
ENSURING PROTECTION AGAINST MARITAL RAPE: A STATE OBLIGATION UNDER CEDAW

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CHAPTER 1

1. INTRODUCTION

Offences against women have taken many forms and it had added to the already existent problems that women face.¹ Indian Constitution promises all its citizens right to life, dignity, and equality². Tenacity in the exclusion of marital rape from the erstwhile Section 375³ of the Indian Penal Code (IPC) and section 63 of the current Bharatiya Nyaya Sanhita⁴ is an uncivilized contrast to such fundamental assurances and is a glaring lacuna in extending sexual autonomy and bodily autonomy to women. Despite India being a signatory to Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),⁵ its criminal law has not brought its domestic criminal law in line with its treaty obligation. CEDAW, the 1979 United Nations General Assembly (UNGA) decision and Indian ratification thereof in 1993, obligates state parties to eradicate all types of discrimination against women both in the public and private domains, within the family, and in the institution of marriage. The perpetuation of constitutional immunity granted to marital non- consensual sex thus constitutes at least an internal constitutional flaw and more to a horrific breach of India's external obligations under CEDAW.

This dissertation examines whether India has remained in compliance with its CEDAW obligations and analyses the legal and socio- political explanations of deviation if any. It further elucidates how the non- criminalization of marital rape mirrors general non- compliance with global human rights norms, largely jeopardizing women's rights, liberty, and gender equality in India. The exemption granted to husbands under Exception 2 of section 375 IPC and now

¹ Shailja Shukla and Sufiya Ahmed, *Marital Rape: A Socio-Legal Perspective* (Satyam Law International 2022) 104.

² Constitution Of India, Article 2, Art.14, Art.21

³ Indian Penal Code, s 375

⁴ Bharatiya Nyaya Sanhita, s63

⁵ Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13

section 63 of BNS de facto legitimates marital rape and patriarchal and time- worn legacy of coverture, a medieval English Legislation that introduced the life of law for the woman in the husband on marriage. British rule in India included of a “civilizing mission” when the British rulers sought to initiate reforms in India, by projecting themselves to be the harbingers of progress and modernity.⁶ The defense of marital was attempted in *Gorakhnath Sharma v. State of Chhattisgarh*,⁷ where a man forcibly put his penis into the anus of his wife and inflicted rectum perforation and death later. In spite of a genuine deathbed confession and supporting post- mortem reports describing peritonitis due to lacerations of the anus, the court relied on the exception of rape under marriage under Section 375 IPC and inexplicably fell back on section 377 IPC – a criminal offense in itself of which there is no exception of marriage. This judicial overreach was opposite to settled legal stands, including Gujarat and Karnataka High court cases in upholding prosecution under section 377 of oral and anal rape during the course of marriage on the grounds that the factum of marriage cannot be in every situation in sexual assault.

India has an obligation per categorically under CEDAW to eliminate all forms of violence against women, such as sexual violence and domestic violence, public and private. The General Recommendation No. 19 (1992)⁸ and General Recommendation No. 35 (2017)⁹ of the CEDAW Committee have identified marital rape as gender- based violence and urged state parties to criminalize it. India’s failure up until now is a failure to uphold this responsibility. Aside, from that, the Supreme court’s (SC) own jurisprudence in decisions like *Justice K.S. Puttaswamy v. Union of India*¹⁰ and *Suchita Srivastava v. Chandigarh Administration*¹¹ has framed sexual and reproductive autonomy to be a component of Article 21 and, as such, the existence of the exception of marital rape as a legislative lacuna and a constitutional anomaly.

As India eagerly awaits the SC’s final ruling on the constitutional validity of the exception of marital rape,¹² recent court judgements like that in *Gorakhnath Sharma* remind us sternly of the price of institutional inertia in terms of human life. Neglect to protect the witness adequately,

⁶ V Chitnis and CD Wright, ‘The Legacy of Colonialism: Law and Women’s Rights in India’ (2007)

64 Washington and Lee Law Review 1315, 1317.

⁷ *Gorakhnath Sharma v. State of Chhattisgarh*, (CRA No. 891 of 2019)

⁸ CEDAW Committee, ‘General Recommendation No.19: Violence against Women’ (1992) UN Doc A/47/38.

⁹ CEDAW Committee, ‘General Recommendation No 35 on Gender-based Violence against Women’ (2017) UN Doc CEDAW/C/GC/35

¹⁰ *Justice K.S. Puttaswamy (Retd.) & Anr. vs. Union of India & Ors*, (2017) 10 SCC 1, AIR 2017 SC 4161

¹¹ *Suchita Srivastava & Anr vs Chandigarh Administration*, 2009 (9) SCC 1

¹² *Hrishikesh Sahoo vs The State of Karnataka*, <https://indiankanoon.org/doc/145346616/>

trial calendars behind schedule, and the system's failure to deliver accountability only perpetuates the culture of impunity of sexual violence in marriage. This is a moment not merely of judiciary reform but one of the parliaments being gender- sensitive and rights- based and responsive to India's voluntary international obligations under CEDAW. It is contended in the note that criminalization of rape of wife is not merely of constitutional imperative but one of compulsive imperative due to India's international legal obligations. Failure to abide by the same is perpetuating discrimination, legalizing violence against women and puts India at international human rights law violations. The hour of the reckoning has come when the Indian state has to realize that the right of consent does not expire at marriage time, and insistence on its realization in its initial form of body autonomy, dignity, and equality is non- negotiable in any modern legal order.

Legal history of the marital rape exception in India traces back to the legal culture during the colonial era based on Victorian values and patriarchal notions about marriage. Rape under section 375 of the erstwhile Indian Penal Code (IPC), drafted under the supervision of Lord Macaulay, was intercourse by force against a woman's will in some cases. This element of common law rule was developed in England by Sir Matthew Hale in the 17th century,¹³ who infamously declared that on marriage a woman agreed in perpetuity to sexual intercourse with her husband – a “contract” which could not later be repudiated. Protection of husbands in law was continued on the presumed identity of person of wife with husband, a fiction which excluded separate legal personality to women in marriage.¹⁴ Even in India, the provision continued after independence with hardly any challenge to its colonial-patriarchal origin. The IPC had been amended scores of times but the exception remained unchanged. The exception of remaining there is typical of a more general reluctance in Indian criminal law to turn regimes of marriage, sex, and domination over women's bodies on their head.

The problem was semi- solved by the Criminal Law (Amendment) Act,¹⁵ 1983, following growing feminist movements and street protests following the acts of sexual violence. But even that act primarily dealt with intent to outrage the modesty of a woman, but without dealing with exception of marital rape per se. The very primitive nature of the exception per se was left

¹³ Sir Matthew Hale, *Historia Placitorum Coronae* (The History of the pleas of the crown)

¹⁴ Dusan Hemming, 'Women and the Law: Marriage, property and legal Identity' (1996) 12 Women's History Review 23

¹⁵ Criminal Law (Amendment) Act 1983

untouched.¹⁶ The law commission of India. In the 42nd Report (1971) and subsequently in the 172nd report (2000), recognized the issue but refused to suggest criminalizing marital rape of consenting adult women on the basis of maintaining sanctity of marriage and issues of abuse.¹⁷ These early grounds were based on the assumption that marriage carried implied consent to sexual intercourse, an implication further limiting women's autonomy.¹⁸

The legal scenario changed in the wake of the 21st century. The Indian Supreme court construed the exception of rape within marriage to include minor brides (under the age of 18) in *Independent Thought v. Union of India* (2017)¹⁹ and held that it was arbitrary and contradictory to article 21 of the constitution, which upholds the right to life and liberty. The court adjudicated that adolescent girls can never be the basis for the prosecution for rape. The judgement however, firmly avoided deciding legally married women's marital immunity and avoided overruling the pervasive scheme. The general constitutional challenge to the marital rape exception stems from the new interpretations given to articles 14,15, and 21 of the Indian Constitution. Right to equality (Article 14), ban on discrimination on the basis of sex (Article 15), and right to dignity, bodily integrity, and sexual autonomy (Article 21) increasingly run counter to the medieval exception in section 375 and the current section 63 of the BNS.²⁰ In the Landmark judgements like *Justice KS Puttaswamy (Retd) v Union of India* (2017),²¹ where the constitutional right of privacy was established, and *Navtej Singh Johar v Union of India* (2018),²² where sexual autonomy as fundamental dignity was reaffirmed, the supreme court has built a constitutional imagination hostile to confronting the persistence of marital rape. Even after such a paradigm shift in jurisprudence, however, the constitutional imagination of the Court remains selectively attuned. In so far as Puttaswamy and Navtej Singh Johar advanced sexual orientation and state surveillance cases in support of fundamental rights, however, the institution of heterosexual wedlock remains in a precarious place of impunity.²³ Extension of Exception 2 to Section 375 of the Indian Penal Code to protect a husband from being prosecuted for raping his wife goes against the benchmarks laid in these judgments. Evasion of the direct face-off of marital rape

¹⁶ Law Commission of India, 84th Report on Rape and Allied Offences: Some questions of Substantive Law, Procedure and Evidence (1980)

¹⁷ Law Commission of India, 84th Report on the Indian Penal Code (1971); 172nd report on Review of Rape Laws (2000)

¹⁸ *ibid*

¹⁹ *Independent Thought v Union of India* (2017) 10 SCC 800

²⁰ Bharatiya Nyaya Sanhita 2023, S 63 Exception 2

²¹ *ibid*

²² *Ibid*

²³ Motilal, Shashi. "Marital Rape and the Indian Legal System." *Indian Journal of Gender Studies*, vol. 25, no. 3, 2018, pp. 345–367

even after such milestone judgments is a reflection on the reality that the judiciary continues to be hesitant to remove patriarchal privileges drawn from marital existence. But the same cases provide us with constitutional language to use in the battle against such exceptions. They leave one in no doubt that the courts have determined the right of privacy, dignity, and autonomy over one's body does not end at the door of marriage. In addition to this, although as yet the marital rape exception remains unscathed by the judiciary, the judgments in Puttaswamy and Navtej authorize it to act to the contrary in the future, indicating the judicial sensibilities having shifted towards being more open to equating marital rape with a constitutional wrong.

In spite of all these advances, legislative backlog still continues to dominate. The Justice Verma Committee Report (2013)²⁴, set up after the atrocious Nirbhaya gang rape, had urged criminalizing marital rape by holding the view that marriage cannot be relied upon as a defense of rape.²⁵ Parliament, however, passed the criminal Law (Amendment) Act, 2013,²⁶ specifically leaving out the exception of marital rape on societal and pragmatic grounds. This inability to define rape within marriage indicates the repressed structural issue: patriarchal assumption of marriage as broad sexual right of access to wife still retains a grip, legally and socially. Aside from this, state attitude has typically marked marriage as a privacy sphere beyond the reach of the state and hence not involving the aspect that there are constitutional rights in private relationship, more so where there is power disparity and violence.²⁷

Constitutional challenges against Exception 2 have recently faced the Delhi High Court with unfavorable orders evidencing judicial perturbation but not as yet a judgement.²⁸ The Court once again delivered a split verdict: Justice Rajiv Shikdher expressed the view that the exception was non-constitutional, while Justice C. Hari Shankar expressed the view that the exception was constitutional. The case therefore still remains pending and has been transferred to the superior bench of the Supreme Court. This is typical of the judiciary as an institution not yet prepared to confront head-on the issue of marital rape, even as there are unprecedented

²⁴ Justice JS Verma, Justice Leila Seth and Gopal Subramaniam, *Report of the Committee on Amendments to Criminal Law* (Government of India 2013)
<https://www.prindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committee%20report.pdf> accessed 14 April 2025

²⁵ Criminal Law (Amendment) Act 2013

²⁶ *ibid*

²⁷ Ratna Kapur, 'Marriage, Autonomy and the state: The State of Indian Feminism' (1996) 1 Feminist Legal studies 131

²⁸ *RIT Foundation v Union of India* (2022) 3 SCC (Del) 1404

events in constitutional law that recognize sexual agency and bodily autonomy.

The following chapters constitute a critical examination of the evolution history and evolution law of CEDAW, Indian ratification history, and normative framework demanding an end to all forms of gender-based violence. Chapter II deals with India's legal and judicial system, the basis of exception 2 of 375 IPC and section 63 of BNS, compares it with progressive jurisprudence like Vishaka, Justice K.S. Puttaswamy, and Navtej Singh Johar, which have widened the horizon of fundamental rights. The paper elucidates how the Indian judiciary has made some efforts towards adopting sexual autonomy but is lagging behind in applying the same principle to marital rape- showing selective constitutional imagination. The thesis contends that non-criminalization of marital rape is a constitutional and human rights failure rather than a legislative retreat. In bringing Indian law in line with its constitutional ideology and international treaty commitments under CEDAW, there has to be an interaction of action between the judiciary and the legislature. The judiciary will have to re-interpret the existing laws in accordance with constitutional morality as well as international covenants, and the legislature will have to be bold and strike down the exception of marital rape. Then and only then can India hope to meet the challenge of fulfilling ideals of equality, dignity and justice for all women- married and unmarried.

CHAPTER 2

2.1 Marital Rape and the Indian Legal Framework

Opponents of criminalizing marital rape often argue that such a move would Disturb the institution of marriage and lead to frivolous litigation. The argument that criminalizing marital rape would be misused is rooted in patriarchal anxieties rather than empirical evidence, as studies indicate that false rape accusations are statistically insignificant compared to the prevalence of sexual violence. Another commonly cited argument is that existing legal remedies, such as divorce and Domestic violence Laws, are sufficient to address marital rape. However, these civil remedies do not provide the deterrence effect of criminal sanctions, nor do they acknowledge the severity of rape as a crime distinct from other forms of domestic abuse. Balazsi argues "the absence of criminalization perpetuates the notion that forced sex within marriage is less grievous than rape outside marriage, reinforcing gender hierarchies and

violating the fundamental principle of equality before the law.”²⁹ The continued exemption of marital rape from criminal liability reflects a regressive legal stance that fails to uphold the principles of gender justice, bodily autonomy, and human rights. The notion that marriage grants a husband irrevocable sexual rights over his wife is incompatible with constitutional morality and evolving societal norms recognizing marital rape as a crime is not an attack on marriage but rather a step toward ensuring that marital relationships are built on mutual respect and consent.

One of the major counter arguments that have come up against Rationale choice analysis which is an analytical paradigm which assumes that agents (voters, politicians, judges, etc.) behave in their own best interest and pick the option maximizing utility or pleasure to them and Median voter theorem which is a lesson that, under a majoritarian voting system, policies will shift to accommodate the wishes of the median voter — the person whose preferences are in the middle of the political spectrum, is the Anti- stereotyping principle in Indian Constitutional Law. Balazsi terms the coins the term as “the robust commitment to the right to equality, enshrined primarily in Article 14, 15 and 21”. Over the years, the Supreme court of India has developed a jurisprudence that only prohibits formal discrimination but also challenges deep- seated stereotypes that underpin systematic inequalities.³⁰ The anti- stereotyping principle has emerged as a critical fact of this evolving jurisprudence, dismantling outdated and discriminating societal norms that hinder substantive equality.³¹ Some of the Judicial precedents shaping the Anti- stereotyping principle are such as the *NALSA v. Union of India*³² in which Supreme court affirmed the right of the transgender persons, rejecting gender essentialism and the binary construct of male and female. It held that the state must adopt a right- based approach rather than a welfare-based model, ensuring that transgender individuals. In *Navtej Singh Johar v. Union of India* (2018)³³, the court while decriminalizing homosexuality by reading down section 377 of the Indian Penal code (IPC), dismantled heteronormative stereotypes that had historically marginalized LGBTQ+ individuals. The judgement explicitly recognized that laws criminalizing same- sex relationships were rooted in societal prejudice rather than constitutional

²⁹ Linnea Balazsi, ‘Marital Rape in India – The Subject of a Private Matter Within the Four Walls of a Marital Home?’ (VT 2021) <https://www.diva-portal.org/smash/get/diva2:1558443/FULLTEXT01.pdf> accessed 15 March 2025.

³⁰ Ibid

³¹ Ibid[n15]

³² *NALSA v. Union of India*, (2014) 5 SCC 438

³³ *Navtej Singh Johar v Union of India* (2018) 10 SCC 1.

morality. *Vishakha v. State of Rajasthan*³⁴ are cited to illustrate India's evolving approach to justice, slowly but surely. The very last CEDAW concluding observations on the combined 4th and 5th periodic reports of India³⁵ was released on 5th July, 2014, it has been more than 10 years and India has not followed up on the recommendations and further reports. This is further damaging to the ongoing and previous works of the state with regard to gender justice.

By ratifying CEDAW, India has undertaken legally binding obligations under international law to eliminate discrimination against women "in all its forms" and to ensure women's full development and advancement on the basis of equality with men.³⁶ Equality of substance doctrine in the core of CEDAW and can be traced in Articles 1 to 5. Article 1 of the Convention provides that "discrimination against women shall mean any distinction, exclusion or restriction made on the basis of sex which has the object or effect of impairing or nullifying the enjoyment by women of human rights and fundamental freedoms."³⁷ Article 2 obliges states parties, including India, "to condemn discrimination against women and to put an end thereto by all means appropriate to that purpose at their disposal in their fields of activity, by legislation, by administration action, by educational measures appropriately directed towards the elimination of prejudices and customary and all other practices which are based upon the stereotyped roles of the man and woman."³⁸ Article 3 obliges states to "take measures to promote the full development and advancement of women."³⁹ Article 5, in turn, obliges states "to transform social and cultural patterns of behavior based on the stereotyped roles of the man and woman."⁴⁰ At the level of international law, ratification is the official process by which a state becomes legally obligated under the terms of a treaty. Whereas, signing a treaty entails that a state commits to negotiate the treaty within itself and perhaps ratify, its ratification is performed after approval from within (e.g., executive or legislative) and constitutionally obligates the state within international law to enact the treaty in good faith. India is a dualist in practice, in that, treaties abroad are not incorporated into the local law on ratification. The treaty obligations are to be facilitated by parliamentary legislation for them to become operational.

India ratified the CEDAW in 1993 and agreed to: eradicate all forms of discrimination against

³⁴ *Vishaka v state of Rajasthan*, 1997 AIR SCW 3043

³⁵ Committee on the Elimination of Discrimination against Women, *Concluding Observations on the Combined Fourth and Fifth Periodic Reports of India* (24 July 2014) UN Doc CEDAW/C/IND/CO/4-5.

³⁶ CEDAW, adopted 18 December 1979, entered into force 3 September 1981, UNTS 1249 p 13

³⁷ CEDAW, art 1.

³⁸ CEDAW, art 2.

³⁹ CEDAW, art 3.

⁴⁰ CEDAW, art 5(a)

women and adopt the correct measures towards changing social and cultural trends (Article 5).

The continuation of the exception of marital rape in India's criminal law- in the first place as Exception 2 to section 375 IPC and in the second place migrated to Section 63 of the Bharatiya Nyaya Sanhita (BNS) 2023 is incompatible with these obligations.⁴¹ It perpetuates the myth of one- off agreement to sex by marriage and thus erodes the bodily autonomy of women and keeps alive ideas about female subordination. To ensure that India can implement its commitments under CEDAW, India must reform or repeal discriminatory laws such as the marital rape exception and introduce positive measures to transform attitudes within society that condone such discrimination. Although violence against women as such was not specifically referred to in the original CEDAW document, the CEDAW Committee was instructed in its General Recommendation No. 19 (1992) that violence "on grounds of gender constitutes discrimination for Article 1 purposes."⁴² That was re-emphasized and clarified in General recommendation No. 35 (2017), which addresses the obligation of states to criminalize all violence on grounds of gender in the public and private sphere.⁴³

Thus, India's inability to criminalize marital rape not only continues gender violence but also places it squarely in contravention of General Recommendations 19 and 35. To fulfil its obligations, India must criminalize sexual violence in marriage as a violation of women's human rights. Moreover, Article 2(c) of CEDAW obliges states to "ensure women effective national tribunals and institutions of protection, as well as effective remedies against discrimination".⁴⁴ Denial of the marital rape exception denies married women such remedies, and thus a breach of India's obligations under Article 2 (c). Without a law, victims of marital sexual violence have no road to any real legal remedy. CEDAW also calls for the eradication of stereotyping ingrained by custom under Article 5 (a).⁴⁵ The idea of marriage as consenting to sex for life is one of severely damaging types and which justifies male dominance and women's subordination. By preserving the marital rape exception, India is failing to move forward to the best extent in regard to an obligation to eradicate such stereotypes. Further, Article 2(f) also

⁴¹ Exception 2 to Indian Penal Code 1860, s 375 (as it stood prior to the BNS, 2023); Bharatiya Nyaya Sanhita 2023, s 63

⁴² CEDAW Committee, 'General Recommendation No.19: Violence against Women' (1992) UN Doc A/47/38.

⁴³ CEDAW Committee, 'General Recommendation No 35 on Gender-based Violence against Women' (2017) UN Doc CEDAW/C/GC/35.

⁴⁴ CEDAW, art 2(c)

⁴⁵ CEDAW, art 5(a)

mandates states to “revoke or repeal” existing laws and customs that perpetuate against women.⁴⁶ Marital exception is a good example of such discriminatory legal provision.

India’s fulfilment of Article 2(f) would be the repealing of the marital rape exception as it exists and replacing it with law that recognizes and criminalizes sexual violence against women in marriage.

India’s CEDAW obligations commit India to a responsibility of duty of due diligence not to act, investigate, prosecute, and provide reparations to women’s violence by non- state parties, in the light of interpretation of CEDAW committee and international law of human rights.⁴⁷

India’s refusal to criminalize marital rape as a measure allowing violation of the bodily integrity of women by non- state actors with impunity amounts to a breach of duty of due diligence incurred pursuant to CEDAW. Moreover, the CEDAW obligations are non-derivable and immediate. Unlike some of the commitments of some other human rights treaties, e.g., the International Covenant on Economic, Social and cultural Rights (ICESCR),⁴⁸ CEDAW does not allow states to defer compliance on the grounds of progressive realization or grounds of culture.⁴⁹ Reasons advanced in India that the social environment is not ready to criminalize marital rape are legally untenable. International law binds India to stay true to its commitment irrespective of political, social, or cultural problems within the country.

Keeping these obligations in mind one cannot completely dismiss the fact that India has complied to its international law commitments every now and then, and one of the important steps in India’s Gender jurisprudence is the historic enactment of the Protection of Women from Domestic Violence Act (PWDVA)⁵⁰. The PWDVA was an innovative legislative measure in India whose intent came into existence due to growing recognized national and global- that there existed loopholes in legal provisions for handling the structural and endemic nature of domestic violence. Its enactment was conditioned by an overlap of legal, political, and international developments, i.e., India’s accession to the CEDAW in 1993 without reserving

⁴⁶ CEDAW, art 2(f)

⁴⁷ Rashida Manjoo, ‘Report of the Special Rapporteur on Violence against Women, its Causes and Consequences’ (2013) UN Doc A/HRC/23/49.

⁴⁸ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

⁴⁹ CEDAW Committee, ‘General Recommendation No. 28 on the Core Obligations of states Parties’ (2010) UN Doc CEDAW/C/GC/28.

⁵⁰ Protection of Women from Domestic Violence Act 2005, No 43 of 2005, India Code (2005)

Article 16 (concerning family and personal life). The rationale behind PWDVA was to cover the hidden, normalized forms of violence in the domestic sphere, and not physical violence alone but emotional, sexual, verbal, and economic violence. In parliamentary discussions on PWDVA, certain MPs De- mystified India's commitment to CEDAW.⁵¹ One such instance is: In Rajya Sabha Debates of 29 August 2005, then- Minister of State for Women and Child Development Renuka Chowdhury reiterated that the Act was drafted after taking advice from Women's rights organizations and that India needed it in order to be back on track internationally in fulfilling its obligations towards CEDAW, when she asserted:

"This is a landmark legislation that addresses our obligations to the Convention on the Elimination of All Forms of Discrimination Against Women and recognizes the right of women to live in a violence-free home."⁵²

Parliamentarians said that parts of the IPC (such as section 498A)⁵³ did not cover non- physical violence and thus PWDVA sought to provide for civil orders like protection orders, residence orders, and maintenance and thereby bring domestic law levels in line with CEDAW's notion of substantive equality and dignity in the life of the family. Prior to 2005, Criminal Law, Indian Penal code (IPC), section 498 A- a provision was created to punish cruelty by husband or his relatives, but failed to give access to full civil remedies, schemes of immediate protection, and recognition of non- violent abuse.⁵⁴ Feminist activism and legal commentators had previously contended that criminalization alone was not adequate to address the range of needs of women living in violent households, such as shelter, maintenance, child custody, or protection orders.⁵⁵

International obligations also gave rise to the enactment of the PWDVA. General recommendation No. 19 (1992) of the CEDAW committee asserted categorically that "genderbased violence constitutes a form of discrimination under Article 1 of the convention."⁵⁶ The Indian government, in its periodic reports to the committee, was always asked to take

⁵¹ Rajya Sabha Debates, 'The Protection of Women from Domestic Violence Bill, 2005' (29 August 2005) <https://rsdebate.nic.in> accessed 13 May 2025

⁵² India, Rajya Sabha Debates, Statement of Renuka Chowdhury, Minister of State for Women and Child Development, (29 August 2005) <https://rsdebate.nic.in> accessed 13 May 2025

⁵³ Indian Penal Code 1860, s 498A

⁵⁴ Ibid

⁵⁵ Flavia Agnes, 'Violence Against Women: Review of Recent Enactments' (2005) 40(44/45) Economic and political weekly 4723.

⁵⁶ Ibid

effective steps for the prevention of the domestic violence.⁵⁷ The PWDVA thus was a move towards complying with international law by India.⁵⁸ It represented an acceptance that the state, as well, bears a constructive obligation under CEDAW, not only to avoid discrimination, but also to prevent, protect, and redress gender harms constructively, even those occurring on the domestic front.⁵⁹ How did we reach there? Aggressive lobbying by feminist organizations, namely the lawyers' collective women's rights Initiative⁶⁰, who had actually drafted the original bill. Drafting was iterative and involved consultation with policymakers, lawyers, and civil society organizations. There was policy consensus that the existing legal system at the time was patriarchal and did not offer low-cost solutions for domestic violence survivors.⁶¹ The act acknowledged the need for a civil law procedure which would provide law procedure which would provide immediate protection and the principle that domestic violence is public and private in nature.⁶² Introduced by the Parliament in 2005 and coming into effect in 2006, the PWDVA was a revolution from framing domestic violence as a criminal problem to viewing it as a breach of human rights and equality.⁶³ It brought in the likes of the "right to live in the shared home", "protection orders," and "residence and custody orders" and thereby balanced civil protection and prosecution. It acknowledged a woman's lived experience and enabled judicial recognition of intimate partner violence, even outside of formal marriage.

In fact, it is not just a legislator's step in response to the facts of social life but is even a jurist's reading of India's treaty commitments with CEDAW. It merely upholds the utmost veritas that substantive freedom from violence and equality are synesthetic issues, and non- interference of State in private activity is unfeasible in an enforceable fundamental constitutional democracy any longer.

This paper argues for the positive obligation of the state, but we must also acknowledge the role Indian judiciary played for the ever evolving gendered-Indian Jurisprudence through its

⁵⁷ CEDAW Committee, 'Concluding Observations on the Second and Third Periodic Reports of India' (2000) UN Doc A/55/38.

⁵⁸ Christine Chinkin, 'Due Diligence Obligations of states in Relation to Gender-based Violence' (2006) 20 International Human rights Law Review 16.

⁵⁹ Indira Jaising, *Bringing rights Home: Review of the campaign for a Law on Domestic Violence*, Economic and Political Weekly, Vol. 40, No. 40 (2005), pp. 4323-4329.

⁶⁰ Lawyers Collective Women's Rights Initiative, *Staying Alive: Fifth Monitoring & Evaluation Report 2012 on the Protection of Women from Domestic Violence Act, 2005* (Lawyers Collective 2012)

⁶¹ Flavia Agnes, *Law, Justice and Gender: Family Law and Constitutional Provisions in India*, Oxford University Press, 2011.

⁶² Lawyers Collective Women's Rights Initiative, *Staying Alive: Third Monitoring & Evaluation Report 2011 on the Protection of Women from Domestic Violence Act, 2005*, available at: <http://www.lawyerscollective.org>

⁶³ Shreya Atrey, *Intersectional Discrimination* (OUP 2019) 142-147

judgements. One such historic judgement is the Vishaka v. State of Rajasthan.⁶⁴ The milestone decision in the Vishaka case brought a sea of change in gender jurisprudence in India. It was a push in the absence of legislative effort in the direction of sexual harassment at the workplace in India as Indian courts had to interpret the constitutional freedoms in a wider meaning by referring to international human rights instruments, which were CEDAW. The case was a landmark when the Supreme court made a link between women workers' dignity and India's foreign commitments and, in so doing, set a precedent of judicial activism for gender equality. The true case which resulted in this historical verdict was the sexual assault on Bhanwari Devi,⁶⁵ a Saathin (state social worker) of Rajasthan state, by upper-caste men who raped her as a punishment for having stopped a child marriage.⁶⁶ Although employed in the state, Bhanwari was never secured by the state nor received justice from criminal courts.⁶⁷ Women's groups, it is indignant that there was no law on the statute books to protect oneself from sexual harassment in the workplace, initiated a public interest Litigation (PIL) under Article 32 and were accorded the historic judgement in Vishaka.

Since the nation lacked such a law, the petitioners had to resort to pleading discrimination under Articles 14, 15, 19(1)(g)⁶⁸, and 21 of the constitution and to plead invocation of article 51(c), which the state is bound by international law. The court, in a dramatic shift, referred to India's enacting into law CEDAW in 1993 and drew upon the general recommendation No. 19 (1992),⁶⁹ which gender-based violence had characterized as a discrimination.⁷⁰ This dependence upon CEDAW was innovative- it imposed international human rights norms upon domestic constitutional mechanisms. The Vishaka Rules thus created binding guidelines to be followed in the workplace until Parliament enacted legislation.⁷¹ These were the ones that created sexual harassment, complaints committees, and employers' liability for a safe workplace. The court declared the rules as binding law under Article 141 of the constitution⁷² and thus bridged the legislative gap and declaring that the right to work with dignity was inherent in article 21.

⁶⁴ *Vishaka and Others v State of Rajasthan* (1997) 6 SCC 241

⁶⁵ Bhanwari Devi vs The State of Rajasthan, 1997(1) WLC42, 1996(2) WLN387

⁶⁶ Madhu Kishwar, 'Violence against Women: A Feminist Perspective' (1997) 32(49) *Economic and Political Weekly* WS4.

⁶⁷ Flavia Agnes, 'Protecting Women against Violence? Review of a Decade of Legislation, 1980-89' (1992)

⁶⁸ Constitution of India, Art. 19(1)(g)

⁶⁹ *ibid*

⁷⁰ *Ibid*

⁷¹ Indira Jaising, 'Law as an Instrument of Social Change: A Case Study on the Vishaka Judgment' in Lotika Sarkar and others (eds), *Indian Feminism: Law, Patriarchy and Women's Justice* (Zubaan 2007) 122-24

⁷² Constitution of India 1950, art 141; art 21

The verdict has been a landmark in Indian feminist jurisprudence. The verdict drew on constitutional interpretation, international law, and judicial ingenuity to preserve the dignity of working women.⁷³ The verdict facilitated the eventual passing of the sexual Harassment of Women at workplace (Prevention, Prohibition and Redressal) Act, 2013,⁷⁴ in its full form 16 years later. Yet, the choice itself is not flawless. Others would say that judicial power usurpation over the legislature, benevolent or not, undermined separation of powers.⁷⁵ Others state that the Guidelines, while not ethically objectionable, had no system of enforcement and implementation, particularly in unorganized or informal sectors.⁷⁶ The employers- sponsored complaints committees are also afflicted with the lack of impartiality and uneven power distribution.⁷⁷ But Vishaka is judicial articulation of substantive equality and juridical fidelity to CEDAW obligations and a potent instance of constitutional rights and international law combined in gendered solidarity. It was a landmark on the path to gender justice in recognizing that harassment in the workplace was not only an individualized transgression but also a structural human rights abuse. Recent judgements on attitudes of the Indian courts and judges towards a woman's bodily autonomy are evidence that there's long way to go in terms of evolution of Gender Jurisprudence in India in favor of the. One such case is the Gorakhnath Sharma v. State of Chhattisgarh.⁷⁸

2.2 CRITICAL ANALYSIS OF THE CHHATTISGARH HIGH COURT JUDGEMENT ON MARITAL RAPE

Chhattisgarh High Court ruling in Gorakhnath Sharma v. State of Chhattisgarh⁷⁹ is the Indian criminal law unimaginable discourse.⁸⁰ The facts of the case was that the husband put his hand in the anus of his wife and it hurt her a lot and killed her later.⁸¹ Despite a genuine dying declaration and supporting post- mortem reports, the accused was acquitted by the High Court on the exceptions of marital rape and illogically applied to invoke upon Section 377 IPC, though

⁷³ *ibid*

⁷⁴ Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013

⁷⁵ Rajeev Dhavan, 'Judicial Activism and the Constitution' (1997) 40(20) *Seminar*

<https://www.indiaseminar.com/1997/448/448%20rajeev%20dhavan.htm> accessed 27 April 2025.

⁷⁶ Naina Kapur, 'Sexual Harassment in the Workplace: Experiences with the Vishaka Guidelines' (2005) 40(50) *Economic and Political Weekly* 5241

⁷⁷ Human Rights Watch, *"Everyone Blames Me": Barriers to Justice and Support Services for Sexual Violence Survivors in India* (2017) <https://www.hrw.org/report/2017/11/08/everyone-blames-me/barriers-justice-and-support-services-sexual-violence-survivors> accessed 27 April 2025.

⁷⁸ Gorakhnath Sharma v. State of Chhattisgarh, (CRA No. 891 of 2019)

⁷⁹ *ibid*

⁸⁰ *Ibid*

⁸¹ *ibid*

the latter is not amendable to such an exception.⁸² The judgement casts a shadow on basic issues of judicial interpretation, statutory interpretation, and constitutional guarantee of equality.

The most devious is the High Court rejection of the dying declaration of the victim on technical procedural grounds.⁸³ The supreme court has never questioned its conviction that dying declarations can form the sole basis of conviction, provided they are reliable and voluntary.⁸⁴ In the present case, though there were no medical evidence to establish that the victim would be incapable of bringing evidence, even with the support of a post- mortem report on rectal perforation and peritonitis, the court simply kept her evidence out of sight. Along with this, procedural mistakes are confessed by the magistrate, doctor's visit under- recording or failing to complete recording of declaration were considered liberally, without any action at institutional level.

Besides construction of statutes, the case is structurally defective as a whole. The court has not even touched the sphere of operation of the offence of culpable homicide under section 304 IPC even where there was evidence of grievous hurt.⁸⁵ The High Court as a rebuke to the trial court for having failed to weigh the grounds under Section 304, did not order remittal of the case for re-hearing nor took cognizance of evidence Suo moto. Moreover, the absence of an established witness protection program and a long trial duration could have affected hostile witnesses.⁸⁶

In practice, the opinion is an excellent example of the broader institutional aversion to criminalizing marital rape. The reference to medieval law of coverture in attempting to persevere with extending the exception amounts to ongoing continuation of subjecting wives to property and suppression of sexual agency. The BNS, 2024 exclusion of Section 377 is continuing to suck retribution from wedded women who were brutalized through unwilling sexual violence.⁸⁷ This shows the imperative for India's criminal law to catch up with speed in order to address constitutional protection of bodily dignity, equality, and autonomy. Non-prosecution of horrific crimes of sexual violence against spouses violates the rights of women

⁸² Naeem v. State of Uttar Pradesh, Cr. Appl No. 1978 of 2024 (SC, 2024)

⁸³ Justice A.V. Chandrashekar, 'Dying Declaration – Its Applicability in Criminal Cases' https://kjablr.kar.nic.in/assets/articles/Dying_Declaration_Its_applicability_in_Criminal_Cases.pdf

⁸⁴ Atbir v. State (NCT of Delhi), CR. App. No 714 of 2022 (SC, 2022)

⁸⁵ Indian penal Code, s 304

⁸⁶ Saumya Uma and Tharika Sai S Mohan, 'The Chhattisgarh HC Marital Rape Judgement Has Perversity and Illegality Writ large', The Wire, 2025 <https://thewire.in/law/the-chhattisgarh-hc-marital-rape-judgement-has-perversity-and-illegality-writ-large>

⁸⁷ Nimeshbhai Bharatbhai Desai v. State of Gujarat, Criminal Misc. Application No. 26957 of 2017, Gujarat High Court, 6 November 2017

and promotes impunity. While India waits with bated breath for the Supreme Court's final pronouncement on the constitutional validity of the exception to marital rape, this judgement is a grim reminder of human lives offered at the altar of judicial sloth.

Another landmark judgement in the Marital rape jurisprudence is the RIT Foundation v. Union of India.⁸⁸ Even though it was a split verdict by Justice Shakti Chaudhary and Justice Chandrachud, whereas the former stood against the exception of marital rape stating that the blatant discrimination between married and unmarried women in regard to justice against Sexual Assault is not only unconstitutional but straight away a person's Human rights. The judgement shows that we have a long way to go with regard to finding a balance between separation of powers and in this case Constitutional validity of difference between married and unmarried women in the context of Article 14. The recent judgements like these shows the attitude towards the bodily autonomy of the courts. Among the many issues raised by both the parties one that stood out the most was if the striking down of MRE would be perceived as a new offence to be created? By such deliberation the Indian Judicial system is giving wrong message to its citizens especially the women in the country that access to justice is different for married and unmarried women. The concept of marriage is so flawed in a country like India where a court upholds the morality of marriage and not the people tied to it. Justice C. Hari Shankar's ruling in upholding the exception to marital rape to section 375 IPC is reactionary and patriarchal law against constitutional morality and individual autonomy. His reasoning that marriage entitles a husband to a "legitimate expectation of sex" under article 14 constructs an "intelligible differentia" that disregards women's inalienable rights of bodily autonomy and sexual integrity. The judgement dangerously brings back the very ancient notion of presumed and ongoing consent in marriage, even as it fails to capture the reality of coercive sex, both with and without wedlock, as a denial of freedom of choice under Article 21. In presuming the characterization of marital rape as an "imposed conception" and denying its legitimation as a juridical injury, the judgement perverts the very basis of human dignity and equality. It resists liberal interpretations of the SC in justice K.S. Puttaswamy v. Union of India⁸⁹ and Independent Thought,⁹⁰ upholding the autonomy of the body and the abhorrent practice of commodifying women as chattels. Moreover, the idea that individual rights have to be subordinated to the institution of marriage is a feudal fantasy of gender relations which has no place in a modern constitutional democracy. This decision is

⁸⁹ *ibid*

⁹⁰ *Ibid*

representative of an institutional reluctance to unpick gender hierarchies and denies survivors of marital sexual violence justice. Justice Verma Committee report was a trailblazing report that was set up under the supervision of Justice J.S Verma which was a much-needed report with regard to legislative accountability.

2.3 JUSTICE VERMA COMMITTEE REPORT⁹¹

Justice Verma Committee was set up at the aftermath of the Delhi Gang rape, and which led to the historic changes in criminal law such as the very definition of rape and included Consent a very integral part of it. Chaired by Ex- Chief Justice of India Justice J.S. Verma and Justice Leila Seth and Gopal Subramaniam, the Committee had to examine the then existing criminal law and make provisions for a speedy and effective justice for sexual assault of women. In addition to the offending crime and in a progressive and liberal interpretation of gender justice, its report had criminalized marital rape as well. The committee made it a point to address India's state obligations to CEDAW and stated that "it is conscious of the recommendations in respect of India made by the UN Committee on the Elimination of Discrimination against women In February 2007. The CEDAW had recommended that the country should"-⁹² *"Widen the definition of rape in its penal code to reflect the realities of sexual abuse experienced by women and to remove the exception of marital rape from the definition of rape...."*

The committee also made sure to add the Declaration in its report that "the Declaration on Elimination of Violence against Women 1993" ("DEVW"), the following passage is pertinent-

"Violence against women is a manifestation of historically negligent poor 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 that violence against women is one of the crucial social 62 mechanisms by which women are forced into subordinate position compared with men....."

The Report strongly asserted that the exception of marital rape in Section 375 of the IPC must be repealed. The Committee stated that the exception of marital rape contravenes constitutional

⁹¹ Justice JS Verma, Justice Leila Seth and Gopal Subramaniam, *Report of the Committee on Amendments to Criminal Law* (Government of India 2013)

<https://www.prsindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committe%20report.pdf> accessed 14 April 2025

⁹² *ibid*

concepts of equality (Article 14), non- discrimination (Article 15), and liberty (Article 21) and can't be justified on social or cultural grounds. The committee discounted the doctrine of marriage being permanent consent and instead propagated freely given consent, to all sex, and withdrawal at will. The Justice Verma Committee was candid in its denunciation of India's rule of law for perpetuating impunity in marriage. The Committee referred to India's commitment under the CEDAW to which India is a signatory. The Committee relied on the fact that in terms of General Recommendation No. 19⁹³ of the CEDAW Committee, violence against women, including marital rape, amounts to discrimination and countries have a positive obligation to abolish it.

While the Committee's suggestion and assurance to criminalize marital rape on the basis of fear of exploitation, prosecutorial difficulty, and necessity to protect the institution of marriage were absolute, the Criminal law (Amendment) Act, 2013⁹⁴, on the basis of the report had no said recommendation. The omission is glaringly the most obvious stain of the post- Nirbhaya legislative changes.

Finally, the Justice Verma Committee recommendation to legalize rape in wedlock has constitutional and international human rights law backing. Its vision is inspiring, to be achieved, and in the meantime, there is a grim lacuna of Indian law on gender violence. Doing nothing to enact this recommendation is another witness to the state's inability to disarticulate patriarchal modalities in spite of legal, ethical, and constitutional compulsions.

CHAPTER 3

3.1 INDIA'S INTERNATIONAL OBLIGATIONS UNDER CEDAW

India ratified CEDAW in 1993, Article 16 of CEDAW focuses on marital and family rights ensuring equality in marriage, divorce, parental responsibilities, property ownership and decision- making regarding children.⁹⁵ The CEDAW committee strictly monitors compliance and discourages reservations on core commitments, particularly article 2 and 16, emphasizing that their removal would demonstrate a state's dedication to achieving gender equality. Under Article 18, states must submit periodic reports to the UN on measures taken to implement

⁹³ Ibid

⁹⁴ ibid

⁹⁵ Ibid

CEDAW, highlighting progress and challenges. The committee reviews these reports to assess compliance and suggests improvements. By ratifying CEDAW, India committed to eliminating discrimination against women, though its reservation and selective interventions in personal laws indicate limitations in fully implementing the treaty's objectives. CEDAW defines discrimination as "any distinction, exclusion, or restriction based on Sex that impairs women's rights". However, Indian law fails to uphold this standard, particularly regarding marital rape. Section 375 of Indian Penal Code (IPC), the former criminal law explicitly exempts forced intercourse by a husband with his wife, provided she is above 15 years of age, from being classified as rape.

The Government in power had the chance to make the wrong right, by not taking the exemption to rape forward to the new criminal laws but failed miserably. Marital rape is now an exemption under section 63 of *Bhartiya Nyaya Sanhita* (BNS) as well. This legal provision permits sexual violation within marriage and contradicts CEDAW's mandate to eliminate gender-based discrimination.⁹⁶ The criminal law amendment act of 2013⁹⁷ also failed to recognize marital rape as an offence, with only section 376 B of the IPC criminalizing forced intercourse when spouses are living separately, but even this carries a lesser punishment compared to other rape cases. Several international bodies, including the CEDAW committee (2007)⁹⁸, the Special Rapporteur on violence against Women⁹⁹ (2014) and the Justice Verma Committee (2013)¹⁰⁰, have strongly advised criminalizing marital rape. However, Indian Government has consistently resisted this, mentioning concerns about destabilizing traditional family structures. A parliamentary committee in 2013 opposed removing the marital rape exemption, arguing that existing legal provisions for cruelty against women were sufficient and that criminalizing marital rape could harm the institution of marriage.¹⁰¹

Indian courts have exhibited inconsistency in addressing marital rape. The SC in *Independent Thought v. Union of India* (2017)¹⁰², criminalized marital rape of minors, recognizing the importance of Consent.¹⁰³ However, broader judicial recognition of marital rape remains absent.

⁹⁶ *Bharatiya Nyaya Sanhita* 2023, s 63.

⁹⁷ *ibid*

⁹⁸ Committee on the Elimination of Discrimination against Women, *Consideration of the Combined Second and Third Periodic Reports of India* (18 January 2007) UN Doc CEDAW/C/IND/2-3.

⁹⁹ <https://digitallibrary.un.org/record/773721?ln=en&v=pdf>

¹⁰⁰ <https://clpr.org.in/tag/justice-verma-committee/>

¹⁰¹ Anuncia Williams, *Indian Family Laws and Implementation of CEDAW*, Indian Journal of Law and Legal Research, Volume II Issue II| ISSN: 2582- 8878

¹⁰² *ibid*

¹⁰³ *Independent Thought v. Union of India*, 13 S.C.R. 821.

The Delhi court, in a split verdict in *RIT Foundation v. Union of India*¹⁰⁴ (2022), highlighting the divide between progressive legal thought and conservative interpretation of marriage. Balazsi¹⁰⁵ in her paper makes a compelling point that while international Human rights Law and Comparative jurisprudence increasingly recognize marital rape as a violation of fundamental rights, India's legal stance remains resistant to change. Countries such as the UK, the US and Canada have long abolished marital rape exemptions, acknowledging it as a form of gender-based violence. India's failure to align with such global standards highlights a critical gap in its commitments to gender justice.¹⁰⁶

Balazsi makes an obvious and yet avoided point that non-criminalization of marital rape contradicts constitutional guarantees of gender "equality, dignity, and personal liberty enshrined in articles 14, 15 and 21 of the Indian Constitution". The right to bodily autonomy and sexual agency is fundamental to human dignity, yet Indian Law continues to deny married women this protection.¹⁰⁷

3.2 INDIA'S CEDAW COMPLIANCE

A question that every researcher and scholar try to understand is that why is it so difficult for the state of India to comply with the CEDAW obligations and what are the obstacles preventing the full adoption and implementation of the CEDAW due diligence obligations on genderbased violence (GBV). Shritha Vasudevan in her paper highlights the persistent deadlock in international human rights law due to reservations and declarations from nation-states, particularly citing the issue between right to gender equality and right to religious freedom.¹⁰⁸ It also integrates feminist international relations (IR) theory, suggesting that the patriarchal nature of the international law contributes to the lack of serious theorization on gender issues. A particularly intriguing point is the application of the median voter theorem to explain India's reservations to CEDAW. The hypothesis that India's stance is influenced by a male, Hindu patriarchal median voter is supported through historical examples like the *Shah Bano Case*¹⁰⁹ where the Supreme court upheld Shah Bano's right to maintenance under section 125 CrPC, saying that it overrides personal laws when the issue comes to secular procedures like

¹⁰⁴ *RIT Foundation v. Union of India*, 2022 SCC Online Del 1404

¹⁰⁵ Linea Balazsi, *Marital rape in India- the subject matter within four walls of a marital home?* VT 2021

¹⁰⁶ *ibid*

¹⁰⁷ *Ibid*[n15]

¹⁰⁸ Shritha Vasudevan, '*A Gendered Refutation of Epiphenomenal Norms through the Median Voter: A Case Study of India's CEDAW Compliance*' (2019) 33 *Emory Int'l L Rev* 223

¹⁰⁹ *Mohd. Ahmed Khan vs Shah Bano Begum and Ors*, 1985 (2) SCC 556

maintenance. The analysis contends that India's non-compliance is not because the due diligence is ineffective and insufficient and avoided but due to political considerations prioritizing majoritarian religious sentiments. It asserts that India's Declaration to Article 5 of the CEDAW effectively protects patriarchal religious norms under the guise of safeguarding minority personal laws.¹¹⁰ India consented to CEDAW in 1993 with a reservation stating that it would implement Article 5(a) only to the extent that it does not interfere with religious laws. This reservation maintains personal status laws on inheritance, succession, guardianship, and custody, which discriminate against women and reinforce gender-based violence (GBV) says Vasudevan.¹¹¹

3.2.1 RATIONALE CHOICE ANALYSIS

Rationale choice analysis in the context of public international law examines how states perceive and respond to international legal norms based on their self-interest argues Vasudevan. She goes on to say that international law depends on state power and consent, making it easily altered and largely ineffective in shaping state actions. The lack of enforceability in treaties like CEDAW leads to persistent non-compliance. The paper makes a note that scholars argue that treaty ratification does not necessarily translate to improved human rights practices, as domestic factors often override international commitment.¹¹² Some scholars view human rights treaties as "empty promises", with states ratifying them for reputational benefits rather than genuine commitment. India's CEDAW compliance exemplifies these debates. The country's historical engagement with gender-based violence (GBV) laws before its CEDAW acceptance in 1993 reveals that domestic political calculations influenced its reservations to Article 5. This perspective challenges the prevailing view that norms are purely consequential by demonstrating how electoral incentives shape treaty commitments and compliance.

3.2.2 MEDIAN VOTER THEOREM

The median voter theorem, fundamental principle of democracy, that majoritarian decisionmaking reflects the preferences of the median voter. Anthony Downs expanded on these ideas, arguing that political party's function solely to maximize votes rather than represent-specific social groups.¹¹³ Applying Down's theory, the study argues that India's declaration

¹¹⁰ CEDAW 1979, art 5.

¹¹¹ Ibid[n22]

¹¹² Ibid-[n22]

¹¹³ Anthony Downs, *An Economic theory of Democracy*, Harper and Row 1957

under CEDAW reflects a rational response to political pressures rather than a fixed ideological commitment.

Both rationale choice analysis and Median voter theorem do talk about state compliance and the government behavior and rationale behind not criminalizing Marital rape or stance against Gender Based Violence in its entirety. Both these principles basically come down to the conclusion that India as a state prioritizes the majoritarian sentiment under the guise of wanting to protect minority religious rights and sentiments. We can also understand that the sentiments and sexual rights of men, married or not married, that too Upper caste Hindu hetero sexual man presides over the sexual and human rights of the married women of the country if not all women. This undermines not only international laws and standards but also the basic right to equality of women. For a country that boasts about women getting voting rights since the 1940s which is much earlier than most of the western states. The state responsibility should be equal to all its citizens and not just the half of the population, this basically undermines the right to equality enshrined in the constitution.

3.3 CONCLUDING OBSERVATIONS ON THE COMBINED FOURTH AND FIFTH PERIODIC REPORTS OF INDIA¹¹⁴

The CEDAW recognized India's efforts in strengthening its legal and institutional framework to promote gender equality. Notable legislative reforms include "The Criminal (Amendment) Act, 2013,¹¹⁵ The Protection of Children from sexual offences Act, 2022¹¹⁶ and The Sexual Harassment of women at Workplace Act, 2013."¹¹⁷ Policy advancements include the

Establishment of a financial services banking company for Women, The National Mission for Women's Empowerment, and the Indira Gandhi Matritna Sahyog Yojna Maternity benefit scheme. India also ratified the Convention on the rights of Persons with disabilities (2007)¹¹⁸ and the United Nations Convention against Transnational organized crime (2011).¹¹⁹ One of the

¹¹⁴ <https://www.ohchr.org/en/documents/concluding-observations/cedawcindco4-5-concluding-observationscombined-fourth-and-fifth>

¹¹⁵ Ibid

¹¹⁶ Protection of Children from Sexual Offences Act 2012, No 32 of 2012 (India)

¹¹⁷ Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013, No 14 of 2013 (India)

¹¹⁸ Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3

¹¹⁹ United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209

key concerns and Recommendations is the Legal and institutional gaps, The committee highlighted the absence of comprehensive anti- discrimination against women. It urged India to enact an all- encompassing anti- discrimination law, incorporating a broad definition of gender equality and protection against multiple forms of discrimination. Another major concern addressed was the Violence Against Women. CEDAW expressed alarm over rising incidents of rape, abduction and dowry death. The committee criticized the exception of marital rape in the Indian Penal Code, the escalation of caste-based sexual violence, and high rate of acid attacks. It recommended Implementation of the Justice Verma committee¹²⁰ recommendations, Amendment of the Criminal Law (Amendment) Act to criminalizes Marital Rape, Stronger police accountability measures and gender- Sensitive investigation, Establishment of one-stop crisis centers for survivors and Monitoring mechanisms to assess legal effectiveness. The committee urged India to allocate sufficient resources for gendersensitive laws and strengthen enforcement mechanisms to improve women's rights and gender equality. The committee urges the Government to withdraw its reservations to articles 5(a) and 16 of CEDAW and implement comprehensive awareness campaigns to eradicate patriarchal and harmful traditions. The committee urges India to Integrate gender perspective into national strategies align policies with the Beijing Declaration and Platform for Action¹²¹, and incorporate a gender- sensitive approach in achieving the Millenium Development Goals and the post- 2015 development framework.

CHAPTER 4

4.1 CONCLUSION

In constitutional safeguard of “equality, dignity, and autonomy under articles 14, 15, and 21 of the Indian Constitution”, blanket immunity to grant husbands a right over unwilling wives to sexually assault them under Exception 2 of Section 375 of IPC and now under section 63 of the Bharatiya Nyaya Sanhita (BNS), 2024, is sheer injustice. The same is true of patriarchal presumptions denying married women sexual agency and bodily integrity wherever so defined by international human rights law. India's failure to criminalize marital rape puts India in violation of its binding international law obligations under the CEDAW, to which India acceded in 1993. Article 1, 2, and 16 of CEDAW and General Recommendation No. 19 (1992)¹²² and

¹²⁰ *ibid*

¹²¹ Beijing Declaration and Platform for Action, adopted at the Fourth World Conference on Women (15 September 1995) UN Doc A/CONF.177/20 (1995)

¹²² *ibid*

General Recommendation No. 35 (2017)¹²³ impose a positive obligation on states to bring about an end to all violence against women, including domestic and intimate partner violence.

Indian Supreme Court Judgements, i.e., Justice K.S. Puttaswamy v. Union of India (2017) and Suchita Srivatsav v. Chandigarh Administrative (2009), have placed the right to privacy and bodily integrity at the forefront of Article 21. This can be done by removing the paradox generated by exception 2. The Justice Verma Committee Report 2013 strongly recommended the repeal of marital rape exception as “an affront to dignity and autonomy” and asserted that “the fact that such an offence occurs within the marriage does not make it any less an offence.”

However, the most significant suggestions were omitted in Criminal Law (Amendment) Act, 2013, in the socio- legal context which hence still lack tests against international commitments. Chhattisgarh high Court judgement in Gorakhnath Sharma v. State of Chhattisgarh places judicial mistake risk and institutional drowsiness in their proper perspective. The inaction by the Court under Section 304 IPC even when peritonitis and general injuries were found on the anal part and negligent failure to note the dying declaration of the victim, has the chilling effect of denial of evidence and escalating impunity of sexual assault in the name of marriage.

4.2 RECOMMENDATIONS

Enactment of Repeal Bill: Exception 2 of section 375 IPC and the corresponding Section 65 of the BNS should be brought into an enactment of repeal. That will harmonize Indian criminal law with India’s international as well as its constitutional requirements.

Judicial Training and Gender Empowerment: Judges, prosecutors, and police officials need to be trained in gender- sensitive interpretation within courts, i.e., sensitivity towards marital rape as a crime against humanity.

Optional Protocol¹²⁴ to CEDAW Ratification: India ought to ratify the optional Protocol to CEDAW to make intentions more solid through enforceability and personal responsibility for gender violence.

¹²³ *ibid*

¹²⁴ Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (adopted 6 October 1999, entered into force 22 December 2000) 2131 UNTS 83

4.3 FINAL WORD

Right of consent is never taken away in marriage. Constitutional fiction that marital sexual violence against wife or husband as law is not merely unconstitutional, but also goes against India's international human rights treaties obligation. The reforms need to start with immediacy. Sexual violence as rape in marriage needs to not just be criminalized on constitutional and statutory forums, but even on a moral forum, but even on moral forum for democratic rights society.

LIST OF ABBREVIATIONS

- 1. IPC-** Indian Penal Code
- 2. CEDAW-** Convention on the elimination of All Forms of Discrimination Against Women
- 3. UNGA-** United Nations General Assembly
- 4. BNS-** Bharatiya Nyaya Sanhita
- 5. SC-** Supreme Court
- 6. RETD. –** Retired
- 7. ICESCR-** International Covenant on Economic, Social and Cultural Rights
- 8. PWDVA-** Protection of Women Against Domestic Violence
- 9. MPs-** Member of Parliament
- 10. PIL –** Public Interest Litigation
- 11. MRE –** Marital Rape Exception
- 12. UN –** United Nations
- 13. DE VW –** Declaration on the Elimination of Violence Against Women
- 14. GBV –** Gender Based Violence
- 15. IR –** International Relations
- 16. CrPC –** Code of Criminal Procedure

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