the bride and are clearly benefitting the groom's household instead.

When it comes to both cash and kind, the illegal nature of dowry discussions can make the negotiations non-specific, which frequently results in a disagreement when the groom's side receive less than they expect.[821] As a general yardstick, the amount of dowry expected

[817] n 783 above, 849.

[818] n 740 above, 34.

[819] n 747 above, 516 and 517.

[820] n 745 above, 36.

[821] n 747 above, 517. Even with complete clarity during negotiations, or their absence altogether, it is easy for the groom's side to change their mind about what they want or expect at any point.

corresponds to the groom's caste or socioeconomic status (his class), his job or education, and his physical appearance.[822] This has also been called a groom price in a reversal of the term relating to the past practice of bride price.[823] Sunil Bhave writes that, 'in essence, dowry became a means of competing for husbands.'[824] Given that the factors defining the amount of dowry expected depend on the qualities of the groom, it is his family who has greater power and say over the dowry discussions.[825] The groom's attributes hold more weight as 'the man's economic value … is deemed to be higher than that of the woman's.'[826] Pardee also interestingly speculates how, 'boys who have received a college education see their diplomas as a symbol of increased worth and use their diploma to demand more dowry, instead of adopting what Western society would consider an enlightened view.'[827] Moreover, any of the bride's qualities, such as her education or employment, are only given consequence in relation to her potential as a wife to her husband or a mother to his children.[828] In fact, families of women who are highly educated might struggle harder to find a suitable groom, as society

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[822] n 737 above, 295, n 785 above, 252 and Nehaluddin Ahmad, 'Dowry Deaths (bride burning) in India and Abetment of Suicide: A Socio-Legal Appraisal' (2008) 1 Journal of East Asia and International Law 277.

[823] n 788 above and n 745 above, 36.

[824] n 737 above, 295. Additionally, the women themselves have the least amount of bargaining power, which is also mentioned in Shalu Nigam, *Women and Domestic Violence Law in India: A Quest for Justice* (Taylor and Francis 2020) 49.

[825] n 756 above, 231, n 808 above, 642 and n 776 above, 68. Shah also mentions how the groom's family 'manipulate the dowry-giving process' and 'often chooses a woman of lower caste or class and demands a high dowry' in n 801 above.

[826] n 756 above, 231.

[827] n 796 above. This is also mentioned by Purna Manchandia, 'Practical Steps towards Eliminating Dowry and Bride-Burning in India' (2005) 13 Tulane Journal of International and Comparative Law 314 and Rajni K, Jutla and David Heimbach, 'Love Burns: An Essay about Bride Burning in India' (2004) American Burn Association 165.

[828] n 796 above and n 785 above, 254. Manchandia (Purna Manchandia, 'Practical Steps towards Eliminating Dowry and Bride-Burning in India' (2005) 13 Tulane Journal of International and Comparative Law 310) also mentions that the physical appearance of the woman is a factor in determining the amount of dowry demanded.

dictates that the husband must be even more educated than the wife.[829] Inversely, this shows the widespread belief that a woman cannot be more educated than a man within a marriage. As an example, on the value of a woman in relation to her characteristics as a future mother, a larger dowry is demanded of unmarried women over the age of thirty[830] as fertility is closely, and often unnecessarily, associated with a younger age.[831] Nigam also remarks upon how, 'many families look for brides who earn handsomely, yet they also demand a dowry and yearn that the bride should be "homely" too.'[832] Such generic and patriarchal means of assessing a woman's attributes results in the groom's family demanding more dowry after the marriage when the bride fails to live up to their definition of her role as a wife and mother.[833]

The amount of dowry required can also partly reflect the amount that the groom's family would later need for the dowry of their own daughter or to repay any existing loans and debts.[834] Supporting this statement, Tambiah writes that 'the proper characterization of the marriage payment from the bride's side … is not that it goes to form the conjugal fund of the new couple but that it becomes part of the assets of the joint family, to be used for its own collective consumption and for effecting the marriages of its own daughters.'[835] Receiving money through dowry is often a more financially viable alternative to going to a bank for a loan – which would later have to be repaid with interest.[836] Using dowry for such purposes

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[829] Nehaluddin Ahmad, 'Dowry Deaths (bride burning) in India and Abetment of Suicide: A Socio-Legal Appraisal' (2008) 1 Journal of East Asia and International Law 276.

[830] n 809 above.

[831] This is further discussed in the following chapter.

[832] Shalu Nigam, *Women and Domestic Violence Law in India: A Quest for Justice* (Taylor and Francis 2020) 121.

[833] n 756 above, 231.

[834] n 747 above, 517 and n 745 above, 37.

[835] Stanley Tambiah, 'Bridewealth and Dowry Revisited' (1989) 30 Current Anthropology 4, 422. Tambiah also provides specific examples of dowry expectations or elements from different states and cultures within India.

[836] n 747 above, 517.

increases an individual's reliance on the institution and creates a warped justification for their participation. In addition to the above qualifications, dowry and the demand for additional dowry is often set to include purchases that the groom's family want, such as electronics and vehicles. As a chilling example, Bhave shares the story of a woman named Rinki. Almost immediately after her marriage, Rinki's father-in-law demanded additional dowry from Rinki's father in the form of a motorcycle and a colour television. When these demands were not met, Rinki was tortured and set on fire. She had barely been married for a month before she died.[837] This incident, and others like it, highlights the dangerously strong hold that this new face of dowry within a consumeristic culture has on members of the society.

Reinforced by the perception of women

In order for the dowry system to continue thriving, despite its illegal and caustic nature, it is important for the benefitting actors to lean in on the low status of women in today's India. In fact, the existence of dowry has relied on this element for decades – if not much longer – and itself reinforces a disposable view of women, just as much as dowry is reinforced by this same view. Through the dowry system, the value of a woman is associated with 'the financial rewards she can bestow on her husband's family.'[838] Accompanying this, the discriminatory and patriarchal view of women as a burden to the household they reside in is essential to the institution of dowry. Through this lens, a higher demand of goods is apparently justified in exchange for shouldering the burden of the bride.[839] The classification of women as an

[837] n 737 above, 291.

[838] n 756 above, 229.

[839] Virendra Kumar and Sarita Kanth, 'Bride Burning' (2004) 364 Medicine, Crime, and Punishment 18 and The Independent Advisory Group on Country Information, 'India: Women Fearing Gender-Based Violence' (UK Home Office 2018).

economic burden, and needing provision, is another form of the ancient outlook that women are a burden as they need to be protected from the outside world.[840] Both these classifications view the woman as a dependent object, rather than an independent individual, and leave her ability to protect or provide for herself out of the picture. Therefore, 'dowry has to be given so as to compensate this non-productive being, even when the woman is educated and has her own job and is not economically dependent on her husband.'[841]

The view of women as either a source of money or a financial burden is also inextricably linked as, for example, when unreasonable amounts of dowry are demanded, 'an inability to pay [] dowries causes families to face the social ignominy of keeping their daughter unmarried in their homes, thereby strengthening the belief that girls are economic liabilities.'[842] This perception of women as an economic burden could be partly attributed to the fact that traditional inheritance laws did not allow women to inherit any property or possessions. Stemming from this exclusion, Musa says that 'women are often viewed as a burden because valuable family resources, which would otherwise be inherited by the males, are used on their upbringing and dowry.'[843] It is disheartening to see that whilst the woman is already at a disadvantage without the right to inherit, she only finds herself at a further disadvantage when seen as an encumbrance on all the property and assets that she will not be receiving. In fact, women are widely considered to be a 'temporary visitor' in their parents' home until they leave for their husband's household.[844] The quote above also shows how a woman is viewed as a burden in her marital home as well as her natal home. This ties back to dowry, which is referred

[840] n 756 above, 230.

[841] n 739 above, 59.

[842] n 809 above, 731.

[843] n 756 above, 230.

[844] n 739 above.

to as a 'compensatory payment to the family which agrees to shelter her hypothetically for the rest of her life.'[845] Such a categorisation does nothing to ensure equality, or agency, for a woman even in her marital home.

The demeaning categorizations of women either as a source of quick money or as a burden – or at times both – are only two of the many varying views surrounding marriage in India, all of which place women at a lower pedestal than men. Consolidating these views, dowry serves as a 'manifestation of the political, economic and cultural significance of women'[846] in both her parents' and her husbands' home. With the weight of all these manifestations supporting the existence of dowry, it is no wonder that the present laws have not been able to satisfactorily eradicate this practice.

Dowry and Non-Marital Violence against Women

Before moving to a discussion of dowry-related violence within a marriage, this short section serves to highlight the relationship that dowry shares with gender crimes and sexual and gender-based violence outside a marriage. Due to the probable heavy financial burden of dowry on the father of the bride, discrimination against the female gender begins very early. The connections between 'dowry, greed and the burden of the girl child'[847] have grave consequences. Dowry, a public health issue in itself,[848] has also been associated with the public

[845] n 829 above, 275 and 276.

[846] n 748 above, 3.

[847] n 832 above, 50.

[848] n 776 above.

health issues of female infanticide and sex-selective abortions, as well as child marriage.[849] Once again, this reveals the view of women as 'extreme financial investments with no material return'.[850] At times, when the family is unable to determine the sex of the foetus, younger daughters are even killed in infancy only because the family already has another girl chid.[851] Estimates state that infanticide and abortion have resulted in the Indian population "missing" more than 50 million girls and women.[852] Even after their birth, girls are discriminated against 'in terms of nutrition, health care, education, and share of family property.'[853] Although these atrocities are also influenced by other factors, the role that dowry plays in their sustenance cannot be denied.

Dowry Deaths and Bride Burning

Dowry after Marriage and Dowry Related Marital Violence

This chapter has already established how marriage and the dowry system are used as a quick and easy method for the groom's family to gain cash and property. If they do not get the dowry that they expect, or do not get more dowry when they ask for it, the bride is often harassed or subjected to marital violence as a means of forcing her natal family's hand. This is

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[849] n 796 above, 493, n 783 above, 844, Saseendran Pallikadavath and Tamsin Bradley, 'Dowry, 'Dowry Autonomy' and Domestic Violence Among Young Married Women in India' (2018) 51 Journal of Biosocial Science 355 among others.

[850] Padma Srinivasan and Gary R. Lee, 'The Dowry System in Northern India: Women's Attitudes and Social Change' (2004) 66 Journal of Marriage and Family 1109.

[851] n 745 above, 36. and n 756 above, 230.

[852] n 756 above, 230.

[853] Arvind Verma and others, 'Exploring the Trend of Violence against Women in India' (2017) 41 International Journal of Comparative and Applied Criminal Justice 1-2, 4. Banerjee also writes how girls 'are subjected to differential treatment in terms of educational opportunities and in general, a reduced share of family resources including those involving basic food and shelter' in n 745 above, 36.

exaggerated by the fact that, 'after marriage, women are often separated from their natal relationships, find themselves isolated from their support systems, and therefore are more vulnerable to abuse.'[854] A wife is considered to be a member of her husband's household rather than her own, and it is often looked down upon for her to interact with her parents or siblings too frequently.[855] Given that many women are expected to stay within the perimeters of the household, their husband and his relatives have full control over almost every aspect of their lives and can do with them as they wish – including subjecting them to violence and harassment. Therefore, economic dependence and social isolation are both factors that increase the risk of dowry-related issues occurring after the marriage.[856] Dowry-related violence is not an irregular occurrence. Estimates from 2012 show that an average of five women are subjected to dowry related violence on an hourly basis.[857] These figures remain at a high despite increasing social and economic developments in many communities within the nation.[858]

There are three main reasons for why the groom's family participates in dowry-related violence. Firstly, violence occurs when demands for dowry are not met. Biswajit Ghosh mentions just such a case where 'Nandita Bhagat was subjected to verbal, emotional, and physical abuse by her husband Ajoy for not having a male child, for failing to bring dowry, and for raising objections about an illicit relationship of her husband with his sister-in-law.'[859] In this case, the absence of dowry served as one of the triggers that led to marital violence. Sujata Gadkar-Wilcox also conveys that 'since grooms' families view dowry as a crucial way to

[854] *id.* at 27.

[855] The frequency is defined by her new family.

[856] n 745 above, 37.

[857] Termed 'dowry related torture and cruelty' in n 756 above, 228.

[858] n 750 above, 410.

[859] n 750 above, 415.

improve their economic status, brides and families of brides who are unable to pay dowries face far greater risks of domestic violence.'[860] This connects the violence directly to the 'new' definition and purpose of dowry under a consumeristic society. The second reason for dowry-related violence is that the groom's family often deems the amount of dowry given as insufficient – with this verdict of insufficiency conveniently appearing after the marriage.[861] Waiting until after the marriage gives the groom's family an even higher position of power from which to bargain as they have the bride under their control and can (and do) subject cruelty upon her until their demands are met.

After a marriage, even when demands for an initial dowry or additional dowry are met, there is no guarantee that the violence and torture of the bride will stop. This is linked to the final reason for dowry-based violence – a demand specifically for post-wedding dowry. In a study conducted in Delhi, dowry was demanded after the marriage, with no prior request for dowry, in 60 per cent of the cases.[862] Post-wedding dowry is most closely related to the ancient rituals of gift-giving, and *vardakshina* in particular, which also included gifts during special occasions after the marriage.[863] This dangerous element continues to exist today where many post-wedding contributions are no longer given as gifts but rather given to meet the demands of the groom's family. Harassment for post-wedding dowry often begins only a few days after the wedding,[864] and these forced gifts soon become necessary contributions in order for the

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[860] Sujata Gadkar-Wilcox, 'Intersectionality and the Under-Enforcement of Domestic Violence Laws in India' (2012) Penn. Law: Legal Scholarship Repository 468. On the flip side, Srinivasan and Lee write how 'the parents-in-law may show preferential treatment to a daughter-in-law who brings a large dowry by giving her fewer household responsibilities, allowing more autonomy, and treating her more courteously' in n 850 above, 1110.

[861] n 745 above, 34.

[862] n 808 above, 625.

[863] Virendra Kumar and Sarita Kanth, 'Bride Burning' (2004) 364 Medicine, Crime, and Punishment, 18.

[864] n 832 above, 123.

family of the bride to ensure the safety of their daughter from her husband or her in-laws. Bhat and Ullman refer to dowry-related violence as 'major physical and psychological harassment and torture by [the women's] husbands and in-laws.'[865] In one such case, a woman named Sabina was subjected to physical and mental violence when her parents were not able to fulfil the continuous dowry demands. All her *streedhan* was kept out of her reach in her in-law's house and she was pushed out of the flat she shared with her husband.[866] With situations like this, 'many women and girls find themselves forced into a life of servitude and experience repeated acts of harassment, intimidation, sexual abuse and violence by their husbands and other family members as part of demands for more dowry.'[867] Surrounded by the constant hunger for more money and property, incidents of dowry-related violence often and easily turn into a dowry-related death.

Dowry Death

An impasse is created when the bride's family is not able to provide additional dowry and the groom's family is not willing to retract their demands. It is this impasse that often leads to dowry deaths, where the woman is either murdered after extended harassment or kills herself because of it.[868] This particular categorization of death is defined under Article 304B of the Indian Penal Code. This article formulates dowry death as a category;

[865] Meghna Bhat and Sarah Ullman, 'Examining Marital Violence in India: Review and Recommendations for Future Research and Practice' (2014) 15 Trauma, Violence & Abuse 1.

[866] n 750 above, 415.

[867] The Independent Advisory Group on Country Information, 'India: Women Fearing Gender-Based Violence' (UK Home Office 2018).

[868] n 813 above.

> 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, ...[869]

It goes on to say that, if the above is found to be true, the husband of the victim or his relative would be charged for the death of the wife.[870] The punishment for dowry deaths vary from seven years to life imprisonment.[871] Such a definition conveys both the unique and horrific nature of this particular category of murder. The Indian Supreme Court, repulsed by dowry deaths, stated that 'nothing could be more barbarous, nothing could be more heinous than this sort of crime.'[872] Part of the barbarity of this crime comes from the fact that, by nature, dowry deaths are carried out by intimate others and family members in a very intentional and brutal manner.

Both culpable homicides and suicides fall under the category of dowry deaths and the husband or his family can be charged for either.[873] In 2011, there were 8,618 dowry-related deaths recorded,[874] although unofficial statistics estimate the amount to be closer to 25,000 deaths in any given year.[875] In 2016, the annual statistics showed a rate of 21 dowry deaths per day, which served as an overall increase from the 19 deaths per day in 2001.[876] The most recent

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[869] Indian Penal Code 1860, 304B.

[870] *ibid.*

[871] *id.* at 304B(2).

[872] n 739 above.

[873] n 813 above and n 745 above, 36.

[874] n 745 above, 34.

[875] n 785 above, 258. and n 745 above, 34. The women are between the ages of 15 and 34.

[876] n 788 above.

statistics to be found placed the number at up to 22 dowry deaths per day in 2018. With these statistics, it is no wonder that scholars have classified dowry deaths as 'endemic international human rights violations.'[877]

Dowry-related suicides are most often committed by hanging, drowning, poisoning or self-immolation,[878] as the women are induced to kill themselves to escape the violence and cruelty they encounter.[879] For dowry-related homicide, the reasoning behind this crime can be hard to discern. If the husband and his family were to kill the wife, they no longer have their leverage for asking for more money from her natal family. This is where a new line of reasoning emerges. The women are murdered so that the husband can once again be placed in the marriage market as an eligible groom and ask for another, perhaps better, dowry.[880] Additionally, the groom or the in-laws may carry out the murder as the ultimate punishment for failing to provide a sufficient dowry or being unable to fulfil later demands for more.[881] Another related reason goes back to the social perception of women as a burden on their household. Murder occurs when the groom's family has decided that they have put up with the bride for long enough, relative to the amount of dowry they received or are receiving as a compensation for this burden.[882]

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[877] n 785 above, 263.

[878] n 745 above, 34.

[879] n 865 above.

[880] Virendra Kumar and C.B. Tripathi, 'Burnt Wives: A Study of Homicides' (2004) 44 Medicine, Science and the Law 1, 57, n 737 above, 296. and n 739 above, 63.

[881] n 745 above, 36.

[882] n 756 above, 230.

Dowry-related murders are performed through a variety of methods. The most common of these, and discussed in detail later, is bride burning.[883] In fact, bride burning is so common that the term is often used interchangeably with dowry death in popular culture.[884] Bride burning consists of dousing the bride in kerosene before setting her on fire.[885] Another popular method is to drown the woman, often by pushing her into a well and claiming it to be an accident.[886] Other frequent methods include poisoning or hanging.[887] Once again, these are methods that can be made to look like an accident. Yet, promisingly, when other criteria under the definition of dowry death are fulfilled, the wife's family-by-marriage are automatically considered to be suspects until proved otherwise. It is invariably the husband and his parents who 'play a central role' in killing the wife.[888] Often, even if the husband does not agree with the violence, he is not in a position to protect his wife due to society's normalisation of both dowry and domestic violence. At times, he is also forced to partake in the violence. As an example, Musa remarks upon how, 'in the case of Meera Srivastava's death, the husband was pressured to participate in her murder even after he initially left the room.'[889]

Bride Burning

[883] n 813 above.

[884] n 813 above.

[885] n 865 above and n 745 above, 36. Rajni Jutla and David Heimbach write that, 'In fact, in India, kerosene is a ubiquitous cooking fuel that is likened to a cheap and handy weapon as much as a gun or baseball bat in an American home.' This is mentioned in Rajni K, Jutla and David Heimbach, 'Love Burns: An Essay about Bride Burning in India' (2004) American Burn Association 166.

[886] n 745 above, 36.

[887] n 813 above, 1.

[888] n 756 above, 232.

[889] n 756 above, 232.

Bride burning, the most common form of dowry death, is not a rare phenomenon.[890] In fact, research shows that fire-related injuries are the number one cause of death for Indian women between 15 and 34 years of age.[891] The majority of these cases were deemed accidental, others were categorised as suicide attempts and the minority proved to be murder.[892] Yet, this minority is not a negligible one as, in 2010 and 2012, a woman was burned to death in India every 90 minutes.[893] Bride burning is not a new phenomenon either. Between 1947 and 1990, around 72,000 brides aged 15 to 20 were burned to death.[894] In fact, the practice of immolation, including self-immolation, goes even further back with the practice of suicide, or forced suicide, under the then-popular act of sati.[895] Today, bride burning – more prevalent than sati – is considered to be epidemic[896] as well as a form of gendercide.[897]

Self-immolation, or suicide by burning, is unfortunately a prevalent practice across India, and its popularity is not hindered by social classes or geographical locations.[898] Statistically, much can be revealed about the nature of self-immolation today through Virendra Kumar's study with a group of 152 burned wives where he found that 21 per cent were

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[890] Bride burning is often used synonymously with dowry death, as mentioned by Purna Manchandia, 'Practical Steps towards Eliminating Dowry and Bride-Burning in India' (2005) 13 Tulane Journal of International and Comparative Law 308 and Navpreet Kaur and Roger Byard, 'Bride Burning: A unique and ongoing form of gender-based violence' (2020) 75 Journal of Forensic and Legal Medicine 2.

[891] n 813 above.

[892] n 813 above. Additionally, Menezes writes that 'one-fifth of dowry deaths caused by burns are reported as abetted suicide (dowry suicide)' in n 776 above, 68.

[893] n 756 above, 228. and NCRB (for 2012).

[894] n 785 above, 258.

[895] Sati is explained in detail within the theory chapter.

[896] n 785 above, 258.

[897] n 785 above, 256 and 257. The author writes that 'gendercide is essentially gender-selective mass killing.'

[898] n 740 above, 31.

suicides.[899] Kumar writes that 'almost 70 per cent of [those] women were less than 25 years old at the time of their deaths, the majority had been married less than 9 years …'.[900] More than two-thirds of the women were also living in a joint family which meant that they were not only living with their husband but with his family members as well.[901] Strikingly, most of these women set themselves on fire in 'areas of relatively common family traffic' within the house, but the amount of burns they sustained shows there were almost no rescue attempts.[902] The information Kumar gathered in relation to murder by burning was similar. 31 per cent of women in the same cohort suffered homicidal burns within which the majority of wives were between 16 to 25 years old.[903] From this information, we can discern that most of these young women died within a decade of their marriage and that many of the suicides correlated with the bride having lived in a joint family. For both burn-related homicides and suicides, the most common cause of death – by a large margin – was shock.[904] Although dowry is not the only factor that causes bride burning, it is the most prevalent by far.[905]

What these statistics are not able to reveal about bride burning is the brutal and, certainly in the case of homicides, intentional nature of this crime. Mittal and Sundaragiri remark upon one such case of bride burning where a 25-year-old was 'set a blazed by her

[899] n 740 above, 31.

[900] n 740 above, 31.

[901] n 740 above, 33.

[902] n 740 above, 34.

[903] Virendra Kumar and C.B. Tripathi, 'Burnt Wives: A Study of Homicides' (2004) 44 Medicine, Science and the Law 1, 55.

[904] *id.* at 59 and n 740 above, 34. This was also found in a study by Shaha and Mohanty in Kusa Kumar Shaha and Sachindananda Mohanthy, 'Alleged Dowry Death: A Study of Homicidal Burns' (2006) 46 Medicine, Science and the Law 2, 108.

[905] n 829 above, 277.

husband under the influence of alcohol while she was sleeping outside the house by pouring kerosene over her and then lit her by matchstick.'[906] The reason given for her murder was that there were family disputes.[907] To her husband, this served as a justification for burning his wife alive. Despite a clear perpetrator for many of these crimes, cultural barriers stand in the way of pointing the finger directly at the victim or his family. Bride burning is especially common in joint families[908] where the witnesses, who can speak out about the murder or any past cruelty, are all members of the husband's family and potential perpetrators of the violence themselves.

India's unique dowry death classification occurs after the victim has been brought to the hospital and the police have been called. The first determination made is whether the death was natural or unnatural. If unnatural, further determination is made as to whether the death was an accident or non-accidental. Once a death is classified as non-accidental, it needs to be categorised as either self-inflicted (suicide) or caused by a third party (homicide).[909] Lastly, if caused by a third-party, it is to be decided whether this party is culpable or not culpable.[910] If the death is determined to be a suicide or a culpable homicide that occurred within seven years of marriage, the category of dowry death comes into play.[911] Although this process seems pretty straightforward, the reality is often biased. The interests and resources of the various parties playing a role in the classification influence the final decision.[912] Given this, dowry deaths have

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[906] Chaitanya Mittal and Suraj Sundaragiri, 'A Case of Homicidal Bride Burning: An Analysis of Variables' Jawaharlal Institute of Postgraduate Medical Education and Research 138.

[907] *ibid.*

[908] n 863 above. and Virendra Kumar and C.B. Tripathi, 'Burnt Wives: A Study of Homicides' (2004) 44 Medicine, Science and the Law 1, 59.

[909] As detailed below, a suicide can also be categorised as a dowry death due to the role the husband or his family might play in abetting the suicide.

[910] n 813 above, 1.

[911] n 813 above, 1.

[912] n 813 above, 1.

the risk of being misclassified as an accident or a suicide (if the death was a homicide). Manchandia writes that, 'when the husband and his in-laws cannot claim an accident based upon the evidence, they simply change the story to one of suicide.'[913] Although abetted suicide is criminalised, the abetment is much harder to prove.[914] Relatedly, when a dowry-related burning is classified as an accident, it is no longer a punishable act.[915] Therefore, the husband's family commonly claim incidents of bride burning to have been caused by an accident in the kitchen or an exploding cooking stove.[916] At times, when the wife survives the burning, she is pressured by her in-laws to say that it was an accident – and she does so out of fear for herself or the future of her children.[917] In the particular case highlighted by Jyoti Belur et al., the victim retracted her statement two days later when her parents arrived and 'she has the guts to say, no, it was not an accident, it was [intentional].'[918]

At other times, homicidal bride burning is reported as a suicide. Along with shifting blame away from a perpetrator, this lie is often accompanied by the victim being 'defamed and labelled as unstable, and as having demonstrated suicidal tendencies in the past.'[919] Such statements discredit the victim, who, on account of being dead, has minimal ability to defend herself. Often, the perpetrators of bride burning are sure to burn any incriminating evidence as

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[913] Purna Manchandia, 'Practical Steps towards Eliminating Dowry and Bride-Burning in India' (2005) 13 Tulane Journal of International and Comparative Law 308 and 309.

[914] This is further discussed under Failures in the Law.

[915] n 745 above, 34.

[916] n 865 above and n 745 above, 36. Nayreen Daruwalla et al write that 'the 'stove blast' is both a real hazard and a means of explaining away intentional burns that has become shorthand for describing incidents, often somewhat vaguely.' This is found in Nayreen Daruwalla et al., 'A Qualitative Study of the Background and In-Hospital Medicolegal Response to Female Burn Injuries in India' (2014) 14 BioMed Central Women's Health 11.

[917] n 813 above, 4.

[918] n 813 above, 4. A quote from an interviewee.

[919] n 863 above, 18.

well.[920] At other times, 'the husband and in-laws do not inform the victim's family of her death until after post-mortem examination or cremation has occurred.'[921] Through these established methods, the husband and his family try their hardest to ensure that the death is misclassified as an accident or a suicide. The existence of these manipulations highlights the importance of reconstructing household events that occurred prior to the death, such as abuse or dowry demands, in order to make sure that any cases of murder are properly classified as such.[922]

Along with an account of past events, a dying declaration is an important piece of evidence for any dowry death case. In most dowry-related suicides and murders, the victim does not survive and 'the prosecution must proceed without its chief witness.'[923] Yet, when a woman arrives at the hospital near death, her dying declaration is recorded which 'provides an authoritative victim account of the circumstances surrounding her burns.'[924] Under the assumption that a dying woman has no reason to lie, her declaration is admitted to court and 'granted special privilege.'[925] This unique allowance permits a victim to also be a witness in her own case and contribute to the search for truth and justice. Unfortunately, these dying declarations are at times considered inadmissible in court due to errors or irregularity in the way they were recorded.[926] In this way, a promising initiative is undermined by improper application – and this has grave consequences for the victim. As this chapter delves further into

[920] Sujata Gadkar-Wilcox, 'Intersectionality and the Under-Enforcement of Domestic Violence Laws in India' (2012) Penn. Law: Legal Scholarship Repository 471.

[921] n 863 above. At still other times, the bride's family themselves choose not to share about the death as it is considered to be shameful, as mentioned in n 913 above, 308.

[922] n 813 above, 1.

[923] n 737 above, 297.

[924] n 813 above, 1.

[925] n 813 above, 1.

[926] n 863 above, 19.

other legal provisions surrounding dowry death, it is quickly revealed that the dying declaration is not the only provision with an absence in enforcement and proper implementation.

Dowry, Dowry Deaths and the Indian Legal System

The practice of dowry and dowry-related deaths continue to thrive in the private sphere despite extensive laws penalising these acts. To understand this, the following sections will provide an in-depth analysis of the criminal laws surrounding dowry and its associated crimes before looking at the failures and weaknesses within these provisions. The intersecting nature of dowry, dowry-related violence, and dowry deaths means that many of the provisions under Indian criminal law penalising one of these elements have implications for the others as well. This section begins with a study of the Dowry Prohibition Act before looking at three prominent amending acts which modified the Dowry Prohibition Act as well as other criminal provisions. Examining dowry-related amendments helps paint a picture of how India's legal understanding of this crime has evolved since the initial act prohibiting dowry in 1961.

The Dowry Prohibition Act (1961)

Prior to the existence of a nation-wide criminalisation, two state governments had implemented dowry prohibiting acts of their own.[927] Unfortunately, the Indian Parliament holds that 'both these enactments failed to achieve the objectives for which they were enacted.'[928] This necessitated the need for a central and consolidated legislation against dowry. The journey towards such a law began in 1953 with the Parliament discussing a non-official

[927] The Bihar Dowry Restraint Act of 1950 and The Andhra Pradesh Dowry Prohibition Act of 1958.

[928] The Dowry Prohibition Act (Act No. 28) 1961, Introduction.

bill on dowry-related crimes.[929] Yet, it was only in 1959 that the government decided to enact legislation prohibiting the practice of dowry. This legislation emerged as the Dowry Prohibition Act of 1961.[930] Divided into ten articles, this act includes the definition of dowry[931], the penalty for giving or taking dowry (either directly or indirectly)[932] and the penalty for demanding (or advertising) dowry.[933] The Dowry Prohibition Act contains both criminal and civil punishments for giving or receiving dowry by including a fine of at least 15,000 rupees or the amount of the dowry[934] along with imprisonment for a period of longer than five years.[935] Similar punishments exist for demanding dowry as well, with a fine of 10,000 rupees and jail time between six months to two years.[936] Article 8-A specifies that the burden of proving innocence lies with those who are accused and charged with demanding or receiving dowry.[937] Finally, it is also to be noted that Article Seven and Article Eight of the Dowry Prohibition Act deem the offences within as cognizable[938] as well as non-bailable and non-compoundable.[939]

Interestingly, Article Six of the Dowry Prohibition Act, titled 'Dowry to be for the benefit of the wife or heirs,' details how all the dowry received by any of the parties must be

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[929] *ibid.*

[930] *ibid.*

[931] The Dowry Prohibition Act (Act No. 28) 1961, Article 2.

[932] *id.* at Article 3; Appendix A.

[933] The Dowry Prohibition Act (Act No. 28) 1961, Article 4; Appendix A.

[934] Whichever amount is higher.

[935] The Dowry Prohibition Act (Act No. 28) 1961, Article 3.

[936] *id.* at Article 4.

[937] *id.* at Article 8; Appendix A.

[938] This term, used in only a few legal systems, refers to a classification of crimes that are considered to be worse than other, non-cognisable offences. If a crime is cognisable, there are certain allowances that come into play – such as the police's right to arrest without a warrant.

[939] Non-compoundable offences refer to crimes where the parties are not allowed to compromise. The Dowry Prohibition Act (Act No. 28) 1961, Article Seven and Eight.

transferred to the wife instead.[940] The language of this article, coming almost directly after articles that lay out the illegality of dowry and the associated punishments, seems to suddenly undermine the absolute prohibition given so far within the act. Although some argue that this section exists for the benefit and protection of the wife,[941] such a provision only reinforces the fact that protecting the bride is used as one of the justifications for participating in dowry in the first place. This undermines the criminality of the institution of dowry within the prohibition itself. Moreover, it is interesting to note that this section allocates all dowry to the bride while the rest of the act has worked hard to be gender neutral in its terminology. For example, the definition of dowry itself presents the act as an exchange from either side to the other. If that were the case, handing all dowry to the woman would hardly make sense.[942] Similarly, Pramila writes how, 'by giving the right to the wife to have full control over the stridhana, the property in the forms of gifts, presents, jewels etc, the state accorded some legitimacy to the practice of dowry.'[943] Either way, this would only provide a surface level solution – if that – to deeper contradictions within the Dowry Prohibition Act.

Notable Amendments

The Criminal Law (Second Amendment) Act of 1983 and Section 498A

The Criminal Law (Second Amendment) Act was released twelve years after the Dowry Prohibition Act in order to address the increasing rate of dowry deaths.[944] The Joint Committee of the Houses (of Parliament) in charge of the Dowry Prohibition Act remarked on the need to

[940] *id.* at Article 6; Appendix A.

[941] n 815 above.

[942] And if that is not the case, why is the definition phrased in such a manner?

[943] n 783 above, 848.

[944] Criminal Law (Second Amendment) Act 1983.

have separate laws dealing with the issue of dowry death. [945] In their reasoning, they mentioned that the prohibition on dowry had clearly not contributed to any decrease in violence or deaths.[946] Therefore, this 1983 amendment act was created. It aimed to modify the Indian Penal Code, the Code of Criminal Procedure and the Indian Evidence Act in order to 'deal effectively not only with cases of dowry deaths but also cases of cruelty to married women by their in-laws.'[947] This aim contributed to something much bigger as the 1983 amendment act was the first time in Indian law that domestic violence became a punishable offence.[948]

Codified within the Indian Penal Code as Section 498A, this article made cruelty by a husband or the relatives of the husband liable to imprisonment and a fine.[949] India was one of the few countries to criminalise domestic violence, under the heading of cruelty by the husband or his family, as early as 1983.[950] In the context of Section 498A, cruelty was given to mean:

(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

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[945] Criminal Law (Second Amendment) Act 1983 Statement of Objects and Reasons.

[946] *ibid.*

[947] *ibid.*

[948] n 785 above, 258.

[949] Indian Penal Code 1860, 498A.

[950] Appendix D. Although, according to the World Bank, 144 countries have domestic violence laws as of 2018. Even CEDAW's Article 19's mention of domestic violence and the Istanbul Convention were only created in 1992 and 2011 respectively.

security or is on account of failure by her or any person related to her to meet such demand.][951]

In the case of dowry-related violence, it is normally the latter definition of cruelty that applies first, with harassment and coercion, which then escalates into cruelty defined as wilfully life-threatening conduct. Notably, this definition includes both mental and physical cruelty that the woman might be subjected to.

Despite being a weighty and ground-breaking provision, Section 498A still does not contain the preciseness that it needs in order to be effective against generations of societal acceptance of domestic violence. For example, even the terminology of mental and physical cruelty is left as a throwaway addition that the victim struggles to interpret just as much as the judge struggles to prosecute. When it comes to dowry-related violence, much of the verbal or mental abuse would be hard to prove in court without specific parameters or legal language to draw upon. In fact, cases under 498A only had a conviction rate of 19 per cent despite 94,000 cases having been reported under this provision in 2010.[952] The inclusion of Section 498A was accompanied by the addition of Section 198A in the Code of Criminal Procedure.[953] This code, which dictates how articles within the Indian Penal Code must be carried out, added to the provisions on cruelty by saying that a police report or victim complaint is necessary before cruelty is registered as an offence.

[951] *ibid.*

[952] n 739 above, 61.

[953] Code of Criminal Procedure 1973.

The 1983 amendment act also added Section 113A to the Indian Evidence Act, which allows for a 'presumption as to abetment of suicide by a married woman.'[954] This means that if a woman commits suicide within seven years of her marriage, and prior cruelty by her husband or his relatives can be proved, they can be charged with abetted suicide. Section 113A was added 'to provide the prosecution a tight hand against the defence while dealing with matter.'[955]

Dowry Prohibition (Amendment) Act of 1984

A year later, the criminal law surrounding dowry was further amended with the Dowry Prohibition (Amendment) Act of 1984.[956] This act directly amended the 1981 Dowry Prohibition Act. The most notable amendment within this act was to remove Explanation I from under the definition of dowry and create sub-section (2) under Article Three instead. Explanation I had initially been added to exclude the giving of gifts during the marriage from the definition of dowry. The amendment act decided to move this exclusion from Article Two but recreate it more thoroughly under Article Three instead. Article Three, which includes the penalty for giving or taking dowry, found itself with a sub-section (2) that stated:

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[954] The Indian Evidence Act 1872, 113A; Appendix B. Interestingly, there are quite a few jurisdictions around the world that criminalise abetment to suicide. However, these do not find a particular reference to violence against women or dowry death as this abetment does in India. The Indian Penal Code contains a separate provision (Section 306) for abetment to suicide outside the scope of dowry death. The above presumption of abetment only applies in reference to Section 304B. UN Women encourages the criminalisation of abetment to suicide and cite the example of India in doing so, although it does specify that a time limitation should not be set, in 'Aiding and Abetting Suicide' (UN Women Virtual Knowledge Center to End Violence Against Women and Girls, 1 March 2011).

[955] n 739 above, 60.

[956] Dowry Prohibition (Amendment) Act 1984.

Nothing in sub section (1) shall apply to, or in relation to, -

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

b. Presents which are given at the time of a marriage to the bridegroom (without any demand having been made in that behalf).[957]

The sub-section also added the stipulations that all presents must be recorded in a list and that their value should not be excessive.[958] Accordingly, a separate document, called 'The Dowry Prohibition (Maintenance of Lists of Presents to the Bride and Bridegroom) Rules of 1985,'[959] was created. This exception of gift-giving within the Dowry Prohibition Act leaves a dangerous loophole that allows for the legal existence of dowry under the guise of presents.[960]

Dowry Prohibition (Amendment) Act of 1986 and Section 304B

The final amendment surrounding dowry occurred soon after the other two, through the Dowry Prohibition (Amendment) Act of 1986.[961] Arguably, this was the most thorough and useful round of amendments to dowry death as it added the very important Section 304B to the Indian Penal Code.[962] This section, created 'under huge pressure from the women's

[957] The Dowry Prohibition Act (Act No. 28) 1961, Article 3(2).

[958] *ibid.*

[959] The Dowry Prohibition (Maintenance of Lists of Presents to the Bride and Bridegroom) Rules of 1985.

[960] The implication of this loophole is discussed in detail when discussing the failures of the law.

[961] Dowry Prohibition (Amendment) Act 1986.

[962] Indian Penal Code 1860, 304B; Appendix D.

movement,'[963] was the first to specifically address dowry deaths as a distinct and formal category of murder or suicide under compulsion following dowry-related harassment. Section 304B of the IPC establishes the category of dowry death as:

> (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.[964]

Creating a section of the Indian Penal code solely to define and address dowry deaths, rather than trying to make this unique category fit into other existing provisions, meant that the 1986 amendment act went further than the Dowry Prohibition Act and other prior amendments. Prior to the creation of Section 304B, dowry deaths were only addressed either under Section 302 of the Indian Penal Code, which deals with murder, or under Section 306, which tackles abetment of suicide.[965] With its definition focused on this particular crime, Section 304B contributed to the concrete and realistic criminalisation of dowry deaths. After defining dowry death, Section 304B continues on by saying that the definition of dowry in this context will be synonymous to the definition provided within the Dowry Prohibition Act. It also sets the punishment for the crime of dowry death between seven years to life imprisonment.

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[963] n 739 above, 61.

[964] Indian Penal Code 1860, 304B (1).

[965] *id.* at 304 and 306 and n 739 above, 60.

Along with the introduction of Section 113A into the Indian Evidence Act in 1983, this new amendment act added a Section 113B. This section created a 'presumption as to dowry death,'[966] which made it obligatory for the Court to consider a murder or suicide as a dowry death[967] if the woman faced cruelty or harassment related to the demand for dowry prior to her death.[968] This addition is to be celebrated as it forces police officers and judges alike to thoroughly investigate any crime with the defining characteristics of violence and dowry as a case of dowry death.

The Dowry Prohibition (Amendment) Act of 1986 also made changes to the original Dowry Prohibition Act by tightening the phrasings under certain articles and by including that dowry offences will be non-bailable.[969] Perhaps most notably, this amendment added the category of Dowry Prohibition Officers into the 1961 Act under the new sub-section 8-B.[970] These officers were to be assigned by the state in order to assure compliance with the Act, prevent dowry demands or transactions and collect evidence against offenders.[971] Furthermore, they also had the responsibility 'to perform such additional functions as may be assigned to him by the state Government.'[972] The addition of Dowry Prohibition Officers shows recognition of the need for separate personnel dedicated entirely to the issue of dowry and dowry-related violations. In reality, however, a lack of resources and implementation has resulted in the sporadic existence of this position and, when it does exist, it is often given as an added responsibility to an existing official rather than a position in itself.

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[966] Indian Evidence Act 113B; Appendix B.

[967] As defined in 304B of the IPC.

[968] Indian Evidence Act 113B.

[969] A non-bailable offence refers to offences where only the court can sanction the bail of the arrested.

[970] The Dowry Prohibition Act (Act No. 28) 1961, Article 8-B.

[971] *id.* at 8-B (2)a-c.

[972] *id.* at 8-B (2)d.

Overall, provisions surrounding dowry were significantly amended three times since the initial Dowry Prohibition Act of 1961. Despite these amendments, scholars still critique this act for being vague and difficult to enforce.[973] Dowry-related cruelty and dowry deaths have also increased since these amendments were implemented.[974] Although this could optimistically be associated with an increase in reporting, it still means that deaths are continuing to occur at a similar or more rapid rate than before and that the practice of dowry itself remains 'highly institutionalised'.[975] Therefore, it is worth spending the next section examining the weaknesses in and shortcomings of the aforementioned provisions criminalising dowry, dowry-related violence and dowry deaths.

Failures in the law

Despite India's array of positive laws on the subjects of dowry, dowry violence and dowry deaths, there are still a startlingly high number of cases and low number of convictions within the nation. This goes to show that 'India's laws offer more bark than bite.'[976] Although impressive in their threats, the current legal framework does not carry its provisions and promises into the reality of the situation in India. To examine this discrepancy more closely, it is important to understand how laws concerning the various abuses surrounding dowry are individually enacted and enforced. As an example, Sunil Bhave writes how 'investigative reports usually deem dowry deaths as family disputes unrelated to dowry.'[977] A

[973] n 756 above, 236.

[974] n 865 above 64. and n 783 above, 847.

[975] n 783 above, 847.

[976] n 737 above, 301.

[977] n 737 above, 301.

misidentification of the crime at such an early stage of the justice process results in the perpetrator being charged under incorrect sections of the Indian Penal Code – outside the provisions allocated to dowry and dowry death. This, in turn, often leads to erroneous acquittals or reduced punishments given that other laws addressing murder and suicide are not meant to accommodate for the particularities that exist only with cases of dowry death.[978] Even when cases of dowry-related cruelty or dowry death are charged under the Indian Penal Code's Section 498-A or 304-B respectively, ambiguities in the law or particularities in their application tend to result in complicated trials, reduced sentences or complete acquittals. Therefore, it is easy to see why Lakhani says that 'the current law is part of the problem, not the solution.'[979]

Speaking of dowry-related abuse as well as domestic violence as a whole, Musa writes that 'a woman's ability to escape the abuse is largely dependent on the support systems and the resources available to her.'[980] When these resources are shrouded by layers of patriarchy that manifest as lack of enforcement and legislative loopholes, it becomes that much harder for a dowry-related victim to access and manoeuvre the legal system. In order to thoroughly understand the issues in India's extensive body of dowry laws, the following section will examine (a) the hurdles that victims face before a dowry related case goes to the court and (b) the complications that arise while presenting a case before the court. Between the time that dowry-related abuse occurs and the time that the offence finds its way to a court, there are many hurdles that can prevent the case from reaching trial. These can be broadly categorised under the issues of accessibility to the law and enforcement of legal procedures on the ground

[978] Such as the lack of evidence or testimonies.

[979] n 785 above, 272.

[980] n 756 above, 232.

level. Even when dowry-related cases do appear before a court of law, various ambiguities and loopholes within the Dowry Prohibition Act and sections 304-B and 498-A of the Indian Penal Code work to prevent the victim from obtaining justice. The above areas of shortcomings are further supplemented by weaknesses and biases in the Indian legal system as a whole. The following section will address each of these in turn.

Before Court: Accessibility and Enforcement

The celebrated provisions surrounding dowry-related violence and dowry death in India are only useful to the cases that actually reach Indian courts. In reality, many dowry-related crimes never make it to court 'despite some pro-active judicial decisions at the higher levels.'[981] In fact, a study claims that less than even one in ten dowry deaths are investigated by the government.[982] An explanation for this jarring absence of investigation and charges can be extracted through Shalu Nigam's field research, where she found a 'huge gap between on-the-ground reality and the theoretical understanding among different actors – those who frame the law, those who implement it and those who are using it.'[983] This research, conducted from 2002 to 2005, shows that the objective laws on dowry remain subjective in their practice – and often depend on the biased, and patriarchal, understanding of the implementor in their enactment.[984] Although this might not seem too grave a reality, it allows for resolutions that do not bring justice to the victim and undermine the spirit of the provisions. As an example, cases occur where a dowry-death victim's parents decide to settle out of court and even marry their other

[981] n 750 above, 410. Many of which will be discussed later.

[982] n 737 above, 301 and 302. and Melissa Spatz, 'A Lesser Crime: A Comparative Study of Legal Defenses for Men Who Kill Their Wives' (1991) 24 Columbia Journal of Law and Social Problems 4, 611.

[983] n 832 above, 1.

[984] More discussion of patriarchy and biases will be conducted in the next chapter.

daughter to the victim's husband, which often results in another dowry-related death in the household.[985]

At other times, victims or family members who wish to seek justice may find difficulties in even accessing the legal system. These difficulties are often associated with their economic or social status[986] – which influences their ability to access help and pay for the technicalities around judicial procedures.[987] Given these hurdles in getting recognition for the crime and getting access to the court, it is even more noteworthy that the number of criminal cases associated with dowry keep increasing. Those who do register cases of dowry-related abuse tend to face large waiting periods both before and during their trial. Such lags speak directly to the 'glaring inefficiencies in the police and judiciary systems'[988] and jeopardise victims of dowry- based violence, who may still be married to their abusers or share a household with them. Even in cases of dowry death, the family of the victim faces societal and monetary burdens during their long wait for a justice that might never arrive. Delayed judgements have also been largely attributed to corruption in the police force.[989] Corruption leads to manipulated investigations that either compromise the case or need to be re-checked and re-categorised later on in the process. In this vein, Meghana Shah remarks upon how 'poorly paid police forces, and the deep-seated Indian traditions of taking baksheesh, or bribes, means that most police officers will turn a blind eye to telling evidence at the crime scene.'[990]

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[985] n 756 above, 234.

[986] n 801 above, 211.

[987] For example, many villages may not have Dowry Prohibition Officers or the families might have to travel far and with great expense to reach the courts.

[988] n 788 above.

[989] Melissa Spatz, 'A Lesser Crime: A Comparative Study of Legal Defenses for Men Who Kill Their Wives' (1991) 24 Columbia Journal of Law and Social Problems 4, 612 and n 801 above, 215.

[990] n 801 above, 215.

Many times, intentionally or unintentionally, proper procedures are not followed when collecting evidence and, prior to the trial, evidence is often misplaced or damaged.[991] Depending on the circumstances of the crime, the police also tend to take excessive time, months to years, in submitting an initial charge sheet. This gives time for the disposal or disappearance of crucial evidence.[992] At times, and more incriminatingly, the police force colludes with various parties of the investigation (such as doctors or magistrates) to manoeuvre the case in the favour of the perpetrator.[993] None of these mismanagements of justice work to the benefit of the victim. In fact, the bride often faces extreme difficulties, and even loses the case, because of the 'carelessness' of investigators. There are also situations where the police simply choose not to investigate a bride burning case as a murder and classify them as kitchen accidents instead. This is despite the fact that Article 113B of the Indian Evidence Act requires the presumption of dowry death, and the relevant investigatory procedures, when a woman dies under unusual circumstances within seven years of her marriage.[994] A Delhi-based study of 109 first information reports and police entries on female burn victims showed that 63 per cent of these cases were classified as an accident, without any investigation.[995] Although it is difficult to identify and classify dowry-related murders as dowry deaths,[996] that is no excuse to forgo the process entirely. This study also found that no post-mortem analysis was conducted in 22 per cent of the cases.[997] Once again, this holds grave consequences for any legal case that the

[991] n 801 above, 215.

[992] Melissa Spatz, 'A Lesser Crime: A Comparative Study of Legal Defenses for Men Who Kill Their Wives' (1991) 24 Columbia Journal of Law and Social Problems 4, 612.

[993] n 739 above, 62.

[994] Indian Evidence Act 1872, 113B.

[995] n 992 above.

[996] n 745 above, 37. (elaborated later when speaking of evidence under 304B).

[997] n 992 above.

victim or her family may build, as the body is often the only available evidence in the crime of bride burning.

This 'general failure of the police and judiciary to put up adequate resistance through timely and proper conviction of the offender'[998] leads to more abuse and fewer convictions.[999] Therefore, it is vital for the police force and the courts to record, register and judge cases in a quick, efficient and honest manner. In addition to corruption, another reasoning provided for the inefficiency of police investigations is that they simply do not care about dowry-related crimes as these are considered to be private, family matters.[1000] Similarly, Manchandia agrees that, at the end of the day, 'police, too, are a product of a society that believes women are subordinate, despite the fact that they have a legal duty to alleviate such a situation.'[1001] Although biases like these are discussed in detail in the following chapter, it is an underlying bias that permeates the investigations by the police, the charges by the prosecutors and the convictions by the courts.[1002] Miscarriages of justice by the police or the judicial system also indicate a larger reluctance of the state as a whole to implement dowry-related laws without bias.[1003] In a cyclical fashion, the absence of justice, that these bodies contribute towards, undermine the laws built around dowry-related issues. This results in dowry abuse occurring more frequently and with greater immunity and the fact that, 'in many cases, the guilty go free.'[1004] After having discussed the weaknesses that dowry-based investigations face when it

[998] n 750 above, 411.

[999] Police failure is also mentioned by Nangia, in terms of disregarding complaints, in n 808 above, 690.

[1000] n 992 above, 613.

[1001] n 913 above, 320.

[1002] n 913 above, 320.

[1003] Kirti Singh's presentation at a conference, as reported in Indu Agnihotri, 'The Expanding Dimensions of Dowry' (2003) 10 Indian Journal of Gender Studies 2, 310.

[1004] n 808 above, 690.

comes to accessibility and enforcement, the subsequent sections look at each of the three prominent dowry-related laws in turn[1005] to examine how courts have exploited ambiguities and shortcomings in the text.

Dowry Prohibition Act 1961 and the Legal Interpretation of Dowry

The Dowry Prohibition Act of 1961 (DPA) criminalises dowry and sets out punishments for those who participate in this institution. As the earliest national provision relating to dowry, this act also holds relevance for all subsequent dowry-related laws. The definition of dowry provided within the DPA is one that is used for both dowry-related violence (IPC 498-A) as well as dowry deaths (IPC 304-B). Moreover, a strong and largely applied dowry prohibition works as a preventive measure for dowry-based cruelty. Despite this prominent advantage and responsibility that the DPA has in preventing and addressing violence, it is generally thought to be ineffective 'due to the vagueness and inadequacy' within its provisions.[1006] In response to the constant increase in dowry-related crimes, the Supreme Court also began to interpret articles within the DPA with 'purposive construction'.[1007] This means that, rather than going by the letter of the law, the Court chose to read provisions within the act based on the intent or spirit with which they were created. Although such allowance should have resulted in more convictions, this did not happen. In fact, the reality of purposive construction gave room for human error in application and often saw judgements that took

[1005] The Dowry Prohibition Act, The Indian Penal Code 304-B and The Indian Penal Code 498A.

[1006] n 756 above, 236.

[1007] Human Rights Law Network, 'Leading Cases on Dowry' (New Delhi 2011) 295. Purposive constriction in the context of the DPA draws interesting parallels to the method of teleological interpretation set forth by Article 31 of the Vienna Convention, which refers to 'the interpretation of a treaty using its object and purpose.' As defined in Ulf Linderfalk, *On the Interpretation of Treaties* (Springer 2007).

away from the existing definition of dowry. Therefore, despite good intentions, the ambiguity within the definition of dowry, along with the rights of judges to interpret it, widely work together to further disadvantage the woman and her family. Given how the Dowry Prohibition act has played out in reality, the National Commission of the Women even recommended getting rid of this act entirely.[1008] However, there is no denying that the DPA is the cornerstone on which other dowry-related prohibitions have been built, and it still serves as a prominent reference for these prohibitions. Therefore, the goal here should be to examine, criticise and amend rather than to start all over again.

Under Article Two of the Dowry Prohibition Act, the amended definition of dowry includes 'any property or valuable security given or agreed to be given … at or before or any time after the marriage in connection with the marriage …'[1009] Outside the DPA itself, this definition is used to prove the occurrence of dowry death under 304-B and is also related to dowry-based violence under 498-A of the Indian Penal Code.[1010] Therefore, jurisprudence on the interpretation and application of this definition has a heavy impact on the wide variety of dowry-related crimes across the nation. The definition of dowry has been extensively criticised for being both too vague and too narrow. Sainabou Musa accuses it of the latter, given that the definition fails to take cultural nuances into account – such as the fact that states in India contain differing traditions under the heading of dowry and that many judges have themselves participated in the institution of dowry.[1011] She goes on to state that these factors have 'resulted in a stringent application of the definition of dowry as provided by the act,' which leads to the

[1008] n 829 above, 275.

[1009] The Dowry Prohibition Act (Act No. 28) 1961, Article 2.

[1010] Indian Penal Code 1860, 304B and 498A.

[1011] n 756 above, 237.

dismissal of many cases that do not fit this exact mould.[1012] Interestingly enough, these tend to be the same reasons that others claim the dowry definition to be too vague. The seemingly all-encompassing statements within the definition of dowry allow perpetrators to argue on technicalities that their demands lie outside its purview. They also allow judges to define parameters, for what dowry is and when it applies, with their own biases.

This chapter addresses two particular areas where the DPA's definition of dowry finds itself exposed to ambiguities and, consequently, varying interpretations. Firstly, the phrase 'in connection to marriage', which was highly celebrated when it was included, has been repeatedly interpreted in an unwanted manner. Although this did allow for demands after marriage to be considered as dowry, it is also often argued by courts that many of these demands do not have a connection to the marriage itself and, therefore, are not dowry. This reveals the risks of a limited legal definition for the social act of dowry, which intersects with marriage in multiple, varying ways. For example, demands to the bride's family for money or articles during the birth of a child or religious ceremonies after the marriage are a traditional and widespread form of dowry – even though they are not directly connected to the marriage itself.

Secondly, Section 3(2) of the Dowry Prohibition Act specifically excludes gifts given to the bride during the marriage from the definition of and penalty for dowry.[1013] This sub-section further elaborates that there should not have been any demand made for the gifts and that the gifts themselves should be customary and in proportion to the financial status of the

[1012] n 756 above, 237.

[1013] The Dowry Prohibition Act (Act No. 28) 1961, Article 3(2).

giver.[1014] Additionally, it required that all gifts be recorded in a list that is signed by both parties to the marriage. Creating a legal exception for gift-giving has allowed for a legislative loophole through which the groom's family can indirectly insist on certain items to be gifted to the bride, who is entering their household, without participating in dowry as defined by the act.

The Gift-Giving Exception

The issue of whether marital gifts can be considered as dowry has featured prominently in the legal debates surrounding dowry prohibition. In fact, prior to the Dowry Prohibition Act, the failure of two state legislations against dowry[1015] has been associated with 'the difficulty of proving that gifts were 'in consideration of marriage.'[1016] The parliamentary discussions during the creation of the DPA also contained debates on whether gift giving should be included under the definition of dowry – and therefore criminalised. With a limited understanding of the intricate ties between dowry and gifts in Indian marriages, many legislators protested against the criminalisation of gifts.[1017] On this matter, Nigam writes how 'dowry [in the form of gift-giving] could not be construed as an exploitative practice; rather, the legislators deem it as a traditional, harmless voluntary gift exchange.'[1018] In reality, gifts given in relation to marriage by the family of the bride are often involuntary and have harmful consequences. Including a gift-giving exception blurs the line between dowry and gifts and weakens the absolute prohibition against the former. It is easy for the groom and his family to

[1014] *ibid.*

[1015] Bihar Dowry Restraints Act (1950) and Andhra Pradesh Dowry Prohibition Act (1958).

[1016] n 750 above, 410.

[1017] n 832 above, 50.

[1018] n 832 above, 50.

'simply label the dowry a "small gift".'[1019] Items such as the latest electronics or gadgets are expected to be gifted by the bride's family to the groom – through the bride – and are not considered to be dowry, even though the very fact of an expectation should nullify the claim that these items are gifts. Although the act of giving gifts might seem relatively innocent, the fact that gift giving and dowry have historically been, and are still thought to be, synonymous makes this an exception that undermines the entire objective behind the Dowry Prohibition Act.

Beyond an overall dilution of the prohibition against dowry, there are many other practical consequences of the exception for gifts. It is very unlikely that the parents of the bride file a complaint regarding a demand for dowry when they know that certain items are considered as expected gifts during a wedding and that an exception for gifts exists within the criminal prohibition itself. These presents can include 'cash, ornaments, clothes and other articles,'[1020] which leave room for almost anything to be categorised as gifts instead of dowry. Additionally, Biswajit Ghosh remarks upon how, 'in a patriarchal society, gifts brought or taken by the bride to the home of husband are very often considered to be the property of the man who has 'owned her'.'[1021] Therefore, the groom and his family clearly know that they can gain wealth and consumer goods through the bride – which is essentially the process of gaining dowry – without it being called dowry. They also know that there is nothing to stop them from doing it again after the wedding upon threat of violence to the woman. Similarly, the exception dangerously specifies that any gift given must be customary. This does not work in favour of the bride since the previously discussed ancient custom of kanyadaan includes the giving of

[1019] n 992 above, 611.

[1020] n 783 above, 848.

[1021] n 750 above, 411.

lavish gifts for the bride to take into her new household. As dowry finds its roots in the ancient practice of kanyadaan, amongst others, this allowance of customary gifts seems to be explicitly allowing the practice of dowry to continue.

The loophole that exists with gift-giving is one that is well known among the general public. A study of rural Bengal by Ghosh revealed that people not only know about the anti-dowry laws, but they also know how to get around the restrictions creatively.[1022] Ghosh's study shows how, despite knowing it was a crime, dowry demands were made prior to the marriage in 82 per cent of the cases and (dowry as) gifts were exchanged in 93 per cent.[1023] Understanding the complicated relationship between gifts and dowry in Indian society helps us understand 'the difficulty in distinguishing 'dowry' from 'gift', coercion from custom, homicide from natural death, and the inability of the bride's family to seek a properly signed list of articles given in marriage from the in-laws'.[1024] All these factors contribute towards the bride or her family being more hesitant to bring requests of dowry to light and finding it more arduous to prove their cases when they do. Interestingly, this terminology of gift giving has also been used to evade recent legal provisions that require sons and daughters to be given an equal share of the ancestral property. Sanchari Roy found that parents label the giving of this property as a gift to their sons in order to avoid giving a share to their daughters as well.[1025] This shows how gift giving is used as a legal loophole for varied acts of inequality.

[1022] n 750 above, 410.

[1023] *ibid.*

[1024] *ibid.*

[1025] Sanchari Roy, 'Empowering Women? Inheritance Rights, Female Education and Dowry Payments in India' (2015) 114 Journal of Development Economics 233.

The Marriage Connection

Given the overwhelming number of cases on dowry-related violence and dowry deaths occurring after the bride and groom are married, it is easy to establish that dowry as an institution has a hold well beyond the actual wedding itself. The 1984 amendment to the Dowry Prohibition Act took a step towards acknowledging the long-term nature of dowry when it recognised that any cash or kind given 'in connection with the marriage of the said parties' should be categorised as dowry.[1026] Although this served as a great improvement to the initial definition, leaving the scope of 'in connection with the marriage' undefined allowed for ambiguities and various understandings to influence the interpretation of this phrase. Unfortunately, there are many demands for dowry that cannot establish a solid legal connection, as defined by legal provisions and jurisprudence, with the marriage. However, this should not take away from their explicit status as dowry demands. Similar to the complications tied to an allowance for gift-giving, discrepancies arise when trying to establish a marriage connection with traditions and social expectations that are not accounted for in the law. In fact, 'it is expected that, once married, the woman's family will continue to provide gifts to the husband's family.'[1027] With the combination of social entitlement and a legal loophole, it is not surprising that many perpetrators do not hesitate to demand gifts, cash or property after the wedding as well. This section looks at common exclusions to dowry, which have failed the required nexus with marriage; including a husband's demands for his wife's property, demands of gifts during births and religious ceremonies as well as demands to meet urgent domestic expenses. In all these cases, the demands should be categorised as dowry when the spirit of the law, or an indirect interpretation of the marriage connection, is taken into account.

[1026] The Dowry Prohibition Act (Act No. 28) 1961, Article 2.

[1027] n 756 above, 238.

Before moving into a criticism of the 'in connection with marriage' requirement, it is worth noting that there are many positive judgements which can be attributed to the creation and implementation of this phrase. This includes the case of *Y.K Bansal* v *Anju*, where money demanded soon after marriage was clearly stated to be included within the marriage connection requirement.[1028] Similarly, the 2010 Supreme Court case of *Ashok Kumar* v *State of Haryana*, where the victim was burned alive, convicted the defendant of dowry death after stating that the husband and his family's demands for 5,000/- rupees to start a new business did, in fact, fall under the definition of dowry.[1029] Along with its application, the Supreme Court even expanded the 'connection with marriage' requirement through the 1996 case of *S. Gopal Reddy* v *State of Andhra Pradesh*. In this case, the Court claimed that 'any money, property or valuable security given, as a consideration for marriage, 'before, at or after the marriage would be covered by the expression 'dowry'.'[1030] This meant that any dowry being demanded even in consideration of the marriage would be interpreted as having a connection to the marriage – and would therefore be criminalised. Moreover, when a previous decision held that a husband's demand for a car was not dowry,[1031] this precedent was overturned in a later ruling where the demand for a motorcycle was categorised as dowry.[1032] Despite these positive judgements, the requirement of a marriage connection has not gone far enough and leaves many situational aspects open to misinterpretation. In some ways, it has contributed to creating boundaries in

[1028] *Y.K. Bansal* v *Anju* (1989) High Court of Allahabad.

[1029] *Ashok Kumar* v *State of Haryana* AIR 2010 SC 2839.

[1030] *S. Gopal Reddy* v *State of Andhra Pradesh*, (1996) 4 SCC 596.

[1031] *Nirdosh Kumar* v *Padma Rani*, 1984 (2) Rec. Cr. R. 239.

[1032] *Bachni Devi & Anr.* v *State of Haryana* (2011) 4 SCC 427, Unfortunately, this demand only came to light after the bride had committed suicide due to harassment from her husband and his family because of the unmet dowry demand.

defining dowry, which are moved around and redefined by the courts depending on the case at hand.

Property of a Wife

One of these boundaries is drawn when it comes to a husband's demand to access or own his wife's property – which the court clearly places outside the nexus of marriage. In the 2008 Supreme Court case of *Baldev Singh* v *State of Punjab*, the court upheld that 'demanding of her [the wife's] share in ancestral property will not amount to a dowry demand.'[1033] Legally supporting a husband's demand to the rights of his wife's ancestral property sets a very dangerous precedent. This surprising judgement also recommended a reduction of the defendants' sentence, even though it was a case of dowry death by poisoning and there were many other explicit and recognised dowry demands outside the demand for the wife's property.[1034]

In another, unnamed case, Sneh Yadav mentions how a woman who committed suicide had faced dowry-related violence with the intent to pressure her to transfer some land that she had received as part of a marriage ritual. The Supreme Court said that the death cannot be considered as related to a dowry demand and released the accused of any charges under the penal code's dowry death provisions.[1035] This case holds particular relevance as it contains elements of the gift-giving exception, which presented the property in the first place, as well as elements of the necessary connection to marriage. Not only was the property connected to

[1033] *Baldev Singh* v *State of Punjab* (2008) 13 SSC 233.

[1034] *ibid.*

[1035] n 739 above, 60.

marriage as it was a marital gift but the property itself would also be considered as dowry if it were not for the gift-giving exception. Either way, the court's judgement seems to legally endorse a transfer of this marital gift to the husband – which perfectly showcases how perpetrators work around the current system to continue demanding and receiving dowry with little to no repercussions.

Births and Religious Ceremonies

The overlaps between dowry and gift-giving during a marriage also carry well beyond the actual wedding ceremony. Providing cash and kind to a daughter's family by marriage during festivals or births is a traditional and highly esteemed practice for the bride's natal family. It is also a practice that is not often voluntary, due to either societal pressure or pressure from the groom's family. Therefore, considering the expected nature of these 'gifts' as well as particular demands made regarding what is to be gifted, this practice leans more towards a form of dowry than a free act of gift-giving. Amendments to the Dowry Prohibition Act itself highlight how 'the demand for valuable presents made by the appellants on the occasions of festivals like Deepavali is not connected with the wedding or marriage and these demands will not constitute dowry'.[1036] It is interesting to observe that the note itself recognises that these presents are demanded but, despite the fact that this demand is made to the bride's family – who are connected by *marriage*, the demand itself is not considered to be dowry.

Beyond religious festivals, the 2001 Supreme Court case of *Satvir Singh and Ors* v *State of Punjab* detrimentally defined that 'some customary payments in connection with birth

[1036] The Dowry Prohibition Act (Act No. 28) 1961 regarding the case of *Arjun Dhondiba Kamble* v *State of Maharashtra* (1995) AIHC 273.

of a child or other ceremonies are prevalent in different societies. Such payments are not enveloped within the ambit of dowry.'[1037] This precedent was also utilised in other cases – including *Kamesh Panjiyar @ Kamlesh Panjiyar* v *State of Bihar*[1038]. In these two cases, the fact that demands during the birth of a child and other ceremonies were not met contributed towards the death of the wife by strangulation[1039] and suicide.[1040] Moreover, given that these demands were, once again, made to the bride's family – who are connected by *marriage*, it is hard to see how the demanded payments are not categorised as dowry. This court-sanctioned mis-categorisation has grave consequences when considering the many religious and cultural ceremonies that lie before perpetrators, where they may demand exorbitantly of the bride's parents while enjoying total immunity.

Urgent Domestic Expenses

A third category of demands that are not considered to fulfil the marriage connection are demands to meet urgent domestic expenses. The most prominent case within this category is *Appasaheb and Anr.* v *State of Maharashtra*, where the victim was poisoned with insecticide after failing to regularly bring money from her natal home.[1041] The case facts show that dowry was given in the form of 5000/- rupees and gold ornaments at the time of the wedding. It was further demanded during multiple instances throughout the short marriage. The case facts show that, six months into the marriage, 'the accused started asking her [the deceased] to bring Rs. 1,000-1,200 from her parents to meet the household expenses and also for purchasing

[1037] *Satvir Singh and Ors* v *State of Punjab* (2001) Supreme Court of India.

[1038] *Kamesh Panjiyar @ Kamlesh Panjiyar* v *State of Bihar* (2005) 2 SSC 388.

[1039] *ibid.*

[1040] *Satvir Singh and Ors* v *State of Punjab* (2001) Supreme Court of India.

[1041] *Appasaheb & Anr.* v *State of Maharashtra* (2007) 9 SCC 721.

manure.'[1042] The deceased had revealed to her parents that she was ill-treated, harassed and beaten. She was not given 'proper food, clothing and even footwear.'[1043] Although many elements of dowry death come into play, the court ruled that 'a demand for money on account of some financial stringency or for meeting some urgent domestic expenses or for purchasing manure cannot be termed as a demand for dowry as the said word is normally understood.'[1044] They argued that the defendants' demand for 1,000 to 1,200 rupees was not a demand for property or valuable security in connection with the marriage. They further defended their decision by saying that dowry, as a 'fairly well known social custom or practice in India,' [1045] does not normally include household expenses within its ambit – and, therefore, neither will they. The husband was released of all charges.

The consequences of this case are grave. The Supreme Court's judgement removes demands made for domestic expenses or at times of financial stringency out of the ambit of dowry, and this decision creates detrimental jurisprudence for other dowry-related cases as well. While missing the forest for the trees (and missing those as well), the Supreme Court has 'disregarded the entire context - the social evil to be tackled, the objective sought to be achieved, the continuing number of horrific cases of dowry death/suicide, and attempts at devising more effective provisions - and gone in for an interpretation totally at odds with the whole purpose of the legislation.'[1046] Terms as vague as 'financial stringency' and 'urgent domestic expenses' now give perpetrators the power to get away with murder scot free – even when there is a stack of evidence within the case that clearly marks it as a dowry-related death.

[1042] *ibid.*

[1043] *ibid.*

[1044] *ibid.*

[1045] *ibid.*

[1046] n 829 above, 286.

On a tangential vein, this case is a good example of how long the judicial process can take as the deceased was murdered and charges filed in 1991 while, after two rounds of appeals, the case was only concluded through the Supreme Court judgement in 2007.

This section discusses how property rights of a woman, birth and religious ceremonies in a family and the domestic expenses of a household are all considered to be outside the categorisation of dowry – due to the required nexus with marriage that these instances are not deemed to hold. It also examines the dangers of the gift-giving exception under Article 3(2) of the Dowry Prohibition Act. The loopholes created by both the gift-giving exception and the marriage connection fall under the larger issue of ambiguity and limitations in how the law is written. The Dowry Prohibition Act is, at the same time, all-encompassing and incredibly narrow. Sujata Gadkar-Wilcox says it well when she criticises the DPA for being too broad in scope by sharing that:

> If the definition of the dowry – "any property" to be "directly or indirectly" given or exchanged – were taken literally by the courts, then the courts would be in the unreasonable position of imprisoning entire wedding parties for bringing any wedding gifts at all. Rather than take this untenable position, courts and law enforcement have simply declined to implement the law.[1047]

Although the court's hands are not entirely clean, further amendment to the definition of dowry and its exceptions – in a thorough and detailed fashion – would not go amiss. However, Musa rightfully warns that 'a change in the definition of the term will be ineffective so long as the

[1047] n 920 above, 462.

social attitudes towards dowry murders remain the same.'[1048] This means that a better understanding of the social pressures and widespread customs that sanction dowry and allow dowry-related violence is necessary in order to create change. Before delving into the social and patriarchal attitudes shaping dowry violence, the subsequent sections explore weaknesses in the Indian Penal Code sections 304-B and 498-A as well as issues with the Indian legal system as a whole.

The Indian Penal Code and Section 304B

The inclusion of Section 304B in the Indian Penal Code was widely celebrated as a win for women's rights all over the nation. While, prior to this act, it was the acts of dowry and dowry-related violence that had been criminalised, Section 304B created a category for the criminalisation of dowry deaths. As penal provisions for murder and suicide already existed, creating Section 304B served as an acknowledgement of the unique and widespread nature of deaths caused particularly in relation to dowry.[1049] This was a necessary step in the right direction. Yet, more than thirty years later, many perpetrators charged with dowry death still get acquitted. Between the years of 2008 and 2010, there were 413 registered cases under Section 304B, and, of these, perpetrators were only convicted in 75 cases.[1050] In 2016, the number of cases registered increased to 7,621, but the conviction rate remained at a low 39.1 percent.[1051] This shows that there was a significant increase in the number of reported cases, as

[1048] n 756 above, 238.

[1049] The dowry death provision comes into application when a woman commits suicide or if homicide cannot be proven. Otherwise, if it is plainly a homicide, then homicide charges would instead apply. Additionally, a 2010 Supreme Court ruling promisingly added that all trail courts must add the charge of murder (Section 302 of the Indian Penal Code) to any charge of dowry death.

[1050] n 739 above, 61.

[1051] n 832 above, 8.

well as a small increase in the numbers convicted. It also shows that the law has a long way to go in providing its promised justice. The discrepancy between the case numbers and the conviction rates can be heavily attributed to the fact that the complex and multi-faceted nature of dowry death is not taken into account by the law. It is important to keep in mind that the low conviction rate does not show that there are many innocent defendants. Rather, cases reveal how perpetrators are let go because guilt could not be sufficiently proved. This means that the issue lies with the law and its interpretation, instead of the innocence of the accused. There is a big difference between an innocent defendant and a defendant who could not be proved guilty.

The courts use three main criteria to establish the occurrence of dowry deaths. At times, these criteria are further broken down into sub-criteria. The criteria emerge from the definition of dowry death under 304B. Section 304B states that;

> (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.[1052]

As seen in the text above, the established criteria include that dowry death firstly needs to consist of fatal injuries which were not the result of an accident or natural causes. The death would then be classified as either murder or suicide. Secondly, the death needs to occur within

[1052] Indian Penal Code 1860, 304B emphasis mine.

seven years from the date of the marriage. Lastly, the victim must have been subjected to cruelty or harassment soon before her death. This cruelty should have been carried out by her husband or his relative and in relation to a dowry demand. These criteria have also been re-iterated in many Supreme Court judgements on the subject matter. Although this seems quite straightforward, many elements of the criteria above are not actually practical to include in the definition or prove in the cases.

The following section will be discussing the abstract but heavy burden of proof that accompanies the requirement of cruelty, as well as the disadvantages of setting a seven-year time limit for this crime. While looking into the proof of cruelty, this section will also touch upon impracticalities in the first requirement, of proving that the death was not an accident. This specific issue has already been partly discussed when examining how police investigations are often manipulated or mishandled.[1053] After looking at the separate components of the criteria to establish dowry deaths, this section will briefly discuss other barriers that exist in gaining a conviction under Section 304B.

Proof of cruelty

Cruelty is defined under the Indian Penal Code's 498A as;

> (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

[1053] Under the section titled *Before Court: Accessibility and Enforcement.*

(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.[1054]

Even at first glance, it is easy to see how it largely falls on the judges to interpret acts as cruelty or harassment, with little assistance from these vague definitions. It is argued that the inclusion of broad phrases like 'grave injury' or 'likely to' are to the benefit of the victim – as they can accommodate an array of abuses under this definition. Unfortunately, such a reasoning depends on the assumption that judges across lower and higher courts would also actually consider certain offences to fall under these categories. As proved by case law, this is not a safe assumption to make in the patriarchal nation of India.

What is promising, however, is that the definition for cruelty includes mental cruelty as well as harassment, even though the latter is not defined at all. Mental cruelty, on the other hand, was elaborated on in the cases of *V. Bhagat* v *D. Bhagat*[1055] and *G.V. Siddaramesh V. State of Karnataka*[1056] among others. During the 1993 *V. Bhagat* v *D. Bhagat* case, mental cruelty was broadly defined as 'that conduct which inflicts upon the other party such mental

[1054] Indian Penal Code 1860, 498A. Cruelty is also outlawed in international law under Article 7 of the International Covenant on Civil and Political Rights (ICCPR) and through the United Convention Against Torture. While both these provisions create positive obligations, the ICCPR also specifically applies to actions by private persons. Although not a legally binding document, Article Three of the Declaration on the Elimination of Violence Against Women also mentions equal enjoyment and protection of the right not to be subjected to cruel treatment or punishment. International law surrounding dowry-related cruelty will be examined in detail in the following chapter.

[1055] *V. Bhagat* v *D. Bhagat* (1993) 1 SSC 337.

[1056] *G.V. Siddaramesh* v *State of Karnataka* (2010) Supreme Court of India.

pain and suffering as would make it not possible for that party to live with the other.'[1057] On the flip side, this means that if the victim remained with her perpetrator, there could be 'reasonable apprehension of injury to the wronged party'.[1058] In a culture where married women are often considered unwelcome in their natal home and face great social pressure to stay in their husband's household, it is not practical to create such a high threshold for proof of mental cruelty. Even with proving cruelty in general, the evidence-based criminal system in India creates an 'extensive evidentiary burden for the prosecution in terms of linking "dowry" with the ultimate "cruelty" and "death".'[1059] When this burden is not met – given that it is often impossible to meet – the victim's murderer is either charged with a more minor offence or, as is frequently the case, allowed to walk free.

When it comes to allocating this burden of proof between the parties of the case, it is Section 113B that lends support to the victim. Section 113B of the Indian Evidence Act, added at the same time as Section 304B of the Indian Penal Code, creates an automatic presumption of dowry death when someone is accused of the crime.[1060] This means that 'where the section 113B presumption is activated, the onus is on the defendant to rebut the presumption'[1061] by providing evidence. Unfortunately, the text of 113B requires that evidence of dowry-related cruelty or harassment should already exist before a dowry death presumption is enforced. Similarly, Section 113A of the Indian Evidence Act refers to the abetment of suicide and, once again, places an automatic presumption on the accused – but only if it is shown that '[the

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[1057] *V. Bhagat* v *D. Bhagat* (1993) 1 SSC 337.

[1058] *G.V. Siddaramesh* v *State of Karnataka* (2010) Supreme Court of India when speaking of *V. Bhagat* v *D. Bhagat* (1993) 1 SSC 337.

[1059] n 785 above, 261.

[1060] The Indian Evidence Act 1872, 113B.

[1061] Human Rights Law Network, 'Leading Cases on Dowry' (New Delhi 2011) 203, specified in *Bansi Lal* v *State of Haryana* (2011) 11 SCC 359, 203.

victim's] husband or such relative of her husband had subjected her to cruelty'.[1062] Even though these provisions can be of great assistance later in the case, they do not initially help with establishing the existence of cruelty. Due to the value of privacy in Indian families, as well as the inherently private nature of dowry deaths, it is very difficult to prove that cruelty or harassment took place. Often, the woman is subjected to acts of cruelty or harassment with only the members of the household present. These same members are later complicit in arranging or abetting her death. Given the private nature of the act, the burden of proof for cruelty or harassment is hard to meet mainly due to a lack of physical evidence and a lack of reliable witnesses.

The Absence of Evidence

As the Indian criminal system is evidence-based, it 'requires adequate incriminating documents for proving a crime.'[1063] Dowry death cases, which usually have insufficient evidence of cruelty or harassment, struggle to meet these requirements. This often leads to poor conviction rates under Section 304B.[1064] Many times, a lack of evidence is also associated with bride burning as a particular form of dowry death. In cases of bride burning, 'any marks on [the victim's] body that may have provided evidence to physical abuse cannot be recovered.'[1065] This, along with the fact that saris[1066] are highly flammable, makes the atrocious practice of bride burning an effective way for perpetrators to destroy evidence of past and

[1062] The Indian Evidence Act 1872, 113A, further restrictions to the application of 113A were made by *Ramesh Kumar* v *State of Chhattisgarh* (2001) Supreme Court of India and *Sanjiv Kumar* v *State of Punjab* (2019) Supreme Court of India among others.

[1063] n 750 above, 411.

[1064] n 750 above, 411.

[1065] n 756 above, 240.

[1066] A traditional garment worn by many Indian women.

present violence.[1067] In the absence of concrete physical evidence, the court sometimes gets creative in what they choose to consider as evidence for the proof of cruelty. Although this should be a positive expansion, it does not often work to the favour of the victim's family. For example, four accused in a dowry murder case were released by the Delhi High Court under the reasoning that violence could not be proved because the 'victim never discussed the harassment and torture she endured in the numerous letters she wrote to her mother.' [1068] This far-fetched reasoning clearly shows the court grasping at straws to provide some proof for or against the existence of cruelty or harassment. It also seems to reveal a detrimental assumption that victims are bound to share the abuse they face with their parents.

In another case of dowry death, the deceased had written a letter prior to her death to the Deputy Superintendent of Police which outlined her abuse and shared her concern for her life and the life of her children.[1069] The deceased later set herself and her three children on fire. Despite this explicit piece of evidence, the High Court acquitted the perpetrators by saying that abetment to suicide could not be proved. Thankfully, the Supreme Court later reversed the judgement. This case really begs the question of what evidence is required to satisfy the courts and convict the offenders. In a statement that applies to the burden of proof of both an unnatural death and prior cruelty, the Human Rights Law Network hold that, 'the rigidity of laws caused huge problems in leading evidence against the accused because often the circumstances in which the crime was committed left the prosecution with little or no ground to lead direct evidence.'[1070]

[1067] n 801 above, 213 and 215.

[1068] Mentioned without a case name in n 756 above, 240.

[1069] *State Of Punjab* v *Iqbal Singh And Ors* (1991) Supreme Court of India.

[1070] Human Rights Law Network, 'Leading Cases on Dowry' (New Delhi 2011) 203, specified in *Bansi Lal* v *State of Haryana* (2011) 11 SCC 359, ix.

The Absence of Witnesses

As another consequence of the particularly private nature of dowry death, it is hard to find witnesses to cruelty occurring within the home. The few witnesses that do exist consist of the husband's family, who are themselves commonly perpetrators 'or silent co-conspirators'[1071] to the violence. Even if members of the household do not participate in the violence, it is impossible to entirely separate their bias from their testimonies. Despite this, police officers are forced to trust the statements of the husband's family as the sole witnesses to any cruelty or murder that might have occurred.[1072] Therefore, establishing the presence of cruelty through witness statements is not always a viable option when it comes to dowry-violence and dowry deaths. Moreover, in the minority of cases where 'independent and honest witnesses' do exist, they are often compelled by dowry offenders to stay away from the courts.[1073] At other times, they might keep a distance of their own accord, as 'managing' one's household (which can include violence against women) is socially considered to be a private affair. Sainabou Musa writes that, 'even when little doubt exists as to who murdered the woman, social and economic barriers diminish the likelihood of anyone voicing their suspicions.'[1074] In this manner, a young bride is often completely isolated from avenues for help, with many of her available witnesses endorsing the violence she faces – either implicitly or explicitly.

[1071] n 801 above, 215.

[1072] n 737 above, 302.

[1073] n 829 above, 287.

[1074] n 756 above, 232.

An additional disadvantage of the requirement for cruelty or harassment is that it allows witnesses, 'who assisted in, but did not actually commit[] the murder,'[1075] to escape without charges. In the 1998 case of *Babu Ram and Ors* v *State of Punjab*, the victim's 'mother-in-law had poured kerosene over her and the father-in-law had thrown a lighted match stick and set her on fire.'[1076] When the victim had tried to run out of the house to save herself, her husband bolted the door to prevent her from leaving. Although the victim shared all of this in a declaration before she died, the Supreme Court acquitted the husband of all charges, saying that 'it cannot be said with reasonable certainty that the husband was also a party to the commotion of the offence.'[1077]

A final danger is that, in the absence of trustworthy witnesses, (as well as a lack of provisions on how to deal with this absence) courts may try to interpret the existence of or probability of cruelty in an arbitrary manor. These interpretations are not always generous or in favour of the victim. For example, in *Sher Singh @ Partapa* v *State of Haryana*,[1078] it seems as if 'the court could not accept the fact that for a motorcycle and a fridge, a woman was barbarically tortured to an extent that she committed suicide while she was pregnant.'[1079] This scandalous judgement also provided the reasoning that, 'in normal course, if a woman is being tortured and harassed, she would not remain reticent of this state of affairs and would certainly repeatedly inform her family.'[1080] Therefore, as the woman had not reached out to her family, it contributed towards the acquittal of those charged for abetment to suicide. The events

[1075] n 756 above, 240.

[1076] *Babu Ram And Ors* v *Sate Of Punjab* (1998) Supreme Court of India, mentioned in n 756 above, 240.

[1077] *Babu Ram And Ors* v *Sate Of Punjab* (1998) Supreme Court of India.

[1078] *Sher Singh @Partapa* v *State of Haryana* (2015) Supreme Court of India.

[1079] n 801 above, 219. In reference to this case.

[1080] *Sher Singh @Partapa* v *State of Haryana* (2015) Supreme Court of India.

detailed in this section provide a glimpse of how biased witnesses, hesitant witnesses and the absence of witnesses, all contribute towards complications in satisfying the burden of proof for cruelty. Moreover, the limited application of the definition for cruelty also allows participants in the crime to instead gain the innocent status of a witness.

Seven-Year Time Requirement

Finally, this study of 304B looks at how the seven-year time limit criteria for the application of this section is not only harmful for women, but also ignorant of the long-term nature of dowry. Unfortunately, there is not much case law on this particular requirement as the victim's family cannot bring a case under the provision for dowry death if the crime takes place after the first seven years of marriage. This research has previously shown how the demand for dowry, in the form of 'gifts', during births and religious ceremonies is a widespread, longterm, and widely expected practice.[1081] Births in the family as well as religious and customary celebrations continue well after the first seven years of marriage. The seven-year limit also fails to acknowledge the pervasive nature of consumer greed, as well as how easy it is to keep demanding dowry once the initial post-dowry demands are met. Therefore, husbands and their families can simply wait seven years, while constantly demanding dowry, before making more outrageous demands or murdering the woman for failing to meet prior demands. Simply biding their time allows perpetrators of dowry death to carry out the act with perfect immunity from Section 304B. Other provisions for murder or abetment to suicide are even less equipped to deal with the particularities of dowry murders. In fact, Musa mentions that, in the case of the deceased Vimala Devi, her husband repeatedly and explicitly threatened

[1081] Discussed in the section titled *The Gift-Giving Exception.*

to kill her once the first seven years of their marriage was over. [1082] It is highly appalling that, 'despite the fact that her husband intentionally waited seven years to commit her murder, no charges were brought against him because the seven-year limitation imposed by the act had expired.'[1083]

It is interesting to note why a seven-year limit exists in the first place. In the 1991 case of *State of Punjab* v *Iqbal Singh and Ors*,[1084] the Supreme Court tries to explain the legislation's reasoning by saying that 'this period of seven years is considered to be the turbulent one after which the legislature assumes that the couple would have settled down in life.'[1085] Such illogical reasoning would almost be comical if it did not hold the power to affect the lives of women all over the country. The Court's reasoning is also highly condescending towards the grave offence of bride burning and dowry death, by classifying it as simply a turbulent time in the marriage. This time requirement also ignores all the societal pressures on the woman to maintain her marriage'[1086] as well as the power-dynamics that place her at the mercy of her husband and his family well past the first seven years.

Outside issues regarding the proof of cruelty and the time requirement of seven years, Section 304B also faces other barriers in getting higher levels of convictions for dowry death. At the worst of times, this includes cases like the *State of West Bengal v. Orilal Jaiswal*. In this case, despite the victim's suicide within a year of the marriage as well as cruelty and dowry demands, 'the High Court … came to the finding inter alia that there was no convincing

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[1082] n 756 above, 239.

[1083] *ibid.*

[1084] *State of Punjab* v *Iqbal Singh and Ors* (1991) Supreme Court of India.

[1085] *ibid.*

[1086] n 756 above, 239.

evidence of systematic cruelty or physical or mental torture of the deceased by the accused persons.'[1087] This case had 19 witnesses and a doctor's report which detailed evidence of clear physical and ante-mortem violence on the body of the deceased.[1088] Thankfully, the Supreme Court overturned the High Court's decision, but only charged the perpetrator under Section 498A for the cruelty the victim faced. The Supreme Court reasoned that 'Although there are materials on record to indicate that both the accused were also guilty under Section 306 I.P.C. [Abetment of Suicide] but we are inclined to give them benefit of doubt so far as the charge under Section 306 I.P.C. is concerned and they are acquitted of the said charge.'[1089] It does not sit well when phrases like 'benefit of doubt' are included in matters regarding justice for murder. This decision casts a bad light on the intentions of the Supreme Court. It also raises the question of how many judgements are blatantly dismissed in High Courts or lower courts and never get to access the Supreme Court for, even partial, justice.

After looking at the components of 304B separately, it is easier to understand how the current criteria to prove dowry death fails to account for the insidious and long-term nature of this act. India's traditionally evidence-based legal system, as well as its reliance on witnesses, run counter-current to what is necessary for a dowry death conviction. As long as the criteria within the law – and the investigative strategies used to meet each criterion – remain unchanged, the conviction rates for dowry death will remain low. Moreover, as shown by this research, it is important not to misconstrue the low conviction rates as evidence of many innocent defendants and false cases. Such baseless assumptions contribute towards the very detrimental misuse or dowry abuse argument, which constantly sets the women's rights

[1087] *State of West Bengal* v *Orilal Jaiswal* (1993) Supreme Court of India.

[1088] *ibid.*

[1089] *ibid.*

movement back. This argument, as well as the disadvantages of compulsory counselling, are discussed in the following portion on Section 498A of the Indian Penal Code.

The Indian Penal Code and Section 498A

Section 498A of the Indian Penal Code is a renowned provision when it comes to fighting against domestic violence in India. This section, titled 'husband or relative of husband of a woman subjecting her to cruelty,' criminalises cruelty against a woman by the members of her marital household.[1090] It does so through the punishment of an imprisonment for up to three years, along with the possibility of a fine.[1091] Section 498A provides two separate but interconnected definitions for cruelty, as detailed in the previous section on 304B.[1092] Although Section 498A criminalises domestic violence in general, the creation of this section was a result of a national uproar regarding dowry violence in particular. This tension between domestic violence and dowry violence is speculated to have undermined the power of Section 498A in addressing everyday domestic violence, as it is so closely associated with dowry-related violence alone in its popular usage.

The Infamous Misuse Argument

[1090] Indian Penal Code 1860, 498A.

[1091] *ibid.*

[1092] Cruelty is defined under the Indian Penal Code's 498A as; (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.

The abuse or misuse argument, which claims that women intentionally manipulate laws to falsely accuse their husbands, is especially prominent when it comes to dowry-related violence under Section 498A.[1093] The misuse of dowry-related provisions 'has been the bone of contention for many 'oppressed husbands''.[1094] Arguments of lenient laws resulting in false convictions have often emerged hand in hand with developments in anti-cruelty provisions.[1095] Interestingly, the misuse argument strongly relies on the claim that the threshold to prove cruelty is too low, which proponents of this argument say allows many husbands to be falsely implicated under the current provisions. However, as we have extensively discussed in the previous section, proving cruelty is a much more complicated matter than it ought to be – with a threshold that is much higher than feasible when it comes to verifying this particular form of violence. Therefore, a legal analysis should reveal that the factual basis of the misuse argument stands on shaky ground and, in reality, this popular and widespread claim of Section 498A being misused has no hard proof. Ghosh mentions that, as per police investigations, there are only seven to eight per cent of false cases under Section 498.[1096] Despite this lack of evidence, 'the state, without analysing the data, diluted the provisions of Section 498A while pushing the myth of misuse of law because well-connected male lobbyists made noise.'[1097] This section examines the narratives surrounding the creation and spread of the misuse argument, as well as how case law has undermined the benefits of Section 498A after buying into this argument.

[1093] Although it can be found in other dowry laws as well and is also used as an argument against creating a criminal provision outlawing marital rape.

[1094] n 750 above, 411. – also mentioned in n 739 above, 61.

[1095] In fact, the Malimath Committee Report and the Singhal Committee report have also used the misuse argument to urge for a weakening of the provisions that currently exist under 498A.

[1096] n 750 above, 412.

[1097] n 832 above, 59.

The narratives around misuse translate back to a perception of women as either 'weak, biologically inferior, modest and incapable of protecting themselves,' or as 'evil, bad women ... who do not conform to the traditional norms,'.[1098] This binary narrative leaves no other option for women. Women placed in the former category are expected to endure abuse under the presumption that her husband knows best, and women in the latter are dismissed as liars or revenge-seekers who have orchestrated a tale of abuse. There is no category for an honest female victim who is only using the legal system in order to gain justice. Translated into Section 498A, these discriminatory perceptions not only present women as manipulators of the law, but they also wrongly present the law itself as a tool biased towards the 'evil, bad women'. In fact, 'in a society where marriage is perceived to be the "be all and end all of a woman's life" a woman who wishes to break the shackles of an oppressive marriage and press criminal charges against her abuser is viewed as a deviant.'[1099] Such narratives, seeping into the courts as well as the general public, play themselves out in a way that heavily undermines the progress made for the protection of women in India.

The Consequence of Misuse Narratives

Despite a lack of proof supporting the misuse argument, there are many cases that rule in favour of the perpetrator under the narratives of this argument. As a direct result, this has contributed to a higher threshold and burden of proof under Section 498A. It has also resulted in a legal narrative of 'cruelty' by the wife and created fiscal punishments for alleged misuse. A major disadvantage for victims, when it comes to the burden of proof, was created by the

[1098] n 832 above, 235.

[1099] Flavia Agnes, 'Section 498A, Marital Rape and Adverse Propaganda' (2015) L Economic and Political Weekly 23, 13.

2000 case of *Kans Raj* v *State of Punjab*.[1100] Utilising the misuse argument within their judgement, the Supreme Court stated that husband's relatives, who had been accused along with the husband, were not guilty and were simply 'roped in the case only on the ground of being close relations of respondent No.2, the husband of the deceased.'[1101] Although it falls within the prerogative of the court to judge the relatives as innocent or not, the connection they made between this judgement and the supposedly innocent parties being 'roped in' without cause has helped establish the misuse argument within case law as well. Moreover, the judges in this case went on to say that, in cases where the relatives of the husband are also accused, 'the overt acts attributed to persons other than husband are required to be proved beyond reasonable doubt.'[1102] This meant that, even in cases of dowry death, it falls on the victim or her family to prove the guilt of other perpetrators, excepting her husband. Having comprehensively examined how hard it is to prove cruelty in the Indian legal system, this ruling – which applies to all the then-current and future cases – is very detrimental indeed.[1103]

The misuse argument increased thresholds associated with Section 498A even higher through the 2014 case of *Arnesh Kumar* v *State of Bihar*.[1104] In this case, the court explicitly cites the misuse argument in saying that, 'the fact that Section 498-A is a cognizable and non-bailable offence has lent it a dubious place of pride amongst the provisions that are used as

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[1100] *Kans Raj v. State of Punjab* (2000) Supreme Court of India.

[1101] *ibid.*

[1102] *ibid.*

[1103] In another case (*Neelu Chopra & anr.* v *Bharti*, AIR 2009 SC(Supp) 2950), the husband's parents had requested an appeal to a High Court decision that charged them under section 498A (the husband himself had died). The Supreme Court ruled that they could not allow the case against the husband's parents to continue as the parents were 'aged' and the court claimed that they only received vague allegations of abuse that did not satisfy their burden of proof. They overturned the High Court decision. This shows one of the many cases where the ruling in *Kans Raj v. State of Punjab* has resulted in an unfavourable judgement without thorough facts.

[1104] *Arnesh Kumar* v *State of Bihar* (2014) 8 SCC 273

weapons rather than shield by disgruntled wives. The simplest way to harass is to get the husband and his relatives arrested under this provision.'[1105] It is worth reminding that these bold-faced accusations come without any empirical basis. Even in the case at hand, the victim had filed under 498A after having been harassed for dowry through threats from her husband to marry another woman and through being driven out of the marital home. Despite these clear examples of mental cruelty, the court does not discuss the merits of the case, but instead chooses to bring in the misuse argument. The court also states that 'arrest brings humiliation, curtails freedom and cast scars forever.'[1106] It is highly disturbing that the humiliation, lack of freedom and scars of the husband (and his family) is being disproportionately considered in a case where the victim has been subjected to marital cruelty. This clearly reveals the insidious nature of the misuse argument. The legal system collectively seems to have forgotten how the exponential rise of dowry-related violence and dowry deaths necessitated the need for these strong provisions against dowry abuse in the first place. Even though dowry violence rates have not gone down, it suddenly seems okay to reduce the amount of protection victims receive from the system.

In addition to these appalling comments, this judgement adds compulsory procedures before the arrest of the accused – even though 498A is a cognisable offence.[1107] These

[1105] *ibid*. Similar comments were also made in the 2017 case of *Natubhai Somabhai Rohit* v *State of Gujarat*, which mentioned the victim's 'tendency to indulge into allegations' after observing that she had filed complaints against ten of her husband's relatives. The court did not consider that she could have been facing cruelty from all these people and was desperately turning to the court for help. The First Information Report (FIR) itself was quashed and the case did not make it to trial. Another 2017 case, Rajesh Sharma, also mentions the misuse argument and mentions that 'such complaints are filed in the heat of the moment over trivial issues' and goes on to build further layers of checks and barriers between the victim and justice.

[1106] *ibid.*

[1107] Cognisable means that there is no need for an arrest warrant – which allows arrests to happen immediately.

procedures include an investigation by the police until they deem an arrest as necessary.[1108] Such an addition clearly does not take into account that 'delays in arresting the accused could jeopardize a woman's life and security in cases where she is a victim of abuse.'[1109] The court is also refusing to recognise, 'the patrilocal familial form, where the bride goes to live with the family of the groom and the closure of possibilities of returning to the natal home.'[1110] This means that a woman is often forced to go back into the violent household which she has just complained against, while she waits for members of the household to be arrested. Restrictions made to the cognisable nature of 498A were further increased in 2017 under *Rajesh Sharma* v *The State of Uttar Pradesh*.[1111] This time, the court also included that all complaints under 498A need to be authenticated by a Family Welfare Committee before any arrests are made. The language of 'family welfare' when it comes to a provision regarding cruelty, the court's claim of a woman's 'growing tendency to abuse'[1112] the law and the fact that these committees would consist of civil society members, all work together to prove that the legal protection and severity afforded to dowry-related abuse are in sharp decline. Much of this decline corelates with the rise of the misuse argument. Thankfully, these committees were removed in the 2018 *Social Action Forum for Manav Adhikar* v *Union of India* case.[1113] However, even while removing the committees, the Supreme Court continued to uphold the misuse argument in stating how 'the abused of the penal provision has vertically risen' based solely on what has been theorised or 'propounded in a court of law'.[1114]

[1108] Necessity is defined in reference to Section 41 A, B and D of the Code of Criminal Procedure.

[1109] n 832 above, 235.

[1110] Indu Agnihotri, 'The Expanding Dimensions of Dowry' (2003) 10 Indian Journal of Gender Studies 2, 315.

[1111] *Rajesh Sharma* v *The State of Uttar Pradesh* (2017) Supreme Court of India.

[1112] *ibid.*

[1113] *Social Action Forum for Manav Adhikar* v *Union of India* (2018) Supreme Court of India.

[1114] *ibid.*

When it comes to dowry-related violence, the language of the law has not only slackened from severe criminal prohibition to family welfare discussions, but it has also gone so far as to accuse the victim of cruelty herself if her charge under 498A is deemed as false. In *Sushil Kumar Sharma* v *Union of India and Ors*,[1115] the court held that, 'by misuse of the provision a new legal terrorism can be unleashed. The provision is intended to be used a shield and not assassins' weapon. If cry of "wolf" is made too often as a prank, assistance and protection may not be available when the actual "wolf" appears.'[1116] The expressive metaphors provided by the court do not undermine the blow that the Indian women's rights movement has received through the categorisation of alleged misuse as legal terrorism.

This narrative of misuse has spread in such a way that it allows minor discrepancies in case facts to be labelled as a false complaint, and therefore misuse, and therefore cruelty, and therefore legal terrorism. In another case, *Christine Lazarus Menezes* v *Lazarus Peter Menezes*, the court held that if a case under 498A is determined to be false, it grants grounds for the husband to seek a divorce from his wife.[1117] Once again, it is not only the relevance of the judgement for this particular case that raises concern but the jurisprudence that these judgements create for all other dowry cases. The court's reactions and willingness to attribute a complaint to misuse is also indicative of the strong grip that the baseless and anti-women's rights misuse argument has on the judiciary. Courts are already imposing fiscal penalties for the filing of false complaints, although 'nowhere does the law state that the penalty may be imposed on the women complainants in any circumstances.'[1118] Unfortunately, even that might change soon. Pramila mentions an amendment to the current laws which proposes a 15,000

[1115] *Sushil Kumar Sharma V. Union of India and Ors* (2005) Supreme Court of India.

[1116] *ibid.*

[1117] *Christine Lazarus Menezes* v *Lazarus Peter Menezes* (2017) BHC 936.

[1118] n 832 above, 234.

rupee fine for misuse of Section 498A, or if the case is proved wrong.[1119] If this were to be enacted, it would strongly discourage victims from seeking justice, through fear of monetary consequences in addition to the social consequences that they already face.

There is no denying that there are cases where Section 498A is misused by women, perhaps the most prominent of these being the Nisha Sharma dowry case of 2003. Yet, these misuse cases need to be acknowledged for the outliers that they are, rather than being categorised in modern narratives as the majority of Section 498A cases. There is no justification for diluting and undermining the essential protections within 498A due to a few instances of misuse. The rampant violence and cruelty that would exist if there were no 498A would be far worse than the rampant violence and cruelty that does exist today.[1120] Thankfully, the Supreme Court made similar statements when faced with a challenge against Section 498A, on the grounds of misuse, under *Sushil Kumar Sharma* v *Union of India* in 2005.[1121] While discussing, and dismissing, this challenge on the constitutionality of Section 498A, the court argued that, 'it is well settled that mere possibility of abuse of a provisions of law does not per se invalidate a legislation.'[1122] However, it should be very worrying that the misuse argument was so prevalent as to result in a constitutional challenge of Section 498A in the Supreme Court of India. Additionally, there needs to be a clear distinction between cases that are settled before reaching the court or cases that cannot be proved under Section 498A and cases that are outright false as a result of misuse by the woman. As we have already seen, many cases remain in processing or in the courts for years at a time and 498A has a conviction rate of less than one

[1119] n 783 above, 849.

[1120] n 739 above, 61. and Human Rights Law Network, 'Leading Cases on Dowry' (New Delhi 2011) xii also agree that cases with misuse are only outliers and do not justify the dilutions, or potential desertion, of 498A.

[1121] *Sushil Kumar Sharma* v *Union Of India And Ors* (2005) Supreme Court of India.

[1122] *ibid.*

per cent for when a woman is still alive.[1123] Given these realities, caused by a lack of accessibility and enforcement, Agnes argues that 'it is but natural that parties reach a compromise and compound the case with the consent of the court.'[1124] Surely, this is also encouraged by the compulsory counselling discussed below. It is important to remember that a compromise or settlement outside court does not, however, mean that the case itself was false.[1125]

Counselling as a 'Solution'

Along with the misuse argument, another issue with the application of Section 498A is the insistence on counselling for cases within this provision. Dowry-related harassment or abuse is often seen as an issue of social or ethical concern, which does not garner the same standing as other criminal offenses. Among other manifestations, this is seen in the fact that many cases under Section 498A do not make it to the higher courts for judgement. [1126] In fact, many cases do not make it to trial court at all. As remarked upon by Shalu Nigam, 'when a battered wife complains under 498A, the violent husband is called upon and the counsellor or the police negotiate on behalf of the woman.'[1127] It is only if and when negotiations fail that the case reaches a trial. Many times, the court itself refers cases under 498A to mediation, in order to encourage a ''settlement' and 'compromise' between parties, thereby precluding the matter from being adjudicated on its merits.'[1128] This dangerous and dangerously common

[1123] n 1099 above, 14.

[1124] n 1099 above, 14.

[1125] n 1099 above, 14.

[1126] Human Rights Law Network, 'Leading Cases on Dowry' (New Delhi 2011) 295.

[1127] n 832 above, 57.

[1128] Human Rights Law Network, 'Leading Cases on Dowry' (New Delhi 2011) 295.

referral to counselling, made despite the imminent threat of life and livelihood that victims of 498A face, reveals further narratives that surround the issue of dowry-related violence.

The most prominent of these narratives puts forward the importance of promoting and maintaining harmony within the private sphere, at the cost of justice for and safety of the victims. Through this narrative, the 'hierarchy or abuse of power in the relationship' is left unquestioned and, instead, 'women are forced to 'adjust' to violent marriages and withdraw their complaints.'[1129] Flavia Agnes speculates that the pressure on women 'to adjust, reconcile and "save their marriage"' is due to the perception that 'nothing else exists for her outside.'[1130] Forcing joint counselling on victims of dowry-related cruelty and domestic abuse takes away from the criminal and absolute prohibition that the law was supposed to provide. It would be unheard of to legally impose mediation on the victim and perpetrator in cases of rape or attempted murder – or a plethora of other crimes that are actually given the gravity of a crime. Greenberg adds that 'reliance on the internal resources of the family, for example through counselling, will work to reinforce the current power relations.'[1131] Moreover, some of the staff within government-funded counselling cells 'do not see a problem with male dominance and control over women. Rather, the problem is reframed as one of women adjusting to newly married life rather than a problem of control and subordination of wives or as genuine issues of domestic violence.'[1132]

[1129] n 832 above, 58. The pressure to adjust is also mentioned under Indu Agnihotri, 'The Expanding Dimensions of Dowry' (2003) 10 Indian Journal of Gender Studies 2, 315.

[1130] n 1099 above, 14.

[1131] Judith Greenberg, 'Criminalizing Dowry Deaths: The Indian Experience.' (2003) 11 American University Journal of Gender, Social Policy & the Law 2, 845.

[1132] n 785 above, 263.

An insistence on counselling and a narrative of adjustment has also had deadly consequences on women who were forced to return to and live in the scene of the crime. In the previously mentioned case of *State of Punjab* v *Iqbal Singh And Ors*, the deceased had written a letter to the Deputy Superintendent of Police before she died, which outlined the abuse that she had faced.[1133] Despite this, no action was taken, and she was driven to immolate both herself and her children shortly after. This displays one case, among many others, where 'despite repeated complaints of torture, these women were compelled to 'adjust' within the marriage until finally they were murdered.'[1134] The clear and cyclical connections between the narrative of familial harmony, the courts insistence on counselling and the push towards reconciliation and adjustments cannot be ignored. The cycle is only interrupted by the highly probable, and yet somehow supposedly unforeseen, deaths that this narrative perpetuates.[1135]

The Legal System as a Whole

Along with the detrimental effects of particular narratives and misinterpretations within the legal provisions on dowry violence and dowry death, there is much left to be wanted when it comes to the legislation surrounding provisions for Indian women in general. Some scholars insist that these gaps in the legislation are purposefully left as gaps. This compelling argument claims that gaps exist, 'especially in areas of potential high social responsibility such as family

[1133] *State Of Punjab* v *Iqbal Singh And Ors* (1991) Supreme Court of India.

[1134] n 832 above, 54. The author also mentions the cases of Tarvinder Kaur, Sudha Goel, Shashibala and Kanchan Chopra.

[1135] Under a similar line of reasoning, the Malimath Committee Report of 2003 also pushed to remove the non-bailable and non-compoundable elements of 498-A, citing how the wife might decide to 'condone and forgive the husband. The Human Rights Law Network comments how this is 'a further step towards diluting the grip of the law over the persistent evil of dowry' in Human Rights Law Network, 'Leading Cases on Dowry' (New Delhi 2011) 203, specified in *Bansi Lal* v *State of Haryana* (2011) 11 SCC 359, 296.

law, precisely because a developing, overpopulated nation like India simply cannot take on the social responsibility that other more developed nations are able to assume.'[1136] Indeed, the highly prevalent public-private divide within the Indian legal system categorically places social issues under the domain of private provisions – such as religious personal laws. With the almost absolute sanctity that the private domain is unduly given, it is no surprise that lawmakers hesitate to centrally legislate on matters of family law and, instead, 'purposefully rely on social systems already in place to shoulder social and managerial burdens.'[1137] In fact, India's hesitant, and often forced, intercession into anti-dowry legislation itself showcases the state's unwillingness to delve into the realm considered private.[1138]

An example of intentional gaps in the law as a whole is seen in the non-positivist role the state takes towards divorce as, although the practice is legal, a divorce is notoriously hard to obtain. This is supposedly because 'permitting a high rate of divorce in a country where economic realities and cultural norms make women unable to support themselves outside of marriage would place excessive social burdens on the already struggling nation.[1139] However, in the legal system's careful consideration of religious rights, personal privacy and social burdens, one wonders when the judiciary will begin to consider the safety of women as a matter of prime importance. Similarly, and as discussed, domestic violence is often dismissed as a

[1136] n 801 above, 220.

[1137] n 801 above, 220. The author writes how this is seen, for example, in the difficulties couples face in getting a divorce, even though the practice is entirely legal.

[1138] This is seen in the fact that laws and amendments were mostly created as a reaction to extreme social pressure. Kirti Singh also relays how 'the original Act of 1961 was so framed that it had to be proved that dowry had been given as an incentive, reason or reward for the marriage, which was virtually impossible.' This was relayed during her presentation at a conference, as reported in Indu Agnihotri, 'The Expanding Dimensions of Dowry' (2003) 10 Indian Journal of Gender Studies 2, 310.

[1139] n 801 above, 220.

lesser crime and many women still do not have legal support in terms of economic benefits or employment opportunities, should they choose to leave their abusive husbands.[1140] Melissa Spatz claims that, given these gaps in the law, 'anti-dowry laws will therefore not work until the government takes preventive measures, enabling women to achieve economic stability.'[1141] In yet another example, although there are provisions for women to register a complaint when subjected to violence, these provisions are not accompanied by the necessary supporting infrastructure, such as emergency shelters for abused women,[1142] who cannot stay in their marital home and are no longer welcome in their natal home.

The gaps in the law also speak to a larger concern – the state's failure in truly addressing the root causes of an issue that jeopardises the rights and lives of women. Akin to putting a Band-Aid over a bullet wound, the law tries to address domestic violence and dowry deaths, while failing to challenge the construction of marriage as 'an institution that reinforces patriarchy and subordination with regard to property, sexual oppression, division of labour and reproduction.'[1143] Such revelations are indicative of the self-imposed limits of the Indian state and lawmakers. On this matter, Shah says that 'the power of a particular centralized system depends on its presence as an enforcement power in the areas it endeavours to control.'[1144] Therefore, although the multiple amendments to the Dowry Prohibition Act are celebrated by proponents of women's rights, these modifications 'ultimately weaken the delicate and limited positivist power of the state',[1145] by undermining its authority. There is much that can be said

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[1140] n 832 above, 54 and n 992 above, 616.

[1141] n 992 above, 616.

[1142] n 1099 above, 14. Agnes also mentions a lack of 'medical aid, halfway homes, skill training, financial support, a specially trained and sensitive police machinery, and reliable and effective legal aid,'.

[1143] n 832 above, 54.

[1144] n 801 above, 220.

[1145] n 801 above, 221.

about the weaknesses in the Indian legal system as a whole but, on the issues of dowry-related violence and dowry deaths, these weaknesses manifest as silences in the law as well as lax or unfavourable enforcement of the existing provisions.

Far more needs to be done in order to comprehensively address dowry-related violence and dowry deaths and to successfully implement dowry laws. Many of the existing laws were created as a pressured response rather than a collective and organic development and, 'the analysis of decisions pronounced indicate that the rule of men supersedes the rule of law.'[1146] Although these developments remain necessary, the nature in which they came into existence results in surface level provisions instead of a complete overhaul of the current system. Rather, the law should also address the perceptions and social attitudes that lead to a cultural acceptance of dowry, dowry-related violence and dowry-death. Instead, the law is used 'symbolically and superficially' and, 'due to a backlash, the focus is shifting away from reality, from 'bad men' who are battering or burning their wives, to 'bad or terrible women' who are misusing the law.'[1147] However, it is not too late to make a change. This time around, it is important to make sure that the entire institution of dowry as well as the dynamics of the marital relationship, which allow for violence, are challenged by the law. In order to confront these traditional institutions, the law needs to freely delve into the realm of the private. The next chapter seeks to understand the role of the public-private divide in creating and maintaining inequality within the familial sphere – which leads to and, in turn, is justified by dowry violence. It discusses how 'the dowry system has a massive social sanction and hence cannot easily be curbed or even decreased despite progressive laws and enactments.'[1148] It also examines the hesitancy of

[1146] n 832 above, 217.

[1147] n 832 above, 245.

[1148] n 806 above, 162.

the state to take strong action within the private sphere on the issue of dowry. The hope is that, armed with this knowledge, we can collectively move forward and create functional provisions with the aim of eradicating the institution of dowry and, consequently, dowry-based violence and deaths.

Chapter Six: Dowry Death – The Role of Scripts and Perceptions

An Examination of How the Public-Private Divide, Scripts and Perceptions Shape India's Current Legal Structure Surrounding Dowry Death and Bride Burning

An examination of the legal framework surrounding dowry, dowry-violence and dowry deaths in India is not complete without an accompanying analysis of the reasons behind a lack of usage and a lack of effectiveness of these laws. Although existing criminal laws surrounding dowry death are often applauded for their progressive nature, their application in Indian society has revealed that 'they operate in unintended ways with some perverse consequences.'[1149] For example, although the laws may be extensive, they fail to address the underlying reasons and scripts that create an atmosphere of domestic violence, to begin with.[1150] This includes elements such as the 'gendered differences in power of the parties to the marriage, and the problem of looking to dowry as women's optimal, if indirect, access to property resources.'[1151] Given this lack in the considerations of the law, it is not rare for existing legal protections to be superseded by social pressures dictating and approving certain behaviours of men and women.[1152] Similarly, women who seek to use or change the current legal protections are met with suspicion or barriers, as this represents a direct demand for the state to intervene in the 'private world of the family.'[1153] The public and private sphere are kept separate, despite the fact that a thorough understanding of the private is needed in order to sufficiently tackle dowry death in

[1149] Jyoti Belur et al., 'The Social Construction of 'Dowry Deaths' (2014) 119 Social Science and Medicine 7.

[1150] Shalu Nigam, *Women and Domestic Violence Law in India: A Quest for Justice* (Taylor and Francis 2020) 245.

[1151] Biswajit Ghosh, 'How Does the Legal Framework Protect Victims of Dowry and Domestic Violence in India? A Critical Review' (2013) 18 Aggression and Violent Behaviour 411.

[1152] Jane Rudd, 'Dowry-murder: An example of violence against women' (2001) 24 Women's Studies International Forum 5, 518.

[1153] n 1150 above, 58.

the public. The public-private divide shapes and influences India's current legal structure surrounding dowry violence as, by refusing to address societal scripts that exist in the private sphere, while dealing with dowry-related violence and death in the public sphere, this form of abuse continues to exist and thrive without sufficient checks or restrictions.

The failure of the law can partly be understood by looking at the patriarchal and colonial perspective which many of these legal provisions are drafted with.[1154] At the same time, other commentators mention that it is the implementation and not the intent of the law that needs to be evaluated.[1155] This chapter adopts both these perspectives by examining dowry murders 'within the context of Indian culture, which is characterized by patrilineal descent, patrilocality, the joint family, and strongly prescribed subservience of wives to husbands and in-laws.'[1156] Such an analysis allows us to understand the biases in the creation of the laws as well as reasons for failure in its implementation. In fact, despite a ban on dowry spanning decades, the practice is so closely linked to Indian custom that 'it has become legitimised in the sub-conscious minds of people and is not perceived as immoral or illegal.'[1157] This can clearly be seen in the lack of collective horror and social action against the constant increase in dowry related crimes and the startlingly violent abuses and deaths that occur on a daily basis.[1158] Such an apathy also fails to place pressure on the Government or hold them accountable for their failures in implementation.[1159] It is also hard to create collective social action when certain factions of the

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[1154] n 1151 above, 416.

[1155] Geetika Dang et al., 'Why Dowry Deaths Have Risen in India?' (2018) 3 ASARC Working Paper.

[1156] n 803 above, 129.

[1157] n 1560 above, 33.

[1158] Sainabou Musa, 'Dowry-Murders in India: The Law & Its Role in the Continuance of the Wife Burning Phenomenon' (2012) 5 Northwestern Interdisciplinary Law Review 1, 235., n 1150 above, 33 and Indu Agnihotri, 'The Expanding Dimensions of Dowry' (2003) 10 Indian Journal of Gender Studies 2, 309.

[1159] *ibid.*

society are accumulating great wealth through the dowry system – and, therefore, are ardent defendants of it.[1160] This lack of accountability is further influenced by the fact that, in India, 'family and polity are seen as separate affairs, and this public-private divide help[s] the state to evade its accountability and responsibility.'[1161] Taking all these elements into account, this chapter examines the social perceptions surrounding marriage, marital violence and dowry – which individually and collectively work to place women at a disadvantageous position and encourage the patriarchal system of dowry and dowry-based violence.

Marriage in Indian Society

The social perceptions surrounding marriage in India are often based on, and continue to perpetuate, social perceptions surrounding women in general. Therefore, it is worth discussing how these broader societal mores, maintained by India's patriarchal society, categorise and subjugate Indian women. Jane Rudd holds that, 'the social mechanisms of male domination and female subordination perpetuate the imbalance of power between men and women in day-to-day events.'[1162] Moreover, these mechanisms are not only pervasive throughout various events, but they have also been pervasive throughout time. In fact, even prior to her birth, 'Indian mythology has already defined a woman's role in society.'[1163] These ancient definitions, and the subordination they still perpetuate, play out in the issue of dowry deaths in multiple, intersecting ways. Avnita Lakhani also highlights this detrimental

[1160] Purna Manchandia, 'Practical Steps towards Eliminating Dowry and Bride-Burning in India' (2005) 13 Tulane Journal of International and Comparative Law 322.

[1161] n 1150 above, 58.

[1162] n 1152 above, 513.

[1163] Avnita Lakhani, 'Bride-Burning: The Elephant in the Room Is out of Control' (2005) 5 Pepperdine Dispute Resolution Law Journal 2, 253.

relationship by stating how 'out-dated, mythological misconceptions of women combined with the grossly manipulative practice of dowry means that bride-burning is as rampant today as it was 2,500 years ago,'.[1164] Therefore, it is clear that dowry cannot be properly understood – and, consequently, addressed – without understanding the social environment that this practice resides and thrives in. As a prominent example, an ancient patriarchal misconception, highlighted by Rudd, is that men are responsible for the control and containment of women's sexuality.[1165] Rudd also mentioned how this form of subordination was intensified and made derogatory when the colonial empire introduced 'the alien western notion of women as inferior,'.[1166] Through this combination of sexual control and social inferiority, a woman's social standing is dangerously associated with her sexuality – and the control of both these elements are in the hands of men.

The following section addresses social perceptions surrounding marriage in general as well as the perceptions surrounding violence in a marriage and the practice of dowry. This will serve to create a better understanding of the patriarchal and colonial scripts that still exist in society and allow 'the Indian government and society [to] implicitly sanction dowry murders by not adequately prosecuting it.'[1167] This section also explicitly and implicitly addresses the reinforcement of the public-private divide within gendered social perceptions. These perceptions constantly place women in the private sphere and, in doing so, get in the way of any existing criminal and public protections that wives could benefit from. In other words, through patriarchal dialogues that heighten the public-private divide, cruelty and crimes against

[1164] *id.* at 250.

[1165] n 1152 above, 517.

[1166] n 1152 above, 517.

[1167] n 1163 above, 250.

women done in the private sphere are socially validated and upheld. Consequently, victims find themselves bereft of sound legal protection in the public sphere.

Societal Scripts and Perceptions of Women's Role in Marriage

Along with its view of women in general, perceptions in society of a woman's role within a marriage can also be traced back to Indian mythology and ancient laws. Most prominently, the ancient Code of Manu, also known as the Manusmriti, provides many behavioural commands on the role and duty of a wife.[1168] This includes statements such as 'though destitute of virtue, or seeking pleasure (elsewhere) or devoid of good qualities, (yet) a husband must be constantly worshipped as a God by a faithful wife.'[1169] Such a command demands absolute obedience, and even reverence, from a wife. Similar sentiments are shared elsewhere in the Manusmriti as well, where it says, 'the wife should subject herself to the authority of her husband. She should never do anything that might displease him, whether he is alive or dead.'[1170] This code also includes statements about the social positions and limitations of women in general by declaring, 'in childhood a female must be subject to her father, in youth to her husband, when her lord is dead to her sons. A woman must never be independent.'[1171] An examination of statements within the Manusmriti clearly depicts an ancient and absolute subordination of women to the patriarch(s) in her life. The Manusmriti is not alone in its devaluation of women. Indian mythology also plays a strong role in painting a

[1168] The Manusmṛiti is an ancient Hindu legal text which was translated to English during the British rule and contributed towards the creation of a codified Hindu Law by the British government.

[1169] Code of Manu, Sneh Yadav, 'Dowry Death and Access to Justice' (2015) 1 International Journal of Law 59.

[1170] Code of Manu, Judith Greenberg, 'Criminalizing Dowry Deaths: The Indian Experience.' (2003) 11 American University Journal of Gender, Social Policy & the Law 2, 822.

[1171] Code of Manu, Sneh Yadav, 'Dowry Death and Access to Justice' (2015) 1 International Journal of Law 59.

picture of female inferiority and blind devotion to their husbands that is idealised to this day. As Anshu Nangia remarks,

> Indian mythology portrays women as economically and emotionally dependent on men as wives, mothers, sisters, and daughters. Myths that portray women with intelligence, vision, and wisdom simultaneously exhibit the desire of women to be protected and sheltered. Men expect women to embody this definition of womanhood, and women attempt to meet these standards.[1172]

A particular example of this is seen in the idealisation of Sita, 'the ideal woman of Hindu mythology,'[1173] whose story prescribes that 'an Indian bride is supposed to be faithful and devoted to her husband, regardless of the adversities she may face and how he has treated her.'[1174] Such gendered myths and commands are remembered and relayed across generations, imbedding themselves deeper and deeper into the societal subconsciousness.

These ancient descriptions of the perfect woman are also accompanied by, and influential towards, ancient and current societal perceptions of marriage. As a 'vital social institution in India,'[1175] marriage is often accorded an even higher standing than what Indian women themselves are privy to. Along with being a social institution that all women are subject

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[1172] Anshu Nangia, 'The Tragedy of Bride Burning in India: How Should the Law Address It' (1997) 22 Brooklyn Journal of International Law 3, 647.

[1173] Mudita Rastogi and Paul Therly, 'Dowry and its Link to Violence against Women in India' (2006) 7 Trauma, Violence and Abuse 1, 70.

[1174] Judith Greenberg, 'Criminalizing Dowry Deaths: The Indian Experience.' (2003) 11 American University Journal of Gender, Social Policy & the Law 2, 822.

[1175] Meghana Shah, 'Rights under fire: The inadequacy of international human rights instruments in combating dowry murder in India' (2003) 19 Connecticut Journal of International Law 216.

to, marriage for Hindus - under Hindu law - is also considered to be a sacrament.[1176] This meant that, 'traditionally, an unmarried daughter is considered not only a financial and social burden but a source of damnation for her family and ancestors.'[1177] Such perceptions of marriage place immense pressure on families to secure grooms for their daughters. Along with religious damnation, an unmarried daughter also brings societal shame – a belief which can exist across religious sections. Linda Stone elucidates the intersectionality of both these elements by sharing that 'in the modern context, the existence of an unmarried adult daughter, with all the same connotations of uncontrolled, dangerous sexuality, brings shame and dishonor to her parents whose duty it is to marry her off, and who receive religious merit for doing so.'[1178] Once again, the patriarchal concept of a man's duty to control a woman's sexuality comes into play within this explanation.

The unmarried woman herself also faces a strong cultural and societal pressure as marriage is portrayed as 'the ultimate goal for women.'[1179] It is through marriage, and only after marriage, that women are considered to be socially accomplished, and are therefore granted the privilege of entering their own society after spending decades in the periphery. Yet, marriage in India is not a matter for the bride and groom alone. Rather, it is considered to be 'an alliance between two families.'[1180] This is important to consider not only for later

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[1176] Sneh Yadav, 'Dowry Death and Access to Justice' (2015) 1 International Journal of Law 59 and Priya R. Banerjee, 'Dowry in 21st Century India: The Sociocultural Face of Exploitation' (2014) 15 Trauma, Violence and Abuse 1, 37.

[1177] Priya R. Banerjee, 'Dowry in 21st Century India: The Sociocultural Face of Exploitation' (2014) 15 Trauma, Violence and Abuse 1, 34.

[1178] n 1156 above, 130.

[1179] n 1172 above, 650.

[1180] Sonia Dalmia and Pareena Lawrence, 'The Institution of Dowry in India: Why It Continues to Prevail' (2005) 38 The Journal of Developing Areas 2, 77.

discussions on violence and the natal family's response, but also because 'women are either absent or often appear as passive participants in marriage negotiations.'[1181] This means that, despite the pivotal importance of marriage in a woman's life and the fact that it permanently impacts both the families, it is questionable whether the bride herself gets to have a say in the discussions and decisions between two patriarchs. With the father's honour and duty at stake the longer his daughter remains unwed,[1182] it is not rare that a woman meets her husband only after the marriage has been finalised. In fact, the emphasis on marriage is so strong that some communities in South India believe that an unmarried girl who dies will come back and haunt her house. Therefore, 'to appease her restless soul, parents arrange a symbolic marriage before the cremation of their dead daughter's body.'[1183] Such strong societal conceptions about the importance of marriage combined with the lack of agency a woman has in this decision, serves to undermine and trivialise the role of women even further.

The Permanence of Marriage

This lack of agency is even more debilitating considering that many women do not have the option to later get out of their marriage – even in the face of extreme circumstances. There is a strong social perception that a marriage is forever, irrespective of any violence that the woman may face. Moreover, if a marriage were to end in divorce, it is the woman – more than the man – who would be shamed by society. The eternal element of marriage can be attributed

[1181] Bhavani Sitaraman, 'Dowry and Brideprice: "The Meaning of Marriage" in Two Societies' (1995) 24 Reviews in Anthropology 2, 124.

[1182] Greenberg writes how 'it is considered a disgrace to a woman's natal family if a woman is unmarried past marriageable age' in n 1174 above, 836.

[1183] Aysan Sev'er, 'Discarded Daughters: The Patriarchal Grip, Dowry Deaths, Sex Ratio Imbalances and Foeticide in India' (2008) 7 Women's Health and Urban Life 1, 71.

to ancient scripts[1184] as well as the Hindu belief that marriage is a sacrament, and therefore indissoluble.[1185] Therefore, despite civil provisions for divorce, societal pressures as well as religious beliefs strongly discourage the ending of a marriage. B.R Sharma et al. discuss how, 'the tendency among most Indian women, even though they may suffer and die, is to stay with the husband and in-laws, since they have been trained to be part of their newly acquired family.'[1186] Similarly, Laurel Remers Pardee writes that 'society's mandate of obedience extends so far that often Indian wives will refuse to implicate their husbands in their murders even on their death beds, blaming their in-laws instead.'[1187] This means that not only is it rare for women to seek divorce, but they also expect to suffer in their marriage.[1188] Hand-in-hand with this cultural expectation is another – that family secrets should be kept contained.[1189] Together, these showcase a clear example of the detrimental effects of the public-private divide, where women are not only expected to suffer in the private realm, but they are not allowed to enter the public realm to discuss their suffering either.

Family Dynamics

[1184] Such as the previously examined Code of Manu.

[1185] n 1173 above.

[1186] B.R. Sharma et al, 'Dowry – A Deep-Rooted Cause of Violence Against Women in India' (2005) 45 Medicine, Science and the Law 2, 167. They go on to say that, 'The woman is brought up to sacrifice her existence for her husband and her children and to keep them happy. These traditional barriers compel her to suffer in silence even though she has a good cause to complain.'

[1187] Laurel Remers Pardee, 'The Dilemma of Dowry Deaths: Domestic Disgrace or International Human Rights Catastrophe' (1996) 13 Ariz. J. Int'l & Comp. L. 495. She also adds that 'Because Indian social mores do not women to divorce or leave marriages, a young woman may turn to suicide to spare her parents added expense and shame.'

[1188] n 1173 above, 69.

[1189] n 1173 above.

Although society's perception of violence is discussed in detail in a later section, it is important to mention it here, in the context of marriage as it brings another set of clearly gendered societal expectations to light. On the one hand, 'Indian society conditions females from childhood to be subservient to their husbands. Men, on the other hand, are taught that they may beat or even kill their wives.'[1190] Such pre-existing perceptions affect a woman's life before and after her marriage. When society dictates the subservience of a woman, it translates into the marital relationship by making it 'hierarchical and inegalitarian.'[1191] To add to this, 'the Indian culture is characterized by patrilineal descent, patrilocality, the joint family, and strongly prescribed subservience of wives to husbands and in-laws.'[1192] This means that, within the dynamics of her new family, a bride is designated as the least valuable member even before she enters the household. Depicting these dynamics, Pratiksha Baxi writes that 'the daughter's matrimonial home is haunted by the spectre of separation, indignity, violence, shame, rupture and death.'[1193]

In fact, Shalu Nigam explains how, 'being a new entry in the marital home, a woman is powerless and vulnerable. She occupies the lowest rung in the hierarchy of relationships; therefore, the prerogative of chastisement rests with those who hold seniority in a graded arrangement.'[1194] Additionally, the joint family structure of many Indian household place

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[1190] n 1187 above, 495. n 1150 above, 25 also mentions that 'she is obliged to obey and serve selflessly, and he gets the right to chastise her. This authority is not questioned even if the husband is a drunkard, gambler or criminal.' Additionally, Melissa Spatz, 'A Lesser Crime: A Comparative Study of Legal Defenses for Men Who Kill Their Wives' (1991) 24 Columbia Journal of Law and Social Problems 4, 614 mentions how 'there is a widespread belief in Indian society that women must serve their husbands and not cause them any harm, whereas men, as their protectors, may beat or even kill their wives if they choose.'

[1191] n 1150 above, 245.

[1192] RG Menezes et al, 'Deaths: Dowry Deaths' in *Encyclopaedia of Forensic and Legal Medicine* (Elsevier 2016) 69.

[1193] Pratiksha Baxi, 'Compromise in Rape Trials' (2010) 44 Contributions to Indian Sociology 3, 224.

[1194] n 1150 above, 24., also in n 1160 above, 315.

emphasis on a husband's devotion to his parents as more important than his devotion to his wife.'[1195] Considering these socio-cultural elements, it seems that the patriarchal and hierarchal faces of marriage in India work together to set women up for failure.

In addition to all the disadvantages women face while participating in the system, abandoning these societal expectations altogether is rarely a viable option. While women are currently seen as 'private property within a marriage',[1196] Jane Rudd writes how 'breaking free of their family constraint'[1197] can lead to their categorisation as sexualized public property. Without sufficient mechanisms in place to consistently protect a woman that society has abandoned, many women struggle to safely exist in the public sphere as single or divorced. This dichotomy between a violent and accepted private sphere and a free and rejected public sphere speaks volumes about the Indian social system as a whole. It also sheds light on why interference (regarding matters of daughters and wives) from the public sphere (which is rejected) into the private sphere (which is accepted) is so contentious and finds little ground. As an example, Nigam mentions that 'the independent existence of a single women as citizens could not be conceptualized, while the idea of inequality within marriage has been upheld as divine above the rule of law.'[1198]

Shifting Perceptions of Fertility

[1195] n 1174 above, 810. Interestingly, there lies an argument to the contrary which shares that it is the break-up of joint families and the creation of nuclear families in the 1980s that resulted in husbands losing 'sight of the rights and well-being of their wives.' This is mentioned in Vineeta Palkar, 'Failing Gender Justice in Anti-Dowry Law' (2003) 23 South Asia Research 2, 185. Regardless, it is the wife who finds herself at a disadvantage.

[1196] n 1152 above, 521.

[1197] n 1152 above, 521.

[1198] n 1150 above, 54.

Historically, social perceptions and obligations surrounding marriage have been closely linked to fertility. The relationship between marriage and fertility is interesting to analyse as, unlike the strong hold that social perceptions still have on marriage in general, perceptions of the importance of fertility seem to be shifting from what they were in the past – especially when dowry is involved. Marriage is considered as the gifting of the daughter, reflecting 'the family's sacred duty to society to give the girl-child to another family for whom she will bear the valuable gift of a new generation.'[1199] Such language showcases the importance given to a woman's fertility and the higher status or respect that she was accorded based on her reproductive capacity. This was especially true if the woman gave birth to a son.[1200] Although a woman's categorisation as fertile did not afford her equality, it did provide her with societally mandated protection.[1201] In fact, 'a woman's fertility was key to what can be considered a "great transition" in her status and identity.'[1202] However, in more recent years, these ties between fertility and protection, especially protection from dowry-related abuse, have started to fray. Stone highlights this 'new loss of female power'[1203] by sharing how many victims of dowry deaths had already given birth to sons.[1204]

Perhaps most horrendously, a 1988 study by Ghadially and Kumar found that 11 per cent of women were pregnant at the time that they were murdered for dowry.[1205] These shifts are significant to note as they negate the absolute nature of societal standards in dictating

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[1199] n 1172 above, 646.

[1200] n 1192 above and n 1152 above, 517.

[1201] Nangia mentions the 'societal view of women as economically and emotionally dependent beings who need to be protected and sheltered so that they can assume their reproductive functions' in n 1172 above, 647.

[1202] n 1156 above, 131. also mentioned in n 1192 above.

[1203] n 1156 above, 125, also in n 1152 above, 517.

[1204] n 1156 above, 131.

[1205] Cited in n 1152 above, 517 and n 1192 above.

behaviour. Unfortunately, in the above case it is a standard that was somewhat beneficial towards women which finds itself changing now. However, in understanding how social expectations change, it is also just as important to note why these changes might be emerging. In this particular case of changes in the value of fertility, a reason mentioned by both Stone and Rudd is that urbanisation has led to an increase in the economic cost of children and a decrease in the economic benefits.[1206] When this is combined with a rising greed and consumeristic mentality that leads to frequent and increasing dowry demands, the urge to get more dowry or marry again for dowry is starting to win out when pitted against the social importance placed on fertility. This leads to a society where 'women lack value, and therefore power, either as workers or as mothers,'[1207] showcasing how significant changes that are occurring in societal expectations seem to remain patriarchal, nonetheless.

Dowry-Related Marital Violence in Indian Society

Apart from the institution of marriage and the importance of fertility, societal mandates also strongly influence the perception and approval of violence within a marriage. This includes scripts and expectations surrounding violence against women in general as well as those surrounding marital violence in particular. The following section first mentions social scripts condoning marital violence as a larger category before examining scripts that relate to dowry-based violence. It then briefly discusses the women's rights movement that emerged from an upsurge in dowry deaths and resulted in many dowry-related laws, before looking at why these laws have not been sufficient. This ties into a discussion on the power of scripts as well as the difficulty of successfully bringing matters deemed private into the public sphere. Lastly, this

[1206] n 1156 above, 131 and n 1152 above, 517.

[1207] n 1156 above, 132.

section will mention the consequences of socially accepted violence in how Indian women themselves sometimes perceive the violence they are subjected to, in order to better understand the pervasive and embedded nature of societal perceptions of marital cruelty.

Social Scripts Condoning Marital Violence

Once again, socio-cultural perceptions of violence within a marriage find their conception in ancient India. Alongside previously discussed laws and idealisations, ancient authorities also name the wife as a slave to her husband and cite her 'discipline' as encouraged and expected.[1208] These multitude of sources and patriarchal authorities all seem to justify their imposed inferiority of women through the lens that it is only when a man is in charge of a woman that she can be controlled.[1209] With strong parallels to the misuse argument discussed in the previous chapter, Melissa Spatz states how society creates 'two conflicting ideals of women's nature: women as innately good wives and mothers, and women as seductresses.'[1210] Through this societally dichotomous characterisation, Spatz goes on to say that, 'if a woman must fill a certain role, which includes duties to the male members of her family, then her violation of that role makes her murder seem like less of a crime.'[1211] Taking this into account, and considering that a woman is expected to obey and serve her husband at all costs, violence for any real or imagined slights finds validation in society. Anuradha Saibaba Rajesh writes

[1208] Greenberg mentions the Manusmriti and Indian mythology – along with other sources. n 1174 above, 822.

[1209] A similar concept is discussed in n 1152 above, 517.

[1210] Melissa Spatz, 'A Lesser Crime: A Comparative Study of Legal Defenses for Men Who Kill Their Wives' (1991) 24 Columbia Journal of Law and Social Problems 4, 630.

[1211] *ibid*. Spatz even highlights how such a dichotomy 'prevents women from leaving their husbands or even denouncing their husbands from their deathbeds. It prevents the woman's parents from intervening, impedes police investigations and discourages prosecutors and judges from punishing women who may have spoken against their husbands.'

that ‘the social construct of an "ideal woman" or "good woman" often sanctifies violence as a yardstick to discipline them.’[1212] If a woman cannot be perfectly good, she must be bad and, therefore, deserving of punishment. In this manner, ‘domestic violence is ironically justified as an act of love and affection meted out to make the victim a "better individual."’[1213]

Dowry, Ownership and Violence

When tying social perceptions that condone – and encourage - violence within a marriage to the issue of dowry, connections can be drawn to the fact that dowry is based on the concept of the sale and ownership of women, and this ownership is seen to permit and excuse violence.[1214] However misguided this initial societal perception may be, it consequently leads to the view that women should silently suffer any violence they are subjected to, dowry-based or otherwise. Bringing it full circle, this also means that ‘many women are afraid to implicate their husbands in a dowry crime simply because the Indian society is viewed as having conditioned women to anticipate or expect abuse and in some sense eventually, endure it.’[1215] Hence, it is the same dowry that symbolised the ownership and subordination of a wife which prevents her from reaching out for help when she is subjected to abuse during a husband’s search for more dowry. In addition and in relation to societal pressures that keep a woman in a violent marriage, a feminist psychological perspective also suggests the theory of learned helplessness as a reason for why women stay. According to Rastogi and Therly, ‘the theory of learned helplessness suggests that an individual will initially attempt to escape an undesirable

[1212] Anuradha Saibaba Rajesh, 'Women in India: Abysmal Protection, Peripheral Rights and Subservient Citizenship' (2010) 16 New England Journal of International and Comparative Law 116.

[1213] *ibid.*

[1214] n 1163 above, 262 and n 1210 above, 631.

[1215] Pramila B, ‘A Critique on Dowry Prohibition Act 1961’ (2015) 76 Indian History Congress 848.

situation. However, when repeated attempts to escape fail, she gives up and becomes passive. Then later, even when an escape route is available, she continues to behave in a passive and helpless manner.'[1216] Particularly given the scripts and expectations in Indian society, women constantly face internal and external pressure to preserve the marriage and are consistently made aware of their inferior status and limited options. Therefore, this theory suggests that 'women who are battered stay in abusive relationship because their past attempts to change their environment failed.'[1217]

Feminist Intervention and Unwanted Consequences

Starting in 1979, attempts were made by women's rights activists and organisations to change this reality that wives are subjected to. The women's rights movement of the eighties brought private violences into the public eye and created many of the criminal provisions discussed in the past chapter. This bid for change was initiated by the bride burning of the 21-year-old and pregnant Shashibala in March of 1979.[1218] As Shashibala's mother campaigned for justice, many women's groups began protesting in the streets and conducting a sit-in outside the house of perpetrators of dowry abuse.[1219] The latter was part of an anti-dowry campaign with the objective of shaming families that asked for dowry and spreading the view of dowry as a 'social evil.'[1220] It is true that 'the advent of women's movement in India and awareness among progressive groups in the country has created a space conducive to addressing this issue

[1216] n 1173 above, 74.

[1217] n 1173 above, 74.

[1218] Namita Bhandare, 'Satya Rani Chadha: The face of India's anti-dowry movement' (2014) Mint.

[1219] n 1150 above, 51, n 1155 above, and n 1174 above, 807. Other actions included the boycott of dowry weddings as well.

[1220] n 1150 above, 51.

at a macro level.'[1221] In fact, it was mainly as a response to these feminist interventions, which unmasked the 'internal dynamics and daily trauma of "traditional family life"'[1222], that laws against dowry death emerged in India's criminal legal sphere. However, it is also true that the institutionalisation of this movement's demands into Indian law has resulted in 'protection without empowerment.'[1223] This can also be seen in the Parliamentary discussions surrounding the creation of a criminal law against domestic violence. During these debates, members argued that this was an interference into the sacred family and that women were not vulnerable in marriage as they could use their sexuality to persuade men to do anything.[1224] Yet others 'reinforced the misogynistic position that 'women are women's worst enemies' while pitting mothers-in-law against daughters-in-law.'[1225] Commenting on these debates, Nigam remarks upon how, 'in all such positions, the issue of domestic violence was trivialized, normalized and reduced to a man-versus-woman issue rather than as a larger question relating to patriarchy.'[1226]

The Blame Game

Additionally, Judith Greenberg elucidates that identifying criminal activity necessitates the labelling of certain behavior as 'immoral or socially undesirable' and that, 'as a means of preserving current social structures, criminal conduct is often blamed on outsiders to society.'[1227] In the case of dowry violence, one category of blamed outsiders is the influence that the colonisers or the West have on Indian culture. Such blame is depicted in how 'some

[1221] Human Rights Law Network, 'Leading Cases on Dowry' (New Delhi 2011).

[1222] n 1150 above, 51.

[1223] n 1152 above, 521.

[1224] n 1150 above, 55.

[1225] n 1150 above, 55.

[1226] n 1150 above, 55.

[1227] n 1174 above, 824.

Indian commentators tie dowry violence to British colonial rule and the effects of Western-style conspicuous consumption in India. This reverses the Western claim of "death by [Indian] culture," turning it into one of death by Western culture.'[1228] However, although Greenberg seems to present blaming Indian culture and blaming Western consumerism as opposing viewpoints, this paper considers them as factors that go hand in hand in the construction of modern dowry. Another category of blame is placed on mothers-in-law as the real instigators of dowry violence. Although this will be discussed in detail later, it is immediately evident that both these categories of blame allow the current patriarchal system to go unchecked. By playing the blame game, 'the current legal discussion tends to obscure the role of the men who dominate the family structure. Furthermore, blaming mothers-in-law, colonialism and consumerism-all of which are already viewed as "evil" -makes fundamental change in family power relationships appear unnecessary.'[1229] Such explanations provide 'excuses and defences for the victims' husbands'[1230] and dull the power and protection that criminal law would have otherwise provided. The results of our society's tendency to blame are also reflected in the aforementioned Parliamentary arguments against criminalising domestic violence. Therefore, although it is vital to address the seemingly private issue of dowry violence in the public, criminal sphere as well, we cannot properly tackle private issues in the public sphere until they have been properly understood, and at times addressed, within the context of the private sphere itself.

Women's Perception and Response to Violence

[1228] n 1174 above, 826.

[1229] n 1174 above, 835.

[1230] n 1174 above, 825.

Despite a strong and dedicated feminist movement on dowry related violence, this abuse continues to exist and thrive in today's society. The extent of influence that societal norms and social scripts on marital violence have can most obviously be seen through women's own perception of the violence that they face. Many women in India consider violence to be normative, 'because they have been socialised into believing that their husbands are entitled to power over them.'[1231] According to Biswajit Ghosh, 'research has revealed that women perceive an incident as abuse only if the beatings are very serious; the odd slap or blow is regarded as routine.'[1232] Additionally, India's National Family Health Survey for 2019 to 2021 reveals that, while 86 per cent of women did not seek help after being subjected to violence, 45 per cent of women agreed that a husband is justified in hitting or beating his wife for one or more of seven presented reasons – including if she shows disrespect for her in-laws (31.7 per cent), if she neglects the house or children (27.6 per cent) , if she argues with him (22 per cent) or if she does not cook properly (13.7 per cent).[1233] Similarly, a survey conducted in rural Karnataka shows how 88 per cent of women said that they would not seek help if or when they are beaten.[1234] Nigam blames this on the patriarchy, which is 'so deeply internalized that, shockingly, a large number of married women accept and justify beatings by their husband as natural consequences when they ignore their wifely duties, such as disrespecting parents, neglecting housework or refusing sex.'[1235] This acceptance or justification, accompanied by other social scripts that dictate the permanence of marriage, only leaves a woman perceiving

[1231] n 1174 above, 821.

[1232] n 1151 above, 411.

[1233] Ministry of Health and Family Welfare, 'National Family Health Survey (NFHS-5) 2019-2021 India Report' (Government of India 2022) Table 14.14.1.

[1234] n 1174 above, 823.

[1235] n 1150 above, 31.

two choices – enduring until she is killed or kills herself.[1236] Therefore, although marriage was considered as a protection for women, it is often the very thing that she needs protection from.

The Role of the Mother-In-Law

In analysing how social perceptions within a patriarchal society maintain and perpetuate domestic violence, despite legal provisions, the issue of violence conducted by mothers-in-law makes for a fascinating case study. A new wife stepping into her husband's family is not only expected to be obedient to him but also to his parents and any other elders in his family.[1237] Interestingly, these dynamics have often resulted in acts of cruelty and violence either instigated or carried out by the bride's mother-in-law.[1238] In fact, after the husband, it is the mother-in-law who is accused of violence in the maximum number of cases – before anyone else in the family. [1239] A 2002 study also reported that 40 per cent of the patients they interviewed stated that their mothers-in-law were the primary instigators of violence.[1240] Although violence by the mothers-in-law has often been used by individuals and law makers alike to diminish the responsibility of men in these crimes, the reality is more complicated. Therefore, rather than a simple solution of placing blame, a broader framework of the societal

[1236] n 1172 above, 651.

[1237] n 1173 above, 71.

[1238] n 1173 above, 71, n 1150 above, 34, n 1215 above and Visalakshi Jeyaseelan et al, 'Dowry Demand and Dowry Harassment: Prevalence and Risk Factors in India' (2015) 47 Journal of Bioscience 6, 729.

[1239] Vineeta Palkar, 'Failing Gender Justice in Anti-Dowry Law' (2003) 23 South Asia Research 2, 188. Another study cited in Visalakshi Jeyaseelan et al, 'Dowry Demand and Dowry Harassment: Prevalence and Risk Factors in India' (2015) 47 Journal of Bioscience 6, 729 writes that 'on many occasions mothers-in-law were instrumental in creating both conflict and violence.'

[1240] Visalakshi Jeyaseelan et al, 'Dowry Demand and Dowry Harassment: Prevalence and Risk Factors in India' (2015) 47 Journal of Bioscience 6, 729.

landscape and dialogues that these crimes, and these mothers-in-law, reside in needs to be examined.

Insecurities and the Illusion of Power

The delicate situation that a woman finds herself in within Indian society does not get any more stable with her status as a mother-in-law. In fact, while society imparts respect and recognition to a woman who bears sons, this status is jeopardised when those sons are married, and her daughter-in-law could eventually take that high status from her. Relatedly, the daughter-in-law is also seen as a 'threat to her son's loyalty and support to herself.'[1241] As the mother-in-law depends on the family dynamics and her son's affection for her financial security and support in her later years, a new bride is often seen as a threat to this future stability.[1242] With this in mind, the mother-in-law can use dowry harassment as a way to 'assert her power.'[1243] Additionally, after being conditioned to obey for the majority of their lives, 'when a woman becomes the mother-in law, she is finally in a position of power after having been controlled throughout her life.'[1244] Along with the conceptions mentioned above, there are deeper, socialised ideas that influence these actions as well. These generationally imposed social perceptions allow for the continued existence of the patriarchy while women are often stuck with much of the dirty work and much of the blame. One of the evident keyways is in seeing how women only gain power through their relationship to men.[1245] Known as the 'illusion of power', this can also be seen through the fact that it is men who delegate the older

[1241] n 1192 above.

[1242] n 1160 above, 315 and n 1173 above, 72.

[1243] n 1160 above, 315.

[1244] n 1173 above, 72. This is also mentioned in terms of influencing the dowry-system in n 1160 above, 315.

[1245] n 1173 above, 72.

women to manage the younger women in the household.[1246] Therefore, young brides often find themselves doubly bound – to serve the men as well as the women of the house. Rastogi and Therly mention how 'women can and do abuse this power, sacrificing those of their own gender, and thus legitimatizing and perpetuating the social norms that define and maintain women's subordinate condition.'[1247]

Patriarchal Bargaining

A concept used to understand these dynamics is that of 'patriarchal bargaining.'[1248] Patriarchal bargaining refers to a situation 'when women vie against each other within the family for the minimal power that is theirs in a system of oppression.'[1249] Rudd goes on to say that, in such a situation, there is no real solution.[1250] The bargain element of this concept lies in women remaining subordinate and participating in consequent subordination in exchange for protection – physical and financial – as well as status or power within the existing patriarchy.[1251] At worst, this means that the mother-in-law lives up to her mythological portrayal of an evil, petty and punishment oriented figure who perpetuates and participates in violence.[1252] At best, this means that 'women, especially mothers-in- law, are socialized to stay silent, accept and also enforce discriminatory rules.'[1253]

[1246] n 1173 above, 72.

[1247] n 1173 above, 72.

[1248] n 1152 above, 521. and n 1173 above, 72.

[1249] n 1152 above, 521.

[1250] n 1152 above, 521.

[1251] n 1173 above, 72.

[1252] n 1174 above, 831 and 832.

[1253] n 1183 above, 72.

In both cases, the consequences of these societal scripts, and a mother-in-law's bid for power within their patriarchal confines, are that 'criminal action against them fits easily with cultural understandings of who mothers-in-law are and does not challenge traditional patterns of male dominance.'[1254] Narratives and categorisations of the mother-in-law have also spilled into the courtroom, where judges and prosecutors may bring this particular angle into the case despite the absence of or minimal proof.[1255] More concretely, such narratives turn the issue of dowry and violence into a woman's issue, or even simply away from its consideration as a gendered issue. Both these configurations distract from the true issue of a patriarchal society with gendered narratives that continue to perpetuate violence. It is vital to recognise this systemic problem in order to understand why current laws are not working, why cases continue to increase and what needs to be done to create effective and permanent change.

The Role of the Natal Family

In addition to the marital violence that society approves and the role that mothers-in-law are expected to play in social structures, there are also certain scripts and expectations that bind the natal family and prevent them from interfering in their daughter's married life. These societal scripts hold even if the marriage is violent or dangerous to the woman. In fact, the social positionality of the natal family in relation to their daughter is pre-defined for both before and after the daughter's marriage. A woman is de-valued within her natal family even before her birth. This is partly due to ancient Hindu sayings that undermine the blessing of a girl child. Such sayings include: 'a son spells rewards, a daughter expense' and 'raising a daughter is like

[1254] n 1174 above, 831.

[1255] n 1174 above, 833 and 834. As seen in the case of *Prem Singh* v *State of Haryana* AIR 1988 SC 2628

watering a neighbours' plant'.[1256] As a woman is always bound to leave her parents' house, society has come to consider expenses and resources spent during her childhood as a burden on the family's finances.[1257]

Through patriarchal determinations, parents also feel that daughters are unable to provide or care for them in their old age – which leads to their depreciation in value.[1258] Therefore, daughters are considered to be '*parayadhan*' – or other's wealth – and parents are pressurised into getting them married off as quickly and as efficiently as possible.[1259] The fact that parents have to pay an often unaffordable dowry for their *parayadhan* does not help increase the value of the daughter either.[1260] However, at the same time, society does not give women the choice to stay unmarried and take care of her parents, and therefore potentially increase her value in her natal home, as 'an unmarried adult daughter is considered a liability to the parents and it is a shame and dishonour if they fail to marry her off at the right age.'[1261] Once again, women are caught in a societal trap where they just cannot win.

Dynamics continue to pose a disadvantage to a woman and her family both during and after her marriage. There is an unequal relationship between the bride's family and the groom's family due to a 'religious and social inferiority of the bride's family to that of the groom.'[1262] At the time of marriage, this is exhibited through dowry, wedding payments and the groom's family's upper hand in negotiations. After marriage, this is exhibited through the fact that

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[1256] Hegde 1999, quoted in n 1183 above, 61.

[1257] n 1160 above, 313. and n 1183 above, 72.

[1258] n 1160 above, 313.

[1259] n 1240 above, 728 and n 1150 above, 24.

[1260] n 1152 above, 515.

[1261] n 1192 above, 69, also mentioned in n 1174 above, 815.

[1262] n 1156 above, 130, n 1150 above, 24.

women are often not allowed to freely return to their natal home and her parents do not get to interfere with relevant decisions made or actions taken by her marital family.[1263] In fact, Indian society pushes her natal family to shun her and bar her frequent access to her former home.[1264]

Violence, Honour and the Natal Family

This situation gets more complicated and even less savoury when violence is involved. As society places the honour of the family in the hands of the woman, she often hesitates to speak out against her husband.[1265] Even though a woman is barely considered a member of her own natal family, social customs tie any and all of her actions directly to her family of birth as well as her marital family. Therefore, 'notions of family honour also prevent women from leaving or denouncing their abusive husbands'[1266] as 'a broken marriage is considered a mar on the bride's family's honour.'[1267] This once again presents how stark a divide there exists between the bondages of the private sphere and the insufficient criminal provisions in the public. When a woman does confide in her parents regarding the violence she faces, she is often encouraged to return to her abusive marital family and told to not discuss her abuse with

[1263] n 1240 above, 728 and n 1150 above, 24.

[1264] n 1187 above, 495 and Angela Carlson-Whitley, 'Dowry Death: A Violation of the Right to Life Under Article Six of the International Covenant on Civil and Political Rights' (1994) Seattle University 649.

[1265] Angela Carlson-Whitley, 'Dowry Death: A Violation of the Right to Life Under Article Six of the International Covenant on Civil and Political Rights' (1994) Seattle University 650 and n 1210 above, 615.

[1266] n 1210 above, 615.

[1267] n 1187 above, 491. These social mores are also relayed in n 1265 above, 649, n 1163 above, 245 and n 1187 above, 495.

A broken marriage can also adversely affect the marriages of any unwed daughters in the natal family.

others.[1268] This can be associated with their fear of 'the stigma of a married daughter leaving the home and returning to her parents.'[1269]

In many cases, for the sake of family honour and in order to prevent a socially taboo divorce, a woman's parents may even refuse her entry into her natal home so that she has no choice but to return to her husband, or commit suicide.[1270] This proves to be true even if the daughter's life is in imminent danger, as social standards against divorce have created a situation where 'most parents would rather see their daughters dead than to have them get a divorce and permanently return to their natal home.'[1271] Along this vein, Greenberg also writes how 'folk wisdom claims that Hindu parents tell their daughter as they leave for her wedding that now she will enter her husband's home, and she is not to leave it, except for her own funeral.'[1272] Adding insult to injury, many families refuse to implicate their son-in-law even after their daughter's death.[1273] Along with creating an atmosphere of legal impunity and allowing the perpetrator to find another bride,[1274] the natal family makes matters worse by sometimes even marrying their second daughter to the husband and killer of the first in order to preserve familial honour and social standing.[1275] It is hard to say whether such despicable

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[1268] n 1173 above, 70 and n 1172 above, 649. Also mentioned in n 1174 above, 838.

[1269] n 1172 above, 649. In a case shared in n 1187 above, 491, a mother even filed a case of desertion against her daughter's husband, after her daughter sought shelter in her natal home, to force the abusive husband to take her daughter back. She says that 'there would be a stain on her honor because she has been deserted. It would mean more and more dishonor for me.'

[1270] Sainabou Musa, 'Dowry-Murders in India: The Law & Its Role in the Continuance of the Wife Burning Phenomenon' (2012) 5 Northwestern Interdisciplinary Law Review 1, 233. and n 1160 above, 321.

[1271] n 1160 above, 320, also mentioned in n 1270 above, 233.

[1272] n 1174 above, 837.

[1273] n 1270 above, 233.

[1274] n 1270 above, 234.

[1275] Rajni K, Jutla and David Heimbach, 'Love Burns: An Essay about Bride Burning in India' (2004) American Burn Association 168.

actions speak more of the low and disposable status of women or of the artificially high value of honour in society, or both. Understanding the role of the natal family as defined by society allows important revelations of the intensely private and honour-bound nature of this publically criminalised act – which cannot be properly addressed publicly until its private nature is altered.

Dowry and Indian Society

More than fifty years after the Dowry Prohibition Act, the institution of dowry continues to be a socially accepted, if not compulsory practice associated with marriages. To this day, 'the beliefs that marriage without dowry is not possible, or matrimonial security or happiness cannot be obtained without dowry are deeply rooted.'[1276] However, there is room for change. A case study of women in Bihar showed that only 35.5 per cent of the participants – married women – approved of dowry.[1277] Srinivasan and Lee comment that, 'to find such widespread opposition to the dowry in a population so traditional suggests a high potential for change.'[1278] Despite these positive results, we have already seen how women are often not included in marriage negotiations – which could prevent these anti-dowry opinions from turning into reality. Menezes et. al. also mention how there has been a recent shift in the perception of dowry within certain Indian communities. They remark upon how, 'many of these parents do not want to receive dowry for their well-educated and settled sons; however, such an act is considered 'strange' by the society and quite often, the respectability of the groom's

[1276] n 1177 above, 37. In fact, a 1996 study found that 87% of the respondents did not know that giving or receiving dowry was illegal in n 1173 above, 70.

[1277] Padma Srinivasan and Gary R. Lee, 'The Dowry System in Northern India: Women's Attitudes and Social Change' (2004) 66 Journal of Marriage and Family 1112. The authors also comment that Bihar is a relatively poor and traditional state, which adds impact to the low numbers of dowry approval.

[1278] *id.* at 1113.

family is questioned.'[1279] To understand the reluctance that anti-dowry families have in acting on their opinions, it is important to look at the social perceptions of dowry and how they have evolved across time. In fact, unlike perception on marriage or violence, many of the societal scripts and expectations around dowry have been established during colonisation and have been heavily impacted by consumerism since then.

Colonial Influence

On the matter of the shifting face of dowry during colonialism, Nigam mentions how colonial rulers linked dowry to other crimes and took on a "moral mission of civilizing Indians" and "preventing them from killing their own women".'[1280] Similar to what occurred with the feminist movement in relation to creating dowry laws, the issue here became about connecting dowry to 'expensive marriage, greed, hypergamy, female infanticide and caste practices while ignoring factors such as the commodification of women or denial of their property rights.'[1281] The significance of this lies in the fact that many laws and actions taken during colonisation made the matter of dowry much worse and much more prominent for Indian women. For example, introducing the masculine idea of private property, which only men could own, took away from the pre-colonial communal model which had allowed women to participate economically as well.[1282] In the absence of this, dowry became even more vital for a woman's autonomy and well-being. Nigam herself summarises; 'the crux of this argument is that dowry

[1279] n 1192 above, 70.

[1280] n 1150 above, 49.

[1281] n 1150 above, 49.

[1282] n 1150 above, 50.

is not a customary practice; rather, it was an evolving institution and has linkages with violence because of the restructuring of property rights that occurred under the colonial rulers.'[1283]

Another consequence of the private property model, as well as consistent land taxations implemented by the colonial rulers, was the introduction and growth of consumerism. Within an existing patriarchal structure, households were now divided between 'haves versus have-notes' and the chronic indebtedness created by taxations was relieved by relying on dowry.[1284] In this way, dowry very obviously transformed into a mechanism by which the groom's household, and not the bride, would gain and spend wealth. As social status and monetary wealth began to intertwine within the colonial system, dowry also became a tool to access surplus wealth and gain a higher social standing. Consequently, 'marriage became more of an economic union instead of a spiritual union during this time.'[1285]

Finally, British legislative actions also directly affected dowry through the colonial government's attempt to standardise the customs and rituals associated with Indian marriages. By seeking advice from members of the Brahmin caste during this process, 'the primacy of the most demanding forms of dowry weddings'[1286] was reinforced and solidified. Therefore, dowry was subsequently required where it did not exist before and dowry was increased in many places where it had already existed. Through this, Greenberg writes that, 'what may have started as a ritual for sanctifying marriage has, according to this way of seeing things, become, as a result of the colonial experience and contact with Western consumerism, a "sordid

[1283] n 1150 above, 50.

[1284] n 1183 above, 60 and 61.

[1285] n 1160 above, 316.

[1286] n 1174 above, 828.

commercial transaction".'[1287] As a product of these colonial decisions, the practice of dowry shifted from a religious practice with the purpose of financially securing the woman, to a compulsory transaction with the purpose of financially benefitting the husband's family.

Dowry as Inheritance, Women as Inheritors

Influenced by the changes created by colonialism and consumerism, dowry has drastically shifted from a compensation for women's inability to inherit property in the past and has instead turned into a practice that equates a woman's value with her economic worth. The following section will examine how dowry was socially justified as a form of compensatory inheritance before looking at the fallacies in applying a similar argument today. Despite these fallacies, dowry remains as a thriving institution in India's private sphere. This discrepancy speaks volumes about the power of social perceptions and expectations in maintaining patriarchal practices despite growing change.

When considering the argument of dowry as inheritance, it is important to remember that, within Indian society and personal laws of the past, inheritance for men was guaranteed but women did not receive an inheritance except through the dowry at their wedding.[1288] This was because, under the Hindu legal system of Mitakshara, women were excluded from the wealth and property of their parents.[1289] Therefore, 'the practice of giving a daughter a

[1287] n 1174 above, 831.

[1288] n 1180 above, 73 and n 1240 above, 730. Yet, it should be mentioned that states in the south did recognise a woman's right to land even in the past – although dowry existed and continues to exist in the south as well. This is highlighted in n 1180 above, 74. This also emphasises the vitality of marriage for women – an emphasis in Indian society which has lasted to this day.

[1289] Lucy Carroll, 'Daughter's Right of Inheritance in India: A Perspective on the Problem of Dowry' (1991) 25 Modern Asian Studies 4, 791 and n 1180 above, 73.

handsome dowry appears to have compensated for this restriction.' It is also argued that the majority of Hindu families still only present women with the family's property or wealth through the daughter's dowry by not providing them with any other inheritance.[1290] Yet, there are many errors with using a similar argument of inheritance to socially justify dowry today. Most prominently, a religious personal law known as the Hindu Succession Act of 1956 gave Hindu women equal rights to inherit immovable property and allowed the transfer of ownership to daughters.[1291] Despite this Act, many women still do not own inherited property.[1292] This is clearly associated with 'the prevalent socio-cultural and economic pressures in the patriarchal and hierarchical society of India,' which prevents the proper implementation or effect of this Act on the institution of dowry.[1293]

Another major flaw with justifying dowry as a form of inheritance is that such a connection presupposes that the dowry will end up or remain in the woman's control. Keeping in mind prior discussions on the low position of women in their marital homes as well as the husband's use of dowry for freedom from debt or for extra wealth, it is clear that, 'a bride does not have (and historically never had) genuine control over the use and distribution of this property.'[1294] Stone goes on to say how, 'women in the Indian dowry system should be seen as vehicles of property transmission rather than as true inheritors.'[1295] To further exaggerate this

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[1290] Lucy Carroll, 'Daughter's Right of Inheritance in India: A Perspective on the Problem of Dowry' (1991) 25 Modern Asian Studies 4, 791.

[1291] Hindu Succession Act of 1956.

[1292] n 1173 above, 71. Coming full circle, this once again affects their ability to get out of a marriage that has dowry-related violence.

[1293] n 1192 above, 71.

[1294] n 1156 above, 126, also mentioned in n 1183 above, 73.

[1295] n 1156 above, 126. This is also echoed in n 1172 above, 651, who says that 'a woman's inheritance may only disguise the practice of dowry since the bridegroom and his family may then seek the bride who inherits the greatest amount of property.'

point, it can be pointed out that if the true intention of dowry was for it to serve as an inheritance for women, it would be better to gift financial assets – such as property – rather than consumeristic items.[1296] Despite maintaining a perception of inheritance, the items gifted reveal how it is really societal expectations and consumerism that drive the dowry market forward. Sharma et. al. comment how, 'it is strange that a father is quite willing to part with a lot of money as dowry at the time of marriage. However, the same father is hesitant to give a share of his property to his daughter.'[1297]

Dowry as an Economic Boost, Women as Collaterals

Given these realities, a true categorisation of dowry actually depicts 'how patriarchy interfaces with capitalism in South Asia today to specifically impact the basis on which interpersonal relationships as well as social/familial relationships are founded and acts as a major factor governing women's destiny.'[1298] The patriarchy mentioned here is not only seen in the relocation of dowry, the consumeristic elements of dowry and the acceptance of dowry-related violence, but it is also seen in the creation of certain cyclical social traps that hinder women and necessitate her family's participation in the act of dowry. As an example, Sainabou Musa relays that many families in rural India believe it to be shameful to the family if the wife or daughter-in-law has to work to support the household.[1299] Therefore, even though it is the patriarchal society itself that considers working to be shameful, this is used as a reason for the bride's family to pay more dowry as she will not be able to, or will not be allowed to, provide

[1296] n 1156 above, 126.

[1297] n 1186 above, 165.

[1298] Indu Agnihotri, 'The Expanding Dimensions of Dowry' (2003) 10 Indian Journal of Gender Studies 2, 311.

[1299] n 1270 above, 235.

financially after the marriage.[1300] Once again, this successfully equates a woman's value with what she can provide economically. This leads to the disheartening conclusion that 'the commodification of women as objects and property to be monetarily valued has ensured the sustenance and development of the phenomenon of giving and taking dowry.'[1301]

With its journey through society from an ancient ritual to a colonial necessity to the economic transaction that it is today, the institution of dowry seems to be only going onwards and upwards. Dowry has thrived despite elaborate criminal sanctions and a determined feminist movement. However, 'because social norms are created and sustained within the community-at-large, members of the community have tremendous power in creating change that will positively impact the lives of women, especially with regards to dowry murders.'[1302] Between the previous section – discussing social conceptions of marriage, violence and dowry – and the following section – that discusses the impact of these conceptions on the current criminal solutions – there remains hope that a better understanding of the role of dowry in Indian society will create a better bid for change.

The Consequences of Social Scripts on the Current Indian Legal System

Societal scripts and mores surrounding women, marriage, violence and dowry not only influence the continued existence of socialised violence against women, but they also affect how this violence is viewed by police, medical and legal officers in the public sphere. In doing so, cases of cruelty or murder that do manage to reach the police or the courts are also tainted

[1300] n 1270 above, 235.

[1301] Human Rights Law Network, 'Leading Cases on Dowry' (New Delhi 2011).

[1302] n 1270 above, 234.

through multiple, intersecting, perceptions and behaviours propagated by society. This is not farfetched to imagine, as all the actors involved in the classification and judgement of a dowry-related crime are members of the Indian society themselves – and, consequently, subject to this society's expectations and misconceptions. The classification of a dowry-related crime or death is influenced by the reports of the woman, her family (both natal and marital), the police and the medical staff, as well as any other relevant personnel. The verdict based on this classification is influenced by the prosecution and the judge, along with the quality of evidence collected during the classification itself. Therefore, Shetty et al. write that 'the social organisation of courts, the police and legal structures tend to systematically devalue domestic violence cases.'[1303] To better understand the influence of societal scripts on these actors, and how this influence brings private scripts into the public sphere – to the disadvantage of women, the following section will be examining how scripts affect dowry-violence classifications by police officers and members of the court.

Classifications by Police Officers

According to Belur et al., a host of factors, including race, religion and culture, as well as care for the family, affect the medico-legal verdicts on death investigations.[1304] While consciously or subconsciously balancing these considerations, police officers act as 'death brokers', which means that they 'use culturally appropriate scripts to classify death of a woman within seven years of marriage as dowry related (or not).'[1305] They do so by engaging in social negotiations with the other actors involved in the classification of a crime, with the purpose of

[1303] B Suresh Kumar Shetty et al., 'Legal Terrorism in Domestic Violence – An Indian Outlook' (2012) 80 Medico-Legal Journal 1, 36.

[1304] n 1149 above.

[1305] n 1155 above, also in n 1149 above, 2.

making ‘a individual death socially and legally acceptable.’[1306] Unfortunately, this has at times come to mean that they dismiss claims of dowry related violence or dowry death as ‘family matters’[1307] or that they collude with the husband’s family in preventing or influencing the registration of a crime or intimidating the victim’s family.[1308] In doing so, the societal values of cultural honour, familial privacy and a wife’s loyalty are maintained. At other times, the absence of definitive instructions and the presence of wide discretion results in incorrect or incomplete classification.[1309] These discrepancies can be blamed, at least in part for the low rate of convictions that dowry-related cases garner.[1310]

Another effect of social scripts on the Indian police is that many of them have ‘traditionally understood problems of domestic violence, whether dowry-based or otherwise, as stemming from maladjustment on the part of the victim.’[1311] As a result, even though many police stations created special units especially for cases on women’s issues, known as All Women Police Stations, these units often pushed for reconciliation in the face of domestic violence complaints.[1312] Therefore, a seemingly beneficial change of All Women Police Stations, in response to complaints and criticism of the police force, still managed to yield negative results due to deeper and more consistent social dialogues. Such an inclination is also seen in the criminal justice system as a whole, where:

[1306] n 1155 above.

[1307] n 1187 above, 501.

[1308] n 1155 above.

[1309] n 1149 above, 6 and 7.

[1310] n 1149 above, 7. Although someone was charged in 93% of dowry-related cases between 2001 and 2010, only 32% of these cases led to a conviction.

[1311] n 1174 above, 812.

[1312] n 1174 above, 811. This push for reconciliation is also seen in the government established counselling cells as well as the few government shelters that exist for women.

> Instead of viewing the criminal justice system as a potential counter-balance to the husband's attempt at total control and subordination of his wife, courts and police often fear that intervention will exacerbate adjustment difficulties. They put the continuation of the marriage above the safety of the victim.[1313]

This shows how women, or their families, who do boldly step out of society and approach the criminal justice system are often worse off for it.

Classification by Legal Officers

When it comes to the classification and verdict of the courts in cases surrounding dowry abuse or dowry deaths, matters are made more complicated because of the discretion a court is given to deal with the particularities of each case. This discretion, along with the private nature of dowry crimes, makes it hard for judges to know which side to trust. Unfortunately, this also often leads to many judges, especially in the lower courts, depicting a reluctance to imprison the perpetrators.[1314] Nigam writes that, by failing to account for 'patriarchal structural discrimination', many Indian courts 'reinforce male domination while normalizing violence and coercing women to internalize the subjugation.'[1315] For example, in a recent case mentioned by Sujata Gadkar-Wilcox, despite eight witnesses who testified of the perpetrator's abuse, a trial court judge acquitted the husband solely based on the victim's dying declaration

[1313] n 1174 above, 811.

[1314] Sujata Gadkar-Wilcox, 'Intersectionality and the Under-Enforcement of Domestic Violence Laws in India' (2012) Penn. Law: Legal Scholarship Repository 464.

[1315] n 1150 above, 236.

which cleared him of all charges.[1316] Although the high consideration placed on dying declaration should not be removed, the social pressures and influences that might affect this declaration – including the well-being of the victim's children or the honour of her family – need to be acknowledged before perpetrators are declared innocent, especially in the face of eight witnesses to a private crime, saying otherwise.

Similarly, the 'soon after' stipulation between dowry-related cruelty or harassment and the wife's death needs to be re-examined while considering social allowances. Firstly, and as previously examined, marital violence is a normalised social behaviour, and can therefore take place at any point in the marriage without an explicitly stated relationship to dowry. However, if [dowry] demands are not viewed as inextricably linked to other patterns of violence and repression within the family, relevant information will be excluded from evidence or underplayed by the courts.'[1317] In this way, not recognising the blanket allowance on violence that society seems to give men proves to be detrimental to the woman's case in court.

The Path Towards Change

The examination of entrenched ideologies and allowances within society makes it easier to understand why many women never complain of abuse in the first place and why many others are not able to access justice even when they do. Nigam emphasises how the anti-dowry violence movement has significantly focused on legal change, even though the legal system itself does not guarantee gender justice.[1318] In fact, although the criminal justice system has

[1316] n 1314 above.

[1317] n 1174 above, 814.

[1318] n 1150 above, 53.

constantly been invoked as a solution for dowry-related problems, 'the real problem, it seems, is the perceived, internalized and socially reinforced ideology of the inferiority of women.'[1319] Without addressing these perceptions first, or creating law reforms with the consequences of these perceptions in mind, there can be no lasting change. Therefore, criticisms of implementation and calls for stricter legislation[1320] will never be satisfactorily addressed without an accompanying change that addresses social biases within the legal system.[1321] As it stands today, 'in a country where women are socialized to consider marriage as 'essential' and domestic violence as 'normal' …, no law can help the majority who often fail to recognize even basic human rights.'[1322] When criminal legal action is taken without consideration of the underlying social situation, it brings scripts found within the private sphere into consideration in public spaces that were supposed to serve as protection – such as the police station or the courtroom.

This dictating influence of private and social discrimination on the Indian population can be somewhat explained through the concept of cultural hegemony, where 'the dominant ideology shapes the social norms while the reality is ignored because those in power do not want that these voices should be heard.'[1323] This cultural hegemony is so invasive that even the

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[1319] n 1151 above, 416. Pardee also adds that 'India's laws are ineffective because: 1) the statutes are too vague; 2) the police and the courts do not enforce the laws; and 3) social mores keep women subservient and docile.' This is mentioned in n 1187 above, 501.

[1320] n 1149 above, 8 and n 1177 above, 38.

[1321] As Spatz writes, 'even when women's groups can overcome these barriers to obtain positive legislation - as in India - attitudes toward women and non-enforcement of the laws allow men to continue to escape punishment.' This is mentioned in n 1210 above, 633.

[1322] n 1210 above, 633.

[1323] n 1150 above, 33. The concept of cultural hegemony originates from Gramsci. This is also seen in the fact that many stories of gruesome violence and murder related to dowry never make it to the front page of newspapers

gains through the anti-dowry movement in the eighties ended with the negative perpetuation of a 'women as victim syndrome,'[1324] rather than moving away from the patriarchal elements of a man's need to protect women and a woman's need for protection. In trying to find a simple solution to a complicated problem, 'the legal system recognizes cruelty in marriage, yet it still fails to understand the intricate social and psychological complexities of the situation of a woman victim of domestic violence.'[1325] Discrimination, the subordination of women and the protection of the private sphere within the existing legal solutions can also be seen in the fact that the crime of dowry death garners a lesser punishment than the crime of murder. While the sentence for dowry death is anywhere between seven years to life, murder results in life imprisonment or the death sentence.[1326] Spatz comments that this discrepancy exists 'because women's lives are considered less valuable than men's.'[1327] It is hard to argue with this conclusion. With private, social scripts spilling into and affecting public, legal functions, an urgent but lasting change is required.

The learnings of this chapter showcase how necessary it is to understand the social context of crimes against women in the private sphere before embarking on a mission of change. This is especially true if the change is looked for from the public sphere of criminal law. This does not imply that criminalisation is unnecessary – criminalisation is certainly necessary. Rather, it indicates that dealing with women's rights issues in Indian society – or any society for that matter – is rarely as simple as finding a single solution to a problem. When

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but, if included, are instead found in a small corner among other trivial stories. This serves to distract and diminish from the severity of such violence – as mentioned in n 1183 above, 58.

[1324] n 1150 above, 53.

[1325] n 1150 above, 236 and 237.

[1326] The author does not condone India's use of the death sentence but simply uses this comparison to prove a point.

[1327] n 1210 above, 629.

faced with multiple, intersecting and generations old social scripts and perceptions that dictate the lives of women in India's patriarchal society, it is important that the solutions created are also multiple and intersecting, and that they can be sustained for generations to come. This includes the changes mentioned for marital rape – such as social movements, state-driven initiatives, community-led programmes, personnel training, and awareness campaigns. Additionally, in discussing the balance between legal and social change, Anshu Nangia writes:

> The only real and practical solution to reducing and eliminating the practice of dowry and dowry-related violence is to create a social environment for women in which they can enjoy the expansion of educational and economic opportunities and the inheritance rights that should be given to them as equal members of society.[1328]

She also adds how, as opposed to the law, 'education offers a more effective means for breaking down the socially embedded patriarchal values' that prioritises dowry compliance and violence over 'divorce or economic self-sufficiency.'[1329] Additionally, although higher levels of education have been seen to increase the amount of dowry demanded,[1330] Virendra Kumar observes that 'the incidence of self-immolation decreased as the level of education increased.'[1331] Along with education, Nangia's emphasis on economic opportunities is accompanied by Greenberg's convicting statement that 'until women have options outside of their marital families, we should not be surprised that they choose to stay in violent relations instead of leaving for lives of economic oppression and social ostracism.'[1332] Both educational

[1328] n 1172 above, 652.

[1329] n 1172 above, 666.

[1330] n 1215 above, 849.

[1331] Virendra Kumar, 'Burnt Wives: A Study of Suicides' (2003) 29 Burns 34.

[1332] n 1174 above, 840.

and economic opportunities for women, along with any other transformative change, require an indispensable combination of legal implementation and social transformation.

Part Four

The Indian Constitution and International Human Rights Law

'India, on balance, cannot continue to deny the significance of its own constitutional commitment to gender equality, as well as its binding international obligations to eliminate violence against women.'

Deborah Kim[1333]

[1333] Deborah Kim, 'Marital Rape Immunity in India: Historical Anomaly or Cultural Defence?' (2017) Crime, Law and Social Change.

Chapter Seven: Marital Rape and Dowry Death in Constitutional and International Law

An Examination of India's Obligations Towards Marital Rape and Dowry-Related Violence within the Constitution of India and International Human Rights Law

The call for effective provisions against sexual and gender-based violence in the private sphere made by lawyers, researchers and activists is supplemented by a similar call in and through a variety of legal provisions. These national and international legal instruments promote the protection of rights and the freedom from actions which directly and indirectly corelate with domestic forms of violence against women. One of these prominent legal instruments is the Indian constitution itself. The continual existence of violence against women is contrary to the civil liberties and human rights advocated for by the Constitution of India. Jethmalani and Dey also highlight that 'the low status of women sanctioned by social custom exists inspite of the egalitarian vision of women expressed in the Indian Constitution.'[1334] Therefore, there is a discrepancy between constitutional obligations and laws that exist, and the ways in which these laws have been delegated and implemented.[1335] For conducting its analysis, this chapter once again focuses on the specific issues of marital rape and dowry-related abuse (which includes both dowry violence and dowry death).

With marital rape, it is interesting to note the number of provisions within the Indian constitution that directly counter the theories that are used to justify the continued maintenance

[1334] Rani Jethmalani and P.K Dey, 'Dowry Deaths and Access to Justice' (1995) in Kali's Yug: Empowerment, Law and Dowry Death 6.

[1335] Shalu Nigam, *Women and Domestic Violence Law in India: A Quest for Justice* (Taylor and Francis 2020) 25.

of the marital rape exemption. For example, the constitutional right to self-determination is in contrast to the implied consent theory, freedom from discrimination contrasts the property theory and the right to equality within the law contrasts both the unities and the privacy theory.[1336] As these rights do not seem to translate into reality, the following section focuses on creating a basic understanding of the provisions and obligations within the Constitution of India. Such an analysis is important because, 'India, on balance, cannot continue to deny the significance of its own constitutional commitment to gender equality, as well as its binding international obligations to eliminate violence against women.'[1337] After examining the Indian constitution, this research turns to International Human Rights Law, drawing up relevant rights and freedoms from treaties that India has willingly acceded, as well as from applicable legal guidelines. Overall, both the Constitution of India and International Human Rights Law are important to consider as they have a lot to say about the state's obligation to offer substantive equality to women in the private sphere. For marital rape, this translates to an obligation to repeal the exemption and criminalise the act whereas, for dowry-related violence, the issue that emerges is a need to address the ineffectiveness of currently prevalent criminal provisions.

The Constitution of India

So far, this research has examined provisions relevant to violence against women in the private sphere that are found within the Indian Penal Code and the PWDVA. It has also examined the influence of notable case laws and the Religious Personal Laws on marital rape, dowry violence and dowry death. Yet, there is an important piece of Indian legislature which

[1336] These theories have been discussed within the chapter titled Marital Rape: The Role of Myths and Perceptions.
[1337] n 1333 above.

is still to be looked at – the Constitution of India. The Indian Constitution has not only been the foundation but also the pride of Indian law since January 26th 1950.[1338] It is the longest written constitution with 395 articles divided into 22 sections.[1339] Vijayashri Sripati observes how 'many of the rights in the Universal Declaration of Human Rights and International Covenant on Civil and Political Rights are mirrored in the Indian Constitution.'[1340] Along with laying out various other provisions, this extensive document guides and dictates India's political structures, governmental obligation and its citizen's rights and duties. Within its many clauses, there is much that is said, directly and indirectly, on the rights and protection of women from violence in the private sphere. Coming to life three years after India's independence, this document was put together by a Constituent Assembly.[1341]

Although this assembly promoted the creation of a constitution that protected the rights of women, it is also criticised for having 'compromised gender justice'[1342] and 'retained blatant legal subordination.'[1343] Christine Keating illustrates the background of this discrepancy by first sharing how women before independence were intentionally incited to fight for the rights of Indian women, alongside the Indians fighting for independence.[1344] However, post-independence, many points on the feminist agenda were compromised for national cohesion. Keating terms this compromise as the postcolonial sexual contract, where 'they established

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[1338] The Constitution of India 1950.

[1339] *ibid.*

[1340] Vijayashri Sripati, 'India's National Human Rights Commission: A Shackled Commission' (2000) 18 Boston University International Law Journal 1, 7.

[1341] Which included 14 women.

[1342] Christine Keating, 'Framing the Postcolonial Sexual Contract: Democracy, Fraternalism, and State Authority in India,' (2007) 22 Hypatia 4 130.

[1343] Srimati Basu, 'Sexual Property: Staging Rape and Marriage in Indian Law and Feminist Theory' (2011) 37 Feminist Studies - Particularly through the continued existence of largely unchecked personal laws.

[1344] n 1342 above, 131.

equality in the public sphere as a fundamental right for women yet sanctioned discriminatory personal laws that maintained women's subordination in the family in order to secure fraternal acquiescence to centralized rule.'[1345] In this manner, the rights of women in their household, even in terms of freedom from violence, were deemed secondary or outside the scope of the state. Promisingly, Indian case law and legislature have since evolved, even if only on paper, beyond the stark division of public and private – at least when it comes to the recognition and criminalisation of marital cruelty (Section 498A of the Indian Penal Code) or dowry deaths (Section 304B of the Indian Penal Code). Calling upon the fundamental rights and duties within the Constitution, which are to be applied regardless of the public or private sphere, this section addresses the illegality of marital rape and dowry violence through provisions within India's own constitution.

When refusing to criminalise marital rape, the Government of India does not hide its hesitancy to interfere with religious personal laws. Kim speculates how this conflict is reflected within the Indian Constitution itself. She says that;

> These controversies signal there remains unresolved conflict between the two distinct constitutional commitments: on the one hand, the right to equality and non-discrimination (art 14, 15, 21, 51A(e)), and, on the other hand, the right to preserve and protect local culture and religion (art 25, 29 and 51A(f)).[1346]

This section will be looking at the set of constitutional commitments that are being violated by a continued marital rape immunity. Many, if not all, of these articles are also relevant for a

[1345] n 1342 above, 131.

[1346] n 1333 above.

discussion on dowry violence and dowry death. However, in the case of dowry violence and dowry death, the articles will not be used to argue that the act should be criminalised, as it is already a crime, but rather to show that not enough has been done to uphold its constitutional obligations when it comes to India's criminalisation of this violence.

Part III of the Constitution of India

Article 14 and 15: The Right to Equality and Freedom from Discrimination

Part III of the Constitution of India is dedicated to fundamental rights and contains a sub-section on the Right to Equality.[1347] Under this sub-section, Article 14 speaks of both equality before the law and equal protection of the law and Article 15 prohibits discrimination on the grounds of religion, race, caste, sex or place of birth.[1348] Article 15 was amended by the Constitution Act of 1951 to include an exception for the state 'making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.'[1349] Gadkar-Wilcox comments on how 'this amendment has led to a strong presumption that the state should redress existing inequalities.'[1350] Article 14 and 15 contain individual and negative rights – which means that other legal documents or individuals cannot interfere with the rights protected here. It is up to the state to make sure that these rights are upheld. Both dowry violence and marital rape stand in infringement of the rights to equality and the freedom from discrimination. However, on paper, India's provisions on dowry, dowry violence and dowry death do work towards

[1347] The Constitution of India 1950. Part III.

[1348] *id.* at Article 14 and 15.

[1349] *id.* at Article 15.

[1350] Sujata Gadkar-Wilcox, 'Intersectionality and the Under-Enforcement of Domestic Violence Laws in India' (2012) University of Pennsylvania Journal of Law and Social Change 15(3).

upholding Article 14 and 15. The question then becomes whether these laws have sufficiently upheld the accompanying constitutional obligations. Contrarily, the state's obligations under Article 14 and 15 have not been fulfilled even on paper when it comes to marital rape.

The marital rape exemption within criminal and civil law not only discriminates based on gender but on marital status as well. Under the same act of rape, it denies equality by providing different provisions for married and unmarried women.[1351] This is an important point as it allows for the criticism of India's current rape laws and its exclusion of marital rape through legal tests set by the Indian courts themselves. Kumar and Mazumdar find that, to determine whether any law is in violation of Article 14, it needs to be 'based on rational or reasonable classification,' with reasonability defined as (i) 'based on an intelligible differentia' and (ii) in which 'the differentia adopted as the basis of classification must have a rational or reasonable nexus with the object sought to be achieved by the statute in question.'[1352] This means that the law needs to differentiate between two distinctly different groups and that the distinction needs to be essential for what the law is trying to achieve. If these criteria are met, the law cannot be considered as discriminatory. In the case of marital rape and the legal distinction between married and unmarried women, Kumar and Mazumdar show how 'there is no trace of real and substantial distinction between a married woman and the un-married ones. The only difference is the one made by the societal norms and psychological barriers.'[1353] Following this reasoning, Article 14 not only necessitates the addition of marital rape

[1351] Also mentioned by Krina Patel, 'The Gap in Marital Rape Law in India: Advocating for Criminalization and Social Change' (2019) 42 Fordham International Law Journal 1519.

[1352] Anvesha Kumar and Ipsita Mazumdar, 'Bride and Prejudice - Marital Rape and the Indian Legal Dilemma' (2013) 2 National Law University Delhi Student Law Journal [12].

[1353] Anvesha Kumar and Ipsita Mazumdar, 'Bride and Prejudice - Marital Rape and the Indian Legal Dilemma' (2013) 2 National Law University Delhi Student Law Journal [12].

prohibitions, but it also calls out the current criminal provisions on rape as being discriminatory and unconstitutional. Similarly, Article 15 rightly prohibits discrimination based on both religion and sex, but sub-clause (3) specifically mentions that 'nothing in this article shall prevent the state from making any special provision for women and children.'[1354] This affirmative action clause challenges the government's constant protection of perceived religious sensitivities over the protection of women from marital rape.

In 2015, the Right to Equality was used to bring a case against the Indian Penal Code's marital rape immunity before the Delhi High Court.[1355] The NGO, called Rit Foundation, brought this case under an Indian legal mechanism known as Public Interest Litigation. PIL allows citizens to get involved in the legislative processes by petitioning to the courts on matters regarding their fundamental rights within the Constitution of India.[1356] Rit Foundation argued that the exception on marital rape went against Article 14 by violating the Right to Equality and should therefore be deemed unconstitutional.[1357] The Delhi High Court, however, refused to accommodate this claim with a vague statement that the court has already entertained and dismissed similar claims.[1358] The Court's easy dismissal of a constitutional argument,

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[1354] The Constitution of India 1950. Article 14 and 15.

[1355] PTI, 'HC Refuses To Admit PIL Seeking Marital Rape Be Made Criminal Offence' (*The Economic Times*, 2015).

[1356] It is interesting to note that Article 32 and Article 226 of the Indian Constitution provide the right to move to the Supreme Court and High Court respectively to seek constitutional remedies or challenge a violation of fundamental rights. The provisions within these articles can also be invoked by others on behalf of an individual who cannot approach the court themselves. Jethmalani and Dey comment how 'this new jurisdiction of the court has been used effectively in dowry and dowry death cases to invite the supervision of the highest court and to obtain orders from it directing the police to register complaints and carry out investigations promptly, honestly, impartially and effectively.' n 1334 above, 9.

[1357] PTI, 'HC Refuses To Admit PIL Seeking Marital Rape Be Made Criminal Offence' (*The Economic Times*, 2015).

[1358] *ibid.*

without even entertaining the plea or sharing a defence, should be worrying. Article 14 was also used in the lead up to the marital rape clauses within the Verma report, where 'it was argued that the relationship between the victim and the accused was immaterial in cases of sexual violence, that the immunity provided to husbands was anachronistic and inconsistent with the equality clause of the Indian Constitution.'[1359] Despite previous hurdles in utilizing these articles, both Article 14 and Article 15 are essential in challenging the Indian Penal Code's marital rape exemption and pushing for more effective provisions preventing dowry violence and dowry death.

Article 21: The Protection of Life and Personal Liberty

The Constitution's section on Fundamental Rights also contains Article 21, which protects life and personal liberty and, importantly, can be used to convict individuals. This article specifies that 'no person shall be deprived of his life or personal liberty except according to procedure established by law.'[1360] Regarding this article, Kumar and Mazumdar say: 'it goes unsaid that it is the most sacrosanct of all the rights.'[1361] The right to life is also defined as the most important human right because 'life is the precondition for the exercise of

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[1359] Saptarshi Mandal, 'The Impossibility of Marital Rape: Contestations Around Marriage, Sex, Violence and the Law in Contemporary India' (2014) 29 Australian Feminist Studies 257.

Article 14 is also cited by many researchers in the context of removing the marital rape immunity, including Krina Patel, 'The Gap in Marital Rape Law in India: Advocating for Criminalization and Social Change' (2019) 42 Fordham International Law Journal 1519, Pallavi Bhattacharya, 'Fighting Marital Rape In India' (2017) *Herizons*, and Anvesha Kumar and Ipsita Mazumdar, 'Bride and Prejudice - Marital Rape and the Indian Legal Dilemma' (2013) 2 National Law University Delhi Student Law Journal [12] among others.

Articles 14 and 15 are also cited in the context of dowry violence and dowry deaths by researchers such as Sneh Yadav, 'Dowry Death and Access to Justice' (2015) 1 International Journal of Law 1, 62.

[1360] The Constitution of India 1950. Part III, Article 21.

[1361] Anvesha Kumar and Ipsita Mazumdar, 'Bride and Prejudice - Marital Rape and the Indian Legal Dilemma' (2013) 2 National Law University Delhi Student Law Journal [12].

any other right.'[1362] Internationally, the right to life is known to transcend cultural, social, and political differences and is categorised as jus cogens, which gives this norm its non-derogable status.[1363] Its codification in Article Three of the Universal Declaration of Human Rights (UDHR) and Article Six of the International Covenant on Civil and Political Rights (ICCPR)[1364] further solidifies the right to life as a fundamental provision within international human rights law. However, international law does not contain any overt connections between the right to life and violence against women that does not result in death.[1365] India, on the other hand, does.

In 1996, the notable case of *Bodhisattwa Gautam* v *Subra Chakraborty* used Article 21 to make a direct connection between rape and the violation of the right to life. The case claimed that 'rape is, therefore, the most hated crime. It is a crime against basic human rights and is also violative of the victim's most cherished of the Fundamental Rights, namely, the Right to Life contained in Article 21.'[1366] Importantly, this case also acknowledged that, 'to many feminists and psychiatrists, rape is less a sexual offence and more an act of aggression aimed at degrading and humiliating women. The rape laws do not, unfortunately, take care of the social aspect of the matter and are inept in many respects.'[1367] As India clearly acknowledges rape as a violation to the right to life, even when no death has occurred, the findings of this case can also be used to argue that marital rape violates the right to life. On a

[1362] Niels Peterson, 'International Protection Of The Right To Life' (2019) Max Planck Encyclopedia of Public International Law.

[1363] This means that states cannot derogate, or deviate, from the rules and provisions detailed within the right to life.

[1364] International Covenant on Civil and Political Rights 1966, Article Six. India acceded to the ICCPR in 1979.

[1365] Except in the non-binding provisions of the DEVAW and CEDAW General Recommendation 19.

[1366] *Bodhisattwa Gautam* v *Subra Chakraborty* (1996) 1 SCC 490.

[1367] *Bodhisattwa Gautam* v *Subra Chakraborty* (1996) 1 SCC 490.

broader scale, the right to life has also 'been interpreted to mean the right to live a life with dignity and to be free from violence.'[1368] Outside case law, the fifteenth Law Commission of India mentioned the violation of Article 21 in its report titled 'Review of Rape Laws'.[1369] Unfortunately, this report did not result in any consideration or modifications from the government. When it comes to dowry-related violence, its connection with the right to life is easier to establish, especially in the case of dowry death. Relatedly, the Verma Report also highlights how 'any form of violence or assault, sexual or otherwise, on women is a violation' of the Constitution of India's protection of the right to life.[1370] The report invokes the concept of dignity and links sexual and gender-based violence with the deprivation of the right to live with dignity.[1371] The insufficient provisions and applications of India's laws on dowry, dowry violence and dowry death mean that these crimes continue to violate the right to life and personal liberty within Article 21 of the Indian Constitution.

Counterarguments

Despite an obvious constitutional prohibition on all forms of violence against women – as seen through Articles 14, 15 and 21 – the Indian legal system still hesitates to implement the relevant rights and freedoms for crimes against women within the private sphere. This hesitancy to interfere in the private, regardless of a constitutional obligation to do so, has been expressly shared by the Delhi High Court in the 1983 case of *Harvinder Kaur* v *Harminder*

[1368] n 1333 above.

[1369] Law Commission of India, '172: Review Of Rape Laws' (2000).

[1370] Justice J.S. Verma, 'Report Of The Committee On Amendments To Criminal Law' (Committee on Amendments to Criminal Law 2018) Part Two Article 24.

[1371] Justice J.S. Verma, 'Report Of The Committee On Amendments To Criminal Law' (Committee on Amendments to Criminal Law 2018) Part Two Article 24.

Singh Choudhary.[1372] This case was brought before the court when the husband petitioned for the restitution of conjugal rights, which falls under Article Nine of the Hindu Marriage Act.[1373] In turn, the wife claimed that this article goes against Article 14 and Article 21 of the Constitution of India, and is therefore considered to be void.[1374] However, the court claimed that;

> Introduction of constitutional law in the home is most inappropriate. It is like introducing a bull in a china shop. It will prove to be a ruthless destroyer of the marriage institution and all that it stands for. In the privacy of the home and the married life neither Article 21 nor Article 14 have any place. In a sensitive sphere which is at once most intimate and delicate the introduction of the cold principles of constitutional law will have the effect of weakening the marriage bond.[1375]

This final sentence especially showcases a portrayal of constitutional rights and freedoms that could protect and give freedom to a woman as the antithesis to an Indian marriage which, as it follows, seems designed to subordinate and restrict women. With the court's deference to religious personal law, they have 'failed to see … that if the wife herself has decided that her constitutional right of life and personal liberty as well as her human rights have been cold shouldered to such extent that they now need immediate restoration, then there must be compelling reasons for enforcement of constitutional law in the domestic quarters of a

[1372] *Harvinder Kaur* v *Harminder Singh Choudhary* AIR 1984 Delhi 66.

[1373] *Harvinder Kaur* v *Harminder Singh Choudhary* AIR 1984 Delhi 66, Hindu Marriage Act 1955, Article Nine.

[1374] *Harvinder Kaur* v *Harminder Singh Choudhary* AIR 1984 Delhi 66, The Constitution of India 1950. Part III, Article 14 and Article 21.

[1375] *Harvinder Kaur* v *Harminder Singh Choudhary* AIR 1984 Delhi 66.

matrimonial relationship.' [1376] Rather, maintaining tradition and prioritising religious personal laws were given consideration over Article 14 and Article 21 of the Indian Constitution. Moreover, it is not true that constitutional law does not have a place in the home. In fact, in refusing to consider the challenge to Article 9 of the Hindu Marriage Act, the court chose to prioritise constitutional articles that have been interpreted to protect religious personal laws – such as Article 25 and 29 – rather than articles for the rights and protection of women.

Article 25 and 29

Article 25 and Article 29 are the two most invoked provisions when it comes to countering questions on the religious personal law system within the nation or opposing any bid for constitutional intervention regarding women's rights in the private sphere. Article 25 of the Constitution of India details an equal right to the 'free profession, practice and propagation of religion.[1377] Although this article is subject to the other provisions within Part III, including the right to equality, freedom from discrimination and protection of life and personal liberty, it is often given priority over the others. This priority is also seen in India's system of personal laws based on religion. When looking at dowry deaths and access to justice, Sneh Yadav comments on how 'the Constitution promises equality but a parallel regime of personal laws prevails and is justified on the ground that they are permitted in view of the express guarantee of the freedom of religion under Article 25 of the Constitution of India.'[1378] This allows the state to profess a fulfilment of its obligations in criminalizing dowry death

[1376] Anvesha Kumar and Ipsita Mazumdar, 'Bride and Prejudice - Marital Rape and the Indian Legal Dilemma' (2013) 2 National Law University Delhi Student Law Journal [12].

[1377] The Constitution of India 1950, Article 25.

[1378] Sneh Yadav, 'Dowry Death and Access to Justice' (2015) 1 International Journal of Law 1, 62.

while knowing full well that these provisions are constantly undermined by a prioritisation of discriminatory myths and practices in the name of religion.

Article 29 focuses on the preservation of culture instead of religion. It details the 'protection of interests of minorities' and rightfully protects a citizen's right to conserve their culture.[1379] However, this clause is frequently and wrongfully pitted against – and given precedence over – the rights of women. Moreover, both these articles are often lumped under the bigger umbrella of family preservation, which is given precedence over and immunity for many wrongs. For example, 'whenever one tries to raise these questions that have so much relevance to women's lives, she is reminded gently that it's best not to adopt a too "individualistic" approach to rights and that the family itself would be put to a test of survival if attempts are made to infuse constitutional values into it'[1380] This shows a clear prioritisation of both the patriarchal private sphere as well as the non-interventionalist approach carried out by these two articles. Together, Articles 25 and 29 are used to solidify the state's hands-off approach when it comes to addressing or amending women's rights within India's private sphere. Bhavana Rao comments on how, due to the secular feature of the state Constitution, it is bound by limitations of giving due weight to the personal laws of all,' even though 'Khap Panchayats and Sharia courts are not given specific legal sanctity.'[1381] Shroff and Menezes also mention that 'the abdication of responsibility by the state is worsened by an abusive husband who demands his conjugal rights and a legal system that does not define rape in consonance

[1379] The Constitution of India 1950, Article 29.

[1380] S Devika and T Mohan, 'Marital Rape and Criminal Law: Patriarchal Phantoms and Neutral Facades' (1991) 3 Student Advocate 19.

[1381] Bhavana Rao, 'Reservations Based on Personal Laws to CEDAW: A Study of Effect on the Status of Equality of Women in India by Comparing it with Afghanistan' (2016) ILI Law Review Winter Issue 50.

with the victim's experiences.'[1382] Moreover, this state-reinforced non-interference creates an unconstitutional re-enforcement of the public-private divide, which is also detrimental considering that, despite their continued existence, 'the very fact that our founding fathers did not place the personal laws above our constitution shows that it had to govern the former.'[1383] However, this tension between the right to equality and personal laws is not unique to India. Christine Keating mentions how, as a result of the postcolonial sexual contract, inconsistent provisions within both the South African constitution and the Iraqi constitution also leads to an ambiguous relationship 'between the equality clauses and the personal status or customary laws that discriminate against women.'[1384] Within the Indian ambiguities, Devika and Mohan stress that 'the private/public distinction has probably been most successfully deployed to defeat and inhibit reform in the sphere of domestic relations.'[1385] Given this reality, there needs to be a reinforcement in the prioritisation of Articles 14, 15 and 21 of the Indian Constitution when it comes to discussions on preventing and safeguarding women from violence in the private sphere.

Part IVA of the Constitution of India

Article 51A: Fundamental Duties

[1382] Aditya Shroff and Nicole Menezes, 'Marital Rape as a Socio-Economic Offence: A Concept or a Misnomer' (1994) 6 Student Advocate 68.

[1383] Aditya Shroff and Nicole Menezes, 'Marital Rape as a Socio-Economic Offence: A Concept or a Misnomer' (1994) 6 Student Advocate 68.

[1384] n 1342 above, 142.

[1385] S Devika and T Mohan, 'Marital Rape and Criminal Law: Patriarchal Phantoms and Neutral Facades' (1991) 3 Student Advocate 18.

Part IVA of the Constitution of India, detailing fundamental duties, consists of solely one clause: 51A.[1386] This part of the constitution was added in 1976 through the 42nd amendment.[1387] Interestingly, Part IVA, introduced during the International Decade for Women, 'does not create rights but enjoins duties'[1388] to obligate the state to apply Article 51A while creating laws. Article 51A(e) is an especially interesting clause to consider.[1389] Among clauses on cherishing India's sovereignty, promoting harmony and developing the spirit of inquiry, lies a clause which shares the duty;

> (e) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women.[1390]

This means the Constitution itself is stating that it is the fundamental duty of each and every Indian citizen to condemn practices that are derogatory to the dignity of women. It is worth noting that the above article also holds a striking similarity to Article 2 of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).[1391] Among the provisions within this article, sub-section (f) specifically mentions a signing state's duty 'to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.'[1392] As a signatory of this convention, India also holds an international obligation – along with its own

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[1386] The Constitution of India 1950, Part IVA, Article 51A.

[1387] The Constitution of India 1950, Part IVA.

[1388] n 1334 above, 7.

[1389] The Constitution of India 1950. Part IVA, Article 51A(e).

[1390] *ibid.*

[1391] Convention on the Elimination of All Forms of Discrimination against Women 1979.

[1392] *id.* at Article 2(f).

constitutional provision – to modify its laws to the benefit of the rights and protection of women.[1393]

Despite such clear provisions within the Indian constitution, they fail to translate to Indian law and Indian reality. When it comes to marital rape, Kim illustrates this failure by sharing:

> every time India's record on gender equality and human rights is questioned, the government of India is quick to invoke the fundamental equality guarantees provided by its Constitution and the relevant statutory bodies that exist to enforce such guarantees. However, the IPC and its failure to criminalise marital rape, together with the absence of any other anti-discriminatory legislation, leave women without access to effective mechanisms for vindicating these constitutional guarantees, compounding gender inequality and the violation of the rights that the Constitution claims to protect.[1394]

Moreover, between the protection of women's rights and the removal of the marital rape exemption lies a chasm of arguments that claim to be cultural and refuse to give way. Through an analysis of the articles above, it is clear that, 'constitutionally speaking, the exception in the rape cannot be defended because it nullifies the rights of wives.'[1395] Similarly, despite the existing

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[1393] Further discussed in the next section.

[1394] n 1333 above.

[1395] Pratiksha Baxi in Pratiksha Baxi and Monika Arora, 'Times Face-Off: Should It Be A Crime For A Man To Rape His Wife?' *Times of India* (2021) <https://timesofindia.indiatimes.com/india/times-face-off-should-it-be-a-crime-for-a-man-to-rape-his-wife/articleshow/86470717.cms>.

provisions relating to dowry, they are clearly not doing enough to protect the constitutional rights of women, especially given the widespread prevalence of the crime. The Dowry Prohibition Act itself still prioritises a preservation of culture by renaming, limiting, and monitoring the practice of dowry rather than eliminating it altogether.[1396] After having examined relevant provisions within the Indian Constitution, this research turns to International Human Rights Law to find accountability and avenues for change within its treaties, conventions, and declarations.

Marital Rape, Dowry Death and Obligations in International Human Rights Law

The provisions found within the Indian Constitution that support legal action regarding violence against women in the private sphere are reinforced by international legal provisions that help promote the same cause. The process of creating a presence for women's rights and gender equality within international human rights law was neither given nor easy, and it is certainly not over. Despite the establishment of a Commission on the Status of Women (CSW) under the United Nations Economic and Social Council (UN ECOSOC) in 1946, it took more than three additional decades before the first women's rights treaty emerged in 1979. During these intermediate years, international provisions that could be utilised for the protection of women, such as a right to equality or freedom from discrimination, largely failed to account for gender-contingent obstacles to the fulfilment of these provisions.[1397] Zwingel illustrates how, 'even if human rights law proclaims a life in freedom and dignity for women as much as

[1396] The Dowry Prohibition Act (Act No. 28) 1961.

[1397] Celina Romany, 'Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law' (1993) 6 Harvard Human Rights Journal 110.

for men, most of the human rights violations specifically affecting women were not recognized as such, but as somewhat less problematic cultural or traditional patterns.'[1398]

This gendered insensitivity in much of international law is contextualised by Okin, who writes that 'the original conception of international "human rights" in the mid-twentieth century were formulated with male household heads in mind' which was protected from outside intrusion but left unprotected internally.[1399] Okin also highlights the larger problem that 'existing theories, compilations, and prioritizations of human rights have been constructed after a male model. When women's life experiences are taken equally into account, these theories, compilations, and prioritizations change significantly.'[1400] In the past few decades, international human rights law has grown to include explicit mentions of gendered discrimination and sexual and gender-based violence against women. Yet, it continues to maintain an implicit colonial and patriarchal undertone. The following section first analyses how India, and instances of violence against women within this nation's private sphere, can interact with rights and freedoms within the international human rights framework. Following the examination of relevant provisions (direct and indirect) and obligations (state responsibility and due diligence) under international legal frameworks, this section concludes by utilising a postcolonial feminist perspective to discuss the limitations of these frameworks themselves.

International Human Rights Law and the Indian Legal System

[1398] Susanne Zwingel, 'From Intergovernmental Negotiations to (Sub)National Change: A Transnational Perspective on the Impact of CEDAW' (2005) 7 International Feminist Journal of Politics 3 403.

[1399] Susan Okin, 'Feminism, Women's Human Rights, and Cultural Differences,' (1998) 13 Hypatia 34.

[1400] *ibid.*

As India follows a dualist theory, 'any provisions or international laws ratified by the central government are not directly binding unless there is an explicit measure, through enactment of a statute, to internalize these obligations.'[1401] This creates a limitation on the international provisions that are available to Indian citizens, regardless of the number of treaties that have been ratified by the executive branch. However, India can – and should – be held accountable to all its ratified treaties, as it does fall on the Indian government, and not individual citizens, if a particular provision has not been legislated. It is also important to note that, 'if uncertainty arises between international and domestic obligations, judges may turn to international obligations to influence the development of the domestic laws.'[1402] In an exceptional case in 1997, the Supreme Court of India has also used international laws and guidelines regarding violence against women in the workplace to create a comprehensive national legal provision on this issue even before the legislature did so. This case, known as *Vishaka* v *State of Rajasthan,* followed a writ petition on the fundamental rights of women in the workplace, and was filed by social activists and NGOs (including Vishaka) after the brutal gang rape of a social worker in the state of Rajasthan. Within the text of *Vishaka* v *State of Rajasthan*, the Court rules:

> [in] the absence of enacted law to provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment and abuse, more particularly against sexual harassment at workplaces, we lay down the

[1401] Bobbie Khanna, 'CEDAW and the Impact on Violence Against Women in India' (2013) UW Bothell Policy Journal, 33. This process occurs through Article 253 of the Constitution of India.

[1402] n 1333 above.

guidelines and norms specified hereinafter for due observance at all workplaces or other institutions, until a legislation is enacted for the purpose.[1403]

The case document goes on to cite constitutional articles as well as international guidelines as the basis of its own guidelines – explicitly mentioning Article 11 and Article 24 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), as well as relevant General Recommendations to the CEDAW.[1404] Quite monumentally, the Court also said that '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.'[1405] The significance of such a statement cannot be overlooked as here the Court legitimates the use of any international human rights law provision, ratified or otherwise, in promoting and protecting the rights and equality of all Indian women. Although Indian courts have yet to embrace such an expansive provision, it is noteworthy that, in creating novel guidelines and 'taking an expansive view of international law in Vishaka, the judiciary "made law,"'.[1406] This means that, in practice, international law seeps into the Indian legal system through a variety of avenues.

The following section will be addressing treaties and conventions within International Human Rights Law that the Government of India has ratified, even if it has not thoroughly been

[1403] *Vishaka* v *State of Rajasthan* (1997) 6 SCC 241.

[1404] *ibid.*

[1405] *ibid.*

[1406] Lavanya Rajamani, 'International Law and the Constitutional Schema', *The Oxford Handbook of Transnational Feminist Movements* (2015) 5.

integrated into local legislation. As it can be controversial to call upon international law when addressing practices that the Indian government excuses in the name of culture, this section will be examining treaty-based obligations that the nation has itself, voluntarily, signed on to. It also analyses international provisions that are non-binding (such as the Declaration on the Elimination of Violence against Women) or not geographically applicable (such as the Istanbul Convention) but are useful in creating an understanding of the international legal dialogue surrounding violence against women in the private sphere. Such a selective analysis also helps to circumvent the criticism of international law infringing on India's sovereignty and the principle of non-intervention.[1407] Angela Carson-Whitley mentions that 'changing the attitudes of Indian society will be difficult, particularly when members of the government accept views that devalue women and condone the dowry death phenomenon. This is where international law becomes important.'[1408] Drawing on these international provisions aims to show that the effective criminalization of marital rape and dowry-related violence is a legal obligation that transcends both the government's justifications against marital rape and the criminal law's current provisions for dowry violence and dowry deaths. This section explores how India's lack of protection for marital rape and lack of sufficient protection for dowry-related violence violates both direct and indirect provisions found in international treaties and declarations.

When addressing direct violations, the research will be examining the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the 1993 UN Declaration on the Elimination of Violence against Women (DEVAW). Within the broader category of indirect violations, the research draws from various sources to highlight violations

[1407] These issues are also mentioned in Avnita Lakhani, 'Bride-Burning: The Elephant in the Room Is out of Control' (2005) 5 Pepperdine Dispute Resolution Law Journal 2, 266.

[1408] Angela Carlson-Whitley, 'Dowry Death: A Violation of the Right to Life Under Article Six of the International Covenant on Civil and Political Rights' (1994) Seattle University 663.

on the right to equality, the prohibition against torture and other such provisions. These sources include the International Bill of Rights, which consists of the 1948 Universal Declaration on Human Rights (UDHR),[1409] the 1966 International Covenant on Civil and Political Rights (ICCPR) and the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR). This research will also examine the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, hereon known as the Convention against Torture or CAT. Finally, this chapter will conclude by briefly examining a variety of other rights and freedoms that are violated by India's protection of the marital rape immunity and insufficient provisions for dowry-related violence before examining a few weaknesses and limitations in utilising an international human rights law framework to address sexual and gender-based violence in India's private sphere.

Direct Violations

CEDAW

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is a highly comprehensive treaty on international women's rights. Breaking the gender-neutral provisions and language of previous treaties on international human rights law, this document addresses gender-specific issues and discusses the legal rights of women as a separate category on a world stage.[1410] Adopted by the United Nations General Assembly in

[1409] Interestingly, it is Hansa Mehta, an Indian delegate to the United Nations Human Rights Commission and a feminist herself, who is credited with changing Article One of the UDHR from 'All men are born free and equal' to 'All human beings are born free and equal'.

[1410] n 1399 above, 33 and Dubravka Simonovic, 'Global and Regional Standards on Violence against Women: The Evolution and Synergy of the CEDAW and Istanbul Conventions', (2014) 36 Human Rights Quarterly 591.

1979, India signed on to this binding convention a year later but took until 1993 to ratify it.[1411] Although not explicitly stating marital rape or dowry-related violence as a crime in the main convention, the CEDAW includes articles that push countries towards ensuring safeguards against possible acts of discrimination against women. Article 17 of the CEDAW creates Committee on the Elimination of Discrimination against Women – referred to as CEDAW (Women's Rights Committee) – which, among other things, monitors and comments on the execution of the treaty by nation-states, based on reports submitted by the parties detailing the 'legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of the present Convention' (Article 18).[1412] This required report has helped expose and create awareness around the reality of gender-based discrimination and women's rights across the globe.[1413] However, the state's implementation to any response or suggestions that the CEDAW (Women's Rights Committee) might have given to the reports is purely optional. In its comments during the two sessions that the CEDAW (Women's Rights Committee) has conducted on India's implementation of the convention, it has specifically mentioned both marital rape and dowry death.[1414] During the most recent session in 2007, the committee commented that, despite the positive developments within the government's report, 'action was needed to combat other forms of violence against women, such as dowry death, bride-burning and witch-hunting. Such crimes must be punished, since impunity served to perpetuate the disadvantaged position of women in society.'[1415]

[1411] CEDAW 1979, Declarations and Reservations, India.

[1412] *id*, at Article 17 and Article 18.

[1413] Mary Shanthi Dairiam, 'CEDAW, Gender and Culture', *The Oxford Handbook of Transnational Feminist Movements* (2015) 18.

[1414] Committee on the Elimination of Discrimination against Women Twenty-second session (2000) and Thirty-seventh session (2007).

[1415] Committee on the Elimination of Discrimination against Women Thirty-seventh session (2007).

The CEDAW (Women's Rights Committee) also issues general recommendations on various topics within the purview of the Convention, as well as deciding on individual cases brought before the committee under the Optional Protocol to the CEDAW (Optional Protocol). Added in 2000, the Optional Protocol creates an individual or systemic complaint mechanism for violations of the provisions within the CEDAW by its signatories.[1416] This protocol is highly significant because, as Simonovic comments, it 'strengthened the Convention as a legal instrument for the protection of women's human rights,'[1417] even if the decisions are not binding. However, India has not signed on to the Optional Protocol, leaving its substantial provisions out of the reach of both women in India and the CEDAW (Women's Rights Committee).

Article Two

While Article One opens with a general definition of discrimination against women, Article Two of the CEDAW details various policy measures for ratified states to establish, including the adoption of 'appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women.'[1418] This clearly encompasses marital rape and dowry-related violence within its scope, as both forms of violence are inherently discriminatory towards married women. Furthermore, the same article also focuses on the state's obligation 'to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise.'[1419] In highlighting India's need to eliminate

[1416] This mechanism can only be utilised when the individual has exhausted all domestic avenues.

[1417] Dubravka Simonovic, 'Global and Regional Standards on Violence against Women: The Evolution and Synergy of the CEDAW and Istanbul Conventions', (2014) 36 Human Rights Quarterly 594.

[1418] CEDAW 1979, Article 2(b).

[1419] *id.* at Article 2(e).

discrimination against women by other individuals, the text of the CEDAW can surely be utilised in reference to violence in the private sphere. As mentioned earlier in this chapter, it is interesting to note the parallels between Article 2 of the CEDAW and Article 51A of the Constitution of India, which promotes the renouncing of 'practices derogatory to the dignity of women.'[1420]

Article Sixteen

Article Two of the CEDAW is strongly supplemented by Article 16 providing that 'State Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations…'[1421] This article also particularly highlights certain provisions for equality within a marriage, including, '(c) The same rights and responsibilities during marriage and at its dissolution;'.[1422] Sub-clause (c) is particularly relevant to the issue of marital rape, as the law's provision of equal right during marriage is questioned by the lack of criminal action against a rapist husband, which shows discrimination towards the wife. When it comes to dowry, dowry-related violence and dowry-death, sub-clause (a), citing equal rights while entering a marriage, and sub-clause (h), citing equal property rights, may apply.[1423] Although dowry-related violence is addressed by the law, stressing on the entire elimination of dowry (often disguised as gift-giving) and on enforcing equal property rights for women can help better address the issue of dowry and dowry-related violence respectively. These sub-clauses within Article 16 are not exhaustive but, rather, work as examples of what the elimination of marital discrimination could look like.

[1420] Constitution of India 1950, Article 51A.

[1421] CEDAW 1979, Article 16.

[1422] *id.* at Article 16(c).

[1423] *id.* at Article 16(a) and 16(h).

Article Five

Article Five of the CEDAW, another promising article for tackling violence in India's private sphere, declares that:

> 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;[1424]

Such an article speaks not only of criminalisation but also of changing Indian culture.[1425] This is particularly pertinent given the variety of social and cultural patterns of thought and behaviour that contribute to the marital rape exemption and continued dowry violence.[1426] Within the article, the onus falls on the state to take responsibility 'for gender discrimination and harmful social norms that affect the roles of men and women; specifically discriminatory gender stereotypes most strongly replicated in family roles and in relation to child rearing.'[1427] Sunil Bhave also mentions how, 'arguably, the social institution that spawns the dowry market

[1424] CEDAW 1979, Article 5 Discussed in detail later in this chapter, Article 4 of the DEVAW and Article 12(5) of the Istanbul Convention also includes a similar provision.

[1425] Fareda Banda, 'If You Buy a Cup, Why Would You Not Use It: Marital Rape: The Acceptable Face of Gender Based Violence' (2015-2016) 109 AJIL Unbound 321.

[1426] Chapters titled Marital Rape: The Role of Myths and Perceptions and Dowry Death: The Role of Myths and Perceptions.

[1427] n 1417 above.

may be a form of gender-based discrimination subject to the CEDAW's provisions.'[1428] This is confirmed within General Recommendation 19 to the CEDAW, discussed in detail further on, which explicitly mentions how traditional attitudes perpetuate dowry deaths – specifically citing Article 5 (as well as Article 2(f) and 10(c)) in this mention.[1429] As seen in previous chapters, India itself is often found to call upon cultural particularities in order to socially diminish its prohibition of dowry-related violence, or legally maintain its marital rape exemption.[1430] This article is explicit about the invalidity of such arguments. Within the provision of Article 5(a), concepts such as implied consent or a husband's right to discipline are no longer valid. In fact, this article nullifies most arguments that could be used to protect marital rape or justify a half-hearted implementation of provisions for dowry-related violence. However, for the application of both Article 16 and Article Five within the Indian context, there is a catch.

India's Declarations

When India signed on to the CEDAW, they also created two declarations and one reservation as contingent to their signature. The declarations were made to Article Five and 16, while the reservation was to Article 29. The first declaration, as the declaration relevant to this research, finds that:

[1428] Sunil Bhave, 'Deterring Dowry Deaths in India: Applying Tort Law to Reverse the Economic Incentives That Fuel the Dowry Market' (2007) 40 Suffolk University Law Review 2, 305.

[1429] CEDAW General Recommendation 19 (1992), Article 11.

[1430] Dowry Death and Martial Rape: The Role of Scripts and Perceptions, Marital Rape: The Role of Scripts and Perceptions.

> 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.[1431]

Although this is a step up from an absolute reservation, this declaration removes women in India from many of the wide-ranging and necessary protections afforded by Articles Five and 16. These protections were particularly necessary for India, given the amount of legal and social power that communities hold in shaping and dictating personal affairs. Therefore, even though marital rape and dowry-related violence can still be admonished through these CEDAW articles, the capacity for meaningful change is nowhere near what it would have been in the absence of this reservation. With such a deference to local communities, it is easy for India to dismiss its obligation to fulfil these articles, especially Article Five where India's referral to various communities runs contrary to its obligation to eliminate gender inequality through the modification of social and cultural patterns.

Including this declaration allows the Indian government to satisfy both the international community – by having signed the convention – and the local communities – by respecting their private lives or diversity. Yet, what it does not satisfy is the protection of women's rights, which was always the primary aim of the CEDAW. In fact, the Netherlands has raised an objection to India's CEDAW declaration on just this ground, stating that the declaration is

[1431] CEDAW 1979, Declarations and Reservations, India, Declaration i. Declaration ii addresses the compulsory registration of marriages, stating that it is not practical in the Indian context.

'incompatible with the object and purpose of the convention' and, therefore, not valid.[1432] India has not responded to this objection and, moreover, has assured that it does not have to by including an absolute reservation to Article 29, Paragraph One of the CEDAW, which would have provided for 'any dispute between two or more States Parties concerning the interpretation or application of the present Convention' to be brought for arbitration.[1433] Interestingly, statistics show that around 20 percent of the CEDAW signatories have made and continue to maintain reservations incompatible with the Convention, despite Article 28 (2) prohibiting this discrepancy.[1434] India is not the only state to object to Article 5 (a). In its reservation to the same article, Niger plainly 'expresses reservations with regard to the modification of social and cultural patterns of conduct of men and women.'[1435] Malaysia also creates a reservation for Article 5 (a), claiming that it creates a conflict 'with the provisions of Islamic sharia law.'[1436] This illustrates an existing tension where women's rights are often pitted against, and compromised for, social and cultural behaviours or expectations.

CEDAW: International Women's Rights v National Cultural Practices

India's declaration to the CEDAW protecting culture over women's rights – and its ability to get away with it – raises a larger question of the relationship between international women's rights obligations and a nation's cultural practices.[1437] Kim identifies 'the clash

[1432] CEDAW 1979, Declarations and Reservations, India.

[1433] CEDAW 1979, Article 29, Paragraph 1. India has not ratified the Optional Protocol to the CEDAW either, which would have allowed for individuals to approach the CEDAW Committee with their petitions.

[1434] n 1398 above, 407 and n 1417 above, 592.

[1435] CEDAW 1979, Declarations and Reservations, Niger.

[1436] CEDAW 1979, Declarations and Reservations, Malaysia.

[1437] In her research, Elvy also comments how 'Postcolonial states may ratify treaties or express support for emerging human rights norms to signal to the international community that they are committed to enhancing human rights, and they may intend to comply with their treaty obligations, but they only do so to the extent that

between the fundamental rights to equality' and 'the preservation of culture of religious practices that may negatively impact women' as a 'key challenge in the human rights sphere.'[1438] On the one hand, it is true that, outside the CEDAW, 'every major international treaty that protects human rights in general, and girls and women's rights in particular, also protects the state's right and the individual's right to enjoy their culture and retain their cultural development.'[1439] On the other hand, with treaties like the CEDAW, the international community is also 'obligated to recognize cultural practices of violence against women as human rights violations and to exert pressure on recalcitrant countries, such as India, to ensure protection of the rights guaranteed under international law.'[1440] Many other treaties that focus on equality for all also include clauses specifically protecting the rights of minorities or the right to practice religion and culture – such as Article 27 of the ICCPR.

Although the result of the CEDAW remains promising, controversy over interference in the private sphere certainly emerged in the drafting process. Zwingel identifies how 'the most significant line of conflict was the tension between religious and secular concepts of the role of women in society, the former interpreting the idea of women's rights as embedded in women's functions within family and society, the latter emphasizing women's autonomy and individuality.'[1441] A reflection of this tension could be seen in the absence of any mention of private forms of violence against women in the main text of the CEDAW itself. In addition to Article 5 of the CEDAW, this is also seen in Article 4 of the DEVAW declaring 'States should

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their international obligations do not conflict with "traditional national values."' Stacy-Ann Elvy, 'A Postcolonial Theory of Spousal Rape: The Carribean and Beyond' (2015) 22 Michigan Journal of Gender & Law 1, 132 and 133.

[1438] n 1333 above.

[1439] n 1407 above, 267.

[1440] n 1408 above, 664.

[1441] n 1398 above, 403.

condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination.'[1442] The Platform for Action emerging from the 1995 Beijing Declaration also clearly details that, 'while the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of states, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.'[1443]

However, with this tension at hand, it is often the right to culture that wins out over the rights of women. In fact, when it comes to international interference, Pardee writes that, 'because the practice of dowry and the devaluation of women is so intensely ingrained in the culture, action against India could meet with fierce resistance and the practice of dowry murders might actually increase.'[1444] This tension can also be seen in terms of the distinction between universalism and cultural relativism. Existing within international human rights law, this distinction defines universalism as the idea that 'there are values which are immune from culture and cultural differences.'[1445] Contrarily, cultural relativism 'is based on the view that there are a variety of notions of justice that are all equally authentic in their own cultural context, and therefore justice must be defined according to social and cultural contexts.'[1446] In the context of women's rights and violence against women, the cultural relativist paradigm is

[1442] Declaration on the Elimination of Violence Against Women 1993, Article Four.

[1443] Beijing Declaration and Platform for Action 1995.

[1444] Laurel Remers Pardee, 'The Dilemma of Dowry Deaths: Domestic Disgrace or International Human Rights Catastrophe' (1996) 13 Ariz. J. Int'l & Comp. L. 520.

[1445] Gizem Guney, 'The Istanbul Convention: A Genuine Confirmation of the Structural Nature of Domestic Violence against Women within a Human Rights Law Framework?', *Preventing Sexual Violence: Problems and Possibilities* (2020) 8.

[1446] *ibid.*

often utilised by patriarchal states to create barriers to the CEDAW's universalist paradigm. There are many disadvantages to the utilisation of a cultural relativist paradigm. Pratibha Jain highlights one such disadvantage by explaining how, 'because group rights provide the leaders within a group the power to discriminate against the weaker members within the group, a legal commitment to group rights may prove detrimental to women.'[1447] This is particularly ironic given that the group often benefits from freedom from discrimination, while itself discriminating.

Despite India's declaration, the CEDAW's blatant prioritisation of women's rights and 'its attempt to forge international consensus that all practices that harm women are to be removed no matter how deeply they are embedded in culture'[1448] is promising. In fact, in their ruling on the 2005 domestic violence case of *AT* v *Hungary*, the CEDAW (Women's Rights Committee) referred to its previous response following Hungary's periodic report in 2002, where it expressed concern about the 'persistence of entrenched traditional stereotypes regarding the role and responsibilities of women and men in the family.'[1449] Subsequent to this reference, the case report indicates a violation of Article 16 and, importantly, Article 5(a) of the CEDAW. The case, therefore, showcased how a failure to modify social and cultural practices resulted in 'the state's failure to act in cases of domestic violence, both generally and emblematically.'[1450] Importantly, regardless of India's declaration, this case is monumental as it explicitly creates a link between social and cultural patterns of conduct – and their lack of amendment – and violence against women in the private sphere.

[1447] Pratibha Jain, 'Balancing Minority Rights and Gender Justice - The Impact of Multiculturalism on Women's Rights in India' (2005) 23 Berkeley Journal of International Law 203.

[1448] n 1333 above.

[1449] *AT* v *Hungary* (Decision) CEDAW-05-A-60-38 (26 January 2005).

[1450] n 1445 above.

Additionally, Article 2(f) of the CEDAW, while discussing policy measures, also highlights the need 'to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.'[1451] This provision is important as it highlights a United Nation treaty's prioritisation of women's rights over culture in two separate places. It is also important because India has not created any declaration or reservation to Article 2 – which, however limitedly, provides an avenue to challenge India's existing customs and practices that discriminate against women, even if the application of a similar provision within Article 5 has been limited. It is interesting to note that fifteen signatories to the CEDAW have created a declaration or reservation to either Article 2 as a whole or Article 2 (f) in particular. An examination of these reservations shows the continued tension between the modification of religious or cultural practices and women's rights on an international level as well. Singapore plainly states that its reservation to Article 2 occurs 'in the context of Singapore's multi-racial and multi-religious society and need to respect the freedom of minorities to practice their religious and personal laws.'[1452] Similarly, the United Arab Emirates, Libya, Egypt, Bangladesh, Bahrain and Algeria all explicitly mention religious legal structures or family codes as the justification for their caveats to Article 2 or 2 (f).[1453] This serves as further proof that women's rights issues, especially regarding rights and protections in the private sphere, are often and openly treated as inferior to the social practices of religions and cultures in nations around the world.

[1451] CEDAW 1979, Article 2(f).

[1452] CEDAW 1979, Declarations and Reservations, Singapore. However, Singapore does not create a declaration or reservation for Article 5(a).

[1453] CEDAW 1979, Declarations and Reservations.

General Recommendation 19

Aside from India's declarations and reservation, another caveat in utilizing the CEDAW lies in the broad nature of its provision. Although this generalization of the text can serve as an advantage, with the CEDAW having to address a variety of issues across various contexts, it is often utilised to the disadvantage of women, with State's citing vague or overarching laws as a fulfilment of their obligations under CEDAW. This is especially true when it comes to the implementation of the CEDAW for violence against women, as there is no mention of this category of discrimination within the convention itself. Therefore, it is at this stage that General Recommendations become useful. In addition to the main body of the CEDAW, the CEDAW (Women's Rights Committee) have also released General Recommendations through the years to supplement the text of the CEDAW. Although these are not binding to the CEDAW signatories, they serve to elaborate upon and expand the text of the CEDAW itself, making them highly pertinent to a thorough execution of the convention.[1454]

Particularly relevant to this research is the CEDAW (Women's Rights Committee)'s General Recommendation 19, which addresses violence against women.[1455] Chinkin celebrates this recommendation for analysing 'the Women's Convention from the perspective of how violence impairs women's physical and mental health, and thus undermines the implementation

[1454] CEDAW 1979, Article 21.1.

[1455] The Committee had also released General Recommendation 12 in 1989 which focused on violence against women. However, the wider and more detailed text within General Recommendation 19 largely replaced General Recommendation 12.
General Recommendation 19 is also explicitly mentioned in the preamble of the Istanbul Convention, which is discussed in further detail within this chapter.

of the requirements of the Convention.'[1456] Released in 1992, General Recommendation 19 categorises gender-based violence as 'a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men.'[1457] It goes on to specify that the definition for discrimination against women provided within Article One of the CEDAW does indeed include gender-based violence as 'violence that is directed against a woman because she is a woman or that affects women disproportionately.'[1458] This violence can include physical, mental or sexual acts or threats or coercions and 'may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.'[1459] Such a promising definition not only includes marital rape, dowry-violence and dowry death within its scope, but it also explicitly provides that these acts were always intended to be included within the scope of what the CEDAW addressed.

General Recommendation 19 also specifically mentions dowry death in paragraph 11, while referring to Article 2(f), 5 and 10(c) of the CEDAW. Here, the text specifically connects 'traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles' to the perpetuation of 'widespread practices involving violence or coercion,' such as dowry deaths.[1460] Paragraph seven of General Recommendation 19 clearly states that gender-based violence 'impairs or nullifies the enjoyment by women of human rights and

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[1456] Christine Chinkin, 'Violence Against Women: The International Legal Response' (1995) 3 Gender & Development 25.

[1457] CEDAW General Recommendation 19 (1992), Paragraph 1.

[1458] *id.* at Paragraph 6.

[1459] *id.* at Paragraph 6.

[1460] *id.* at Paragraph 11. The text also specifically mentions forced marriages, acid attacks and female circumcision. It also calls out how 'such prejudices and practices may justify genderbased violence as a form of protection or control of women.'

fundamental freedoms,' including the right to life and freedom from torture.[1461] Near the end of this General Recommendation, paragraphs 23 and 24 refer to family violence, naming it as 'one of the most insidious forms of violence against women.'[1462] Here, the text includes rape as a form of family violence within the purview of the CEDAW. Paragraph 24(b) once again mentions rape in the family context and asks for adequate legal protection from this crime. Similarly, paragraph 24(r)(i) and 24(t)(i) necessitate effective measures to overcome family violence and gender-based violence respectively, including penal sanctions.[1463] With these clauses, it is the need for effective action which is most relevant for dowry violence and dowry death, while marital rape requires both legal sanctions and their effectiveness.

These measures to criminalise – along with all other measures within the recommendation – are not binding, and India's reaction to or implementation of General Recommendation 19 has not been made clear. Yet, the text of this recommendation is vital in creating visibility for and making explicit the connection between gender-based violence and discrimination against women.[1464] In doing so, on a practical level, General Recommendation 19 allows the CEDAW (Women's Rights Committee) to observe and comment on the level and forms of gender-based violence that occur within any given state that has signed on to the CEDAW. Unlike India, women in states that have acceded to the Optional Protocol have also used the link established by General Recommendation 19 to bring cases of violence before the CEDAW (Women's Rights Committee) under the freedom from discrimination provision within Article Two of the CEDAW. This includes the previously mentioned 2005 case of *AT* v *Hungary* as well as others, including *Goecke* v *Austria* (2005), *VK* v *Bulgaria* (2011) and

[1461] *id.* at Paragraph 7.

[1462] *id.* at Paragraph 23 and 24 – within paragraph 24, particularly sub-clauses (a)(b)(k)(r) and (t).

[1463] *id.* at Paragraph 24 (r)(i) and (t)(i).

[1464] n 1417 above, 601.

Carreño v *Spain* (2014).[1465] This makes the contributions of General Recommendation 19 significant and indispensable. On a global level, Guney illustrates how, with this recommendation's 'first identification of the discriminatory pattern of violence against women,'[1466] it opened the door for UN institutions to evaluate gender inequality 'as both the reason for the occurrence of violence against women and the factor promoting the maintenance of this phenomenon.'[1467] In 2017, General Recommendation 19 was superseded General Recommendation 35 on gender-based violence against women.[1468] Although expanding in scope and definition – including a passing inclusion of marital rape,[1469] – this recommendation does not mention dowry-related violence or dowry death. Promisingly, this updated recommendation does acknowledge,

> gender-based violence against women to be rooted in gender-related factors such as the ideology of men's entitlement and privilege over women, social norms regarding masculinity, the need to assert male control or power, enforce gender roles, or prevent, discourage or punish what is considered to be unacceptable female behaviour. These factors also contribute to the explicit or implicit social acceptance of gender-based violence against women, often still considered as a private matter, and to the widespread impunity for it.[1470]

[1465] *González Carreño* v *Spain* CEDAW/C/58/D/47/2012 (2014), *Goecke* v *Austria* CEDAW/C/39/D/6 (2005), *VK* v *Bulgaria* CEDAW/C/49/D/20/2008 (2011).

[1466] n 1445 above, 4.

[1467] n 1445 above, 4.

[1468] CEDAW General Recommendation 35 (2017).

[1469] *id.* at Paragraph 33.

[1470] CEDAW General Recommendation 35 (2017), Paragraph 19.

Although this does emphasise the social influence on the continued prevalence of violence against women, as well as the influence of the public-private divide, this recommendation, just like its forerunner, remains non-binding.

Implementation of CEDAW

India's effective implementation of the CEDAW itself is also easily questionable. Although India has made changes or additions to its women's rights and violence against women legislature since the ratification of the CEDAW – such as the 2005 Protection of Women from Domestic Violence Act – the effectiveness of such provisions remains uncertain. One possible avenue to measure the effective implementation of the CEDAW could be the examination of statistics regarding the number of reported cases and conviction rates on gender-based crimes.[1471] According to the 2020 report of the National Crime Records Bureau, there were 3,71,503 reported crimes against women, with almost one-third of all the cases under crimes against women falling under the category of 'Cruelty by husband or his relatives' under Section 498A of the Indian Penal Code (1,12,292 cases).[1472] When it comes to conviction rates, crimes against women as a general category had a low conviction rate of 28 per cent,[1473] while crimes under Section 498A had an even lower conviction rate of 18.1 per cent.[1474] This low conviction rate can partially be attributed to previously discussed myths and social scripts – such as the misuse argument and pressure to reconcile. Therefore, if evaluating the

[1471] Bobbie Khanna similarly recommends the observation of statistical change to measure effective implementation in n 1401 above.

[1472] NCRB 2020 – 378236 in 2018 and 405326 in 2019.

[1473] *id.* at Table 3A.7 – includes cases from 2019 and 2020 that were tried in 2020.

[1474] NCRB 2020 – for cases from 2019 and 2020 tried in 2020.

implementation of the CEDAW based on statistics, there is no evidence of a significant decline in crimes against women or a significant increase of the conviction of these crimes.

The CEDAW (Women's Rights Committee) has also highlighted India's lack of effective implementation by mentioning the continued existence and immunity of dowry death and marital rape during their 2007 and 2013 comments on India's reports to the committee.[1475] In both these documents, the committee urges India to remove the marital rape exemption, so that the definition of rape includes marital rape.[1476] The 2013 comments from the committee also request more information on India's claim that 'the National Commission for Women has studied the efficacy of legislation prohibiting harmful practices against women and girls such as dowry,'.[1477] India's responses, unsurprisingly, 'repeatedly cite "cultural norms" as the main hurdle to improving the status of women and securing compliance.'[1478] Through this, it is clear to see that India is not prepared to take the CEDAW seriously except when it suits the country's own purposes – and especially not when it interferes with the private sphere.

[1475] Committee on the Elimination of Discrimination against Women, 'Concluding Comments Of The Committee On The Elimination Of Discrimination Against Women: India' (2007) and 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' (United Nations 2013). Article 18 of the CEDAW requires CEDAW members to report the measures they have taken to comply with the articles of the CEDAW. As India has not signed the Optional Protocol to the CEDAW, the committee is mostly limited to commenting on the report that the state itself presents.

[1476] Committee on the Elimination of Discrimination against Women, 'Concluding Comments Of The Committee On The Elimination Of Discrimination Against Women: India' (2007) and 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' (United Nations 2013).

[1477] 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' (United Nations 2013), Article 8. This same paragraph also asks India to 'provide information on measures taken to modify gender stereotypes and cultural beliefs that portray women in a subordinate role in society, including in textbooks and the media.'

[1478] n 1333 above.

Regardless of its declarations, India is a signatory to the CEDAW and needs to comply with its anti-discrimination mandate, which means – at a minimum – removing the marital rape exemption and amending dowry violence and dowry death provisions. Sujata Gadkar-Wilcox comments on how India's current CEDAW-adjacent action of creating agency structures and investigative boards can only cater to the elite or the middle class in urban settings.[1479] A lack of active change in social scripts and perceptions creates barriers to the access of such structures.

The CEDAW has been criticised for placing too much emphasis on legal mechanisms, such as clauses on gender equality or special tribunals, rather than social change.[1480] Meghana Shah highlights two disadvantages to this legislative-heavy approach. Firstly, such an approach 'holds India to standards that are not meaningful given the current status of dowry-related legislation.'[1481] As an issue that has already been addressed in the domestic legal framework, it now needs to be supplemented with non-legislative changes rather than an international push for criminalisation. Secondly, there are also claims that India, as a developing nation, does not have the resources or capacity to viably address cultural change or take responsibility for the private sphere.[1482] Shah elaborates:

[1479] Sujata Gadkar-Wilcox, 'Intersectionality and the Under-Enforcement of Domestic Violence Laws in India' (2012) University of Pennsylvania Journal of Law and Social Change 15(3) 474.

[1480] Meghana Shah, 'Rights under fire: The inadequacy of international human rights instruments in combating dowry murder in India' (2003) 19 Connecticut Journal of International Law 217 and Siwan Anderson, 'Why Dowry Payments Declined with Modernization in Europe but Are Rising in India' (2003) 111 Journal of Political Economy, 221.

[1481] Meghana Shah, 'Rights under fire: The inadequacy of international human rights instruments in combating dowry murder in India' (2003) 19 Connecticut Journal of International Law 211.

[1482] *id.* at 222 and Siwan Anderson, 'Why Dowry Payments Declined with Modernization in Europe but Are Rising in India' (2003) 111 Journal of Political Economy, 222 and 228.

> In modern India, it is the traditional gender roles that are sustaining some sense of social cohesion. The traditional notions of familial duty, duty to one's parents, spouse and children, mean many fewer abandoned women, children, and elderly citizens for the already over-committed and under-resourced government to contend with.[1483]

However, the sacrifice that women are expected to make in such a situation – especially in the face of varied forms of violence – goes against the fundamental principles of equality and non-discrimination that the nation is built on. It is worth mentioning that the General Recommendation 19 does supplement its focus on legislation with points on overcoming cultural attitudes that perpetuate violence and points on including counselling and rehabilitative services.[1484]

Despite criticisms on the CEDAW's law-making focus, and any validity they might hold, it is important to remember that India voluntarily ratified and chose to be accountable to the CEDAW. There is no need to view criminal law and social change as opposing concepts either. There is a need, however, to understand that – given the increasing figures of violence against women – postponing cultural change on the status and treatment of women within the family until India is a further developed nation might just mean putting off cultural change until it is too late. Interestingly, the case that criminalised marital rape in the United Kingdom (*R* v *R*) also discussed a change in social perceptions of this act as its reasoning – showing the legal influence of societal change.[1485] In fact, Zwingel identifies 'a level of cultural affinity with the Convention' as one of the three influential factors in a successful domestic

[1483] Meghana Shah, 'Rights under fire: The inadequacy of international human rights instruments in combating dowry murder in India' (2003) 19 Connecticut Journal of International Law 222.

[1484] CEDAW General Recommendation 19 (1992), Article 24.

[1485] *R* v *R* UKHL 12 (1991).

implementation of the CEDAW, with the other two being the representation of women in political institutions and transnational activism on women's rights.[1486] This final factor is also discussed by Mary Shanti Dairiam, who argues that 'the biggest gain from the convention's treaty processes is the energizing of nongovernmental activism to demand accountability from governments. Through such activism at the international level, as well as by taking the international debates back to the national level, changes have been achieved in the areas of law and policy.'[1487] Promisingly, the gains of women's rights activism also translate back to the Indian context, where the CEDAW (Women's Rights Committee) was able to make varied observations on gender inequality in India based on shadow, or 'alternative', reports written by Indian NGOs.[1488] However, there is still a long way to go. The CEDAW serves as an important starting point in addressing and eliminating discrimination against women within the nation, including marital rape and dowry-related violence, but it can only be effective if the state accepts and enforces the provisions within. Nepal provides a positive example of the implementation and utilisation of CEDAW, where the provisions within this convention – as well as other international instruments – were mentioned in support of the criminalisation of marital rape during the 2006 landmark case of *Jit Kumari Pangeni and Others* v *Government of Nepal*.[1489]

DEVAW

[1486] n 1398 above, 408 and 411.

[1487] n 1413 above, 21.

[1488] n 1413 above, 22. In this context, Dairiam particularly highlights the committee's mention of compulsory marriage registration and resource allocation in its Concluding Observations.

[1489] *Jit Kumari Pangeni and Others* v *Government of Nepal* 2006.

Where the CEDAW is a binding provision addressing discrimination against women, the Declaration on the Elimination of Violence Against Women (DEVAW) is a non-binding provision addressing violence against women.[1490] As a document created by the United Nations General Assembly, the DEVAW does not have the obligatory or enforceable status of the CEDAW or other such conventions. Instead, it is an instrument of soft-law – which indicates an 'aspirational and political consensus among states' that can only be imposed through political pressure.[1491] Despite its non-binding status, the DEVAW is important to examine as it is the first international instrument that mentions marital rape or dowry-related violence within the main body of its text. It also has interesting connections with local laws in India through the adoption of the DEVAW's definition of violence against women within the Protection of Women from Domestic Violence Act (PWDVA).

Adopted in 1993, the DEVAW consists of six articles on violence against women. The DEVAW is complementary to the effective implementation of the CEDAW,[1492] and it importantly acknowledges that:

> 'violence against women is a manifestation of 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 the full advancement of women, and

[1490] Between the CEDAW and the DEVAW, prominent international initiatives to address domestic violence included the 1985 Seventh Congress on the Prevention of Crime and the Treatment of Offenders in Milan, which 'called for further multidisciplinary measures to deal with domestic violence' and the 1985 Nairobi World Conference, which raised the issue of GBV. Vineeta Palkar, 'Failing Gender Justice in Anti-Dowry Law' (2003) 23 South Asia Research 2 182.

[1491] n 1445 above, 5.

[1492] Declaration on the Elimination of Violence Against Women 1993, Preamble.

that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men.'[1493]

This feminist understanding of violence against women is an important step in international human rights law's understanding of sexual and gender-based violence as well as an important herald of more intentional national understandings of sexual and gender-based violence in the future.

Article One of the DEVAW defines violence against women as, '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.'[1494] It is meaningful and exciting to see the end of this clause mentioning the public-private divide, while holding that the divide does not diminish the illegality of any acts that might take place in the latter. To drive the point home, Article Two monumentally and explicitly states how violence against women includes dowry-related violence and marital rape, as well as other private forms of violence against women.[1495] Although India has not explicitly taken these clauses within the DEVAW into consideration, it is promising to see their implicit influence within State documents such as the Protection of Woman from Domestic Violence Act (PWDVA).

The definition of domestic violence within the PWDVA Article Three has strong connections with Articles One and Two of the DEVAW. These similarities include the fact that

[1493] *ibid.*

[1494] *id.* at Article One.

[1495] Declaration on the Elimination of Violence Against Women 1993, Article Two.

both definitions go beyond the physical elements of violence against women,[1496] that they cover a wide range of relationships within their purview (notably, a wide range of domestic relationships), and that both include threats and coercion of violence as violence itself.[1497] India's adoption of elements of the DEVAW's definition into its own national legislature strengthens the influence of this declaration's expansive and inclusive definitions into the Indian legal understanding of, and framework on, violence against women in the private sphere. However, with the continued legal existence of marital rape and social acceptance of dowry-related violence, the violations raised by these first two articles remain insufficiently addressed.

Istanbul Convention

Another women's rights provision that needs mention, despite the difference in its spatial applicability, is the 2011 Convention on Preventing and Combating Violence against Women and Domestic Violence – also known as the Istanbul Convention. Created by the Council of Europe and open to its members, the Istanbul Convention was the first European legally binding document on domestic violence.[1498]

Prior to this convention, legal instruments applicable in the European context were either gender neutral in the scope of their rights or fell under the category of soft law. Even the CEDAW 'dispose(s) of weaker enforcement mechanisms than other forms of international regimes.'[1499] In addition to its binding nature, the Istanbul Convention is progressive and novel

[1496] Jeni Klugman, 'Gender Based Violence And The Law' (2017) The World Bank.

[1497] Some of these similarities are also noted by Jeni Klugman in *ibid.*

[1498] Globally, the Convention of Belem do Para under the Organization of American States, which came into effect in 1994, was the first ever legally binding provision on gender-based violence.

[1499] n 1398 above, 401.

within Europe for highlighting – just as the non-binding DEVAW does – the historic power struggle that marks the domination over and discrimination of women by men.[1500] This statement directly connects sexual and gender-based violence to both inequality and discrimination, acknowledging its pervasive nature rather than considering violence against women as coincidental or sporadic. The convention goes on to recognise 'the structural nature of violence against women as gender-based violence, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men.'[1501] Not only does this further acknowledge the structural nature of violence against women but, importantly for the Indian context, it also identifies violence as a means of social subordination. This resonates with the examination of social myths and scripts in India, which sanction violence against women and contribute towards the maintenance of a patriarchal society.

Also relevant is the Istanbul Convention's stance on the constructed debate between culture and women's rights. Guney mentions how 'the Istanbul Convention takes a firm stance against any potential cultural or traditional arguments that could be harmful to women and their equality.'[1502] The convention does so in two main ways. Firstly, Article 12(1) states:

> Parties shall take the necessary measures to promote changes in the social and cultural patterns of behaviour of women and men with a view to eradicating prejudices,

[1500] Istanbul Convention on Preventing and Combating Violence against Women and Domestic Violence 2011, Preamble.

[1501] *ibid.*

[1502] n 1445 above, 8.

> customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men.[1503]

In doing so, the text of the Istanbul Convention resonates with Article 5 of the CEDAW. Secondly, this convention also includes Article 12(5), which states:

> Parties shall ensure that culture, custom, religion, tradition or so-called "honour" shall not be considered as justification for any acts of violence covered by the scope of this Convention.'[1504]

Therefore, it both insists on a change in discriminatory cultural practices while also insisting that current practices cannot be used as a legal justification of sexual and gender-based violence.

Unlike the CEDAW, including these clauses in a convention inherently focused on violence against women results in a stronger prohibition of the prioritisation of discriminatory social or cultural practices over the rights of women. The definition of violence against women within Article 3 includes offenses occurring in private life, while Article 4 on equality and non-discrimination protects these rights in the private sphere as well.[1505] Although the Istanbul Convention does not specifically mention marital rape or dowry-related violence, the essential connection it makes between discrimination and structural violence clearly show how both these crimes fall under its scope. Moreover, the convention's firm and binding prioritisation of

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[1503] Istanbul Convention on Preventing and Combating Violence against Women and Domestic Violence 2011, Article 12(1).

[1504] *id.* at Article 12(5).

[1505] *id.* at Article 3 and Article 4.

women's rights within its clauses on cultural or religious practices that beget violence qualify this provision to be a potent resource for documents, such as this research, addressing how to understand and respond to violence against women in India.

Indirect Violations

The CEDAW, CEDAW's General Recommendation 19 and the DEVAW all contain direct mention of women's rights, with the latter two also including a particular mention of family violence, marital rape, and dowry-related violence. However, the wide scope of issues and violations that these documents aim to cover - both spatially and categorically - may be used as a reason to detract from their applicability to the issue of marital rape or dowry-related violence in India. In contrast, the following section addresses provisions with no direct mention of violence against women or family violence. Yet, connecting these indirect violations to marital rape, dowry violence and dowry death creates a strong argument for the effective criminalization of these acts. This is because marital rape and dowry-related violence also violates a set of rights that have widely and collectively been categorised as fundamental, unlike the unfortunately subjective nature of many provisions particular to women. Referring to dowry deaths, Laurel Remers Pardee states how this crime 'constitutes a deprivation of the right to life, of the right to security in one's person, and of the right to be free of torture' and that, by failing to curb this crime, the Indian government is in violation of the UDHR and the ICCPR.[1506] The DEVAW explicitly connects violence against women to a 'violation of the rights and fundamental freedoms of women' and, in Article Three, goes on to say that women are entitled to the right to equality, freedom from discrimination and the right not to be

[1506] n 1444 above, 492.

subjected to torture, among other rights.[1507] These rights will be discussed briefly in the following section by examining how they are violated by particular forms of violence against women, and how they create a positive obligation for India to actively work towards change.

India and the Prohibition Against Torture

The prohibition against torture within international law was recognised as jus cogens during the 1998 International Criminal Tribunal for the former Yugoslavia case of *Prosecutor* v *Furundžija*.[1508] The court finds that, 'because of the importance of the values it protects, this principle has evolved into a peremptory norm or jus cogens, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even "ordinary" customary rules.'[1509] This means that, even without mention of a prohibition against torture within India's constitution, the state is bound to this international norm. Relevant to the Indian situation, this case even goes on to specify that the prohibition against torture 'cannot be derogated from by States through international treaties *or local or special customs* or even general customary rules not endowed with the same normative force [emphasis mine].'[1510] The peremptory norm of the prohibition against torture also creates positive obligations on the Indian state. Therefore, in addition to refraining from torture itself, the state is also obligated to protect its citizens from private forms of torture. This prohibition is further strengthened by its mention within Article Seven of the ICCPR and Article Five of the UDHR, both stating that 'no one shall be subjected

[1507] Protection of Woman from Domestic Violence Act 1993, Preamble 3(a) and 3(h).

[1508] *Prosecutor* v *Furundžija* (Judgement) ICTY-98-IT-95-17/1 (10 December 1998).

[1509] *id.* at paragraph 153.

[1510] *id.* at paragraph 153.

to torture or to cruel, inhuman or degrading treatment or punishment.'[1511] India is a signatory to both the ICCPR and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).[1512] Therefore, India's legal ties to the prohibition against torture are strong. Article One of the CAT provides a thorough definition of torture, which also provides criteria to see if a particular act can be categorised as torture.[1513] Ann Shalleck stresses the importance of this prohibition for violence against women as, 'placing gender violence in the paradigm of torture or enslavement reveals the gravity of the systemic harm inflicted on women.'[1514] To prove that an act is torture, (a) it must include 'severe pain or suffering' that is either physical or mental, (b) it must be 'intentionally inflicted' with a (c) coercive, retributive, intimidating or discriminatory purpose and it must (d) directly or indirectly involve public officials.[1515]

Violation of the Prohibition against Torture

Marital rape in India fulfils all four categories – making it an act of torture and, therefore, a very grave violation on this count as well. Interestingly, the final category of (in)direct involvement by public officials is fulfilled through the wilful absence of provisions, especially when connected to the positive obligation generated by the right to life. Although

[1511] International Covenant on Civil and Political Rights 1966, Article Seven, Universal Declaration of Human Rights 1948, Article 5.

[1512] The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1985.

[1513] *id.* at Article 1.

[1514] Ann Shalleck, 'Feminist Inquiry and Action: Introduction to a Symposium on Confronting Domestic Violence and Achieving Gender Equality: Evaluating Battered Women &(and) Feminist Lawmaking by Elizabeth Schneider' (2002) 11 American University Journal of Gender, Social Policy and the Law 245.

[1515] The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1985, Article 1.

many gender-neutral international provisions tend to apply more to the public sphere, the international crime of torture lacks consistency in its application when it comes to the public-private divide.[1516] General Comment Two to the CAT also specifically mentions gender-based violence as a form of torture that the state has an obligation to protect its citizens from, even going so far as to provide rape and domestic violence as examples of gender-based violence.[1517] Given that marital rape falls under the classification of torture, India needs to recognise marital rape as a criminal act in accordance with its acquiescence and obligation to the prohibition against torture. A very similar argument can be applied for dowry-related violence and dowry death as well, which tick the boxes of severity, intentionality and intimidatory or discriminatory. For the fourth criterion, an involvement of public officials can be seen through India's responsibility to have effective laws, as mentioned within India's execution of the right to life. Pardee illustrates how, 'because dowry death is deeply entrenched in the patriarchal state and culture of India, the state, arguably, perpetrates dowry deaths. In addition, because the state fails to enforce its laws, dowry deaths are inflicted "at the acquiescence" of public officials.'[1518] The government's lack of action in addressing the widespread ineffectiveness of their current dowry-related violence laws ties into their involvement in the continuation of this form of violence, which can now be classified as torture. This due diligence standard is discussed in detail further in this chapter. As marital rape and dowry-related violence both fit into the definition of torture, India is in indirect violation of the international prohibition against torture in its failure to effectively address these forms of violence.

[1516] n 1456 above.

[1517] The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 'General Comment Number Two' (United Nations 2008).

[1518] n 1444 above, 519. She also adds how 'India's failure to remedy the practice of dowry murder constitutes state action and dowry murders are sanctionable torture.'

The Right to Equality, Freedom from Discrimination, and India

In addition to the prominent prohibition against torture, a lack of effective legislation against marital rape and dowry-related violence also indirectly infringes a host of other protections and provisions. The right to equality and the freedom from discrimination are both mentioned in many international conventions, including under Article 26 of the ICCPR, Article Seven of the UDHR and even under Article Two of the International Covenant on Economic, Social and Cultural Rights (ICESCR).[1519] Given the progress made by CEDAW General Recommendation 19, the DEVAW and other such documents, the connection between violence against women and the right to equality should no longer be a novel or contested concept. During the Committee on the Elimination of Discrimination against Women's Twenty-second session in 2000, the committee connected the right to equality to marital rape when it 'expressed grave concern that Indian family law, particularly its provisions on … marital rape … contradicted and undermined the equality embodied in the Constitution and in court jurisprudence.'[1520] The right to equality is also a vital provision for every nation to substantively execute because, as Dairiam stresses, 'women claiming the right to equality are asserting their citizenship rights.'[1521]

As a complement to the positive obligation within the right to equality, the negative obligation created by provisions for freedom from discrimination are also intricately and undeniably tied to gender-based violence. Ineffective marital rape, dowry violence, and dowry death provisions violate the right to equality and freedom from discrimination by drawing

[1519] International Covenant of Civil and Political Rights 1966, Article 26, Universal Declaration of Human Rights 1948, Article Seven and International Covenant on Economic, Social and Cultural Rights 1966, Article Two.

[1520] Committee on the Elimination of Discrimination against Women Twenty-second session (2000).

[1521] n 1413 above, 24.

arbitrary distinctions along the lines of gender or marital status. These forms of violence also infringe upon a right to the 'highest attainable standard of physical and mental health,' encased within Article 12 of the ICESCR.[1522] Additionally, a host of other provisions within the ICCPR and the ICESCR can be called upon for their connection to marital rape and dowry-related violence. These include equal rights within a marriage (article 23(2), ICCPR), right to liberty and freedom of movement (articles 9 and 12, ICCPR), and the right to protection and assistance to the family (article 10(1), ICESCR).[1523] Within the prominent judgement of *C.R.* v *UK* by the European Court of Human Rights, the court found that rape remains rape, regardless of the relationship between the perpetrator and the victim.[1524] This judgement was also cited by the Verma Report for its compliance with 'the fundamental objectives of the Convention on Human Rights, the very essence of which is respect for human rights, dignity and freedom.'[1525]

State Responsibility and Due Diligence

The discussion of India's legal obligations under international law also raises the topic of state responsibility and due diligence. The concept of due diligence is particularly pertinent while invoking the application of international legal provisions for the private sphere of any given nation. As Garcia Del-Moral and Dersnah elucidate, the public-private divide creates a 'depoliticizing effect…beyond the boundaries of the state, including the restrictions it has placed on women's ability to mobilise international human rights law or to institutionalise their

[1522] International Covenant on Economic, Social and Cultural Rights 1966, Article 12.

[1523] International Covenant of Civil and Political Rights 1966, Article 9, 12 and 23(2), and International Covenant on Economic, Social and Cultural Rights 1966, Article 10(1).

[1524] *C.R.* v *UK ECtHR* 20190/92 (1995).

[1525] Justice J.S. Verma, 'Report Of The Committee On Amendments To Criminal Law' (Committee on Amendments to Criminal Law 2018) Article 74.

concerns in global governance organizations.'[1526] This means that the private sphere is largely considered to be a private matter by international human rights law as well, restricting access to many relevant provisions applicable for violence against women in the home. In this context, due diligence steps in to provide an avenue for women to hold the state accountable for the violence they face behind closed doors. Whereas state responsibility traditionally referred to crimes against human rights committed by public actors alone, due diligence promisingly 'represents a set of standards to determine when a state's omission or failure to act, prevent, investigate, or punish violations constitutes a breach of its international obligations, even if private persons commit those violations.'[1527] This perspective is also supported by case law examined in the following section. With an expansive view of state responsibility through the concept of due diligence, Celina Romany states that state responsibility for private forms of gender-based violence can be invoked in two scenarios: firstly, through a systematic failure to protect – which makes the state 'complicit in the violation' – and secondly, through discrimination in the prevention or punishment of a crime – which 'denies women the equal protection of the law.'[1528] The lack of due diligence witnessed within each of these scenarios then invokes state responsibility. Interestingly, India's current legal stance on dowry violence neatly fits into the first category, where laws exist but the high rates of dowry-related crimes clearly show a systemic failure. Similarly, the lack of criminalisation for marital rape in India shows discrimination in prevention and punishment, as non-marital rape invokes criminal provisions. Emerging from theory into reality, the principle of due diligence for crimes by

[1526] Paulina García-Del Moral P and Megan Alexandra Dersnah, 'A feminist challenge to the gendered politics of the public/private divide: on due diligence, domestic violence, and citizenship', (2014) 18 Citizenship Studies 6-7 663.

[1527] *id.* at 661.

[1528] n 1397 above.

private actors has increasingly been applied by both international case law and international provisions.

Due Diligence Beyond the Public-Private Divide: Case Law

Velásquez Rodríguez v Honduras (1988)

The 1998 Inter-American Court of Human Rights case of *Velásquez Rodríguez* v *Honduras* was a landmark ruling when it came to state responsibility in the private sphere, even though it did not pertain to gender-based rights.[1529] This case concerned the disappearance of Velásquez Rodríguez by private actors. Within the text of this noteworthy case, the judges stressed that 'the judicial and governmental authorities did not act with due diligence in cases of disappearances.'[1530] They go on to explicitly state that:

> an illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the state, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.[1531]

This is already very promising and is made even more so by the added claim that 'where the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the state responsible on the

[1529] *Velásquez Rodríguez* v *Honduras* IACtHR (1988).

[1530] *id.* at Article 79.

[1531] *Velásquez Rodríguez* v *Honduras* IACtHR (1988) Paragraph 172.

international plane.'[1532] These statements changed the international legal understanding of due diligence and state responsibility by directly applying these concepts to the state's interaction with private actors.

Bevacqua and S. v Bulgaria (2008) and Maria Da Penha v Brazil (2000)

In the wake of such a shift, a 'discursive opportunity' was created, which feminists seized to argue that states could be held internationally responsible for failing to effectively prevent and address violence against women, especially at the hands of private actors in the private sphere.'[1533] Therefore, although *Velásquez Rodríguez* v *Honduras* was still concerned a public violation by a private actor, its reasoning was later utilised for cases of private violations by private actors as well. This is seen in the 2008 European Court of Human Rights ruling on *Bevacqua and S.* v *Bulgaria*, which plainly mentions the influence of *Velásquez Rodríguez* v *Honduras* in its own ruling, before dismissing the Bulgarian state's argument that such a dispute was a private matter that did not require state assistance.[1534] Similarly, although without direct reference, the IACtHR case of *Maria Da Penha* v *Brazil*[1535] in 2000 ruled against the state for failing to act on and for tolerating domestic violence. The court rules:

> Given the fact that the violence suffered by Maria da Penha is part of a general pattern of negligence and lack of effective action by the state in prosecuting and convicting aggressors, it is the view of the Commission that this case involves not only failure to

[1532] *id.* at Paragraph 177.

[1533] n 1526 above, 669.

[1534] *Bevacqua and S.* v *Bulgaria* ECtHR 71127/01 (2008) Article 53 and 83. Article 73 also mention due diligence.

[1535] *Maria Da Penha* v *Brazil* IACtHR 54/01 12.051 (2000).

> fulfil the obligation with respect to prosecute and convict, but also the obligation to prevent these degrading practices.[1536]

Considering such rulings, the state responsibility and due diligence established in 1988 continued with its application to future cases as well.

Opuz v Turkey (2009)

Another landmark case on domestic violence and state responsibility is the 2009 European Court of Human Rights (ECtHR) case of *Opuz* v *Turkey*.[1537] Here, the court unanimously ruled that the state's failure to protect against domestic violence is a violation of the prohibition of torture (Article Three) and prohibition of discrimination (Article 14) as detailed within the European Convention of Human Rights (ECHR). The court particularly highlighted a violation of Article Three due to 'the state authorities' failure to take protective measures in the form of effective deterrence against serious breaches of the applicant's personal integrity by her husband.'[1538] To compound state responsibility, the court also details a failure of non-discrimination and equal protection rights in the face of domestic violence, specifying that 'this failure does not need to be intentional.'[1539] The direct connections made among domestic violence, the prohibition of discrimination and torture and the principles of due diligence and state responsibility make *Opuz* v *Turkey* a noteworthy case in the international jurisprudence on private forms of violence against women.

[1536] *id.* at Paragraph 56.

[1537] *Opuz* v *Turkey* ECtHR 33401/02 (2009).

[1538] *id.* at Paragraph 176.

[1539] *id.* at Paragraph 191.

The 2011 IACtHR case of *Gonzales* v *US* summarises 'the evolving law and practice related to the application of the due diligence standard in cases of violence against women' into four main principles.[1540] The second of these principles – which links discrimination, sexual and gender-based violence and due diligence – also specifies that 'States must adopt the required measures to modify the social and cultural patterns of conduct of men and women and to eliminate prejudices, customary practices and other practices based on the idea of the inferiority or superiority of either of the sexes, and on stereotyped roles for men and women.'[1541] This creates a connection between due diligence and the modification of cultural and socially sanctioned violence, which is promising for India's crimes of marital rape and dowry-related violence, despite the countries declaration to Article 5 of the CEDAW.

CEDAW General Recommendations and DEVAW

[1540] *Gonzales* v *US* IACtHR 80/11 12.626 (2011) Paragraph 126 and 127.

126. First, international bodies have consistently established that a State may incur international responsibility for failing to act with due diligence to prevent, investigate, sanction and offer reparations for acts of violence against women; a duty which may apply to actions committed by private actors in certain circumstances. Second, they underscore the link between discrimination, violence against women and due diligence, highlighting that the states' duty to address violence against women also involves measures to prevent and respond to the discrimination that perpetuates this problem. States must adopt the required measures to modify the social and cultural patterns of conduct of men and women and to eliminate prejudices, customary practices and other practices based on the idea of the inferiority or superiority of either of the sexes, and on stereotyped roles for men and women. 127. Third, they emphasise the link between the duty to act with due diligence and the obligation of States to guarantee access to adequate and effective judicial remedies for victims and their family members when they suffer acts of violence. Fourth, the international and regional systems have identified certain groups of women as being at particular risk for acts of violence due to having been subjected to discrimination based on more than one factor, among these girl-children, and women pertaining to ethnic, racial, and minority groups; a factor which must be considered by States in the adoption of measures to prevent all forms of violence.

[1541] *Gonzales* v *US* IACtHR 80/11 12.626 (2011) Article 126.

Although the text of the CEDAW itself is more implicit in its mention of state responsibility, General Recommendation 19 draws a clear connection between the two. Article 9 of the recommendation recalls Article 2(e) of the CEDAW, which has the state address discrimination against women 'by any person'.[1542] As a signatory of the CEDAW, India is bound to Article 2(e), despite its lack of acquiescence to General Recommendation 19. This recommendation also finds that '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.'[1543] The findings within General Recommendation 19 are supplemented by General Recommendation 28, Article 10 which stresses that, along with a prohibition on states from discriminating against women, the states 'are further obliged to react actively against discrimination against women, regardless of whether such acts or omissions are perpetrated by the state or by private actors.'[1544] Furthermore, this provision also details that 'discrimination can occur through the failure of States to take necessary legislative measures to ensure the full realization of women's rights, the failure to adopt national policies aimed at achieving equality between women and men and the failure to enforce relevant laws.'[1545] Through such phrasing, this recommendation also refers to both state responsibility and the need for due diligence. Finally, Article 4(c) of the DEVAW also mentions due diligence for private sexual and gender-based violence, urging states to 'exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the state or by private persons.'[1546]

[1542] CEDAW 1979, Article 2(e) and CEDAW General Recommendation 19 (1992), Article 9.

[1543] CEDAW General Recommendation 19 (1992), Article 9.

[1544] CEDAW General Recommendation 28 (1992), Article 10.

[1545] CEDAW General Recommendation 28 (1992), Article 10.

[1546] Declaration on the Elimination of Violence Against Women 1993, Article Four (c).

The application of due diligence in general, as well as international provisions on the principle of due diligence, remains a promising measure to hold India accountable for its continued legal and social acceptance of marital rape and dowry-related violence. It not only gives an added layer of weight to the international human rights provisions discussed above, but it also showcases the changing global perspectives on the topic of the public-private divide and the acceptance of violence against women in the private sphere. Importantly, the utilisation of due diligence in a gender sensitive manner allows a more well-rounded understanding of sexual and gender-based violence as it 'politicizes acts of violence at the hands of private actors, even if they take place within the so-called private sphere, to complicate traditional conceptualizations of state responsibility, citizenship, and human rights.'[1547] Hopefully, the concept of due diligence will gather more traction when discussing violence against women in India's domestic sphere as well.

The expansive list of provisions violated by marital rape, dowry violence and dowry deaths – as well as by many other forms of violence in the private sphere – is indicative of the pervasive and highly illegal nature of these crimes. Following an analysis of the Indian constitution, the focus on international human rights law and due diligence within this section further indicates an urgency in sufficiently addressing these crimes, and an absurdity in the fact that the Indian government has still not done so. Within this discussion, an examination of the tensions between culture and women's rights highlight how, 'while respecting cultural diversity, there has to be a commitment to ensuring rights for all women, and the universality of rights must be protected.'[1548] Keeping an examination of India's legal and social contexts in mind, a study of the nation's constitutional and international obligations supplements this

[1547] n 1526 above, 662.

[1548] n 1413 above, 24.

research through an understanding of the international contexts and conversations regarding these crimes.

This chapter also reveals the limitations of international law, as the most promising of provisions continue to fail to create an absolute prohibition for violence against women. As Zwingel writes, 'the idea of the universality of human rights is confronted with human rights practice that is always contextual and embedded in existing social relations and values.'[1549] This can clearly be seen in India's earlier mentioned declaration to the CEDAW, citing culture as its justification. A postcolonial feminist lens shows how international human rights law, as an immediate solution, needs structural modifications to create structural change. From a postcolonial perspective, Alpana Roy highlights the influence of Western frameworks and values on international law, such as the priority given to liberalism.[1550] Additionally, Eslava and Pahuja write how the 'European ethos remains alive in contemporary international law today through, for example, the distinctions between 'public' and 'economic', 'secular' and 'religious', and 'private' and 'public'.' [1551] Within postcolonial feminism, this translates to a lack of 'understanding and articulation of concerns of third world women'[1552] and an international legal system where the 'experiences of women from the Global South are not substantially represented.'[1553] An example of the colonial and patriarchal bias within international law can be seen in the 'revival of protective stereotypes of women outside the west' – perpetuating a harmful and outdated discourse of third world women needing to be

[1549] n 1398 above, 413.

[1550] Alpana Roy, 'Postcolonial Theory and Law: A Critical Introduction', (2008) 29 Adelaide Law Review 2, 329.

[1551] Luis Eslava and Sundhya Pahuja, 'Beyond the (Post)Colonial: TWAIL and the Everyday Life of International Law' (2012) 45 Journal of Law and Politics in Africa, Asia and Latin America - Verfassung und Recht in Übersee 2, 199.

[1552] Ratna Kapur, *Erotic Justice: Law and the New Politics of Postcolonialism* (Glasshouse Press 2005) 4.

[1553] n 1398 above, 414.

protected or rescued by Western men and women.[1554] Such protectionist sentiments perpetuate a gender binary which 'took women's inferiority to men as a given, and legitimated treating them protectively, rather than as bearers of rights.[1555] This created a situation where legal measures within international law were working to validate and perpetuate a patriarchal model of society – which helped create the very conditions for violence to begin with.

Through this example, international human rights law can be understood as a framework that often replicates colonial and patriarchal discourses and pushes for short-term legal solutions at the expense of a longer-term social transformation. However, the international legal framework is not entirely unsalvageable. As Rhode writes, 'the central problem with rights-based frameworks is not that they are inherently limiting but that they have operated within a limited institutional and imaginative universe. Thus, critical feminism's central objective should be not to delegitimate such frameworks but rather to recast their content and recognize their constraints.'[1556] This includes provisions for women that go beyond the jargon of protection, solutions that recognise sociolegal particularities and the prioritisation of intervention for violence against women – whether it occurs in the public or the private. Therefore, despite the tension between utilising and reinventing the current international legal framework, it is indisputably important to take advantage of the emancipatory potential of available rights to create accessibility and avenues for those currently affected by sexual and gender-based violence – even while creating a long-term plan for structural change.

[1554] Diane Otto, 'International Human Rights Law: Towards Rethinking Sex/Gender Dualism and Asymmetry', *A Research Companion to Feminist Legal Theory* (Ashgate Publishing Ltd 2013).

[1555] *ibid.*

[1556] Deborah Rhode, 'Feminist Critical Theories', (1990) 42 Stanford Law Review 3, 635.

Conclusion

This research explores how India's legal inconsistencies and insufficiencies in addressing private forms of violence against women can be tackled, at least in part, through a postcolonial feminist understanding of the social scripts and perceptions that surround sexual and gender-based violence and marriage in the private sphere. These private social narratives help shape – or prevent – the creation and application of laws in both the public and the private legal sphere. Thus, current legal structures maintain and reinforce forms of violence against women in India's private sphere. This research illustrates this argument throughout its various parts and chapters. Following the introductory chapter, the research provided a detailed exposition of violence against women in India's private sphere and the legal protections that currently exist for these forms of violence, along with what the legal and social public-private divide in India looks like. It then introduced postcolonial feminism as the theoretical framework used to address the research question and argument. In doing so, the research addresses feminist legal theory, postcolonial theory, the principles of postcolonial feminism and the history of colonialism and law in India to create a background understanding for a continued discussion of colonialism and patriarchy prevalent in today's India.

Over and above its relevance in addressing and understanding the colonial and patriarchal narratives scattered across India's private sphere, utilising postcolonial feminist theory as a framework for this research is also important for two other reasons. Firstly, as Archana Parashar writes, 'unless systematic theoretical analysis becomes part of Indian legal scholarship, the level of critique will remain limited and gender equality will continue to be an

afterthought rather than a core component of the law.'[1557] Therefore, a postcolonial feminist analysis helps create a more systematic critique that highlights the need for a reframing of the Indian legal frameworks surrounding violence against women in the private sphere. Secondly, a postcolonial feminist lens, to focus on private forms of sexual and gender-based violence, also provides novel and relevant contributions to the oft discussed public-private divide debate. Postcolonial feminism allows for an understanding of the colonial origins of this divide, along with its patriarchal appropriation in much of today's society. Rather than calling for the abolition of this divide on one hand or reinforcing it on the other, this research pushes for a re-evaluation of where the line between the two currently lie, and where this line should lie – particularly in following India's constitutional mandates of the right to equality and freedom from discrimination.

Following an introduction to both violence against women in India's private sphere and postcolonial feminism, the research brought attention to marital rape and dowry death as two specific forms of violence. These in-depth studies were conducted to provide detailed illustrations on how the dynamics touched upon in the previous chapters play out. While marital rape is an example of a form of violence where no laws exist, dowry death showcases a situation where the existing laws are proved insufficient and flawed. Within its discussions on marital rape, the research first elucidated the origins of and justifications for the absences in the legal framework surrounding this form of violence. It then provided an explanation for these insufficiencies through an examination of various social scripts and perceptions surrounding the marital rape immunity. This included Indian perceptions on marriage, the impossibility thesis, and pervasive rape myths.

[1557] Archana Parashar, 'Gender Inequality and Religious Personal Laws in India', (2008) 14 Brown Journal of World Affairs 2, 110.

The research on dowry death followed a similar structure, discussing the origins of this crime, its transformations and its addressal in Indian legal structures before social myths and perceptions within the private sphere were examined. These perceptions, which also affect law, were studied as an explanation for this rampant form of violence against women. In understanding dowry death, these social discourses primarily include various legal and social perceptions of marriage, as well as the roles dictated to the bride, the groom, and both the families. As with the scripts and perceptions on marital rape, a postcolonial feminist analysis of these discourses leads to an important examination of the effect that they have in isolating the private sphere from sufficient legal intervention. At the same time, these discourses still influence the public legal and social sphere in their response to the discussed violence. Therefore, the sections on marital rape and dowry death both highlight consequences of private, social narratives on the public, legal frameworks surrounding private forms of violence against women – such as the unproved misuse argument or harmful classifications of dowry deaths as accidents by legal and police officers.

After journeying through detailed sociolegal analyses of marital rape and dowry death, the final section of this research turned to an analysis of the Indian constitution and international human rights law. This analysis addressed constitutional and international avenues within such frameworks to address private forms of violence against women, as well as the inherent shortcomings of turning to the Indian constitution or international human rights law for violence in the private sphere. While examining the Indian constitution, the research particularly looked at the constitutional right to equality, freedom from discrimination, protection of life and personal liberty, and the fundamental duty ‘to renounce practices

derogatory to the dignity of women.'[1558] In looking at international human rights law, the research examined how such violence directly violates provisions within the CEDAW, DEVAW and the Istanbul Convention as well as how it indirectly violates international provisions for the prohibition against torture, the right to equality and the freedom from discrimination. The analysis concluded with a discussion on state responsibility, due diligence, and the public-private divide. This illustrates potential and evolving avenues for international bodies to address private forms of violence, along with the limitations of international law through its Western influences and the priority it places on forms of violence in the public sphere alone.

The components of this research add up to an understanding and analysis of the influence of the social and legal public-private divide on the Indian legal framework, which then contributes to the law's continued maintenance and reinforcement of violence against women in India's private sphere. In explaining these dynamics, the research utilises marital rape and dowry death to first showcase the weaknesses and absences in the current legal system, before using a postcolonial feminist lens to dissect relevant scripts and perceptions and draw connecting lines to depict their influence on Indian legal structures. This sociolegal study includes novel contributions to the relationship between postcolonial feminism and the social and legal public-private divide – especially regarding scripts and perception, violence against women and public, legal interventions into the private, social sphere. In this manner, the research also translates back to the broader field of women's rights law and contributes to discussions on how such rights can be sufficiently addressed, despite the reluctance of some states to interfere in forms of violence against women that they consider to be 'personal

[1558] The Constitution of India 1950. Part IVA, Article 51A(e).

matters.' Such a discussion has also been initiated within the research on marital rape and dowry death through a brief examination of the path towards change. However, while previous mentions focused on forms of private violence, the following section briefly explores the path towards change regarding violence against women in India's private sphere as a whole.

The Path Towards Change

Before concluding, this research seeks to sketch out a few legal and social interventions suggested by scholars, which could serve both short- and long-term solutions. To prevent repetition, this section will not focus on violence-specific reactions, interventions, or legislative change, nor will it further emphasise the ever-prevalent need for gender-sensitive trainings. Instead, it will briefly look at general recommendations for initiatives into legal implementation and enforcement before moving on to other civil, social, and state supported initiatives for change. This also ties into the overarching need for checks and amendments on sexual and gender-based violence related provisions, in the aim to work as perfectly as possible within an imperfect system.[1559]

[1559] As Pramila B, 'A Critique on Dowry Prohibition Act 1961' (2015) 76 Indian History Congress 849 mentions, 'changes should be brought out from time to time according to the circumstances.' Additionally, Deborah Kim writes that 'Codification runs a risk of entrenching legal norms into a statutory form that suffers from increasing obsolescence over time, and the permanence of a code itself becoming a barrier to reform. To avoid this, codes must be subject to periodic review and reform. In relation to the IPC, however, such review has rarely been a legislative priority. To prevent legal obsolescence, it has been suggested that lawmakers must make a commitment to 're-codification', as well as the continual critical reflection of how the codes impinges upon fundamental rights and responsibilities, including those derived from international human rights law.' Found in Deborah Kim, 'Marital Rape Immunity in India: Historical Anomaly or Cultural Defence?' (2018) 69 Crime, Law and Social Change 91.

As always, the social and legal elements of a socio-legal approach need to lie in a fine balance. For example, Jethmalani and Dey ask if, 'whether by "fetishizing" the law we have ignored the real needs of victims and their families for supportive structures, compensation, productive employment?'[1560] Therefore, speaking of sexual assault in intimate relationships, Randall and Venkatesh insist that 'calls for criminalization are necessarily situated within a broader agenda for structural change and an improvement of the social, economic, and political conditions that allow for gendered violence in the first place.'[1561] This works the other way around as well. Social measures taken to improve the conditions of Indian women also help fight myths and perceptions that encourage or sanction violence against women in the private social sphere and, in turn, reduce or challenge biases held by police and judicial enforcement personnel in the public legal sphere.

Legal Interventions

Police and judicial biases often reveal themselves in a 'cultural unwillingness to investigate instances of domestic violence.' [1562] For example, Kim writes about a 'selective under-enforcement' by which 'the police are often not interested in registering domestic violence as an offence, instead regarding it as a private family affair, even in cases involving dowry deaths and rapes.'[1563] Such realities showcase the need to 'reassess the forums from

[1560] Rani Jethmalani and P.K. Dey, 'Dowry Deaths and Access to Justice' (1995) in Kali's Yug: Empowerment, Law and Dowry Death 3.

[1561] Melanie Randall and Vasanthi Venkatesh, 'Why Sexual Assault in Intimate Relationships Must Be Criminalized as Required by International Human Rights Law: A Response to the Symposium Comments' (2015-2016) 109 AJIL Unbound 343.

[1562] Deborah Kim, 'Marital Rape Immunity in India: Historical Anomaly or Cultural Defence?' (2018) 69 Crime, Law and Social Change 91.

[1563] *ibid.*

which we seek gender justice.'[1564] This need could not have been made more clear than after an infamous statement by the former Delhi Police Commissioner, cited in Basu's article, that crimes against women would reduce by half if only they were 'careful in the way they dress, if they know their limits and if they do not exercise unsafe behavior.'[1565] Therefore, social and patriarchal codes of conduct clearly find their way into the consideration and execution of law as well. To combat this bias, Kaur and Byard recommend increasing accountability through 'an organized and multipronged approach' that investigates 'police officers, women's' welfare organizations, responsible public servants, and the judiciary with consistent applications of deterrent penalties.'[1566] Kapur and Singh also stress 'a need to establish gender task forces to clearly document the truth of bias in the courtroom.'[1567] Along with the courts, this is a viable course of action to understand and address bias in police stations as well. Additionally, many researchers identify the need to socially normalise and legally assist both divorce and economic independence for women so that leaving a marriage becomes a viable option for women facing violence in its various forms.[1568]

[1564] Nina Kapur and Kirti Singh, 'Practicing Feminist Law: Some Reflections,' (1994) 6 Student Advocate 35

[1565] Srimati Basu, 'Sexual Property: Staging Rape and Marriage in Indian Law and Feminist Theory' (2011) 37 Feminist Studies, 190.

[1566] Navpreet Kaur and Roger Byard, 'Bride Burning: A unique and ongoing form of gender-based violence' (2020) 75 Journal of Forensic and Legal Medicine 1.

[1567] n 1564 above.

[1568] Divorce is mentioned by Priya R. Banerjee, 'Dowry in 21st Century India: The Sociocultural Face of Exploitation' (2014) 15 Trauma, Violence and Abuse 1, 38 and Jane Rudd, 'Dowry-murder: An example of violence against women' (2001) 24 Women's studies international forum 5, 518, who also mentions the 'social taboo' of divorce. Divorce and Economic independence are mentioned by Angela Carlson-Whitley, 'Dowry Death: A Violation of the Right to Life Under Article Six of the International Covenant on Civil and Political Rights' (1994) Seattle University 651 and 663, who also writes how 'Indian society must make a place for single women.'

Social Interventions

Alongside legal implementation and enforcement, a vast array of social interventions is also necessary to help combat patriarchal and colonial discourses surrounding private forms of violence against women.[1569] These social measures may stand distinct or complement and spill into each other, as well as into the legal sphere. This section briefly initiates the conversation for potential social measures that particularly target sexual and gender-based violence in India's private sphere and its surrounding scripts. Such social movements must aim to create and support a change in 'the attitudes of Indian society toward women and their proper role, and it must address the societal factors that lead to domestic violence and murder.'[1570] This necessarily begins with a need to 're-examine the very basis of these institutions like marriage and family, the traditional understanding of which must give way to emerging definitions which permit women to assert their dignity and self worth even within the parameters of the family.'[1571] Any legal or social initiative necessitates a proportionate increase in awareness among married women regarding their rights and agency in order to garner the widespread utilisation of the initiatives. Bhat and Ullman recommend specifically designed prevention and interventions programmes that address marital violence 'within the unique context of family dynamics in India' in order to 'target norms and traditions condoning marital violence and engage men in preventing such VAW.'[1572] Kim also highlights that 'prevention is critically

[1569] As expressed in earlier addresses of the path towards change, these interventions include, but are not limited to, social movements, state-driven initiatives, community-led programmes, and awareness campaigns.

[1570] Angela Carlson-Whitley, 'Dowry Death: A Violation of the Right to Life Under Article Six of the International Covenant on Civil and Political Rights' (1994) Seattle University 662.

[1571] S Devika and T Mohan, 'Marital Rape and Criminal Law: Patriarchal Phantoms and Neutral Facades' (1991) 3 Student Advocate 19.

[1572] Meghna Bhat and Sarah Ullman, 'Examining Marital Violence in India: Review and Recommendations for Future Research and Practice' (2014) 15 Trauma, Violence, & Abuse, 71. They add that 'engaging men and the

important, and this can be promoted through raising social awareness about the nature of, and the harms caused by, patriarchal values in modern India, encouraging society to examine the true causes of gender discrimination and inequality.' [1573] This would also help educate many women, socialised to believe that violence is a part of their life, about a viable and attainable existence beyond their abuse.[1574] Dang, Kulkarni and Gaiha also importantly recommend 'using community networks, identifying change agents, and disseminating provocative messages through the media [to] at least bring intimate partner violence out of the private realm into the public eye.'[1575] The emphasis of such a transition from the hidden private to the open public is a crucial element for long-term and transformative social initiatives. In the context where, 'for many Indian families, maintaining the social fabric is much more important than pursuing legal avenues,'[1576] the widespread initiation, support and maintenance of such awareness and norm-challenging programmes would be an important first step towards community-led and substantive change.

State driven change outside legal deterrents requires a recognition of and response to absences in existing support systems for survivors of sexual and gender-based violence in the private sphere – whether they choose to seek criminal recourse or not. These include women's shelters, emergency clinics, crisis hotlines, reliable financial aid for legal recourse and structured legal and social support in general. Flavia Agnes berates the lack of evolution in

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community in efforts to promote healthy and meaningful dialogues about the impact of marital VAW may result in increased awareness and sensitivity.'

[1573] n 1562 above.

[1574] Biswajit Ghosh, 'How Does the Legal Framework Protect Victims of Dowry and Domestic Violence in India? A Critical Review' (2013) 18 Aggression and Violent Behaviour, 413.

[1575] Geetika Dang et al., 'Why Dowry Deaths Have Risen in India?' (2018) 3 ASARC Working Paper.

[1576] Zoe Brereton, 'Perpetuating myths of women as false complainants in rape cases in India: culture v The law' (2017) 41 International Journal of Comparative and Applied Criminal Justice 1-2, 42.

such support structures, where instead 'our only answer to the problem over the decades has been to provide "counselling," where the woman is advised to adjust, reconcile and "save the marriage" even at the cost of danger to her life, because nothing else exists for her outside.'[1577] Once again, this reliance on counselling reveals a limited and patriarchal understanding of the role and rights of women within the private sphere. Along with creating more gender-sensitive, responsive, and accessible support systems, the state should also consistently and increasingly fund and support local organisations addressing sexual and gender-based violence in their initiatives to do the same.

Avenues for Further Research

With its focus mainly on understanding the sociolegal factors behind a continued prevalence of violence against women in the private sphere, this research affords only a brief mention for social and legal avenues for change. Therefore, expanding this exploration of policy recommendations – based on the learnings of the research – serves as a viable and vital avenue for further research. The research findings, currently solely focused on private forms of violence, also invite further exploration into scripts and perception that affect violence against women in India's public sphere. Another important avenue in expanding on the presented research would be to create a more intersectional understanding of private forms of violence against women in general. In working towards such an understanding, further research has the opportunity to examine how a postcolonial feminist understanding of sexual and gender-based violence in the private sphere intersects with other factors such as class, caste, geographical location (urban spaces, rural spaces, specific states), education, and economic

[1577] Flavia Agnes, 'Section 498A, Marital Rape and Adverse Propaganda' (2015) L Economic and Political Weekly 23, 13.

independence – to name a few.[1578] For example, on the complicated relationship between education, employment and violence, Pallikadavath and Bradley highlight that 'women's education and marrying after the age of 18 years reduced the likelihood of experiencing physical domestic violence' even though, perhaps surprisingly, 'women's participation in paid employment increased the odds of them experiencing physical domestic violence.'[1579] This already serves to highlight the manifold nuances that enter the conversation once intersectional factors come into play. Speaking of another listed factor and its influence on transformative change, Sujata Gadkar-Wilcox writes how 'recognizing that the intersection of gender and class discrimination is at the heart of the problem of domestic violence is a necessary step to solving the problem of the lack of enforcement of laws criminalizing gender-based violence.'[1580] Similarly, Gita Mehrotra highlights how 'feminists of colo[u]r, in particular, have continually asserted that race, class, and gender are interlocking and interdependent oppressions that are simultaneously experienced.'[1581] Intersectionality, therefore, is a key element for conducting further research, and translating findings into real-life, substantive change.

This research hopes to have created a more nuanced understanding of the visible and hidden social and legal factors contributing to the continued sanction of violence against

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[1578] Mentioned by, among others, Sujata Gadkar-Wilcox, 'Intersectionality and the Under-Enforcement of Domestic Violence Laws in India' (2012) Penn. Law: Legal Scholarship Repository 473 and Deborah Kim, 'Marital Rape Immunity In India: Historical Anomaly Or Cultural Defence?' (2017) Crime, Law and Social Change. Gadkar-Wilcox also writes that 'while India's laws against domestic violence are generally under-enforced, the problem is exacerbated among the poorest and lowest caste women who do not have access to organizational support, education, or legal remedies.'

[1579] Saseendran Pallikadavath and Tamsin Bradley, 'Dowry, 'Dowry Autonomy' and Domestic Violence Among Young Married Women in India' (2018) 51 Journal of Biosocial Science 353.

[1580] Sujata Gadkar-Wilcox, 'Intersectionality and the Under-Enforcement of Domestic Violence Laws in India' (2012) Penn. Law: Legal Scholarship Repository 457.

[1581] Gita Mehrotra, 'Toward a Continuum of Intersectionality Theorizing for Feminist Social Work Scholarship' (2010) 25 Affilia: Journal of Women and Social Work 4, 418.

women in India's private sphere. In highlighting the private, social myths and perceptions that bleed into the supposedly separate public, legal sphere, the analysis above creates an awareness of the non-binary and interconnected nature of the public-private divide – as well as the disadvantages that women face when this divide is hijacked by colonial and patriarchal narratives. With the aim of building a firm foundation and creating a first step towards change, the success of this research will be determined by its contribution to an increased awareness and engagement on violence against women in India's private sphere and an understanding of how the law continues to – intentionally and unintentionally – excuse this abuse. Whether it be the issue of marital rape, dowry death, battering, honour killing, economic or psychological violence or any other private form of cruelty and abuse, it is now well beyond time that women have substantive legal and social support to feel safe and secure in their own home.

Appendices for Marital Rape

Appendix A: The Indian Penal Code 1860 – Sexual Offenses: Section 375, Section 376, Section 376B and Section 376C and Chapter XXA: Section 498A

Rape

[375. Rape.—A man is said to commit "rape" if he—

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

under the circumstances falling under any of the following seven descriptions:—

First.—Against her will.

Secondly.—Without her consent.

Thirdly.—With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly.—With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.—With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.—With or without her consent, when she is under eighteen years of age.

Seventhly.—When she is unable to communicate consent.

Explanation 1.—For the purposes of this section, “vagina” shall also include labia majora.

Explanation 2.—Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act: Provided that a woman who does not physically resist

to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1.—A medical procedure or intervention shall not constitute rape.

Exception 2.—Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.

Punishment for Rape

376.

Punishment for rape.— (1) Whoever, except in the cases provided for in sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which 1 [shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine].

(2) Whoever,—

(a) being a police officer, commits rape—

(i) within the limits of the police station to which such police officer is appointed; or

(ii) in the premises of any station house; or

(iii) on a woman in such police officer's custody or in the custody of a police officer subordinate to such police officer; or

(b) being a public servant, commits rape on a woman in such public servant's custody or in the custody of a public servant subordinate to such public servant; or

(c) being a member of the armed forces deployed in an area by the Central or a State Government commits rape in such area; or

(d) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution, commits rape on any inmate of such jail, remand home, place or institution; or

(e) being on the management or on the staff of a hospital, commits rape on a woman in that hospital; or

(f) being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; or

(g) commits rape during communal or sectarian violence; or

(h) commits rape on a woman knowing her to be pregnant; or

(j) commits rape, on a woman incapable of giving consent; or

(k) being in a position of control or dominance over a woman, commits rape on such woman; or

(l) commits rape on a woman suffering from mental or physical disability; or

(m) while committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman; or

(n) commits rape repeatedly on the same woman,

shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

376B.

Sexual intercourse by husband upon his wife during separation.—Whoever has sexual intercourse with his own wife, who is living separately, whether under a decree of separation or otherwise, without her consent, shall be punished with imprisonment of either description for a term which shall not be less than two years but which may extend to seven years, and shall also be liable to fine.

Explanation.—In this section, "sexual intercourse" shall mean any of the acts mentioned in clauses (a) to (d) of section 375.

376C.

Sexual intercourse by a person in authority.—Whoever, being—

(a) in a position of authority or in a fiduciary relationship; or

(b) a public servant; or

(c) superintendent or manager of a jail, remand home or other place of custody established by or under any law for the time being in force, or a women's or children's institution; or

(d) on the management of a hospital or being on the staff of a hospital,

abuses such position or fiduciary relationship to induce or seduce any woman either in his custody or under his charge or present in the premises to have sexual intercourse with him, such sexual intercourse not amounting to the offence of rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than five years, but which may extend to ten years, and shall also be liable to fine.

Explanation 1.—In this section, "sexual intercourse" shall mean any of the acts mentioned in clauses (a) to (d) of section 375.

Explanation 2.—For the purposes of this section, Explanation 1 to section 375 shall also be applicable.

Explanation 3.—“Superintendent”, in relation to a jail, remand home or other place of custody or a women's or children's institution, includes a person holding any other office in such jail, remand home, place or institution by virtue of which such person can exercise any authority or control over its inmates.

Explanation 4.—The expressions “hospital” and “women's or children's institution” shall respectively have the same meaning as in Explanation to sub-section (2) of section 376.

498A.

Husband or relative of husband of a woman subjecting her to cruelty.—Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation.—For the purposes of this section, “cruelty” means—

(a) anywilful 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.

Appendix B(1): The Constitution Of India 1950 – Part III: Fundamental Rights – Articles 15, 16 and 21

Right to Equality

14. The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

15.

(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to -

a. access to shops, public restaurants, hotels and places of public entertainment; or

b. the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

(3) Nothing in this article shall prevent the state from making any special provision for women and children.

(4) Nothing in this article or in clause (2) of article 29 shall prevent the state from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

(5) Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the state from making any special provision, by law, for the advancement of any socially

and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the state, other than the minority educational institutions referred to in clause (1) of article 30.]

Right to Freedom

21. No person shall be deprived of his life or personal liberty except according to procedure established by law.

Appendix B(2): The Constitution Of India 1950 – Part IVA: Fundamental Duties – Article 51A(e)

Fundamental Duties

51A(e) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women;

Appendix C: Report Of The Committee On Amendments To Criminal Law 2013 - Chapter iii: Article 72 – Article 80

Marital Rape

72. The exemption for marital rape stems from a long out-dated notion of marriage which regarded wives as no more than the property of their husbands. According to the common law of coverture, a wife was deemed to have consented at the time of the marriage to have intercourse with her husband at his whim. Moreover, this consent could not be revoked. As far back as 1736, Sir Matthew Hale declared: 'The husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself up in this kind unto her husband which she cannot retract'.

73. This immunity has now been withdrawn in most major jurisdictions. In England and Wales, the House of Lords held in 1991 that the status of married women had changed beyond all recognition since Hale set out his proposition. Most importantly, Lord Keith, speaking for the Court, declared, 'marriage is in modern regarded as a partnership of equals, and no longer one in which the wife must be the subservient chattel of the husband.'

Appendices for Dowry Death and Bride Burning

Appendix A: The Dowry Prohibition Act 1961 – Section Two, Three, Four, Six, Seven and Eight

2. Definition of `dowry'.

In this act, `dowry' means any property or valuable security given or agreed to be given either directly or indirectly:

a. by one party to a marriage to the other party to the marriage; or
b. by the parents of either party to a marriage or by any other person, to either party to the marriage or to any other person; at or before or any time after the marriage in connection with the marriage of said parties but does not include dower or mahr in the case of persons to whom the Muslim Personal Law (Shariat) applies.

Explanation II.-The expression `valuable security' has the same meaning as in Sec. 30 of the Indian Penal Code (45 of 1860).

3. Penalty for giving or taking dowry.

(1) If any person, after the commencement of this Act, gives or takes or abets the giving or taking of dowry, he shall be punishable with imprisonment for a term which shall not be less than five years, and with the fine which shall not be less than fifteen thousand rupees or the amount of the value of such dowry, whichever is more:

Provided that the Court may, for adequate and special reasons to be recorded in the judgment, impose a sentence of imprisonment for a term of less than five years.

(2) Nothing in sub-section (1) shall apply to or, in relation to,-

presents which are given at the time of a marriage to the bride (without nay demand having been made in that behalf):

Provided that such presents are entered in list maintained in accordance with rule made under this Act;

Provided further that where such presents are made by or on behalf of the bride or any person related to the bride, such presents are of a customary nature and the value thereof is not excessive having regard to the financial status of the person by whom, or on whose behalf, such presents are given.

4. Penalty for demanding dowry.

(1)If any person demands directly or indirectly, from the parents or other relatives or guardian of a bride or bridegroom as the case may be, any dowry, he shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to two years and with fine which may extend to ten thousand rupees:

Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than six months.

6. Dowry to be for the benefit of the wife or heirs.

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

a. if the dowry was received before marriage, within three months after the date of marriage; or

b. if the dowry was received at the time of or after the marriage within three months after the date of its receipt; or

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

(2) If any person fails to transfer any property as required by sub-section (1) within the time limit specified therefor or as required by sub-section(3), he shall be punishable with imprisonment for a term which shall not be less than six months, but which may extend two years or with fine which shall not be less than five thousand rupees, but which may extend to ten thousand rupees or with both.

(3) Where the woman entitled to any property under sub-section (1) dies before receiving it, the heirs of the woman shall be entitled to claim it from the person holding it for the time being:

if she has no children, be transferred to her parents, or

if she has children, be transferred to such children and pending such transfer, be held in trust for such children.

(3-A) Where a person convicted under sub-section (2) for failure to transfer any property as required by sub-section (1)or sub-section (3) has not, before his conviction under that sub-section, transferred such property to the women entitled thereto or, as the case may be, her heirs, parents or children, the Court shall, in addition to awarding punishment under that sub-section, direct, by order in writing, that such person shall transfer the property to such woman, or as the case may be, her heirs, parents or children within such period as may be specified in the order, and if such person fails to comply with the direction within the period so specified, an amount equal to the value of the property may be recovered from him as if it were a fine imposed by such Court and paid to such woman, as the case may be, her heirs, parents or children.

(4) Nothing contained in this section shall affect provisions of Sec. 3 or Sec. 4.

7. Cognisance of offences.

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2of 1974),- no Court inferior to that of a Metropolitan magistrate or a Judicial Magistrate of the first class shall try any offence under this Act; no Court shall take cognizance of an offence under this Act except upon –

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

ii. a complaint by the person aggrieved by offence or a parent or other relative of such person, or by any recognized welfare institution or organization:

Explanation.- For the purposes of this sub-section, "recognised welfare institution or organization" means a social welfare institution or organization recognized in this behalf by the Central or State Government.

(2) Nothing in Chapter XXXVI of the Code of Criminal Procedure, 1973 (2of 1974), shall apply to any offence punishable under this Act.)

Notwithstanding anything contained in any law for the time being in force, a statement made by the person aggrieved by the offence shall not subject such person to a prosecution under this Act.

8. Offences to be congnizable for certain purposes and to be bailable and non-compoundable.

(1) The Code of Criminal Procedure, 1973 (2 of 1974) shall apply to offences under this Act as of they were cognizable offences-

a. for the purpose of investigation of such offences; and

b. for the purpose of matters other than-
   i. matters referred to in Sec. 42 of that Code, and
   ii. the arrest of person without a warrant or without an order of a Magistrate.

(2) Every offence under this Act shall be non-bailable and non-compoundable.

8-A. Burden of proof in certain cases: Where any person is prosecuted for taking or abetting the taking of any dowry under Sec. 3, or the demanding of dowry under Sec.4, the burden of proving that he had not committed an offence under those sections shall be on him.

8-B. Dowry Prohibition Officers:

(1) The State Government may appoint as many Dowry Prohibition Officers as it thinks fit and specify the areas in respect of which they shall exercise their jurisdiction and powers under this Act.

(2) Every Dowry Prohibition Officer shall exercise and perform the following powers and functions, namely, -

a. to see that the provisions of this Act are complied with;

b. to prevent, as far as possible, the taking or abetting the taking of, of the demanding of, dowry;
c. to collect such evidence as may be necessary for the prosecution of persons committing offences under the Act; and
d. to perform such additional functions as may be assigned to him by the state Government, or as may be specified in the rules made under this Act.

(3) The State Government may, by notification in the official Gazette, confer such powers of a police officer as may be specified in the notification, the Dowry Prohibition Officer who shall exercise such powers subject to such limitations and conditions as may be specified by rules made under this Act.

(4) The State Government may, for the purpose of advising and assisting the Dowry Prohibition Officers in the efficient performance of their functions under this Act, appoint an advisory board consisting of not more than five social welfare workers (out of whom at least two shall be women) from the area in respect of which such Dowry Prohibition Officer exercises jurisdiction under sub-section (1).

Appendix B: Indian Evidence Act 1872 – Section 113A and 113B

113A. Presumption as to abetment of suicide by a married woman.—

When the question is whether the commission of suicide by a woman had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of

her husband had subjected her to cruelty, the Court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband.

Explanation.—For the purposes of this section, "cruelty" shall have the same meaning as in section 498A of the Indian Penal Code (45 of 1860).

113B. Presumption as to dowry death.—

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

Explanation.—For the purposes of this section, "dowry death" shall have the same meaning as in section 304B, of the Indian Penal Code, (45 of 1860).

Appendix C: The Code of Criminal Procedure 1973 – Section 198A

198A. Prosecution of offences under section 498A of the Indian Penal Code.

No Court shall take cognizance of an Offence Punishable section 498A of the Indian Penal Code except upon a police report of facts which constitute such offence or Upon a complaint made by the person aggrieved by the offence or by her father, mother, brother, sister or by her

father' s or mother' s brother or sister or, with the leave of the Court, by any other person related to her by blood, marriage or adoption.

Appendix D: The Indian Penal Code 1860 – Chapter XVI: Section 302, 304B, 306 and Chapter XXA: Section 498A

302. Punishment for murder.

Whoever commits murder shall be punished with death, or imprisonment for life, and shall also be liable to fine.

304B. Dowry death.

(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.

Explanation.-For the purposes of this sub-section, "dowry" shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).

(2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.

306. Abetment of suicide.

If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

498A. Husband or relative of husband of a woman subjecting her to cruelty.

Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation. — 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.

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