



# **VIOLENCE, GENDER AND THE STATE**

***NOT JUST A LEGAL ANALYSIS***

Saumya Uma



ROUTLEDGE



“This book by Prof. Saumya Uma is an encyclopaedic work that will be of immense value to all those working on violence against women and seeking to understand the reasons for the failure of the legal system to provide justice to the women victims/survivors of crimes against them.”

**Prof. (Dr.) V.S. Elizabeth**, *Vice-Chancellor, Tamil Nadu National Law University, India*

“This book addresses an urgent need. Various forms of gender-based violence exist, affecting women negatively, particularly those with marginalised identities. How does one make law *real* for all women? The author discusses this from many angles with clarity.”

**Justice Prabha Sridevan**, *Judge Madras High Court (Retd)*

“*Violence, Gender and the State* is not *just* a legal analysis but a brave coverage of herculean challenges facing women in contemporary India. It shows the way forward in the collective pursuit of justice.”

**Adv. Sophia Khan**, *Director, Social Action Forum Against Repression*



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# Violence, Gender and the State

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This book examines the adequacy of laws in India as a response to sexual and gender-based violence against women.

It addresses questions such as: is law doing enough in responding to violence against women in India? Where are the barriers and bottlenecks, particularly for women from marginalised communities? What can be done to ensure that justice is rendered? Based on women's experience of violence, not solely on the basis of gender but a combination of caste, class, and religious and gender identities, the book examines law as a response to gendered violence against women in India through the lens of intersectionality. It combines socio-legal and feminist analyses of relevant statutes on sexual and gender-based violence, their judicial interpretations, their implementation by law enforcement agencies, and their ramifications for women's lives.

This book will be of interest to academics, research scholars, and students in a range of disciplines, including law, women's studies, gender and sexuality studies, victimology, sociology, political science, and human rights. It will also be useful for policymakers, advocates, judicial officers, paralegal workers, women's rights campaigners, non-profit organisations and, globally, anyone interested in and concerned with justice for women in India.

**Dr. Saumya Uma** is a Professor of law and heads the Centre for Women's Rights at the Jindal Global Law School, O.P. Jindal Global University, India. She teaches, writes, and speaks at the intersections of gender, human rights, and the law.



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Saumya Uma

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Dedicated to all victims and survivors of sexual  
and gender-based violence, acknowledging their courage  
and tenacity.

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# Foreword

*Swarna Rajagopalan\**

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For more than 15 years, my organization, Prajnya, has been working to create public awareness around sexual and gender-based violence – what it is, what forms it takes, why it happens, what help is available, and what legal remedies obtain. We had set out to document women’s work in the public sphere – as politicians and social workers, bureaucrats and activists, and in public professions – but women’s entry into the public sphere and, more fundamentally, public spaces, is delimited by the fear of violence. This reality drew us into working in public education on gender-based violence.

I write about us to point to a gap that this book fills. Our team, like many others, came into this work only with the knowledge of how real this fear of violence was in our own lives. “Please call when you get home”. “Don’t go alone; let’s do this in pairs”. “Okay, that speaker you propose has a history of harassment”. “We had a colleague who . . .”. Violence – its histories, its threat – was pervasive. We knew a little about the law. We had heard something about the numbers. Everything we know now, we have taught ourselves – a little from here, a little from there. A book like this would have been very useful.

Saumya Uma’s book fills this resource gap with the astounding lucidity and acuity that I have come to associate with her over our long professional association. It is a book about law. But it is a book about law in the context of society. This rich monograph is a primer for understanding laws addressing sexual and gender-based violence in India in the socio-political context where they must work.

Law in this book does not have an impersonal, gender-neutral, ever-impartial, and divinely irreproachable presence to which we must defer. Rather, it is presented to us as a malleable, even shapeshifting, set of instruments that we sometimes use adroitly as they are meant to be used; sometimes bend and distort to our purpose, and that sometimes express values we do not as yet understand or interpret as intended. This book is for lawyers who want a quick contextualization of the law; for non-lawyers who want an introduction to what the law says and how it has worked; and for all citizens, who are at pains to understand why after almost eight decades, we have still

not found an effective and sensitive way to respond to the commonplace reality of sexual and gender-based violence.

Indian efforts to address sexual and gender-based violence have historically looked first to the law for solutions, whether it was the social reform movements of the nineteenth century in their response to Sati, widow remarriage, and child marriage or the women's movements of the twentieth century. The belief that somehow having a law and an available punishment would automatically end violent discriminatory practices also characterises contemporary media and public responses to incidents of violence. Is there a law, we ask? Yes; there is. But then, why did the victim not go to the police? Why did they not tell anyone? People are corrupt, people are incompetent! All our complaints circle around non-existent laws and their shoddy implementation as if we, the people, had nothing to do with the culture of violence.

The narrative of this book breaks that separation between who we are, how we are, and what the law can do. It takes an intersectional approach, highlighting in each chapter the universality of violence, the peculiarity of each category of violence, and the distinctive experiences of vulnerability and trauma at every identity standpoint. Each of us occupies a unique intersectional location, experiencing privilege in some ways and vulnerability in others, so that we might be responsible for perpetrating, ignoring, justifying, or invisibilising some forms of violence even as we fear and guard ourselves from others. While the book's conclusion squarely points to state responsibility in preventing violence, in taking an intersectional approach to law and reparation, the analyses in each chapter make it hard to escape our collective complicity. The laws work when we take recourse to them and let them work, to put it simply. Recourse to legal remedies is determined by our collective comfort (or discomfort) with normalising violence; how can a state change that?

I started reading the conclusion with this scepticism borne of our years of public education in this area. Violence stems from how we think about each other and our need to assert our dominance. It is enabled by us when we ignore or trivialise it or refuse to recognise the violence our discriminatory practices perpetrate. But this is in our hearts and minds; what can the state actually do about this? Moreover, what can we do with states embedded in patriarchal societies and run by a misogynistic political class? Feminists push for better laws, better implemented even as we struggle with our despair over the lack of institutional (and public) will to actually change society. Feminists also critique and challenge the violence inherent in the state's nature and structure, calling out its own role as a predator. The culture of rape is a chronic condition in a patriarchal society; how can a state intervene without violating the freedom of thought and expression and the right to privacy?

Saumya Uma points to three areas where the state can engage strategically to transform the context of legal implementation: addressing the root causes of conflict, integrating intersectional approaches in law, and adopting

a reparative approach to justice. These are also entry points for feminist and broader citizen engagement with the state in the spaces of making, implementing, interpreting, and applying the law. What this state-civil society engagement should be like is outside the scope of this book and up to public educators and advocates to ideate and design.

What can you expect as you start to read this book? Saumya Uma opens with a problem statement that is potent, seething with anger, and dripping with erudition. The continuum of violence – private to public; interpersonal to institutional; cultural, socioeconomic, and structural – is laid out, illustrating her intersectional approach. Her discussions of crimes in the name of ‘honour’, family violence, violence in public spaces and by institutions, mass violence, and cyber-violence weave one into another, showing us that no single form stands in isolation of the enabling and impunity of the others. Because ultimately this is a book about law, her conclusions lead us to the state – not expecting it to transform and deliver a glorious, egalitarian society, but pragmatically pointing to potential action points within its structure and processes.

\* Dr. Swarna Rajagopalan is a political scientist, peace educator, and founder of Prajnya Trust, India.

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This book has drawn upon the existing literature, experiences, and narratives of victims and survivors of sexual and gender-based violence from secondary sources, as well as of lawyers and scholars of social sciences and the law. There are too many to name, but I express my deep gratitude to all of them.

The research drew from the Gender Violence Reports 2021 and 2022 of The Prajnya Trust, which provided a framework and direction. The Feminist Law Archives of Partners for Law in Development, which chronicle the engagement of women's movements with the law, and the Committee on the Elimination of Discrimination Against Women (CEDAW) South Asia provided rich resources during the phase of researching for this book. The Lawyer's Collective's Women's Rights Initiative's annual monitoring and evaluation reports provided useful insights on the status of implementation of the domestic violence law in India. The research and publications of Majlis, particularly the 'Defending Women' series, as well as 'Negotiating Spaces' conferences and reports of the same, were instructive in understanding women's and girls' lived experiences and dilemmas faced inside and outside courts of law. The National Alliance of Women's (NAWO's) shadow reports for the CEDAW committee and reports of All India Dalit Mahila Adhikar Manch also provided rich resources for the book. The online portal of The Working Group of India and the UN Working Group on Human Rights (WGHR) were useful for research related to India's compliance with international human rights standards. I am grateful to the organisations/networks and teams that made the resources available on these websites, led by Flavia Agnes and Audrey D'Mello, Henri Tiphagne, Indira Jaising, Madhu Mehra and Vimal Thorat.

The contents of this book were shaped by numerous conversations with my co-travellers – feminists, human rights activists, lawyers and law academics, social science educators and scholars, and many young colleagues whose freshness in thought and clarity in articulation I deeply admire. Several of them brainstormed ideas and chapterisation with me from 2019, challenged my analysis, provided alternative ways of articulation, pointed out new bills, judgments, and other relevant resources, read and reread the draft chapters

at different stages and gave me their suggestions, shared with me the happenings in courts of law, in communities and in families, obtained for me certain unreported judgments so that I could read, analyse, and add my analysis in the book, and helped with Hindi judgments so that I do not miss out on the nuances due to my own lack of proficiency in the language. These include Abha Bhaiya, Aditya Kamath, Bishakha Bhanja, Geeta Ramashan, Gowthaman Ranganathan, Hasina Khan, Manisha Mashaal, Manjula Pradeep, Niharika Banerjea, Niti Saxena, Rebecca John, Rita Manchanda, Rukmini Sen, Sameena Dalwai, Saptarshi Mandal, Sneha Mishra, Sophia Khan, Surabhi Singh, Swarna Rajagopalan, Veena Gowda, Vijay Hiremath, Vrinda Grover, and Warisha Farasat. I am eternally grateful to all of them and am proud of the feminist culture of love and labour learnt through feminist methods of doing activism, which I have imbibed from and with many of them.

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## Abbreviations & Acronyms

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@	Alias
Adv.	Advocate
AFSPA	Armed Forces (Special Powers) Act, 1958
AIDWA	All India Democratic Women's Association
AIR	All India Reporter
ANI	Asian News Institute
AP	Andhra Pradesh – a state in India
Art.	Article
BJP	Bharatiya Janata Party – political party of the Hindu Right
CAT	UN Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, 1984
CBI	Central Bureau of Investigation
CEDAW	UN Convention on the Elimination of All Forms of Discrimination Against Women, 1979
CEDAW Committee	A UN treaty body established under the CEDAW
CERD	International Convention on the Elimination of All Forms of Racial Discrimination, 1965
CJI	Chief Justice of India
CLA	Criminal Law Amendment
CPED	International Convention for the Protection of All Persons from Enforced Disappearance, 2006
CrPC	Code of Criminal Procedure, 1973
CRC	UN Convention on the Rights of the Child, 1989
CRPD	Convention on the Rights of Persons with Disabilities, 2006
CSDS	Centre for the Study of Developing Societies
CSPSA	Chhattisgarh Special Public Safety Act, 2005
DEVAW	UN Declaration on Elimination of Violence Against Women, 1993

DNA	Deoxyribonucleic acid
DPA	The Dowry Protection Act, 1961
DV	Domestic violence
Ed.	Editor
Eds.	Editors
FIR	First Information Report
GBVAW	Gender-based Violence Against Women
HC	High Court
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights, 1966
ICESCR	International Covenant on Economic, Social, and Cultural Rights, 1966
IEA	Indian Evidence Act, 1872
IIPS	International Institute for Population Sciences
ILC	International Law Commission
IMTFE	International Military Tribunal for the Far East
IPC	Indian Penal Code, 1860
IPV	Intimate Partner Violence
IT Act	The Information Technology Act, 2000
ITPA	The Immoral Traffic (Prevention) Act, 1956
LCI	Law Commission of India
LGBTQIA+	An acronym used to signify Lesbian, Gay, Bisexual, Transgender, Queer/Questioning, Intersex, Asexual people and communities collectively
MLA	Member of the (state) Legislative Assembly
MP	Madhya Pradesh – a state in India
MRE	Marital Rape Exception
NAWO	National Alliance of Women
NCRB	National Crime Records Bureau
NCW	National Commission for Women – a statutory body
NFHS	National Family Health Survey – a survey conducted by the government of India
NFHS-5	Fifth National Family Health Survey
NGO	Non-governmental organisation
NHRC	National Human Rights Commission – a statutory body
PIL	Public Interest Litigation
PO	Protection Officer
POA	The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989
POCSO	The Protection of Children from Sexual Offences Act, 2012

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<b>POSH Act</b>	The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013
<b>PTI</b>	Press Trust of India
<b>PUCL</b>	People's Union for Civil Liberties
<b>PWDVA</b>	Protection of Women from Domestic Violence Act, 2005
<b>RICE</b>	Research Institute for Compassionate Economics
<b>RSS</b>	Rashtriya Swayamsevak Sangh – the ideological organisation of the Hindu Right
<b>SAARC</b>	South Asian Association for Regional Cooperation
<b>s.</b>	Section
<b>Ss.</b>	Sections
<b>SC</b>	Scheduled Castes
<b>SC</b>	Supreme Court
<b>SCC</b>	Supreme Court Cases
<b>SGBV</b>	Sexual and gender-based
<b>SIT</b>	Special Investigation Team
<b>SMA</b>	The Special Marriage Act, 1954
<b>SLP</b>	Special Leave Petition
<b>SP</b>	Superintendent of Police
<b>SRVAW</b>	UN Special Rapporteur on Violence Against Women
<b>ST</b>	Scheduled Tribes
<b>TCF</b>	Tripartite Cybercrime Framework
<b>TP Act</b>	The Transgender Persons (Protection of Rights) Act, 2019
<b>UAPA</b>	Unlawful Activities (Prevention) Act, 1967
<b>UDHR</b>	Universal Declaration of Human Rights
<b>UN</b>	United Nations
<b>UP</b>	Uttar Pradesh – a state in India
<b>UPR</b>	Universal Periodic Review
<b>v.</b>	Versus
<b>VAW</b>	Violence against women
<b>VPN</b>	Virtual Private Network
<b>WP</b>	Writ Petition

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# Glossary

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**Adivasi** Literally means original inhabitants and refers to indigenous peoples. In law, they are included among Scheduled Tribes.

**Amicus curiae** Friend of the court and court-appointed independent expert.

**Bona fide** In good faith.

**Brahminism** The hegemonic Hindu religious tradition from the Vedic period.

**Chhed Chaad** Sexual harassment, but expressed in a manner that trivialises the offence.

**Dalit** The term means “oppressed people” and refers to persons belonging to a category at the lower end of the caste system, considered untouchables.

**Dharma** Duty.

**Devadasis** Literally translated as female servants of god; are usually pubescent girls who were traditionally dedicated to a temple deity (without their consent).

**Ex parte order** Orders passed by a court without issuing notice to the accused/defendant and hearing them, in exceptional circumstances.

**Eve teasing** Sexual harassment, but expressed in a manner that trivialises the offence.

**Gunda** Goon/thug.

**Habeas Corpus** Literally means produce the body; a legal mechanism for redress in contexts of illegal detention.

**Hindutva** Ideology and political formation of the Hindu Right.

**In camera** In closed court.

**Izzat** Connotes high respect, recognition, acceptability, and honour.

**Jogini** A region-specific title that connotes the *Devadasi* tradition.

**Katta Panchayats** Informal alternative dispute resolution mechanism in the state of Tamil Nadu.

**Khap Panchayats** Informal alternative dispute resolution mechanism in the North Indian states of Haryana, Madhya Pradesh, Rajasthan, and Uttar Pradesh.

- Lok Sabha** Lower House of the Indian Parliament.
- Love jihad** An unproven conspiracy theory popularised by the Hindu Right to label all Hindu-Muslim romantic relationships as fraudulent ones.
- Mala fide** In bad faith.
- Mangal sutra** A symbolic piece of jewellery wore by married women on their neck.
- Manusmriti** An ancient Hindu text written by Manu – a lawgiver.
- Panchayats** Village council.
- Paramilitary forces** The paramilitary forces are agencies of the government of India that work in close collaboration with the armed forces in its work. The paramilitary forces have several components such as the Assam Rifles, Rashtriya Rifles, Special Frontier Force, Central Industry Security Force, Border Security Force (BSF), National Security Guards (NSG), and Indo Tibetan Border Police (ITBP). The Central Reserve Police Force (CRPF) is the largest para-military force and assists the work of the police. They are controlled by the Ministry of Home Affairs or the Ministry of Defence, Government of India.
- Paraya dhan** Stranger to the natal family.
- Parens patriae** A legal concept by which the court assumes the role of a parent and protects individuals who are unable to protect themselves.
- Pativrata** The specific *dharma* of the Hindu wife.
- Rahmah** Compassion.
- Rajya Sabha** Upper House of the Indian Parliament.
- Rakhi** Sacred thread tied by the sister to the brother, on the day of Raksha Bandhan, symbolising that he will protect her lifelong.
- Sagotra** Inter-clan.
- Sakha** Symbol of married woman.
- Sapinda** A common ancestor within prescribed generations. Such a relationship is prohibited under Hindu law.
- Seerthirutha marriage** Reformatory marriage – refers to a form of marriage with simplified and secular rituals.
- Sindoor** Symbol of married woman.
- Shalishi adalat** Informal alternative dispute resolution mechanism in the state of West Bengal.
- Stridhan** Literally translated as a woman's property.
- Suo motu** On its own initiative.
- Suyamariyathai** Self-respect marriage – refers to a form of marriage with simplified and secular rituals.
- Thaali** A symbolic piece of jewellery worn by married women on their neck.

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# Introduction

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*Trigger Warning: This chapter contains instances of physical and sexual violence against women.*

Rampant impunity exists for violence against women in India.<sup>1</sup> The brazenness with which sexual and gender-based violence (SGBV) is perpetrated on women is matched proportionately by the futility of achieving justice. This, despite the Indian Constitution, rule of law, and democracy that India is positively associated with. The Constitution states that untouchability is abolished, yet day after day, Dalit women are brutally attacked, humiliated, and killed by men from dominant castes. Landmark judgments that decriminalised homosexuality and upheld transgender rights are hailed, yet homophobic and transphobic crimes against women continue. India's secularism is celebrated globally, yet women belonging to religious minorities are targeted for heinous forms of violence in contexts of mass crimes. Despite a constitutional guarantee of gender equality and non-discrimination, women continue to be killed in their homes, and attacked and harassed in public places, institutions, workplaces, and in the cyberspace. This is the 'incredible' India, filled with power and privilege, and the looming gaps between the written law and the lived experiences of women.

In this 'incredible' India, the security State that weaponizes the law is back on a ramp walk with a cheering populace. Accountability is on a retreat while brazenness is the mantra of the day. The ideas that we need stronger laws, higher punishments, quick fixes and short cuts in procedural fairness, increased policing, and increased concentration of power in law enforcement officials with fewer or no checks and balances – all in the larger interests of society – have permeated the walls of institutions of law that are intended to provide redress for SGBV against women. A powerful state controls families and communities, which, in turn (and in addition), police women. The family, community, and the State, along with the market, play a collective and

well-coordinated gig that flouts the law with impunity, with women paying the price for it.

The benevolent State's protectionist policies on gendered violence against women are insidious and infested with double standards and contradictions. Women being killed by their live-in partners is a 'legitimate' State interest, but extreme and everyday forms of domestic violence and dowry harassment warrant little intervention because, after all, those women are vengeful liars! When women choose their intimate partner, transgressing religious boundaries, the State claims legitimacy in enacting a legislation to prevent the marriage, protect the 'gullible and innocent' women from 'devious' men of 'other' communities, but when women are killed by their own families for asserting their autonomy, family is the victim, not the woman! Women who are raped by strangers must resist the violence, even at the risk of being killed, but women raped by their husbands should not ask for the criminal law to recognise the same as an offence in the interests of preserving the institution of marriage!

The contradictions and double standards make law an important site of contestation and engagement for women. Law is often drafted and manipulated by the powerful in a manner that scuttles justice, boomerangs on the victims and projects them as the perpetrators and the perpetrators as victims, thereby deterring the victims from accessing mechanisms of justice. In the case of women, law and legal processes are often used as instruments of oppression – by framing women as liars and dismissing their allegations as fictitious, by insinuating their 'character' to discredit them, by punishing them for transgressing societal norms and seeking justice, through threat or coercion to silence them, by negating their agency and infantilising them, by institutional apathy and bias that forces women to retract from their complaints, and by questioning their *bona fides* in approaching a court for justice. This is more so in the case of Dalit and *Adivasi* women, women from religious minority communities, women with disabilities, and trans and queer women. Simultaneously, laws can also be tools for maintaining the status quo in society by historically privileged and dominant groups. Caste, class, religious, and gender biases get institutionalised against the historically oppressed groups in order to perpetuate their subordinate social and legal status.

Yet, law impacts women's lives substantially and is too powerful to be ignored. More so when they are targets of SGBV. Law has the potential, questionably, to be used as a tool in the pursuit of justice. Law creates a normative standard that can be advocated for in asserting one's individual and collective rights. When women experience violence, which law prohibits and provides redress for, it has the potential to validate and restore women's self-esteem and self-dignity. Law may also help prevent violence, at least in the short run. Law also creates oversight mechanisms that are useful in holding errant officials accountable for their actions and inactions.

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## **The Conundrum of 'Justice' for Women Through the Law**

Engaging with the laws and legal mechanisms of the hypermasculine, hegemonic, and repressive Indian State have been fraught with challenges and dilemmas for women. This is more pronounced in the case of criminal laws that come into play in the context of SGBV against women, where the State has a prominent and a dominant role from the time of registration of the complaint to investigation, prosecution, trial, judgment, sentencing, and afterwards.

Despite a clear mandate of state responsibility that is provided by the Indian Constitution and international human rights standards, when the legislature passes legislations that are anti-women directly or indirectly; when law enforcement agencies act maliciously in their failure to register offences accurately, investigate sincerely and thoroughly, and implement the law in the manner it is intended to be; and when the judiciary interprets the laws in a biased manner that controverts the interests of women, the three arms of the State fail to discharge state responsibility.

In this light, should a woman who has been subjected to violence pursue justice through the law? Would the process itself become a punishment for her rather than restore her dignity and heal her from the harm and trauma that she experienced? Is her character likely to be assassinated in the process, causing her more harm than when the legal process began? How can she maintain a semblance of control over her experiences and her narrative, if at all, once the police intervenes and the incident and her experience of violence are transformed into a 'case'? What advice should one give a woman who has faced violence – to engage with the criminal legal system or to find other ways of healing and coping? Additional questions emerge through a critical engagement with law: is law doing enough in responding to violence against women in India? Does law deliver justice for women, given that the idea of justice is a gendered, non-homogenous experience that law tries to homogenize? Why are women struggling in their pursuit of justice as a redeeming, restorative entity? Where are the barriers and bottlenecks, and why are they more formidable for women with intersectional, marginalised identities? What can be done to ensure that justice is rendered? In short, between a repressive State that weaponises the law and law as the last straw for women facing violence, how do we navigate in a manner that women get a semblance of justice? What can be done to make justice 'real' for all women?

This is the dilemma I have faced over the past 29 years of my professional journey, from a starry-eyed law graduate with idealism about using law for social injustices, to an oscillation between cautious optimism, hope, and despair while donning varied roles – as a practicing lawyer representing women in courts of law, as a trainer, researcher, activist, campaigner, and academic working at the intersections of law, gender, and human rights. This book is my attempt to earnestly address this dilemma. The book is shaped by



my professional trajectory – my observations of the gap between the written law, the avatar it takes in courts of law, and the ground realities of women's lived experiences; the existential questions it posed for me as a lawyer; my interactions with victims of violence during litigation and field research and their expectations of and faith in justice; and animated engagements with a new generation in the classroom with its own modern/post-modern notions of gender equality.

Although several women-centric laws existed prior to 2012, the homicidal gang rape of a young paramedic in a moving bus in Delhi in December 2012 was a wake-up call that much more needed to be done. It triggered public protests, discourse, deliberations, advocacy campaigns, and law reform initiatives on sexual violence and certain other aspects of violence. In a Thomson Reuters Foundation survey of 2018, based on a survey of 548 experts on women's issues, India was ranked the most dangerous country for women due to a high incidence of sexual violence and slave labour (Goldsmith & Beresford, 2018). While this was dismissed by the Indian government as an 'opinion poll', and others critiqued the methodology adopted by the survey, an outcome of the survey was that it placed India in the global spotlight on violence against women (MCD, Government of India, 2018; John, 2018). This infused and triggered public scrutiny and interest in discourses on SGBV against women in India and the role of the law, both domestically and internationally. The ideation for this book arose partially from the need to address this curiosity and concern.

### **Aims**

As explained by Smith (2005, p. 90), feminist jurisprudence in the contemporary context focusses on three issues:

- a) To identify sources of bias and injustice within the law;
- b) To find ways to use law to achieve justice for women; and
- c) To identify, address, and critique 'devices of denial, subversion, and containment that pose barriers to reform'.

This book aims to focus on all three aspects in relation to SGBV against women in India. The forms of violence that this book addresses are 'honour' crimes, violence by and within the family, violence by and within the community, mass crimes and institutional violence, and violence in the cyberspace.

Mindful of an Indian and global readership for the book, this work aims at striking a balance between a descriptive approach that provides an outline of relevant legal statutes and their provisions and an analytical approach that examines their judicial interpretations, implementation by the law enforcement agencies, and ramifications for women's lives. In each of the chapters,

the normative framework of law is juxtaposed with ground realities and lived experiences of women to highlight the chasm that exists and the challenges to justice that it poses. Additionally, it aims at foregrounding the feminist theoretical framework and Indian women's movements' engagements with the law.

### **Gendered Violence Against Women and Brahminical Patriarchy**

In the Indian context, most often, a woman's experience of violence is not solely on the basis of her gender. The targeting of violence, its typology and brutality, as well as the (un)responsiveness of the legal system are influenced by her combined caste, class, religious, and gender locations. Hence, the only meaningful manner in which law as a response to SGBV against women can be examined is by using the lens of intersectionality. Prominent among them is the role of the caste system.

Indian feminists have coined the term 'Brahminical patriarchy' to mean "an attempt to maintain patrilineal succession as well as caste purity through the control of women's bodies and agencies" (Chakravarti, 1993). Dr. B.R. Ambedkar spoke and wrote about the interlinkages between caste and gendered violence against women, which were further discussed and elaborated by Rege (2013). Rege placed the responsibility on the systematic erosion of status of women on the Hindu law giver, Manu, as well as on Brahminism. Feminist research has indicated that SGBV against Dalit women are often perpetrated by men from the hegemonic dominant castes who exercise their caste privilege. SGBV against Dalit women is thereby used as a tool to reinforce caste hierarchies and boundaries in order to maintain caste 'purity' (Chakravarti, 1993; Gupte, 2013; Irudayam et al., 2011). It has been further asserted that "to understand the reality of caste in Indian society in general, and the Dalit community and Dalit women in particular, an analysis of inter-linking caste-class-gender dynamics is imperative" (Irudayam et al., 2011, p. 5). Falling in love and standing up for the intimate inter-caste relationship is an exercise of agency, in an intense site of violence and contestations. It is in this context that Geetha (2009, p.99) notes, "love in a caste society is . . . an intensely regulated phenomenon".

After a caste-based analysis of violence against women, Rege (1998) observed that:

while the incidence of dowry deaths and violent control and regulation of their mobility and sexuality by the family is frequent among the dominant upper castes, Dalit women are more likely to face the collective and public threat of rape, sexual assault and physical violence at the workplace and in public.

Dalwai & Dasarathi (2022) illustrated, through an analysis of several judgments, that:

where the female victims are from higher caste-class strata than their male attackers, a high level of sensationalised attention is paid by the media, and quick justice is delivered by courts. However, cases in which the female victims belong to a lower caste-class strata than their attackers do not catch public imagination with as much vigour.

They traced the origins of this phenomenon to the ordering of sexual desires along caste lines. Their analysis reiterates the reason why, in India, patriarchy and gendered violence against women cannot be understood without a recognition of its intrinsic inter-linkages with the caste system. Keeping in mind that Dalit women are not passive victims but active survivors who fight back against SGBV, as Javaid (2015) reminds us, it is not the Dalit women's agency that warrants examination, but the law's subversion of or inertia to their pursuit of justice.

### ***Intersectional Feminism***

Drawing from the notion that women are not a homogenous community, intersectional feminism informs our understanding of the differences 'among' women due to their different situations, opportunities, and markers of identities such as caste, class, religion, sexuality, age, ability, race, and ethnicity. The concept of 'intersectionality' has its origins in the situation of African-American women, who were at the cross-section of the women's movements and the anti-race movements in the United States (Crenshaw, 1994). Applying intersectionality to the Indian context, while most women have a subordinate status in the Indian society due to the operation of patriarchal forces, a Dalit, *Adivasi*, queer, and trans woman, or a woman with disabilities is doubly disadvantaged and discriminated against due to the intersections of multiple marginalised identities and faces a higher risk of violence. Hence, this book adopts an intersectional feminist approach that recognises ways in which women's social identities overlap, compounding and exacerbating experiences of violence, harassment, oppression, and discrimination. As explained by John (2015), intersectional approach is not merely about which woman suffers 'more' or 'less', but about how the oppressions are different and unique in their own contexts.

### ***'Honour' and Patriarchy***

Honour is known as *izzat* in Hindustani and is a term connoting high respect, recognition, and acceptability. 'Honour' is not gender neutral and operates in contexts of unequal power relations, control over women's sexuality, bodily

integrity, and decisional autonomy. The threat of ‘honour’ crimes compels conformity to societal norms and gendered roles of the ideal daughter, ideal wife, and ideal mother. *Manusmriti* – an ancient Hindu text – stated that day and night, women must be kept in dependence by the men of their families, and if they attach themselves to sensual enjoyments, they must be kept under one’s control.<sup>2</sup> The ideal woman, then, is one whom her father protects in her childhood, her husband protects in her youth, and her sons protect in her old age, as, according to Manu, a woman is never fit for independence.<sup>3</sup> While obedience, submission, patience, tolerance, and sacrifice are qualities expected of her, conversely, the exercise of agency by women and assertions of their rights, identities, and choices are seen as transgressions of social norms and as actions perceived to bring disgrace and dishonour to the family and community concerned. Thus women’s ‘transgressions’ are perceived as a threat to patriarchal structures that perpetuate the subordination of women and calling such acts dishonourable aims at keeping women within the hegemonic patriarchal structures.

Almost all the chapters of this book illustrate how ‘honour’ and the associated notion of shame deter women from seeking redress for SGBV perpetrated on them. ‘Honour’ crimes are perpetrated, particularly on young women seen as transgressing social norms (discussed in Chapter 2). The emotion of shame plays a key role in perpetuating intimate partner violence (IPV) and violence within the family, as explained by (Forner, 2018), and is discussed in Chapter 3. As Siddiqui (2006) tells us, there is no ‘honour’ in domestic violence, only shame! Dowry-related crimes, discussed in Chapter 3, are often perpetuated due to the perceived compulsion to pay dowry to avoid ‘dishonour’ to the family; conversely, dowry-motivated killings and suicides take place when parents of the woman shut the door of their home on her, as it is considered dishonourable for a married daughter to return to her natal home. Rape, discussed in Chapter 4, is considered dishonourable to the raped woman, thereby creating a barrier in her access to justice, as has been reflected in many judgments. This necessitated the government-appointed Justice Verma Committee (Verma et al., 2013) to spell out the “duty of the State and civil society to deconstruct the paradigm of shame-honour in connection with a rape victim” (para. 27) and to opine that “we do not think the victim suffers a stigma. It is a stigma against society” (para. 32). Offences such as “assault or criminal force to a woman with intent to outrage her modesty” (s. 354 Indian Penal Code, 1860 or IPC) and “word, gesture or act intended to insult the modesty of a woman” (s. 509 IPC), discussed in Chapter 4, are both couched in problematic gendered assumptions about a woman’s modesty – closely associated with concepts of honour and shame. Forced nudity of women – the act of stripping and parading women naked – as a caste-based atrocity, as targeted violence against religious minorities, and as a part of institutional violence against trans women in everyday contexts of incarceration – aim at shaming the woman and her community, and

is discussed in Chapter 5 (Baxi, 2016). The perception of shame also deters women from seeking redress for violence in the cyberspace, as discussed in chapter 6. Thus, the social and legal manifestations and ramifications of ‘honour’ are a common and connecting theme across this book.

### **Sexual and Gender-Based Violence Against Women & Patriarchy: Broader Feminist Concerns**

SGBV against women has often been used as a patriarchal tool for subordination, as it maintains the structures of gender hierarchy. Lerner (1986) prefers to use the term ‘subordination’ instead of ‘oppression’ because the latter term connotes forceful subordination, which does not adequately describe paternalistic dominance with a set of mutual obligations and is frequently not perceived to be oppressive. In contrast, she opines that ‘subordination’ allows for the possibility of collusion between the subordinator and subordinate, such as the voluntary acceptance of a subordinate status in exchange for protection and privilege – a condition that characterises many historical experiences of women.

Patriarchy is a theoretical tool that is used to understand and address forms of SGBV. As a social and political system, patriarchy relies on gendered physical and sexual violence as a way to maintain the subordinate status of women to men (Quek, 2019). It is also an assertion of power, male superiority, and dominance – by men over women in general, but more specifically also by men of dominant communities against women of oppressed, underprivileged, or marginalised communities. Rico (1997) opines that “gender-based violence exists within the framework of the patriarchy as a symbolic system that engenders an array of day-to-day practices which deny women their rights and reproduce the existing imbalance and inequity between the sexes” (p. 8). In her opinion, “the difference between this kind of violence and other forms of aggression and coercion lies in the fact that in this case the risk factor or source of vulnerability is the mere fact of being a woman”.

Walby (1990) states that the ideology of patriarchy aims “to keep women away from the power systems” (p. 24) through two distinct forms of patriarchy: private and public patriarchy. In private patriarchy, expropriation of women’s labour is undertaken through individual patriarchs in the household, while in public patriarchy, the expropriation is collective. Violence is used in both forms of patriarchy to subordinate women. She observes that patriarchy operates through six complex structures, namely:

- a) Production relations in the household – where women are assigned the responsibility of unpaid housework, including care of the aged, sick, and the young, as per the expectations of the ‘head’ of the household (the patriarch);

- b) Paid work – discrimination and harassment of women at the workplace, including unequal wages and sexual harassment;
- c) The patriarchal state – where laws and policies favour men either in the letter, or in their implementation, or both;
- d) Violence against women – this is not isolated, sporadic aberrations, but a systemic tool for subjugating women;
- e) Patriarchal relations in sex and sexuality – different rules apply to men and women with regard to sexual behaviour; and
- f) Cultural institutions – facets of society such as media, education, and religion portray women through a patriarchal lens, which colours women’s own understanding of their role (Walby, 1990, pp. 20–21).

Though this book is substantially focused on the laws formulated, interpreted, and implemented by the patriarchal State in India, in relation to SGBV against women, it discusses other patriarchal structures as well in their inter-linkages to the law. Of prime importance among them is the law’s construction of sex and sexuality, and its governance of relationships on that basis.

SGBV against women remained a public secret for centuries, as an invisible social problem that was normalised and accepted in society, undeserving of any State intervention. However, in the last few decades, such assertions and the consequent subordination, devaluation, denial, and deprivation of rights of women that reduce women to secondary citizens have been the subject of considerable feminist scholarship (Brownmiller, 1975; MacKinnon, 1989; Nussbaum, 2005).

The many forms of State and institutional violence and their adverse impact on women, sometimes perpetrated through State machinery and at other times in collusion with dominant non-State actors, both with patriarchal mindsets, also need to be acknowledged. In the words of Kannabiran (2014), they wage “war on women’s bodies and their lives in a democracy”.

### ***Acknowledging Factors Other than Patriarchy***

Heteronormative patriarchal practices are strengthened by caste and class oppression perpetuated through unequal social structures. Additionally, culture is often used to justify violence. The rising power of the Hindu Right, also referred to as *Hindutva* forces, their identity politics and their gendered construction and subordination of women also contribute to SGBV against women. As DeSilva (2000) observes, “at the core of the ideology of Hindutva is a subtext of female repression that runs counter to women’s struggle against competing hegemonies”. Basu (1995) and Butalia (1995) have referred to the repeated reference to rape of Hindu women under Muslim rule in India by Hindutva forces to urge ‘masculine’ Hindu warriors to protect their motherland and their women from ‘others’. Banerjee (2003) analysed the construction of masculinity in the wake of Hindu nationalism and the ramifications of masculinisation on women.

The neo-liberal restructuring of the Indian economy in the 1990s and consequent entry of multi-national companies with their sole objective of profit maximization, and the corresponding shrinking of the welfare state in India, has also contributed to violence against women. This has been through ‘developmental policies’ that minimise women’s agency; through environmental destruction by corporate forces for which women unfairly bear the brunt; through corporate grabbing of lands causing increased homelessness, destitution, and internal displacement of women; and privatization of health-care facilities that rings a death knell to women. Ghosh (2016) explored the relationship between economic processes and violence, and, in particular, how economic violence is perpetrated by gender and social discrimination.

## **Concepts and Definitions**

### ***Sexual and Gender-Based Violence***

While ‘sexual violence’ has a clear import, the term ‘gender-based violence’ warrants a closer examination, as it is a contested term. The term gained visibility at the global level when the United Nations defined ‘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.<sup>4</sup>

This definition emerged in 1993 in the UN Declaration on Violence Against Women (DEVAW) after the women’s groups had successfully campaigned and advocated for recognising violence against women as a human rights issue at the World Conference on Human Rights held in Vienna the same year.<sup>5</sup> Feminist theory and praxis informed and contributed to the understanding of SGBV against women and helped shift it from the confines of the largely unregulated and invisible ‘private sphere’ into the ‘public sphere’ where law and policy intervention was warranted. Rico (1997) narrated the history of how gender-based violence gained visibility and recognition as a serious problem at the international level.

A 2011 definition of violence against women is provided by the Istanbul Convention that describes the same as:

all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life

and that VAW is a “violation of human rights and a form of discrimination against women”.<sup>6</sup> The said convention further defines gender-based violence

against women (GBVAW) as “violence that is directed against a woman because she is a woman or that affects women disproportionately”.<sup>7</sup>

In 2017, General Recommendation 35 of the Committee on the Elimination of Declaration Against Women (CEDAW Committee) stated that while the term ‘violence against women’ was used earlier, the term ‘gender-based violence against women’ is used in the current recommendation “as a more precise term that makes explicit the gendered causes and impacts of the violence”.<sup>8</sup> It also stated that the term further strengthens the understanding of the violence as a social rather than an individual problem, requiring comprehensive responses beyond those to specific events, individual perpetrators, and victims/survivors. Thus, in the DEVAW, CEDAW, and the Council of Europe, gender-based violence and violence against women have been equated with one another and used almost interchangeably. This is because most gender-based violence affects women disproportionately.

In contrast, the United Nations High Commissioner for Refugees (UNHCR) currently defines SGBV as:

any act that is perpetrated against a person’s will and is based on gender norms and unequal power relationships. It includes physical, emotional or psychological and sexual violence, and denial of resources or access to services. Violence includes threats of violence and coercion. SGBV inflicts harm on women, girls, men and boys and is a severe violation of several human rights.

There is no denying the fact that men and boys, as well as members of LGBTQIA+ communities, may also be targeted for SGBV for non-conformity with norms of gender and sexuality. Shame and stigma, as well as patriarchal constructions of masculinity, may prevent visibility and recognition for such forms of violence. Read-Hamilton (2014) argues that while there maybe similarities between different forms of gendered and sexualised violence that are experienced by women and men, they are not the same. She opines that the causes, dynamics, and outcomes of violence against women are different. She advocates for SGBV against men and other genders to be understood and addressed through evidence-based and theory-driven frameworks.

This book uses the terms ‘SGBV against women’ and ‘gender-based violence against women’ to mean and imply violence that either targets women because they are women, or where such violence affects women disproportionately, by underscoring the power differentials between the victim and the perpetrator.

### ***Continuum of Violence***

Despite the typologies of violence categorized by the UN Special Rapporteur on Violence Against Women (SRVAW) as violence in the family, community,



and by the State, which is broadly adopted in this book for Chapters 3–5, this book does not treat them as watertight compartments or impermeable silos.<sup>9</sup> Instead, it is premised on the notion of continuum of violence against women. Cockburn (2004), who coined the term, drew attention to the imbalance in gender relations that shapes every site of human interaction and generates cultures of masculinity that are prone to varied forms of violence. Her work suggested that there can be no clear delineation made between peace, war, and post-war when it came to women and made linkages between violence that perpetuated gender inequality “between the bedroom and the battlefield”. The constructions of male dominance and female subordination influence SGBV against women in all sites such as the family, community, State, and the market. Some types of violence against women fall under more than one category – such as honour crimes – where the perpetrators are sometimes from within the home (family members) and sometimes from within the community (such as leaders of local informal adjudicatory bodies such as the *khap panchayats*) or sometimes both. The patriarchal forces, combined with class, caste, communal, and other forms of bias, operate in all categories of violence and reinforce each other.

### **Victims or Survivors?**

It has become a common practice in recent times to refer to the ‘victim’ of violence as a ‘survivor’. Concern has been expressed that the term ‘victim’ connotes weakness, a lack of resilience, and absence of agency of women, projecting them to be passive and helpless receivers of violence. It has also been pointed out that a ‘victim’ is defined by the harm that has come to them, while a ‘survivor’ is defined by their life afterward, and it connotes positivity and triumph of hope over despair (Kelly, 1988). Dunn (2010), who traced the history of the changing terminology, observed that when victims are shown to be trapped and survivors to the contrary, they are both projected at two ends of an agency continuum.

Unfortunately, every victim of violence against women does not survive the violence meted out to her. Moreover, the journey from victimhood to being a survivor is sometimes a long and arduous one, and the duration differs from woman to woman, depending on various supportive factors. While the term ‘survivor’ is an important one connoting agency of women, it is also one that places an onus on every victim to use her individual capacity to become a survivor and diminishes the responsibility of the State and society in her journey from victimhood to survivorhood. Self-identification of women affected by violence, as either a victim or a survivor, is of prime importance, but in its absence, this book uses the term ‘victim’ because it carries with it the harm committed, which law is compelled to address and redress. Additionally, terms such as ‘aggrieved woman’, ‘affected woman’, and ‘woman facing violence’ are used to connote victims of SGBV against women.

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## **Theoretical Frameworks Used**

While outlining the theoretical frameworks found relevant for and used in this book, it is pertinent to note that each of the theories outlined below are open to multiple interpretations. For its approach and analysis, this book draws from critical legal theory, legal realism, and feminist legal theory or jurisprudence. Additionally, the research uses the lens of intersectional feminism and feminist multiple standpoint epistemology in its treatment of the topic.

### ***Critical Legal Theory***

Critical legal theory is one that asserts that law is a reflection of social and political values – such as gender, sexual orientation, race, and religion (and in the Indian context, caste). In the words of Wacks (2014), it depicts law as uncertain, ambiguous, and unstable, reproducing political and economic power as a result of which social justice remains a hollow promise. On one end of the spectrum of critical legal theory is the classical Marxist viewpoint of law as nothing more than a tool of the ruling class – a cynical viewpoint that makes engagement with the law for social justice futile for lawyers, law campaigners, and social science academics (Hunt, 1976). Diametrically opposite is Roscoe Pound's theory of law as a tool of social engineering – to reconcile competing and conflicting interests in society, to achieve maximum satisfaction of human gains with minimum resources, with law as having an immense potential to shape and control human conduct. The optimism around Pound's theory is muted by the implication of individual interests being subsumed by larger public interests. Its ramifications in the context of Dalit women, for instance, are of grave concern, as their right to dignity, bodily integrity, sexual autonomy, and livelihood may be trumped by the larger public interest in maintaining strict caste hierarchy. Carceral punishments that are supported by a bloodthirsty society, in the larger interests of public safety, may also be encouraged.

A view that synthesises these concerns while also providing a justification for engaging with the law is expressed by Gabel & Harris (1982–1983), which states that the legal system is an important public arena through which the State attempts – through manipulation of symbols, images, and ideas – to legitimize a social order that most people find alienating and inhumane. Drawing from this premise, they state that the legal system works in different ways to shape popular consciousness towards accepting the political legitimacy of the status quo and resisting these efforts becomes imperative for effecting social reforms. This book is premised on this understanding of a rationale for engaging with the law.

### ***Legal Realism***

Additionally, a Realist theory of law views the meaning of law through a societal perspective, with a focus not on statutory law but how it is implemented

and interpreted, through judgments of courts of law. In an interview of prominent human rights advocate K. Balagopal by Daka (2011), law is not what the legislature made, but what the judiciary says the legislature made. Its application in the Indian context has illustrated, time and again, that laws and policies, even those that are well-intended, are rendered virtually ineffective through deliberate non-implementation or wrongful implementation. A case in point is in section 498A of the Indian Penal Code, 1860 (IPC), dealing with cruelty to the wife by her husband and his relatives. This book draws from legal realism through its focus on not merely the written legislations but also on critiquing judgments that interpret their provisions, and by examining the implementation (or lack thereof) of the law.

### ***Feminist Legal Theory***

Feminist legal theory/jurisprudence draws from critical legal theory and legal realism and develops it further through its application of feminist principles. A central focus of feminist legal theory is to challenge, subvert, or transform the relationship between law and society through the lens of women. Legal concepts and notions that have benefitted from a feminist analysis include the rule of law (Scales, 2006), equality and difference (Smith, 2005), reasonableness in law (Chamallas, 2010), public/private dichotomy (Dempsey, 2010), and human rights (Bunch, 1990; Copelon, 1994). As opined by Conway (2016), a theory on violence that is devoid of a feminist lens invariably presents the manner in which the male subject perceives the violence – which is incomplete and partial. Cockburn (2004) emphasizes the importance of a feminist perspective on violence as one that would expose how violence is embedded in patriarchal structures of power. Heyes (2013) pointed out that feminist theories that analyse SGBV tend to adhere to the gender binaries. She observed that the feminist lens would have a higher potential to include a “more complete understanding of violence” if it included an analysis of violence against persons whose gender identities do not conform to the established gender binaries of male/female (p. 211). Feminist jurisprudence also compels stakeholders within the legal system to listen to and assimilate what they are trained to ignore – women’s lived experiences and their conception of justice. For these reasons, this study draws inspiration from a feminist analysis of law.

### **Indian Legal Framework & Feminist Engagements with Laws on SGBV**

The Indian Constitution and its guarantees of fundamental rights forms the foundation of a legal response to SGBV against women. These include the right to equality before the law and equal protection of the law (Article 14); right to non-discrimination (Article 15); abolition of untouchability (Article

17); fundamental freedoms including freedom of expression, movement, association, assembly, and livelihood (Article 19); right to life and liberty (Article 21); prohibition against trafficking in human beings (Article 23); and right to freedom of religion (Articles 25–28). While proscribing discrimination on grounds including of sex, religion, and caste, the constitution nevertheless provides for special provisions for women (Article 15[3]). This is to counter the historic discrimination and marginalization that they have been subjected to for centuries. Women-centric legislations such as the Protection of Women from Domestic Violence Act, 2005, (PWDVA) gain their constitutional validity from this provision. The constitutional provisions are invoked in adjudication on varied topics related to gendered violence, including in asserting a woman's choice in marriage (discussed in Chapter 2).

Indian criminal law consists of the IPC, which defines offences and prescribes punishments; Criminal Procedure Code, 1973 (CrPC), which lays down the procedure to be followed for registration of offences, investigation, prosecution, and conducting of the trials; and the Indian Evidence Act, 1872, (IEA) which prescribes the evidentiary rules and guidelines to be followed during a trial. Amendments have been made to all the three laws from time to time in order to address the changing social context and forms of violence against women. The Indian women's movements have had robust engagement with law reform, particularly from the late 1970s till date. Its focus has been to ensure that criminal law responds adequately to the reality of violence faced by women and provides reparative justice. In addition to the three criminal legislations, other special criminal legislations have been enacted over time including the Dowry Prohibition Act 1961, Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989, The Preconception and Prenatal Diagnostics Techniques (Prohibition of Sex Determination) Act 2003, The Immoral Traffic (Prevention) Act 1956, and The Protection of Children from Sexual Offences Act 2012. Additionally, The Armed Forces (Special Powers) Act (AFSPA) 1958 is a legislation that allows the government to deploy armed forces in 'disturbed areas' and vests the military with unbridled powers, including the right to kill civilians on suspicion. A culture of impunity engendered by the AFSPA has made it easy for security forces to get away with several human rights violations (Lyngdoh, 2021).

The Mathura rape case of 1972 catalysed the women's movement through the anti-rape campaign of the 1970s and 1980s, resulting in changes in substantive, procedural, and evidentiary law with regard to the offence of rape (Patel, 2012). Similarly, subsequent to the homicidal gang rape of a paramedic on a moving bus in Delhi in December 2012, the public outrage in India and internationally spurred the Indian government to establish a committee to examine the legal framework and make recommendations on criminal law reform on the issue of sexual violence against women. This committee, headed by a retired Chief Justice of India – Justice J.S. Verma – received oral and written submissions from women's organizations, activists,

and concerned citizens from across the country, and its report made some path-breaking recommendations to the government (Verma et al., 2013). The demand for comprehensive law reform on sexual offences, which the women's movement had been negotiating with the government for several years prior to December 2012, received a fresh lease of life due to the recommendations and the new-found political will to bring about reforms. The Criminal Law (Amendment) Act (CLA) was passed in March 2013, which accepted some recommendations of the Justice Verma Committee (Verma et al., 2013) and introduced the offences of acid attacks, voyeurism, forced disrobing, and stalking in Indian criminal law, while expanding and modifying many other provisions related to violence against women, including rape. Feminist legal scholars have subsequently traced the trajectory of recent law reforms and provided a critical lens (see Mehra, 2013). The 2013 amendments led to a shift in criminal law from a singular focus on rape to a gradation of sexual offences. Dash (2021, p. 22) observed that though the Indian feminist groups were invested in these reforms, and have been critical of the carceral approach, "other than denouncing the death penalty, they have largely abstained from conversations around appropriate punishments for sexual crimes".

Apart from the homicidal gang rape of December 2012, two other cases of rape shaped the legal discourse on SGBV in India. One of them was a rape of a teenaged girl by a powerful politician in Unnao, state of Uttar Pradesh, in 2017. When she pursued justice, her father was tortured and killed in police custody, for which the perpetrator was subsequently convicted. The other was the abduction, sedation, gang rape over several days, and the murder of an eight-year-old Muslim girl by seven Hindu men in Kathua, Jammu and Kashmir in 2018. The girl belonged to the nomadic Bakarwal community, which made pursuit of justice formidable for her family. In the light of the two incidents, the United Nations Resident Representative in India reportedly expressed deep concern for the prevalence of SGBV against women and children (Balachandran, 2018). Both incidents illustrated a new disturbing low in the nexus between politicians, police personnel, and persons accused of heinous crimes against women and girls. The implicit assumption made through the 2013 amendments that strong laws and stringent punishments would deter crimes against women was proved wrong by these and other such incidents 2013 onwards. Yet, when both incidents sparked public outrage, the Indian State's knee-jerk reaction was to introduce the death penalty for rape cases where the victim is below 12 years of age and to increase the minimum sentence for rape of girls under 16 years of age.<sup>10</sup> Deora & Bhutani (2018) opined that the amendments were misplaced, as the need is to address "regressive, victim blaming culture". These were missed opportunities for the State in introspecting why the 2013 amendments had been largely unsuccessful in decreasing SGBV against women and girls.

Apart from rape law, domestic violence was also addressed through legal amendments. In 1983, section 498A IPC was enacted in response to women's movements' demand for a specific legal provision on domestic violence and dowry-related murders, violence, and harassment. Due to several shortcomings with the criminal law provision, more elaborately discussed in Chapter 3, Protection of Women from Domestic Violence Act, 2005, (PWDVA) was enacted, which provides civil remedies using criminal procedures. While discussing the role of the Lawyers' Collective, a non-profit organization that drafted the law after nationwide consultations with women's rights groups, "the complex relationship between state and non-state institutions, and the leverage and power exercised by state institutions" have been analysed (Subramaniam et al., 2014).

Indian feminists have introspected on their engagements with the law, including on issues of gendered violence. Basu (2015, p. 18) notes that "feminist intervention in questions of marriage, body, sexuality, and violence" is "often equated with the destruction of family, marriage, and love". Kapur & Cossman (1996) questioned if law was indeed a 'subversive site' for women. Menon (2004) observed that the language of rights that law brings is alienating, individualistic, restrictive, and perhaps counter-productive for feminism. Agnes & Ghosh (2012) have drawn attention to the fact that women's access to criminal law is:

crucially mediated by police and socio-legal intervention as well as more familiar institutions such as family, kinship, or neighbourhood networks and community organizations, resulting in the rights of women who have suffered violence being subsumed under varied interests and perspectives.  
(p. xix)

Gangoli (2007, p. 9) captured in a nutshell the trepidations faced by Indian feminists when she observed that "it is safe to postulate that most feminists have little or no faith in legal solutions to violence" yet "for many feminists law remains a significant arena for feminist intervention, and the dreams of a feminist jurisprudence are not completely abandoned". The present book is postulated on this premise while being mindful of the critique of criminal law as a site for feminist engagement in India.

Dalit feminists critique the erasure/exclusion of caste from mainstream feminist discourses on law. For instance, Sonavane & Wadekar (2021) highlighted the erasure of caste in the petition filed by women's groups in *Vishakha v. State of Rajasthan*,<sup>11</sup> when, ironically, it had been filed against the backdrop of gang rape of Bhanwari Devi – an oppressed caste woman – by five dominant caste men in 1992. They noted that the "precarity of the female worker is compounded by the intersection of caste and gender", yet the guidelines issued by the Supreme Court make no mention of it. Scholars such as Bansode (2020) have noted the absence of Dalit women's voices in

the #MeToo movement and the overlooking of Dalit women's testimonies on sexual violence, arguing the relevance of such testimonies for strengthening the feminist and Dalit movements. Similarly, Ghai (2002) highlighted that the issue of disabled women is an excluded agenda in the feminist movement. Such critiques pave way for introspection and self-reflexivity within the mainstream women's movements in India and to recalibrate more inclusive approaches and agendas in the future.

### **Structure and Chapterisation**

The book is divided into eight chapters. Five of them examine the law and legal response to various forms of SGBV against women perpetrated in varied contexts. Political questions related to the role of the State in formulating, implementing, and interpreting laws in a manner that would further women's pursuit of justice are addressed across the chapters of this book. Additionally, its duties as mandated by the Indian Constitution and international human rights standards, juxtaposed with its discharge of the same, are in conversation throughout this book.

The present chapter of Introduction is followed by Chapter 2, which focuses on 'honour' crimes. This chapter combines socio-legal research on 'honour' crimes committed in contexts of choice marriages/relationships, along with forms of moral policing by vigilante groups and public officials, as well as policing of couples involved in inter-religious marriages where the discourse on 'honour' is pivotal. The chapter also examines anti-conversion legislations that seek to prevent inter-religious marriages and the possible efficacy of special legislation to address honour crimes, and critiques contemporary law reform initiatives. It ends with highlighting the challenges to justice in contexts of 'honour' crimes.

This is followed by Chapters 3 and 4, which focus on violence by the family and violence by the community, respectively. Chapter 3 examines law and legal discourses related to intimate partner violence, marital rape, and dowry-related killings, violence, and harassment. It analyses judicial narratives that are suspicious of women's testimonies of violence within the home, as the law seeks to protect the sanctity of institutions of marriage and family, often at the expense of women's safety and right to life with dignity. Chapter 4 discusses responses of the law to a range of acts that amount to violence by the community, including rape and other forms of SGBV against women, such as acid attacks, stalking, voyeurism, forced nudity, street sexual harassment, and trafficking. It includes an analysis of SGBV on Dalit women, trans women, and women with disabilities, and how the challenges to justice are compounded through their marginalised identities. It discusses some of the prickly and contentious issues in feminist discourse in India, namely rape charges in contexts of promise to marry, age of consent (for sexual



intercourse) and its ramifications on under-aged romantic relationships, and the death penalty for rape. It exposes the moral and prescriptive norms embedded in the letter of the law and its judicial interpretations, which give rise to the question of whether law is a solution or the problem in the context of gendered violence against women.

Chapter 5 discusses SGBV in contexts of mass crimes and institutional violence, and the extent to which law is effective in addressing such violence. The ‘mass crimes’ contexts it focusses on are caste-based and communal (religion-based targeted) violence, when women belonging to Dalit and religious minority communities are targeted for SGBV. In delving into forms of institutional violence by the police and security forces, it argues that the aggrieved women often deal with not only apathy of the legal machinery but also with the complicity of stakeholders within the legal system, thereby exacerbating the challenges to justice.

Chapter 6 discusses violence in the cyberspace – a topic included for its contemporary relevance, on which feminist legal scholarship in the Indian context is scarce. It discusses the emerging forms of cyber violence against women, the manner in which it targets women with marginalised identities, and analyses the confusing legal tapestry and the legal and institutional challenges they pose to women’s pursuit of justice.

Chapter 7 interrogates the relevant international standards that apply to SGBV with the underlying notion that international standards that have a binding effect on the Indian State have the potential to buttress domestic processes for justice and accountability. The usefulness of international human rights standards and mechanisms is explored. It also examines engagements of the legislature, judiciary, and civil society with international normative standards relevant for SGBV against women.

This is followed by Chapter 8, the concluding chapter of this book, which aims to weave together the common emerging challenges to justice for women. It suggests ways in which State obligations to protect, promote, respect, and fulfil women’s human right to a violence-free life, enshrined in the Indian Constitution and international human rights standards, can potentially be transformed into tangible outcomes. In particular, it makes three suggestions for a way forward: first, it suggests that root causes of SGBV must be addressed by the Indian State, rather than only its manifestations. This could lead us towards preventing the violence. Second, compensatory jurisprudence ought to be expanded and reparative justice to women be strengthened in order to shift away from carceral justice. Third, an intersectional approach could be incorporated into legislations and judicial interpretations concerning gendered violence against women so that women are not treated as a homogenous community, and the multiple layers of oppression and subordination faced by women are fully recognised in law and redressed accordingly.



## **Research Methodology, Approach and Treatment of the Topic**

The research contained in this book is qualitative in nature, with its fulcrum of analysis being the legal response to SGBV in India. Though it employs an approach that combines critical legal theory and legal realism, the main lens it uses is intersectionality. The work is grounded in socio-legal research. Its primary site for examination is the law and, more particularly, criminal law. Provisions of statutory law, legislative debates, law reform proposals, amendments made in law, official documents, Bills, reports of Law Commission of India, other committees and commissions, judicial pronouncements, and reports of various UN treaty and non-treaty bodies have been referred to and relied upon. It draws upon feminist, social science, and legal scholarship, while also using media reports and reports produced by civil society.

This work also draws inspiration from three feminist concepts – embodiment, feminist multiple standpoint epistemology, and feminist reflexivity and self-reflexivity. Feminist analysis has illustrated through its scholarship that violence which is perpetrated on women is “embodied, experienced and personal” (Jokela-Pansini, 2020). A feminist concept of embodied violence would ensure that women’s experience of violence is not seen only as events, devoid of a human element, and that women are treated as active agents as opposed to passive subjects. Since the present work is research on the law, drawing inspiration from the notion of embodied violence will ensure that it is mindful of law’s tendency to dehumanise and decontextualise human experiences of violence and treat them as ‘cases’ and statistics, thereby making human agency invisible.

Feminist standpoint epistemology focusses on feminist research that is grounded in the experience of the oppressed (Harding, 2004, Hesse-Biber, 2011). While a woman’s oppressed location in society may provide fuller insights of social reality, the diversity of women’s lived experiences with interlocking marginalised identities is accounted for through feminist multiple standpoint epistemology. Although the current research does not employ empirical methods, its attempt will be to foreground and amplify the voices and narratives of women from secondary sources – their experiences of violence and responsiveness of the law, to the extent possible. Illustration of the law and its shortcomings through ‘case studies’ (for the want of a better term) of women victims of SGBV and their trajectory through the annals of law also draws upon this epistemology.

Feminist reflexivity emphasizes the importance of positionality, as opposed to a universal claim to truth. In the words of Valentine (2002), “all knowledge is shaped by the specific contexts or circumstances in which it situated and produced” (pp. 116–117). Additionally, the notion of feminist self-reflectivity, as elaborated upon by Kirsch (1999) and Peake (2017), is helpful in my own awareness of my positionality as a researcher, which has

shaped my research agenda, analysis, and findings of the research. Although these principles of feminist research are usually applied in empirical work, they are useful for the current research.

In practicing sociological research, Choo & Ferree (2010) outline the need for inclusions, interactions, and institutions in the study of social inequalities. This entails:

- a) Including the perspectives of and knowledge from people who are marginalised in multiple ways (in the context of this book, this includes Dalit women, women from religious minority communities, trans and queer women to a larger extent, and that of women with disabilities, *Adivasi* (tribal) women and adolescent girls to a lesser extent);
- b) Seeing intersectionality as a process that highlights power as relational, examining the multiplying oppressions at various points of intersection and drawing attention to unmarked groups; and
- c) Seeing institutions as overlapping and co-constituting social inequalities (institutions examined in this book include those institutions that constitute the criminal legal system, as well as the institutions associated with the three branches of the government – legislature, executive, and the judiciary).

Although these are means for practising intersectionality in sociological research on inequalities, this book draws from the same, as the framework is equally relevant for the feminist, intersectional, and socio-legal analysis that is adopted in this book.

Additionally, in implementing the author's politics of being avowedly against hierarchy, this work is written in a language that is easily discernible so that it is accessible beyond the high echelons of the education pyramid. The regret, though, is that it had to be written in English – a language that connects with a global readership while simultaneously being alienating and exclusionary to many within India and the Global South.

### **Limitations**

SGBV against women necessarily attracts criminal law, which is the primary site of examination and analysis in this book. This, by no means, provides a holistic analysis of the legal response, which include civil laws, matrimonial, and other laws pertaining to such forms of violence. While acknowledging that all genders face violence in different contexts, and such violence and the legal response merits discussion, this book limits itself to engaging with gendered violence against women (broadly construed), given that the gamut of such violence is, in itself, expansive.

For this reason, all forms of SGBV against women and their interactions with the law could not be covered in a comprehensive manner. One such

topic is sexual harassment at the workplace – a chapter that was researched and written upon, and subsequently excluded from this book due to paucity of space. This is regretted, more so due to the contemporary relevance of the topic, given the protest by women wrestlers against several counts of alleged sexual harassment by Brij Bhushan, the current president of the Wrestling Federation of India, since January 2023 (see Mehta, 2023). For the same reason, the chapter on mass crimes and institutional violence could not discuss ethnic violence (such as against women from Northeastern states), racial violence (such as against women of African origin), and conflict-induced displacement. In the chapter on violence by the family, female genital mutilation practiced by the Dawoodi Bohra Muslim community, violence pertaining to female sex-selective abortions, and gendered violence against aged women and minor girls could not be included. In the chapter on violence by the community, despite the existence of important feminist scholarship on witch hunting, the topic could not be engaged with due to paucity of space.

Names of women and girls who have been subjected to SGBV have been withheld in those instances that they were withheld in legal documents, in accordance with the laws of the land. However, the names of other women are acknowledged as they became inspirational figures due to the injustice they countered, pursuing justice and accountability for themselves and, intentionally or not, a larger movement and all women. Where courts began using their real names and the same entered the public domain, the public associates the incidents with names of the women too and suppressing the names may be confusing for the reader.

Statistics pertaining to SGBV against women, judgments, legislative amendments, and legislations that change the tenets of the law have been updated till February 2023. Yet by the time the book is printed, there may be some changes in these due to the dynamic nature of law.

## Notes

- 1 In its study of sexual and gender-based violence against women, this book broadly construes the term ‘woman’ to include not only cis gendered, heterosexual women, but also trans women and queer women, and extends the analysis of violence and the law beyond the gender binaries, to the extent possible. Additionally, ‘woman’ includes girls unless otherwise specified.
- 2 Manusmriti (trans. George Buhler). 1984. *The laws of Manu*. Motilal Banarasi-dass (Reprint), IX/2.
- 3 *Id.*, IX/3.
- 4 G.A. Res. 48/104, Declaration on the Elimination of Violence Against Women (20 December 1993).
- 5 Report of the World Conference on Human Rights, U.N. GAOR, at 20, U.N. Doc. A/CONF.157/24, (1993) (part III, Vienna Declaration and Programme of Action), *reprinted in* 14 HUM. RTS. L.J. 352, 356 (1993).
- 6 Council of Europe Convention on preventing and combating violence against women and domestic violence, Treaty No. 210, 11 May 2011, Article 3(a).

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## 'Honour' Crimes

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